THE REPUBLIC IF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 59 OF 2015

DUKE MABAYA GWAKA ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

CORAM: KATUREEBE,C.J; MWANGUSYA; OPIO AWERI; MWONDHA; TIBATEMWA;JJ.SC

(Appeal against the judgment of the Court of Appeal before S.B.K. Kavuma DCJ, Arach-Amoko and Remmy Kasule JJA).

JUDGMENT OF THE COURT.

Introduction

This is a second appeal. It is against the judgment of the Court of Appeal that was delivered on the 28th day of August 2015 arising from the judgment of the High Court at Kampala.

The appellant was indicted for murder contrary to Sections 188 and 189 of the Penal Code Act.

Brief facts of the case.

Ruth Oirere Nyirangi, the deceased, and the appellant were cousins and both Kenyan nationals. Sometime in August 2008 the appellant was a student at Makerere University while the deceased was a first year student at Bugema University. It was the deceased's first time in Uganda and as such, she contacted the appellant to take her to Bugema University. Before leaving for the University, the deceased entrusted the appellant with 40,000 Kenyan shillings, being her tuition fees for banking on the University account with Bank of Africa. The appellant issued her with a bank slip indicating that she had paid fees amounting to 1,012,000/= Uganda Shillings. The deceased handed over the slip to the University for Registration. However the University later discovered that while the slip she presented had a figure of Uganda shillings 1,012,000/=, the bank copy was reading Uganda Shs 12,000/= only as money deposited by the appellant. The accountant attached to Bugema University called the appellant on phone and he promised to take the money to the university.

The appellant did not turn up as promised. On 30th October 2008, the deceased travelled to Kampala to meet the appellant and sort out the problem of her tuition money. She stayed with Phanice Okundi (PW5), another Kenyan

national she met through the appellant in Douglas Hostel, as she waited for the appellant who had travelled to Kenya.

When he returned, he fell out with PW5 alleging that she was inciting the deceased against him. A meeting was held under the umbrella of the Kenya Students Association where it was resolved that the matter of the deceased's tuition must be resolved by the two in the bank. At the meeting, the appellant still blamed Okundi (PW5) and he told her that she was interfering in a family matter.

The appellant took the deceased away from PW5's hostel on 1st November 2008 while she (PW5) was away. When PW5 rang the deceased to inquire about her whereabouts in the morning on 2nd November 2008, the deceased told her that the appellant had taken her to a different hostel where there were other Kenyan girls. PW5 asked the deceased the name of the hostel where she was but the deceased did not know its name and further added that the appellant had not yet resolved the school fees problem.

On 3rd November 2008, the appellant went to book a room at UMKA Guest House located at Kawaala, Rubaga Division in Kampala. Nabulime Christine (PW1) was at the reception desk. She registered the appellant under the fake name of Jackson Tumu from Jinja. He did not produce the passport but gave its number as 2330775. He was allocated room number 15. He went to his room and ordered for food which was delivered by Namakula Safina (PW2), a hotel worker to his room.

The next day, it was observed, the door to room Number 15 remained closed and the TV was on, very loud the whole day. The guest house cleaners could not access it as the door remained closed. However at around midnight, PW1 and PW2 became suspicious so they used a spare key and opened the door to the said room. They were shocked to find a woman's clothes scattered all over the floor of the room. Upon entering the bathroom, they were further shocked to find the body of a young female, lying on the floor, naked.

They immediately called the security guard after which they informed the owner of the Guest House who reported the murder to Old Kampala police Station. On the 5th of November 2008, Sgt Kiiza Julius (PW3) was allocated the file to investigate the murder crime. The police visited the scene and took the body to City Mortuary in Kampala for postmortem. No identity documents of the female body were found at the scene of the crime, so it was described as "the body of an unknown female adult".

In the meantime, a missing person's report relating to the deceased was made to Wandegeya Police station, Kampala by officials of Bugema University and the representative of University Kiisi Association. They suspected the appellant to have been responsible for the deceased's disappearance because she had accused him of embezzling her tuition money. The appellant was subsequently

arrested by officers from Wandegeya police station. He was then handed over to Old Kampala Police Station where he was eventually charged with the offence of murder of the deceased.

The police searched the appellant's room at Douglas Villa hostel at Makerere Kivulu in his presence and recovered a number of items including a blood stained t-shirt , a piece of cloth containing a piece of body tissue, a blood stained coat and a blood stained handkerchief. Later, the police also conducted an identification parade where PW1 and PW2 identified the appellant as the person who had booked room number 15 at the Guest House on the 3rd November 2008.

After a postmortem examination was conducted by Dr. Wandera Richard, the deceased was first buried at Bukasa cemetery as one whose particulars were unknown. Later, the body was exhumed and was eventually buried in Kenya after the same had been identified as that of the deceased.

The prosecution led the evidence of 11 witnesses and tendered 5 exhibits to prove the case of murder. The five exhibits were:- (i) A receipt from UMKA Guest House, (ii) A Government Analyst's Report, (iii) A Post Mortem Report, (iv)A search Certificate, (v) An identification Parade Report.

In defence, the appellant made an unsworn statement and denied the charge. He stated that at the material time he was away in Kenya attending a burial. He contended that he could not have been at UMKA Guest House on the 3rd to 4th of November 2008, where the unknown female was allegedly murdered because he was an evening student whose lectures ran form 5:00 pm in the evening to 10:00 pm at night. He said that on 9th November, 2008 while he was in his room at Douglas Villa Hostel, some people approached him asking for the whereabouts of the deceased. He said, he explained to them that he had last seen the deceased six days earlier and, according to him, she should be at Bugema University. He was then arrested and taken to Wandegeya Police Station. The police also searched his room and recovered some items. According to the appellant, PW5 and her boyfriend Nyamwembe (PW6), a fellow Kenyan student at Makerere University, had framed him because of a grudge they had against him in their student politics.

At the end of the trial, the trial judge convicted the appellant of the murder of an unknown female not of Ruth Oirere Nyirangi as for which he had been indicted. He was sentenced to 45 years imprisonment.

The appellant was dissatisfied with the decision hence appealed to the Court of Appeal on the following grounds;

1. *That the learned trial judge erred in law and fact when he convicted the appellant on the basis of unreliable circumstantial and identification evidence.*

2. *That the learned trial judge erred in law and fact when he disregarded the appellant's defence of alibi which was credible.*
3. *That the learned trial judge erred in law and fact when he failed to adequately evaluate all the material evidence adduced at trial and hence reached an erroneous decision which occasioned a miscarriage of justice.*

The Court of Appeal dismissed the appeal on all grounds and upheld the conviction of the appellant for murder. Court however substituted the conviction for the murder of an unknown person with the murder of Ruth Oirere Nyirangi.

Aggrieved by the decision of the Court of Appeal, the appellant lodged an appeal to this court challenging the decision of the Court of Appeal on the following grounds;

1. **That the learned Justices of Appeal erred in law when they failed in their duty as first appellate court to properly re-evaluate the evidence on record thus arriving at wrong conclusion that the offence of murder of Ruth Oirere Nyirangi was proved which occasioned a miscarriage of justice.**
2. **The Learned Justices of Appeal erred in law when they condoned illegalities and irregularities that manifest in the re-evaluation of evidence which denied the appellant a fair trial thus occasioning a miscarriage of justice.**
3. **The learned justices of Appeal erred in law when they failed to resolve all doubts, conflicting evidence and gaps in the prosecution as in favor of the appellant arising out of unsatisfactory circumstantial evidence.**
4. **The learned justices of appeal erred in law when they upheld a sentence of 45 years imprisonment which was illegal and did not follow precedent.**

Representation

At the hearing, the appellant was represented by Kunya Henry while the respondent was represented by Alice Komuhangi Khaukha, Senior Assistant Director of Public Prosecutions.

Both counsel filed written submissions.

Duty of this court.

The ambit for the interference by a second appellate court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the lower court

where the recorded evidence shows that the finding is clearly wrong. Therefore, this court is not required to and will not re evaluate evidence as the first appellate court is under duty to, except where it is clearly necessary. See; Milly Masembe Vs Sugar Corporation and Anor, Civil Appeal No. 01 of 2000.

Bearing the above in mind, we shall proceed to consider counsel's submissions and resolve the grounds giving rise to this Appeal.

Ground one

That the learned Justices of Appeal erred in law when they failed in their duty as first appellate court to properly re-evaluate the evidence on record thus arriving at wrong conclusion that the offence of murder of Ruth Oirere Nyiranyi was proved which occasioned a miscarriage of justice.

Appellant's arguments

Counsel submitted that the prosecution did not prove its case beyond reasonable doubt that Ruth Oirere Nyiranji is dead, the death was unlawfully caused, the act or omission leading to the death was with malice aforethought and the appellant participated in that act or omission.

He contended that the Justices of Appeal's decision was erroneous because of 2 reasons which were that; the death of Ruth Oirere Nyiranyi was not proved beyond reasonable doubt and that there was no cross appeal by the respondent against the finding of the trial court that the offence of murder of Ruth Oirere Nyiranji as contained in the indictment was not proved after the Appellant defending himself against the indictment.

Counsel argued that the items recovered from the scene of crime room at UMKA Guest house related to be PW3 were never exhibited nor was the search certificate from the scene exhibited. That the only exhibited items were those recovered from the appellant's room to which the appellant explained that the source of blood was him because he was asthmatic. He submitted that the blood Exhibit PID allegedly obtained from the deceased failed the chain of evidence test in that it was not known where it was obtained from and the person who obtained it was not even called to testify. Further that PW8 testified that the blood was got from the mortuary but did not say from which particular body.

Counsel contended that there was no evidence that the appellant who was arrested 4 days after the alleged date of murder had suffered any physical injury which would circumstantially eliminate the appellant's evidence of bleeding due to asthma and instead connect it to homicide.

Counsel argued that it was on record that the appellant's keys to his room were in police custody 3 days prior to the searching of his room however it was a

different person who opened for them when they came to search. Counsel stated that it was strongly possible that the napkin with a body tissue Exhibit PE VI whose DNA was said to match Exhibit PIDZ might have been planted in the appellant's room.

He further argued that the body was not identified by either PW5 or PW6. He stated that PW5 claimed to have been shown a photograph of the body but the photograph was not tendered in evidence neither did the person who took the photograph testify in court. Further PW6 claimed to have seen the body at Mulago mortuary but he did not state who called him to see the body.

Counsel also contended that the trial judge having made a finding that there was no evidence to prove that there was unlawful cause of death of Ruth Oirere, should not have convicted the appellant for the murder of an unknown person. He relied on the case of **Joseph Magezi vs Uganda SCCA No. 8 of 1993** where it was held that it was not open to the court to convict the appellant of the murder of unknown persons when specific names were stated in the indictment. It was incumbent upon the prosecution to prove that the person named there had died at the hands of the appellant.

Counsel concluded that court erred when it held that the body would not have been buried in Kenya had it not been that of Oirere. That the fact at Kenya was not sufficient proof ..... Further that nobody testified to have identified the body exhumed at Bukasa.

Respondent's arguments

Counsel submitted that the Justices of Appeal did not err in finding that the deceased was not an unknown person as had been held by the trial court. He argued that circumstantial evidence pointed to the fact that the body was of Ruth Oirere. Counsel argued that PW5 and PW6 identified the body after exhumation since the body had not been identified at the time of conducting the postmortem examination.

Counsel further contended on the issue of the blood stains, items recovered from the appellant's room during the search that the police officer who recovered the body from the scene testified that he and the team got some blood samples of the deceased from the scene of crime. He further argued that the same witness recovered blood stained items from the house of the appellant and both were submitted to the government analyst.

Counsel submitted that the blood samples were lifted from the scene but by the time the analysis came out, the body had already been identified as that of Ruth Oirere Nyirangi. Counsel submitted that the claim by the appellant that the police might have planted the evidence of blood samples (A15) in the house of the appellant was not supported by evidence. Counsel urged court not to look at the evidence of blood samples in isolation but rather to look at the evidence as a whole.

Counsel urged court to take judicial notice that City Mortuary and the Mulago hospital Mortuary were next to each other and therefore an ordinary man especially a foreigner may mistake one for the other. Further that the body was identified after exhumation that was why the doctor who did the post mortem referred to the body as that of an unknown person.

Counsel prayed that Court dismisses this ground and find that it was Ruth Oirere Nyiranji's body that was found in a room at UMKA Guest House, taken to City Mortuary, examined and buried at Bukasa by KCCA as an unknown person. The body was exhumed and identified by PW5 and PW6 who knew her very well and was later taken to Kenya for reburrial.

Consideration.

The appellant's case is that the prosecution did not prove the death of Ruth Oirere Nyiranyi beyond reasonable doubt from the evidence which include non exhibition of the items recovered from the scene of crime (at UMKA Guest House) and lack of identification of the dead body by PW5 and PW6. He also challenged the decision of the Court of Appeal when it convicted the deceased for murder of Ruth Oirere Nyiranyi without the respondent filing a cross appeal on record. We shall proceed to resolve the grievances one by one;

Non exhibition of the items recovered from the scene of crime;

The testimony of PW3 reveals that certain items which included woman's clothes, an exercise book, bloodstained clothes and some blood samples were recovered from the scene of crime. In court, the exhibited items were; a receipt from UMKA Guest House, a Government Analyst Report, a post mortem report, a search certificate and an identification parade report. We do not accept the appellant's argument because PW3 who was the investigating officer testified to have got some blood samples from the deceased at the scene of crime which were conveyed to the Government analyst as those of the deceased.

This was corroborated by the testimony of PW 8 and Exhibit P.2 which was a report from the government analyst. In his evidence PW8 stated as follows:-

I received the following exhibits:-

1. *"Exhibit marked A1 (a t-shirt of mixed colours).*
2. *Exhibit marked A2 (a piece of toilet paper)*
3. *Exhibit marked A3 (a piece of cloth containing a piece of tissue.*
4. *Exhibit marked A4 (a light blue and black handkerchief).*
5. *Exhibit marked A5 (a white handkerchief).*
6. *Exhibit marked A6 (a blood sample from accused Duke Mabeya).*
7. *Exhibit marked A15 (a blood sample from accused Ruth Nyirangi).*

I proceeded to examine the exhibits together with my technicians and lab assistants. My findings were:-

1. *Exhibit A1, A2, A4 & A5 were visually examined and found to contain visible stains. They tested positively for blood. The presumptive test is for blood, it is not specific if it is human or animal blood.*
2. *The exhibits were further examined for human DNA. Exhibits marked A6 and A15 were used as controls for the suspect and deceased respectively. With regard to Exhibit A2 there was insufficient DNA recovered from the said exhibit and therefore no DNA profile was generated. This means no subsequent analysis was done on Exhibit A2.*

The DNA profiles generated from Exhibit A15 & A3 matched at all positions. This meant that the DNA from exhibit A15 & A3 were from the same female donor. These findings were further subjected to a statistical analysis and it showed the deceased Ruth Nyirangi is seven billion times more likely to be the donor of the biological material on exhibits A3.

In conclusion, there is extremely strong genetic evidence for the proposition that the deceased is the donor of the genetic material on exhibit A3. With regard to exhibits A4, A1 and A6 the DNA profile recovered from the above exhibits was from the same male donor. Further statistical analysis showed that the suspect Duke Mabeya Gwaka is three billion times more likely to be the donor of the genetic material on exhibits A1 and A4.

In conclusion, I am of the opinion there is extremely strong genetic evidence for the proposition that Duke Mabeya Gwaka is the donor of the bloodstains on exhibits A1 and A4. I signed the report on all the three pages".

The Justices of the Court of Appeal were alive to the above testimony of PW8 in their judgment on page 16 as follows;

"...we also find corroboration of the evidence of identification in the DNA results of the Government chemist, PW8. The items recovered from the Hostel room by PW3 namely the blood stained T-shirt, the piece of tissue, the stained handkerchief. PW8 established that there was a link in the donors of the DNA and the samples found in UMKA Guest House as well as some of the items in the appellant's room.."

We further do not accept the contention by the appellant that the Government Analyst testified that he could not be sure from which dead body the samples came from. The evidence on record specifically the testimony of PW8 does not infer that the sample he examined was from the mortuary. He simply gave his opinion on cross examination that blood samples can be got from the mortuary. The evidence of the samples that were handed to the government analyst were got from the scene of crime from the dead body and were handed to the forensics by PW3.

Identification of the dead body;

Appellant's arguments were that PW5 and PW6 did not ably identify the body in the mortuary as that of Ruth Oirere.

7 The Court of Appeal while dealing with identification of the dead body by PW5 and PW6 held as follows;

" .....the body at the city mortuary that was unidentified was that of a female adult of about 25 years of age. PW5 and PW6 identified the deceased's body on two separate occasions and they confirmed that it was that of Ruth Oirere Nyirangi who had been well known to both of them. The deceased was last known to be alive in the company of the appellant. The appellant never reported
14 *back to the Kenyan community stating that he had settled the tuition problem. The evidence shows that the body of the deceased was identified in the mortuary by PW5 and PW6. Further, through a photograph shown to PW5 at the police station as Ruth Oirere was unchallenged. These two people knew the deceased very well. There is also the evidence of Keith Kwesigwa Tibenda Amooti (PW4) a lecturer at Bugema University who stated that the body was exhumed from Bukasa Cementary was brought back to the mortuary and later*
21 *he transported it to Kenya for burial. He attended the burial in Kenya. We note that he never indicated anywhere that the family raised any doubt as to the identity of the person they buried as being that of their daughter Ruth Oirere Nyirangi..... There is also ample evidence to prove that the body found in room 15 at UMKA Guest House was the same as that transported by police to the City Motuary early in the morning of the 5th ,November 2008. It was the same body in our view that Dr. Wandera Richard, examined that morning and issued a*
28 *postmortem Report in respect of. It was the same body that was buried at Bukasa Cemetery and later on exhumed and escorted by PW4 to Kenya where it was buried by the deceased's family at their ancestral burial grounds in Kenya. There was only one dead body.."*

The learned Justices in our view labored in detail regarding identification of the body. The appellant argued that the alleged photograph failed the chain of evidence because no one testified to have taken it. We agree with the learned
35 justices that this was not challenged in the lower court. Further, even if PW5's evidence on identifying the body is excluded, we still find that PW6 ably identified the body in the Mortuary for reasons already given in this judgment.

The evidence was that PW6 knew Ruth Oirere Nyiranji in person and therefore was able to identify her dead body.

Further, the testimony of PW4, a lecturer at Bugema University was to the effect that after exhumation of the body, it was transported to Kenya for burial
42 which he also attended. We agree with the Court of Appeal that the fact that the relatives of the deceased did not complain of having been given a body that was not that of Ruth Oirere Nyiranyi corroborated evidence, the fact that the body was correctly identified and was indeed that of Ruth Oirere Nyiranyi.

Lack of a cross appeal by the respondent.

It was the appellant's contention that the state having not exercised its right of appeal, the Court of appeal had no jurisdiction to substitute the conviction of the murder for an unknown female for Ruth Oirere. That this infringed on the appellant's right to a fair trial.

The Court of Appeal held as follows;

"therefore the question of amending the indictment or that the appellant was wrongly convicted by reason of a defective indictment does not arise because the trial judge had evidence which in our considered view , proved beyond reasonable doubt that the appellant murdered the deceased , Ruth Oirere Nyirangi."

We agree with the learned Justice observations above. The appellant was indicted for the murder of Ruth Oirere Nyiranyi in the High Court which offence was read to him to the best of his understanding. The High Court after evaluating evidence convicted the appellant of the murder of an unknown person. The matter was taken to the Court of Appeal by the appellant. The scope of duty of the Court of Appeal requires a fresh scrutiny of the evidence. It follows that the offence and the evidence had to be re-evaluated by the Court of Appeal. Therefore there was no need of a cross appeal. We find that the Court of Appeal in substituting the conviction for the murder of an unknown female for that of Ruth Oirere Nyiranyi only discharged its duty as conferred upon it by law. See; Section 11 of the Judicature Act. See also; Kifamunte vs Uganda [citation].

Further, there was no miscarriage of justice was occasioned and there was no contravention of Article 28(3) of the Constitution as argued by the appellant since the appellant knew very well what and who he was indicted for. The charge was read to him and he understood it very well, pleaded to it and also defended himself by giving unsworn testimony.

The other arguments forwarded by the appellant such as the possibility of the police planting evidence of a napkin containing a body tissue in the appellant's house were unfounded because they lacked evidential support. PW3 testified that the appellant was asked where the keys were and he stated that they were at the police reception. They subsequently proceeded to his place to search in his company. The appellant did not testify to anything irregular during the search and also no evidence was adduced from the hostel warden or neighbors at the hostel to have seen any one enter the appellant's dwelling prior to the search.

We come to the conclusion that the Court of Appeal was right to hold that the body of a female person who was murdered in room 15 of UMK Guest House and buried at the Cemetery and later exhumed and taken to Kenya for re-burial was Ruth Oirere Nyiranyi. Her death was unlawful, committed with

malice aforethought, and that it was the appellant who participated in the murder.

7 We find no merit in this ground, it therefore fails.

Ground two

The Learned Justices of Appeal erred in law when they condoned illegalities and irregularities that manifest in the re-evaluation of evidence which denied the appellant a fair trial thus occasioning a miscarriage of justice.

Appellant's arguments

14 Counsel submitted that the appellant's main contention was that the Justices of Appeal erred when they convicted the appellant without the appellant filing a cross appeal hence occasioning a miscarriage of justice.

He explained that the accused ought to know the charges against him in order to prepare his defence. He was never heard on charges regarding the murder of an unknown female. That all preparations and arguments made were in respect of the murder of the unknown female only for the Court of Appeal to
21 convict him for the murder of Ruth Oirere and thereby the appellant was denied his right to a fair trial and the right to be heard.

Counsel further submitted that Article 135(1) of the Constitution provides for a Coram of the Court of Appeal to constitute an uneven number being not less than 3 justices. Counsel argued that the decision of the Court of Appeal was made without a fully constituted Coram. He added that the case had been recalled for rehearing when the appellant was produced for judgment.

28 *Respondent's arguments*

Counsel for the respondent submitted that the Justices of Appeal reached a conclusion that the person killed was with Oirere Nyiranyi after critically re-evaluating the evidence. She added that there was no disadvantage or miscarriage of justice occasioned on the appellant since he had earlier on been indicted for the murder of Ruth Oirere Nyiranyi and the facts of the case were familiar to him.

35 On the issue of lack of Coram, counsel submitted that it was true that the 3rd Justice did not sign on the judgment. However counsel argued that the justice in issue participated in the decision making as revealed on pg 92 of the record. Further, counsel stated that the reasons for that Justice not signing the judgment were that at the time of signing of the judgment, the Judge had been elevated as a Supreme Court Judge. Counsel argued that absence of the signature did not occasion a miscarriage of justice.

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Consideration.

The issue concerning the respondent not filing a cross appeal was resolved in detail under ground one and we shall not re visit it.

Concerning to the issue of lack of Coram in the first appellate court, the law that provides for the composition of the Court of Appeal is **Article 135(1)** of the Constitution which states as follows:-

The Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the court. Emphasis or simply (emphasis added).

In the instant case, proceedings on record show that the case was heard by three Justices. However, the judgment was signed by only two Justices. The effect of Article 135(1) is that the case must be heard by Justices numbering not less than 3. It does not encompass the signing of a judgment. Appending a signature onto a judgment means that the Judge agrees with the contents of the judgment and in the same spirit, when a judge does not append a signature on a judgment, it means that he/she has dissenting opinions on the case. It does not whatsoever affect the legality of the judgment. In the instant case, the Justices of Appeal explained why one Lady Justice Arach-Amoko did not sign the judgment although she participated in the hearing, the consideration of the merits and demerits of the appeal as well as the taking of the decision on the appeal. The learned Justice could not sign the judgment because by the time the same was ready for signing, the said Justice had left the Court of Appeal having been elevated to the Supreme Court. We accordingly do not find any miscarriage of Justice done.

This ground we find no merit in this ground fails.

Ground 3

The learned justices of Appeal erred in law when they failed to resolve all doubts, conflicting evidence and gaps in the prosecution as in favor of the appellant arising out of unsatisfactory circumstantial evidence.

Appellant's arguments

Counsel submitted that this case was decided on circumstantial evidence which was the weakest of its kind. He stated that the appellate court did not address the gaps in conflicting evidence created in proving the ingredients of murder of Ruth Oirere Nyarangi. He submitted that there was no nexus between the unknown body at City Mortuary and the one at Mulago Hospital Mortuary which was not examined. He argued that the prosecution also did not explain the origin of the photograph of a body shown to PW5 nor was there an explanation on how the body identified by PW6 as that of Ruth Oirere arrived at Mulago Hospital Mortuary. He added that the prosecution did not call PW6

who was a key witness to view the body of Ruth Oirere at Mulago Hospital mortuary.

Counsel submitted that there was no investigation regarding the passport Number 23403775 in the names of Jackson Tumu as well as Martha Nyoteyo whose book was found in room 15 UMKA guest house. He further argued that the blood drawn from the body failed the chain of evidence test since it was not known who obtained the blood sample and from where. He stated that the DNA samples submitted to the Government chemist were recovered from the appellant's room and mortuary. He said however that it was not established which mortuary the blood sample PIDZ was obtained from and that itwas never admitted as an exhibit. He added that PW8 testified that he could not clarify whether the blood was from a particular body thereby breaking the chain of evidence.

Counsel further submitted that there was a possibility of the police planting evidence in the appellant's room since it spent 3 days with the keys to the appellant's room were in the possession of the police. He added that it was not clear why PW1 would issue a receipt and then retain it at UMKA Guest House.

Counsel argued that PW9, Dr. Byaruhanga, stated that the injuries mentioned in the post mortem report could have been accidental, suicidal or homicidal hence leaving the options open. Counsel argued that such doubts were not considered by court.

Counsel contended that there was no search certificate to show items that were recovered from the scene of crime. Counsel argued further that no evidence was led to show that Ruth Oirere was transferred to UMKA Guest House nor was she seen at the guest house since PW1 testified that for one to access room 15, they must have passed through the reception. Counsel added that the issue of school fees being the motive was denied by the appellant but his denial was not considered by court.

Counsel argued that key witnesses in the case were not called to testify. He relied on the case of Bukenya & Ors Vs Uganda [1972] E.A 549, where court held that the prosecution has discretion to call material witnesses to establish the truth even if the evidence given is inconsistent and that where the prosecution fails to do so, court may draw an inference that those witnesses if called would have been adverse to the prosecution case.

He submitted that the evidence regarding the identification of the appellant was unsatisfactory. He stated that the conditions for a proper identification were unfavorable. He further argued that the identification parade was conducted in violation of the law and rules of fairness. He stated also that the appellant's photos appeared in the Red Pepper news papers 2 days prior to the carrying out of the parade.

Respondent's arguments

Counsel for the respondent argued that the available circumstantial evidence was sufficient to sustain the charge of murder against the appellant as was found by the lower courts. She relied on the cases of Simon Musoke Vs R (1958) EA 715 at 718H and Godi V Uganda Crim Appl No. 3 of 2013.

She submitted that most of the issues in the submissions of the appellant were responded to in the respondents submissions on ground one.

She argued that it was not necessary to investigate who Jackson Tumu was because PW1 who identified the appellant testified that it was the appellant who booked room 15 at UMKA Guest house using the above fake name.

She further stated that the appellant's argument that blood allegedly drawn from the body totally failed the chain of evidence was untrue because the blood samples were not got from the mortuary.

She further argued that it was not true that none of the samples submitted to the government chemist was recovered from the scene of crime since PW3 clearly stated that he submitted to the government chemist both what he picked from the appellant's room and what was picked from the scene.

Counsel contended that the identification parade was conducted according to the rules governing identification parade and any inconsistencies therein were minor. On the issue of the parades being conducted after the picture of the appellant was circulated in the Red Pepper, counsel argued that it was not raised in the Court of Appeal. She stated further that there was no evidence that the witnesses had seen the photograph in the Newspapers

Consideration.

The appellant's arguments were that the prosecution evidence was marred by inconsistencies arising out of very weak circumstantial evidence.

The law on inconsistencies is that where there are contradictions in the prosecution evidence which are minor and of a trivial nature, these may be ignored unless they point to deliberate untruthfulness. However where contradictions are grave, this would ordinarily lead to the rejection of such evidence unless satisfactorily explained, see; *Alfred Tajjar v Uganda, EACA, Criminal Appeal No. 17 of 1969, Sarapio Tinkamalirwe V Uganda, SCCA No. 27 of 1989, Obwalatum Francis V Uganda, SC Crim Appl No. 30 of 2015.*

The law on circumstantial evidence is that before court decides upon convicting an accused person based on circumstantial evidence, it must find that the inculpatory factors are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. *See Simon Musoke Vs R (1958) E.A.715, Teper Vs R [1952] 2 AIIER 447.*

Bearing the above factors in mind, we proceed to consider the arguments by counsel on this ground. The appellant submitted that the prosecution case was weak and contradictory in the following areas:-

Nexus between the unknown body at City Mortuary and the one at Mulago Hospital Mortuary.

Appellant's counsel argued that the body at Mulago was not examined to establish the cause of death and that there was no nexus between these two bodies. It is not true that the cause of death was not established. It is clear from the evidence of PW9 that Dr. Wandera Richard performed a post-mortem examination on the body of a female victim who was then unknown. He established the cause of death as hemorrhagic shock (loss of blood) due to injuries following a sharp trauma. The deceased had stab wounds on the right neck and a lacerated left ear. Internally, the body had contused neck muscles and vessels with haematoma, contused lungs, petechial hemorrhages of the kidneys and lungs.

As to the nexus between the unknown body, the learned Justices of the Court of Appeal in their re-evaluation of the evidence were right to find that the body of the unknown female was in fact of Oirere Ruth Nyiranyi.

The Court of Appeal held as follows:-

"..There is also ample evidence to prove that the body found in room 15 at UMKA Guest House was the same as that transported by police to the City mortuary early in the morning of the 5th November, 2008. It was the same body, in our view, that Dr. Wandera Richard examined that morning and issued a post mortem Report in respect of. It was also the same body that was buried at Bukasa cemetery and later on exhumed and escorted by PW4 to Kenya where it was buried by the deceased's family at their ancestral burial grounds in Kenya. There was only one dead body..."

It is true that Mulago Hospital mortuary was mentioned in the testimony PW7 whereas other witnesses talked about a body at the city mortuary. A scrutiny of the evidence reflects that the body was never in Mulago Hospital Mortuary. According to the testimony of PW3, the body was taken to City Mortuary from UMKA Guest House, examined by a pathologist and later buried in Bukasa Cemetery given that it was of an unknown identity. We take Judicial Notice of the fact that bodies recovered by Police from scene of crime are always taken to City Mortuary. Mulago Hospital Mortuary is for people who die in the hospital.

The body however was exhumed pursuant to an exhumation order procured by PW4 and PW6. The body was then identified by PW6 as that of Ruth Oirere and transported to Kenya for burial by PW4. We therefore find that there is a nexus. We are satisfied it was the same body involved.

Investigation of Jackson Tumu.

The appellant argued that there should have been an investigation of who Jackson Tumu of Passport No. 2340775 actually was.

We find that, Jackson Tumu was a fake name that was given at the reception of UMKA Guest house and therefore an investigation was unnecessary because PW1 identified the appellant as the person who booked room 15 at UMKA Guest House.

Identification

Appellant's counsel contended that the appellant was not properly identified at the scene of crime because the conditions were unfavorable for proper identification.

The Court of Appeal said as follows;

"regarding circumstantial evidence , the prosecution relied on the evidence of two identifying witnesses namely, PW1 and PW2. Evidence was led to show that the appellant had booked into UMKA Guest House on 3/11/2008. He was taken around the said guest house by PW1 to see the rooms, until he settled for room 15. He then went back to the counter where he was asked for his identification, he stated his name as Jackson Tumu, and then stated a passport number and was given the key. He then asked for a beer that he drank from the counter, for some time. When he returned, he asked for food and PW2 took it to him inside the room. All the while he was not covering his face with anything. PW2 stated that there was light in the appellant's room and also light came from the kitchen into the room. He was again seen talking on phone outside his room the following day.

We find these circumstances favored the identification of the appellant by PW1 and PW2. Even though PW2 only had a short encounter with the appellant, both PW1 and PW2 had sufficient opportunity to become familiar with the appellant's face, even though he was not previously known to both of them."

The law on identification is that court should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and further, evidence on conditions favoring a correct identification is of utmost importance. See; *Waziri Amani Vs R (1980) TLR 100*

We do agree with the above observations leading to the decision by the learned Justices of the Court of Appeal and see no reason to interfere with it. We find that the conditions were favorable for proper identification and that the appellant was identified at the scene of crime by PW1 and PW2.

Identification parade.

The manner in which the parade was conducted was challenged by the appellant. He also argued that he was identified after his face was published in

an issue of Red Pepper and in the circumstances, his face was already familiar to those who claimed they had identified him at the parade.

The Court of Appeal stated held as:-

".... Indeed nothing on the record shows that there was information given to the appellant that he needed to have a lawyer. Nonetheless, the parade was conducted and both witnesses identified the appellant as Jackson Tumu. The appellant's main complaint was that the features on which the identifiers based their views were unsatisfactory as there were many brown people.

We have perused the evidence of the prosecution witnesses and accept counsel Okwang's submission that it was substantially conducted in accordance with the guidelines set out in the cited authorities and that the parade only corroborated the oral evidence of PW1 and PW2, the two identifying witnesses. Besides , it is our view that the inconsistencies in the testimony of PW1, PW2 and PW11 regarding the dress of the participants in the parade and the number of participants are excusable considering that it was about two years from the time when the identification parade had been conducted to that when the trial actually took place."

The learned Justices in the above passage properly evaluated the evidence regarding identification of the appellant, identification parade and further addressed the inconsistencies in the prosecution evidence. We find that the inconsistencies were minor and ought to be disregarded. Further, the parade was conducted fairly since the appellant in his testimony testified to have been put in a group of many light skinned individuals and therefore he did not stand out from the rest in order for him not to be recognised.

Further, on the issue of the appellant's picture appearing in the Red Pepper Newspaper; it is our view that there was no proof that the identifying witnesses had access to the newspaper before identifying him. This was stated by the accused in his unsworn statement and therefore all chances of cross-examination it was not available. We also agree with the learned Justices of Appeal that the parade was just corroboration to the overwhelming evidence against the appellant. An identification parade is relevant in cases where a witness claims he or she can identify a suspect who committed an offence in the presence of a witness who did not know the suspect previously:- see Bashir Ssali v Uganda, S.C. Criminal Appeal No. 40 of 2003. In the instant case the witnesses knew the appellant and in a cob-web of evidence identified the appellant and placed him squarely at the scene of crime.

Furthermore, there was motive in the instant case. According to section 8 (3) of the Penal Code Act, the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility. However, it is always useful since a person in his normal faculties would not commit a crime without a reason or motive. The existence

of a motive may make it more likely that an accused person did in fact commit the offence. It is one of the factors that may be taken into account: See **Kato John Kyambadde and another v Uganda, SCCA No. 30 of 2014**.

In the instant case, the appellant could have killed the deceased because the deceased was following up her tuition money, which the appellant had embezzled. According to Okundi (PW5), the appellant took the deceased from her and he was the last person who was seen with the deceased until her dead body was recovered from UMKA Guest House. When he was tasked by PW4 to explain what happened to the deceased, he kept quiet, probably because he was aware of what he had done to the deceased.

We accordingly find that the respondent proved the case beyond reasonable doubt that Ruth Oirere Nyiranyi died, that the death was unlawful with malice aforethought and the appellant participated in the death.
This ground therefore fails.

Ground four.

The learned Justices of Appeal erred in law when they upheld a sentence of 45 years imprisonment which was illegal and did not follow precedent.

Appellant's arguments

Counsel argued that much as the ground was not raised in the Court of Appeal, it was addressed by the first appellate court unsatisfactorily.

He contended that the trial court did not deduct the period the Appellant spent on remand. Counsel relied on the cases of *Umar Sebidde Vs Uganda SCCA No. 23 of 2012 and Rwabugande Moses Vs Uganda SCCA No. 20 of 2014* where court reduced the sentences after establishing that the remand period had not been considered in both cases. He prayed court to reduce the sentence from 45 years to 20 years specifically taking into account the remand period.

Respondent's arguments

In response, counsel for the respondent submitted that the court considered the period the appellant had spent on remand before sentencing him in a sense that the trial judge mentioned it before sentencing the appellant. Counsel prayed that in case this court establishes that the period spent on remand was not considered by the trial court, it should deduct two years as the period that the appellant had spent on remand at the time of sentencing.

Consideration;

The issue arising out of this ground was whether the trial judge while arriving at the sentence took into account the period the appellant had spent on remand.

Article 23(8) of the Constitution provides as follows;

Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment. (emphasis added)

It follows that taking into account the period an accused spent on remand before arriving at a sentence is a Constitutional right to be enjoyed by the accused and in the same spirit a Constitutional duty is imposed on the trial court, breach of which renders the sentence illegal.

The question then left to be answered is: what amounts to "taking into account?" Courts in the past labored to discuss the ambiguity in the wordings of the above provision. They held that the words *"taking into account"* do not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand from the sentence to be awarded by court. [See: *Kizito Senkula vs. Uganda SCCA No. 24 of 2001, Bukenya Joseph vs. Uganda SCCA No. 17 of 2010*].

However, in the case of **Rwabugande Moses vs. Uganda, SCCA No. 25 of 2014 delivered on 3rd March 2017, this Court** departed from its earlier decisions that the words "taking into account" do not require a trial court to apply a mathematical formula. The Court held that since the period spent on remand is known with precision consideration of the remand period should necessarily mean substracting that period from the final sentence. The Court further held that a sentence couched in general terms that a court has taken into account the time the accused spent on remand was ambiguous and it could not be unequivocally ascertained that the court took into account for the remand period in arriving at the final sentence. The Court then concluded that the taking into account the period spent on remand by a court is necessarily arithmetical.

The Court also emphasized that since **Article 23 (8) (supra)** deals with a constitutional imperative, consideration of the remand period cannot be placed on the same scale with other factors developed under common law such as age and remorsefulness of the convict as well as the convict being a first time offender, all of which are discretional mitigating factors. That consequently, in arriving at an appropriate sentence, a court should consider all the mitigating factors first, come at an appropriate sentence and then subtract the remand period from the sentence. The rationale for subtracting the period spent on remand is in Article 28 (3) (a) of the Constitution which is that during the said period, the accused is still presumed innocent.

That is now the position of the law.

In the instant case, the trial judge while sentencing the appellant stated as follows:

"Looking at the circumstances of his case, it is evident that the maximum penalty, which is death, would not be misplaced.

Court however takes into account that the convict is a first offender and at 27 years. He is definitely still a young man. He has been on remand for 2 years.... In the premises, I consider a sentence of 45 years imprisonment appropriate taking into account the period spent on remand."

We note that in the instant case, the decision of the Court of Appeal upholding the sentence of the trial court was delivered on 28th August 2015, before the **Rwabugande Moses** decision. The Court of Appeal cannot therefore be faulted for upholding the trial court's sentence because it was guided by what was then accepted as the meaning of **Article 23 (8)** of the **Constitution**.

In the result, we find that all the grounds have no merits. The appeal is accordingly dismissed.

Dated at Kampala this 21st day of December 2018

.....
BART KATUREEBE
CHIEF JUSTICE.

.....
ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT.

.....
OPIO-AWERI
JUSTICE OF THE SUPREME COURT.

.....
FAITH MWONDHA
JUSTICE OF THE SUPREME COURT.

.....
PROF. DR. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA.

THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.59 OF 2015

[Coram: Katureebe, CJ; Mwangusya; Opio-Aweri; Mwondha; Tibatemwa-Ekirikubinza, JJSC.]

BETWEEN

DUKE MBAYA GWAKA :::::::::::::::::::::::::::::::::: APPELLANT

AND

UGANDA :: RESPONDENT

JUDGMENT OF PROF. TIBATEMWA-EKIRIKUBINZA, JSC (Partial dissent).

I agree with the majority decision that the appellants' conviction be confirmed.

However, I respectfully differ from the majority in their conclusion that the principle set out in **Rwabugande Moses vs. Uganda**[1] which was delivered by this Court on 3rd March 2017, only applies to matters which

[1] Supreme Court Criminal Appeal No. 25 of 2014.

were tried after its pronouncement. I posit that Rwabugande must apply retroactively.

In Rwabugande, what this Court engaged in was interpretation of a Constitutional right embodied in **Article 23 (8)** of the **Constitution**. The Court pronounced itself on one of the rights under the Bill of Rights.

The concept of the retroactive operation of court decisions derives from the fundamental principle of common law jurisprudence that courts have "jurisdiction only to declare the law [and] not an authority to make it."[2] The principal is sometimes called the "declaratory theory of adjudication," or simply the "Blackstonian view". This is derived from Lord Blackstone's statements that judges are "not delegated to pronounce a new law, but to maintain and expound the old one," and that when courts are called upon to overturn an existing precedent, they "do not pretend to make a new law, but to vindicate the old one from misrepresentation."[3]

Judicial construction of a Statute is an authoritative statement of what the statute meant before, as well as after the decision of the case giving rise to that construction. A decision of a court of supreme jurisdiction overruling a former decision must therefore, except in very special circumstances, be retroactive in its operation. In the words of Steven W. Allen,[4] "the first principle of the law of retroactivity is that all court decisions are retroactive back to the

[2] Steven W.Allen, Toward a Unified Theory of Retroactivity, New York Law School Law Review, Vol. 54/2009-10, Page107.
[3] WILLIAM BLACKSTONE, COMMENTARIES,PAGES 69 and 70.
[4].See ft n.2, Page 108.

source of law underlying that decision"[5]. That is, when a court announces that a particular legal principle exists, it is a determination that the principle in question has been the law since the principle was established by the constitution or an act of legislature or the common law etc. The effect is not that the former decision is bad law, but rather it never was the law. In the matter before us, it follows that entitlement to have the period spent on remand specifically subtracted from the sentence accrued as soon as the 1995 Constitution came into effect.

Consequently, this Court's interpretation of Article 28 (3) of the Constitution in **Rwabugande** binds all existing cases that must be decided by all courts whether as courts with original or appellate jurisdiction. The right enunciated must benefit all and cannot depend on the particular time at which the matter was first handled. Had the Court wanted to make the operation of Rwabugande prospective, it would have said so and also given clear justification. The appellant~~s are~~ is in essence asking us to apply Rwabugande, "which is now known to state the correct principle of law that, in a more perfect world, would have been applied to their case in the first place"[6]. What the appellant is arguing is that "at my trial and at the Court of Appeal, something happened which would now be regarded as a constitutional error under the new decision by the Supreme Court."

Nevertheless, I must emphasize that while I subscribe to the jurisprudential principle that as a general rule a decision of a court

[5] See ft n.(2),(4), page 119 .
[6] Ibid, page 119.

of supreme jurisdiction overruling a former decision in a criminal matter must be retroactive in its operation if the new rule has the effect of expanding the rights of accused persons, I also recognize that its unrestrained application could create chaos in the judicial system. The example I would think of in regard to the retroactivity of the Rwabugande decision would be if the decision is said to be applicable to persons whose cases had by the time of the Rwabugande decision been subjected to adjudication by the final court but were still serving sentence. If all such cases were to be re-opened with the demand that the time spent on pre-trail detention be specifically deducted from their term of imprisonment, perhaps the criminal Justice System would be unduly burdened.

It is thus critical that a logical limit be applied to retroactivity of the jurisprudential principle in Rwabugande. The limit must be that the "new" principle applies to appeals which were still in the system at the time of delivery of the Rwabugande judgment. Any further limitation to retroactivity of the new jurisprudential principle would be if its application would lead to societal cost or if it would be impractical. I see no such cost since the cases to which the principle will apply are cases where there has been no "final" adjudication and are thus still in the system.

I am fortified in my view by developments in the United States jurisdiction. Prior to 1965, there was little doubt concerning the retrospective effect of constitutional decisions of the Supreme

Court.[7] In 1965, the Supreme Court codified that doctrine in **Linkletter vs. Walker**[8] and held that "the Constitution neither prohibits nor requires retrospective effect" but that in both civil and criminal litigation "a change in law will be given effect while a case is on direct review. In 1982, the Supreme Court again held in **United States vs. Johnson**[9] that a new rule applies to all cases pending on direct review at the time the decision is handed down.[10] In this case however the Court exempted application of retroactivity to cases where the new rule was a 'clear break' with the past precedent (as was the case in **Rwabugande**). Nevertheless in a 1987 case, **Griffith vs. Kentucky**,[11] the Court did not only reaffirm their precedent from **Johnson,** holding that a new rule is to be applied retroactively to all state and federal cases pending on direct review or not yet final but also abolished the "clear break exception" that disallowed retroactivity when the new rule was a clear departure from previous precedent. The Court held that even in such a case there is a retrospective effect for cases pending direct review. It is important to note that in all the above cases (**Linkletter, Johnson** and **Griffith)**, the Supreme Court was dealing with rules regarding the conduct of criminal prosecutions. Similarly, the **Rwabugande** decision dealt with interpretation of a constitutional provision and its effect on the rights of an individual in a criminal appeal.

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[7] *Robinson v. Neil*, 409 U.S. 505, 507 (1973).
[8] 381 U.S. 618 (1965).
[9] 457 U.S at 562.
[10] *Johnson*, 457 U.S. at 562.
[11] 479 U.S. 314, 328 (1987).

Consequently, the persuasive authorities from the US Supreme Court are relevant.

In line with the persuasive US authority of **Griffith vs. Kentucky**[12] the new rule in Rwabugande should apply retroactively to defendants whose convictions were not yet final when the new rule was announced. Indeed as concluded by the US Supreme Court, to have it otherwise would be fundamentally unfair because it would constitute fishing one case from the stream of appellate review and employing that case as a vehicle for announcing new constitutional standards, but then refuse to apply the new standards to all the other defendants who were waiting for their appeals to be heard.

I am also emboldened in my view by the fact that this Court adopted the principle of retroactivity in **Attorney General vs. Susan Kigula and 417 Ors**[13] wherein the Court engaged in judicial construction of penal provisions which provided a mandatory death sentence. The respondents were persons who at different times had been convicted of diverse capital offences under the Penal Code Act and had been sentenced to death. The respondents contended among other things that penal provisions which provide for a mandatory death sentence contravene various Articles of the Constitution. The Court held that all laws on the Statute books which provide for a mandatory death sentence are inconsistent with the Constitution and are void to the extent of that inconsistency.

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[12] See ft n.9

[13] Supreme Court Constitutional Appeal No. 03 0f 2006.

Such mandatory sentences were to be regarded as a maximum sentence.

As a consequence of the above holding the Court made orders which resulted into retroactive application of its departure from the hitherto held view that where a statute provided that a person convicted of a specified offence "shall" suffer death, courts did not have any discretion in arriving at a sentence other than the death penalty. The Court ordered that for respondents whose sentences arose from the mandatory sentence provisions and were still pending before an appellate court, their cases were to be remitted to the High Court for them to be heard only on mitigation of sentence. The High Court would pass such sentence as it deems fit under the law. Another order was that for respondents whose sentences were already confirmed by the highest court, their sentences would not be reviewed by courts of law. Their petitions for pardon by the President were to be processed and determined within three years from the date of confirmation of sentence and where after three years no decision would have been made, the death penalty would be deemed to have been commuted to imprisonment for life.

It is clear that the respondents in **Susan Kigula** benefitted from the principle that court decisions are retroactive back to the source of law underlying that decision – the Constitution. I also note that the retroactivity of the new jurisprudential principle was limited, perhaps by the principle of *functus officio*. This must have been the justification for two different orders depending on whether the case

was still within the judicial system or had been adjudicated upon by the final court.

In applying the principle of retroactivity of an overruling decision, this Court would not be faulting the lower courts for applying what was, prior to **Rwabugande**, accepted as the meaning of Article 23 (8) of the Constitution. Nevertheless, we are duty bound to ensure that appellants enjoy their "expanded" constitutional right.

Dated at Kampala this 21st day of December 2018.

.....Tibatemwa.....

PROF. TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.