

UGANDA / JUDGMENT

Jumba Joshua v Uganda

(Criminal Appeal No. 087 of 2021)

[2023] UGCA 392 (4 August 2023)

[2023] UGCA 392

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Gashirabake, JA, Kihika, JA

CASE / FILE NUMBER

Criminal Appeal No. 087 of 2021

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

(Coram: R. Buteera, DCJ, C. Gashirabake, JA, O. Kihika, JA.)

CRIMINAL APPEAL NO. 087 OF 2021

(Arising from Criminol Session No. IICT-00-CR-CS-0402/2020)

BETWEEN

JUMBA JOSHUA aka SULAIMAN aka KIRABO.. .. APPELLANT

AND

UGANDA .. RESPONDENT

(Appeal from the Judgment of the High Court of Uganda rendered at Kampala, by Anthony Oyuko Ojok, J. delivered on 09th December, 2020)

JUDGMENT OF COURT**Introduction**

- 1.] The appellant was indicted for murder contrary to sections 188 and 189 of the Penal Code Act Cap 120.

- 2.] The facts of the case are that on the 5th day of December 2018, in the morning, one Nanyombi Florence set off to take her 7- years old son, Sekanza Amos, to Wabigalo health center for treatment. As they left Wabigalo health center for their home at around 2p^h, they met the appellant in an isolated place. The appellant walked past them and hid far away. When they approached the appellant, Nanyombi saw the appellant emerge out of the bush wielding a panga and ordered Nanyombi to hand over her son. In fear, Nanyombi released the son and the appellant took him 5 meters away lay him facing down, and beheaded him.
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- ⁵ 3.] The appellant proceeded ahead where he met Adur Judith going to sell firewood at Wabigalo trading center. The appellant cut off her head and he proceeded ahead where he met Matovu Alozious at his home peeling matooke in the compound. The appellant cut off his head. He also cut his right hand. The appellant entered into a bush where he found Mawanda Misaki about 10 years old grazing cattle. The appellant cut off his head too, and also cut him on his right hand.
- 4.1 At around 10:00 pm on the 06th December 2018, the appellant approached ^a traffic Police Officer at Katuugo, asked him to help him with transport to Kampala. The appellant indicated that he was wanted for the said killings. The traffic officer then informed Onenarach Geoffrey and Olal Gilbert both attached to Katuugo Police Station to come and pick up the appellant. The officers detained him at the police station from where he was forwarded to Nakasongola Police Station.
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- 5.] While in police custody, he admitted to having committed the said offences. The appellant directed the police to the locations where he had committed the said offences. At his trial, however, he totally denied committing the said offences and pleaded alibi. He stated that at the time and day of the offences, he was at his uncle's home at Namuyonjo village in Wabigalo. He was subsequently indicted for the murder of the said Mawanda Misach, Sekanza Amos, Adur Judith and Matovu Alozious, convicted and sentenced to life imprisonment, hence this appeal.
- 6.1 The appellant being aggrieved with the decision of the High Court lodged an appeal in this court. The appeal is premised on five grounds set out in the Memorandum of Appeal as follows;
- ⁵ 1. That the learned trial Judge erred in law and fact when he ignored the Appellant's defence of insanity/ unsoundness of the mind which was plausible.

- 2. That the learned trial Judge erred in law when he failed to sum up the law and evidence to the assessors which occasioned ^a miscarriage of justice.
- 3. That the learned trial Judge erred in law and fact when he failed to adequately evaluate the evidence as a whole regarding the charge and caution statement and as a result came to the wrong decision.
- 4. That the learned trial Judge erred in law and fact when he failed to evaluate the entire evidence on record and convicted the appellant on wrongful identification hence occasioning a miscarriage of justice.
- 5. The learned trial Judge erred in law and fact by imposing a sentence of life imprisonment on the appellant which sentence was harsh and excessive in the circumstances of the case.

Representation

7.1 At the hearing of the appeal, the appellant was represented by Dr. Daniel Walyemera on, State brief, while the respondent was represented by Mr. Simon Ssemalemba, Assistant DPP.

O Ground I

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That the learned trial Judge erred in law and fact when he ignored the Appellant's defence of insanity/ unsoundness of the mind which was plausible.

Appellant's submission.

8.] It was submitted for the appellant that the appellant's counsel raised a defence of insanity. However, the appellant was never subjected to any medical examination of an expert to ascertain the same. Counsel cited section 48 of

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⁵ the Trial on Indictment Act Cap23, where Court is implored to make a special finding to the effect that the accused is not guilty of the act or omission charged by reason of insanity.

9.] Counsel further submitted that the state of mind of the accused person may be discerned from the evidence on record. Counsel cited *Tirwomwe James vs. Uganda, Criminal Appeal No. 668 of 2014*. Counsel submitted that there was overwhelming evidence on record that the appellant was insane. The behavior of the appellant after the commission of the offences was inconsistent with the behavior of a person who is sane. That was indicated in his conduct before and after he was convicted of the said crimes. This included going to the traffic officers and indicating that he is being investigated for the murders. Telling Police Officer some truth and lies and elaborating that he did so because he always had a dream of joining Uganda Police Force. That he took that interaction as an opportunity to test the investigative system.

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10.] It was argued further that the medical evidence showed that the appellant was of normal mental status, was irrelevant since it was made days after taking the appellant's confession and the commission of the offence. 20

Respondent's Submissions

- ^{1.]} It was submitted for the respondent that there was no evidence adduced by the prosecution nor the defence to show that the appellant was insane to warrant the trial Judge to invoke the provisions of the section of the Trial of indictment Act.
- 12.) Furthermore, counsel cited *Tirwomwe James vs. Uganda* (Supra) which cited *Batagenda Peter vs. Uganda*, SCCA No. 10 of 2016, where the Court held that the conclusion as to the state of mind of the accused person

41Page

⁵ may be discerned from the evidence on record, be it from the prosecution side or a statement made by the accused person to the police. The Supreme Court further upheld the decision of the Court of Appeal that, the behavior of the appellant therein after the commission of the offence was not consistent with the behavior of a person who would be suffering from insanity.

13.] It was contended that the appellant never raised the defence of insanity immediately after his arrest, nor did he raise it at his trial. He only raised the defence of alibi after giving unsworn evidence.

Consideration of Court

14.1 We are mindful that as a first appellate court, our powers are spelt out in Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S. I 13-10. The first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*, (1968) E. A 123.

15.1 Section 11 of the Penal Code Act Cap 120, provides that;

" a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act or make the omission ; but a person may be criminally responsible for an act or omission , although his or her mind is affected by disease, if that disease does not in fact produce

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16.] The above section is to the effect that a person is not criminally responsible for an act or omission at the time of doing the act or making the omission he or she is through any disease was incapacitated to understand what they were doing or omitted to do. However, on the other hand, one will be held liable if that disease does not in fact incapacitate the appellant from understanding what they are doing. In Leonard Mwansemi Munyasia v Republic, 2015 eKLR. The court held:

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"It is a rule of universal application and of criminal responsibility that a man cannot be condemned if it is proved that at the time of the offense he was not a master of his mind..."

17.1 For defense of insanity to stand, the accused must satisfy the grounds set out under the M'Naughten rule in M'Naughten Case (1843) 10 Cl &

Fin 200. The test is purely cognitive and the defence must show whether the accused understood her/his actions or that her/his actions were wrong. The defence of insanity is twofold. First, an insane defendant does not have control over his or her conduct. This is similar to a defendant who is hypnotized, or sleepwalking. Second, an insane defendant does not have the ability to form criminal intent. Without the ability to control conduct, or the understanding that conduct is evil or wrong by society's standards, an insane defendant presumably will commit crimes again and again.

18.1 The M'Naughten Rules require that the following three tests should be proved:

- i. That an individual suffers from a "defect of reason, ii. That it was caused by a "disease of the mind", iii. That as a result, he or she does not know the "nature and quality" of the act or that it is wrong.
- 19.1 In Richard Kaitany Chemasoms v Republic: Criminal Appeal No 150 of 1983 the Court of Appeal had sought to distinguish a malfunctioning of the mind from non-functioning of the mind due to epilepsy and held:
- 20.1 "There was ample evidence that the defendant was acting unconsciously and involuntarily when he inflicted the injury, but because of his condition was psychomotor epilepsy. Where the effect of a disease was so to impair the mental faculties of reason,

memory and understanding that the sufferer did not know the nature and quality of his act or, if he did, did not know he was doing what was wrong, it was a 'disease of the mind' within the meaning of the Mc'Naghten Rules in Mc'Naghten's Case (1843) 10 Cl & Fin 200, even if the effect was transient or intermittent. On the evidence the defendant was therefore 'insane' at the time of his act, and the only possible verdict was that provided for by the Act of 1883 as amended. "

- 21.1 It is for the defence to adduce evidence to demonstrate that at the time the act was committed he or she did not have the knowledge that his actions or omissions were wrong.
- 22.1 We have carefully considered the evidence adduced on the record and the arguments in submissions by both parties. 'The accused faced a charge of murder contrary to section 188 of the Penal Code. That section defines murder as follows:

"Any person who of malice aforethought causes the death of another person by an unlawful act or omission commits murder"

23.) The prosecution adduced evidence to establish that the appellant caused the deaths of the deceased persons by an unlawful act. 'The prosecution had to prove that the appellant's action was motivated by malice aforethought which is one of the essential elements of the offence of murder. The circumstances which constitute malice aforethought are described under Section 191 of the Penal Code as follows:

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⁵ " Malice aforethought shall be deemed to be established by evidence proving either of the following circumstances-- (a) an intention to cause the death of any person, whether such person is the person actually killed or not; or (b) knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused. "

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24.1 'The defence of insanity seeks to do away with an essential requirement of malice aforethought. It seeks to prove that the appellant did not have the intention to cause death and neither did he have knowledge that such an act or omission would cause death. Since there is a presumption that all people are sane, (See section 10 of the Penal Code Act Cap 120), the burden is on the accused to prove that he was not in the right mental state at the time of omission or action. However, he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. Godiyano Barongo S/O Rugwire vs. Rex 1952 19 EACA 229, Court held that; 15 20

> " the burden resting upon the accused when attempting to rebut a natural presumption which must prevail unless the contrary is proved will never be so heavy as that which rests upon the prosecution to prove the facts which they have to establish and it will not be higher than the burden which rests on a plaintiff or defendant in civil proceedings. It must however, at least establish the probability of what is sought to be proved. "

25.) There is no evidence on record that the accused was at the time of committing the offence incapacitated of appreciating or understanding what

⁵ they were doing. The appellant ought to have placed material evidence before the trial court such as expert evidence or oral evidence such as previous history as to the mental condition the state of his mind at the time of the offense, the events immediately after the incident that throw light on the state of his mind and other documentary evidence, presumptions, admissions or even the prosecution evidence, satisfying that he was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. In R vs. Magata S/o Kachehakana, U9571 EA, 330, Court held that;

" I have come to the conclusion, mainly upon the evidence adduced here that although the appellant did not tell the Police that when this accused killed his father he did not know what he was doing and he did not know that he ought not to have done the act. In my opinion the evidence as a whole has established the reasonable probability that this was the accused's state of mind at the relevant time. "

- 26.] To the contrary, the only medical report marked Ex. PEX. V, indicates that the appellant had a normal mental state. There was no evidence to the contrary.
- 27.1 It is prudent that such a defence is raised at the earliest stage possible, which was not the case. According to the record, the defence initially raised the defence of alibi and only raised the defence of insanity during the submissions. Had he raised this defence earlier, a medical test would have been conducted to establish his mental state. See Batagenda Peter vs. Uganda, S. C. C. A No. 10 of 2006,
- 28.1 To summarize, it is not only the fact that the person is suffering from mental illness but it is the totality of the circumstances seen in the light of the evidence on record to prove that the person was also unable to appreciate the

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- ⁵ nature of the act or wrongdoing or that it was contrary to the law is appreciated in the Court of law for the defence of insanity. This Court has not found such cogent to support the assertion of insanity.
- 29.) This ground therefore fails.

Ground 2

That the learned trial judge erred in law when he failed to sum up the law and evidence to the assessors which occasioned a miscarriage of justice.

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Appellant's submissions

- 30..| It was contended that there was no evidence of the summing up to the assessors by the learned trial Judge. Counsel cited Section 82(1) of the Trial on Indictment Act that requires a trial Judge to sum up evidence and the law to the assessors. Counsel relied on Bakubye Muzamiru and Anor vs. Uganda, SCCA No. 56 of 2015, where the Supreme Court held that the presiding Judge is duty-bound to do the summing up and that the duty cannot be delegated. Counsel further relied on Sam Ekolu alias Obote vs. Uganda, Supreme Court Criminal Appeal 15 of 1994, where court held that failure to sum up the law and the evidence amounted to not complying with an obligatory requirement of section 82 (1) of the Trial on Indictments Act.
- 31.1 Additionally, counsel submitted that failure to comply with the requirement under section 82(1) of the Trial on Indictments Act amounted to violation of the right to a fair hearing provided under Article 28 of the Constitution of the Republic of Uganda 1995 (as amended).

5 Respondent's submissions

32.1 Counsel for the respondent submitted that the learned Judge summed up the evidence and the law in accordance with Section 82(1) of the Trial on Indictment Act.

Consideration of court

33.] Section 82(1) of the Trial on Indictment Act provides that; "When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors. "

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34.] According to the above provision it is a procedural requirement that the trial Judge sums up the law and the evidence for the assessors.

35.] The record of appeal reflects that the assessors gave a detailed opinion that took into consideration the evidence of both the prosecution and the defense. The opinion also addressed the legal aspects that were raised during trial, including the appellant's defense of insanity. They came to the conclusion that the appellant was guilty of killing the deceased persons.

The question then would be; what was the effect of the failure by the trial Judge to sum up the evidence and the law to the assessors? Was that failure to sum up fatal as to lead to miscarriage of Justice? And what is the purpose of trial Court summing up for assessors?

The manner in which summing up should be done was addressed by this Court in *Tindyebwa Emmanuel & 20 others vs. Uganda Criminal Appeal No. 396 of 2017*, it cited *Simbwa Paul vs. Uganda*; CACA No. 23 of 2012, where this Court noted that:

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⁵ "it is a good and desirable practice that the substance of the summing up notes to the assessors appears in the record of proceedings. It is the only way an appeal Court can tell whether the summing up was properly done. We are however satisfied that this essential step was undertaken by the trial Judge and that failure to file the notes on record was not fatal to the conviction."

> Court further referred to *Mawanda Patrick vs. Uganda CACA No. 210 of 2010*, where it was held that;

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"the Judge therefore erred when she failed to comply with the above provision of the law which is set out in mandatory terms. (5. 81 (2) of the T.1. A). we however, find that no substantial miscarriage of justice was occasioned to the appellant as the assessor's opinion to convict him of lesser offence of manslaughter, was rejected by the trial Judge who went on to convict him of a more serious offence of murder. Section 3a Q) of Criminal Procedure Code Act permits this Court to ignore procedural errors and omission if no substantial miscarriage of justice has been caused. "

The Court in *Tindyebwa (Supra)* went ahead to find as follows: "In the instant case, from the Court record, the trial Judge noted, "assessors briefed. Opinion to be given on 18/08/2017."

S. 34(1) of the Criminal Procedure Code Act, Cap 16 and S. 139 of the Trial on Indictments Act mandate this Court to set aside a conviction on account of the error of law or fact complained about of the error of law or fact complained about only where the appellants have shown that the said error occasioned a miscarriage of justice. In the present case, we find that the summing up was done but the only fault was not to include the notes on record, which in our view was not fatal to the appellants' case hence no miscarriage of justice was occasioned. Ground 1 thus fails. "

- ⁵36.] Similarly, in this case, premised on the above authorities, it is our view that the omission of the summing up notes from the record of appeal alone may not be sufficient reason to justify a retrial.
- 37.) The record shows: "Court issues summary of proceedings to the assessors. " This be as the question; is the omission of the summing up notes from the record of appeal so fatal as to justify ordering a retrial by this Court? From the opinion rendered by the assessors, it is clear that the learned trial Judge summed up to the assessors and it is what they relied on to make their opinion.

38.] Is a retrial necessary? This question was answered by this Court in Adiga Johnson David vs. Uganda; C. A Criminal Appeal No. 0157 of 2010, Court stated:

"the overriding purpose of a retrial as stated in the case of Rev. I-ather Santos Il/akpora vs. Uganda C. A. C. A No. 204 of 2012, is to ensure that the cause of justice is served in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However, it must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay or inconvenience by reason of the retrial. The other considerations to be taken into account before ordering a retrial include; where the original trial was illegal or defective, the rule of the law that a man shall not be twice vexed for one and the same cause (Nemo bis vexari debet pro eadem causa), where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, strength of the prosecution case, the seriousness of otherwise of the offence, whether the original trial to the accused, who

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⁵should not suffer a second trial, unless the interest of justice so require and the length of time between the commission of the offence and the new trial, and whether the evidence will be available at the new trial. see Ahamecl Ali Dharamsi Sumar vs. R p964J Ezl 481; Ta mano vs. ^RI 19691 EA 126."

39.] In the instant Appeal, it is our view that the omission of the summing up notes from the record of appeal alone is not fatal as to justify a retrial. The appellant was arrested on 06th December 2018. He was convicted on 09th December 2020. He is serving sentence. This appeal is being heard in 2023. The assessors were guided and they understood their role. They fulfilled it but the Judge's notes on how he summed up for the assessors is missing from the record. Given that the prosecution evidence upon which the appellant was convicted was strong enough, it would be unnecessary to subject him to ^afresh trial.

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This ground fails.

Ground 3 20

That the learned trial judge erred in law and fact when he failed to adequately evaluate the evidence as a whole regarding the charge and caution statement and as a result came to the wrong decision

Appellant's submissions.

40..1 It was the contention of counsel for the appellant that the charge and caution statement was wrongly admitted in evidence. That according to the record, the charge and caution statement was repudiated and required corroborati on from independent credible evidence. 25

41.] Counsel cited Omaria Chandia vs. Uganda, Criminal Appeal No.23 of 2001, where the Supreme Court held that it was improper for the learned trial Judge to admit in evidence the confession statement of the appellant without conducting a trial within a trial is to establish the voluntariness of the statements made by accused persons. Counsel cited Amos Binuge & others vs Uganda, SCCA No. 23 of 1989, where it was held that,

" It is trite law that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish, by evidence, his grounds of objection. 'This is done through a trial wilhin a trial. T'he procedure to be followed in a trial within a rial was fully set out in the celebrated case o/: Kirytori s/o Karuditu (1956) 23 li. A. C. A. 480. T'he only improvement on that Case is that today the Assessors remain in Court during the lrial within a trial under Section 80 of the T'rial on Indictments l)euee. T'he purpose of the trial within a trial, is to decide, upon the evidence of both sides, whether the con/bssion should be admitted. See: M'Murqri s/o Karegwa v R. (1954) 2l li. A. C.l. 262 and Mwangi s/o

Njerogiv R, (1954) 2l E. A. C

42.1 Furthermore, counsel for the appellant submitted that the trial Judge took into account the contents of the confession statement in convicting the appellant. In counsel's view it was therefore erroneous to convict the appellant on the basis of a retracted confession without carrying out a trial within a trial as mandated by the law.

Respondent's submission.

43.1 Counsel for the respondent, submitted that what was admitted in the lower Court was not a charge and caution statement of the appellant but it was a plain statement of the appellant. In his view counscl argued that there

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⁵ was no need to conduct a trial within a trial for the admissibility of the plain statement. Counsel cited section 29 of the Evidence Act which provides that,

> "Notwithstanding sections 23 and 24, when onyfact is deposed to as discovered in consequence of information received from a person accused of any o/fence, so much of that information, whelher it amounts to a con/bssion or nol, os relates distinctly lo the foct thereby discovered, may be proved."

44.1 Mr. Simon Ssemalemba argued that it was the evidence of PW6, ^a Police traffic officer that the appellant approached and told him that people were looking for him, and that he had killed four people on the 5th December, 2019. Additionally, PW9 testified that after the appellant's confession he led Police to Kampala where he had taken some body parts together with the gumboots. The gum boots where recovered. Counsel submitted that the soil samples picked from the scene of the crime, matched the sample soils. It was further argued that PW9 submitted that without any threats or force, the appellant took them through the four scenes of crime where the four deceased persons were murdered.

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45.1 Counsel further submitted that it was the evidence of PWIO, D/AIP Okello Felix, that the appellant revealed to then that he was the one who killed the victims after having been sent by on Muhereza from Kampala. During this time, PW10 was able to recover a white vest and black strips. In his view, counsel submitted that the evidence of PW8, PW9 and PW10 was admissible under section 29 of the Evidence Act, since their evidence established the facts of the killer, how the deceased were murdered and where there were murdered. It was further submitted that even if the plain statement was expunged from the record, the learned Judge properly relied on the evidence

⁵ " Plain statement of the suspect "

47.) We therefore agree with the submissions by counsel for the respondent that since this was not a charge and caution statement there was no need for a trial within a trial. We also note that while evaluating the evidence on record the trial Judge did not consider this statement, so we cannot fault him on ground that he failed to evaluate evidence as a whole regarding the charge and caution statement.

This ground fails

Ground 4

That the learned trial Judge erred in law and fact when he failed to evaluate the entire evidence on record and convicted the appellant on wrongful identification hence occasioning a miscarriage of justice.

Appellant's submissions.

48.] It was submitted for the appellant, that the Judge relied on the evidence by PW7, who was a single identifying witness for the prosecution. Counsel argued that the position of the law on treating evidence of a single identifying witness was laid out in the case of Abdallah Bin Wendo and Another vs. R (1953), 20 EACA 166 and Abudalla Nabulere and 2 others vs. Uganda Criminal Appeal No. 9 of 1978. Counsel argued that applying the parameters of the law governing correct identification, the appellant was not properly recognized by P. W. 7. She did not reveal what distinctive mark or body feature enabled her to recognize the Appellant. As regards familiarity, PW7 never knew the appellant prior to the incident. In terms of proximity, the appellant was close to the P. W.7 However, she never actually witnessed

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⁵ of PW8, PW9 and PW10, whose evidence was para material with exhibit PEX. X

Consideration of Court.

46.) A charge and caution statement is a statement under caution by the recording Police officer or Magistrate. For a statement to amount to a Charge and caution statement it must adhere to the written procedures set down in the Evidence Act Cap 6, the Rules therein and case law. The recording of a Charge and Caution statement is governed by section 23(l) of the Evidence Act Cap which provides that;

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No confession made by any person while he/ she is in the custody of a Police Officer shall be proved against any such person unless it is made in the immediate presence of -

- (a) A police of or above the rank of assistant inspector; or
- (b) A magistrate, but no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b), unless the confession is corroborated by other material evidence in support of the confession implicating that person.

The procedure of recording a charge and caution statement by a Police Officer is found in The Evidence (Statement to Police Officers) Rules. Looking at the PEX, X, and in corroboration with the evidence of PW 10, exhibit P. Ex. X was not a charge and caution Statement. PW 10 in his testimony stated that he just recorded a Plain statement. I-lc did not demonstrate that he followed the procedure laid down in the Evidence (Statement to Police Officers) Rules. Furthermore, the title of the said document is indicative of the fact that it was a plain statement of the suspect. It reads;

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⁵ him committing the said offense. As regards duration, given the circumstances the incident happened very quickly. It was not long enough to aid correct identification and the appellant's alibi was never disproved by the prosecution evidence. It was therefore an error for the Judge to find that the evidence of identification by P. W.7 was cogent evidence to convict the appellant. Counsel for the appellant prayed that this ground be allowed.

llespondent's submission

- 49.) It was submitted for the respondent that the trial Judge properly found that the conditions of identification favored a correct identification by the appellant by PW7. It was submitted that PW7 testified that the incident occurred at about 2:00pm which was broad day light. She further testified that the appellant forcefully grabbed the child from her. The appellant then made the victim to lie down and started striking him with a panga. FHe repeatedly struck the child until the child became silent. It was submitted that from the time the appellant grabbed the victim from PW7 up to the time the child went silent, there was ample time for PW 7 to properly identiff the appellant.
- 50.] It was further submitted that PW7's evidence was corroborated by the evidence of PW8,9 and 10, who testified to the effect that the appellant revealed to them that he had killed four people.

Consideration of Court 25

51.] The law on identification by a single witness has been laid out in several cases even those referred by the appellant like Abdullah Bin Wendo and

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⁵ Another vs. R (supra) and Abudalla Nabulere vs. Uganda (Supra), specifically in the latter case the Court held that;

"where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that ^a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger

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52.) It is not in dispute that PW7 was a single identifying witness of the appellant. It was PW7 Nanyombi Florence testimony that on the 5th day of December 2019, she took her son to hospital for treatment while on her way back home at around 2p, the accused followed them from behind and later went ahead of them and disappeared in the bush. She further testified that the appellant resurfaced with a panga saying "This is the type I want" he then forcefully grabbed the boy and started beating him with the flat side of the panga. The victim kept telling the appellant, "You man, leave me" but he did not heed. That as he repeatedly hit the child, he went silent. She then feared that the son was dead so she ran and called other people. By the time she returned the boy had been beheaded.

53.] Relating to the above evidence, there was sufficient light for proper identification, the events having happened at 2pm. PW7 had ample time to

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⁵ identify the appellant because the appellant took time hitting the child with the panga before the child went silent. The proximity is not in question because the appellant grabbed the boy from PW7's hand. We are convinced that the conditions for proper identification were satisfied.

- 54] Additionally, the evidence of PW7 was corroborated with the evidence of PW8, 9 and 10. PW8, testified that while on duty on 06th day of December 2019, at 2am, the appellant came to him asking for transport and protection because they were searching for him. PWS got a motorcycle and took him to the station. While there, the appellant told him how he had killed four people. PW9 on the other had testified that the appellant led them through the four murder scenes of the crime where Mawanda Misaki, Sekanza Amos, Adur Judith and

Mzee Matovu were murdered. Lastly PW 10 testified that when he interrogated the appellant he confessed to have killed the four people.

- 55.1 The appellant raised a defence of alibi but then acknowledged that PW8 took him to Katungo Police station when he was looking for transport. The appellant also acknowledged the black and white stripped vest that was tendered in evidence as his. Having evaluated the evidence on record, it is no doubt that the evidence of PWS, PW9 and PW10 corroborated the evidence of PW7. It was therefore proper for the trial Court to find that the appellant participated in the murder of the four deceased.
- 56.1 This ground fails.

Ground 5

The learned trial Judge erred in law and fact by imposing a sentence of life imprisonment on the appellant which sentence was harsh and excessive in the circumstances of the case.

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⁵ Appellant's submissions

57.) Counsel for the appellant submitted that the appellate Court cannot interfere with the sentence imposed by the trial Court unless in the exercise of its discretion, it imposed a manifestly excessive or low as to amount to ^a miscarriage of justice or where Court ignored to consider an important matter or circumstance which ought to be considered. see Kasira Moses vs. Uganda, Criminal Appeal No. 23 of 2016 which referred to Kiwalabye Bernard vs. Uganda, SCCA No. 143 of 2011.

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- 58.] Counsel for the appellant conceded to the fact that the trial Judge took note of the principle of consistency, he however did not apply the same while sentencing the appellant. Counsel cited Tusigweri Samuel Vs. Uganda Criminal Appeal No. 110 of 2007, where Court found the sentence of life imprisonment on a murder charge to be harsh and manifestly excessive. The Court reduced the sentence to 30 years. In Atiku vs. Uganda Criminal Appeal No. 0041 of 2009, the appellate Court reduced the sentence of life imprisonment to 20 years' imprisonment.
- 59.] Counsel prayed that in the spirit of consistency, this Court should invoke its powers under section II of the Judicature Act to impose an appropriate sentence.

Respondent's submission.

²⁵ 60.] It was submitted for the respondent that the sentence of life imprisonment was neither excessive nor harsh in the circumstances of this case. Counsel conceded to the submissions of counsel for the appellant with regard to the position of law in *Kasira Moses vs. Ugan da* (Supra) which referred to *Kiwalabye Ilernard vs. Uganda* (Supra).

22 lPage

⁵ 61.] Furthermore, counsel submitted that the trial Judge while passing the sentence against the appellant considered the fact that the maximum sentence for the offence of murder is death, but such sentence was reserved for the worst murder cases. In the case before us, two of the murder victims were children, Sekanza Amos who was aged 7 years old and Misaki Mawanda aged 10 years old. Ms. Adur Judith was 33 years old and Lozio Matovu undetermined age. It was submitted that these victims were defenseless before the appellant. Counsel invited Court to make reference to *Kato Kajubi vs. Uganda SCCA No. 2014*, where Court upheld the sentence of life imprisonment passed against the appellant.

15 Consideration of Court

- 62.] We agree with the submissions of both counsel regarding the interference of the appellate Court in the discretion of the trial Court during sentencing. It is true that the Appellate Court will only interfere where there is cogent evidence that the sentence imposed was manifestly harsh or low to lead to a miscarriage of justice, or the trial Judge failed to follow the set principles or failed to consider the most important or circumstances. *Kiwalabye vs. Uganda* (Supra)
- 63.1 We agree with the position of the lower Court that the offence of murder attracts a maximum penalty of death as provided for under section 189 of the Penal Code Act. The trial Court properly found that this was a preserve of the worst murder cases.
- 64.1 The trial Court also properly considered the sentencing guiding principles as laid down in the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2010. Counsel for the appellant conceded to the fact that the trial Court took note of the sentencing guidelines. But 23 lPage

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⁵ flouted the trial Court on the principle of consistency set out in Principle ⁶ (c) of the sentencing guidelines. While handling this principle, the Supreme Court in *Aharikundira Yustina vs. Uganda*, Supreme Court Criminal Appeal No. 27 of 2015, held that;

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"We are in agreement with the above passage. It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."

- 65.] Considering similarity in facts, in *Kato Kajubi vs. Uganda* (Supra) referred to by counsel for the respondent, the Supreme Court upheld the sentence of life imprisonment having considered the gruesome way the victim was murdered. Additionally, in *Ssekawoya Blasio SC Criminal Appeal No. 24 OF 2014*, the Appellant was imprisoned for life for ^a premeditated murder of his three children. In *Turyahabwe Ezra and ¹⁴ others vs. Uganda SCCA No. 50 of 2015*, this Court and the Supreme Court upheld a life imprisonment sentence against some of the Appellants who were convicted of murder. Lastly, in *Sunday vs Uganda*, CACA NO. 10312006 the Court of Appeal upheld a sentence of life imprisonment for a 35-year-old convict who was a part of a mob that attacked a defenceless elderly woman until they killed her, 15
- 66.) The appellant ended the life of young people, Sekanza Amos aged ⁷ years, Misaki Mawanda aged 10 years, Adur Judith aged 33 years and Lozio Matovu undetermined age. The murders brought trauma and fear on the community and its neighbours. We find that the learned trial Judge correctly considered the evidence on record and came up with an appropriate sentence. This ground fails.

We find no merit in the appeal which we dismiss accordingly. 67.] S We so Order

Dated at Kampala this 10 MARRE RICHARD BUTEERA DEPUTY CHIEF JUSTICE 15 m_1 CHRISTOPHER GASHIRABAKE JUSTICE OF APPEAL 20 $\cdots$ OSČAŘ KIHKA JUSTICE OF APPEAL

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