THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Egonda-Ntende, Obura, Madrama, JJA*]

Criminal Appeal No. 061 of 2018

(Arising from High Court Criminal Session Case No.0280 0f 2013 at Kampala)

BETWEEN

Mbaguta Ronald... Appellant No.1
Kigongo Kalemba Kamala .... Appellant No. 2

AND

Uganda .... Respondent

(An appeal from the judgement of the High Court of Uganda [Oyuko, J] delivered on 8th June 2018)

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted and convicted of kidnap with intent to murder contrary to sections 243 (1), (a), (b) and 243 (2) of the Penal Code Act Cap 120. The particulars of the offence were that the appellants and others still at large on the 20th day of September 2014, at night while at Mariana Bar & Lodge in Kasese District by force or fraud kidnapped Mansuli Hamisi with the intent that he be murdered or may be so disposed of as to put him in danger of being murdered.

[2] On 8th June 2018 the learned trial judge convicted the appellants as charged and sentenced them to a term of 30 years' imprisonment. Being dissatisfied with the decision of the trial court the appellants appealed to this court on the following grounds:

'(1) That the Learned Trial Judge erred in law and fact when he tried and convicted the appellant when they had not been charged and committed of kidnap **with intent to murder C/S 241(1) (a) (b) and (2) of the Penal Code Act** contrary to **Section 1 of the Trial on Indictments Act Cap 23** and **Section 168 of the Magistrates Courts Act Cap 16**.

(2) That the Learned Trial Judge conducted the trial with improperly appointed assessors and never made summing up notes for them as required by law and this occasioned a serious miscarriage of justice to the appellants.

(3) That the Learned Trial Judge erred in law and in fact when he wrongly admitted evidence in a preliminary hearing without following the requisite procedures and this occasioned a serious miscarriage of justice to the appellants.

(4) That the Learned Trial Judge erred in law and fact when he failed to properly evaluate the circumstantial evidence relied on by the respondent which evidence was insufficient to prove all the ingredients of the offence.

(5) That the Learned Trial Judge erred in law and in fact to hold that there was evidence of common intention by the appellants to commit the offence in issue when there was no such evidence.

(6) That the Learned Trial Judge was wrong when he relied on weaknesses in the defence case to convict the appellants other than relying on the strength of the respondent's case.

(7) That the Learned Trial Judge wrongly relied on inadmissible evidence of the 1st appellant's plain statements to convict the appellants.

(8) That the sentence passed against the appellants was illegal as it contravened Article 23(8) of the Constitution or in the alternative, it was harsh and manifestly excessive in the circumstances.'

[3] The respondent opposes the appeal.

Submissions of Counsel

[4] At the hearing of the appeal, the appellants were represented by Mr. Richard Bwiruka, Mr. Vincent Mugisha and Ms. Suzan Sylvia Wakabala while the respondent was represented by Mr. Charles Bwiso, Senior State Attorney. The appellants opted to adopt their written submissions.

[5] In relation to ground 1 Mr. Bwiruka submitted that the appellants were originally charged with the offence of murder, indicted and committed to High Court for trial. However, the Director of Public Prosecutions entered a *Nolle Prosequi* under section 134 of the Trial on Indictments Act, Cap 23 and charged the appellant with the offence of kidnap with intent to murder instead of discharging them as required by the law. Counsel for the appellants contends that this was done in contravention of section 1 of the Trial on Indictments Act and section 168 of the Magistrates Courts Act. Mr. Bwiso, in reply conceded that this was an irregularity by the trial court but he contends that it is neither fatal nor did it occasion a miscarriage of justice.

[6] Counsel for the appellants on ground 2 submitted that the trial court did not record the particulars of the assessors to confirm that they were eligible as provided by section 3 of the Trial on Indictments Act. He contended that the appellants and their advocates were not asked whether they had any objection to the assessors as provided by section 68 of the Trial on Indictments Act. Mr. Bwiruka asserted that this was a gross irregularity that goes to the jurisdiction of the court. In addition the trial judge did not sum up to the assessors as required by section 82 (1) of the Trial on Indictments Act which renders the trial a nullity. He relies on the case of Byamukama Francis v Uganda Court of Appeal Criminal Appeal No. 397 of 2015 (unreported). In reply Mr Bwiso submitted that the appellants were in court when the assessors were appointed and their particulars read. He conceded to the fact that the particulars of the assessors are not on record and neither were the appellants given an opportunity to object to the assessors. He also agrees to the appellants' submission that failure to sum up to the assessors is a fatal irregularity and prayed for an order for a re-trial should this court find the trial a nullity

[7] Counsel for the appellants submitted on ground 3 that the evidence of the clinical officer (PW1) and exhibits PE1 A and PE1 B were improperly admitted into evidence in contravention of section 66 (1) of the Trial on Indictments Act.

Mr. Bwiruka argued that the above exhibits were admitted into evidence by the trial court without the appellants agreeing to that effect. In reply Mr. Bwiso conceded to the appellants' contention but argued that the irregularity does not occasion a miscarriage of justice to render the trial fatal.

[8] Counsel for the appellants argued grounds 4, 5 and 6 together. He submitted that the evidence of seizure by force or fraud of the missing person, Mansuli Hamisi was solely circumstantial. Mr. Bwiruka submitted that for a conviction to be sustained on circumstantial evidence, the inculpatory facts must not be capable of any other reasonable hypothesis than that of guilt, that before drawing any inference of guilt from circumstantial evidence court must be sure that there are no other co-existing circumstances to weaken or destroy the inference. He relied on Emmanuel Nsubuga v Uganda (1992-93) H.C.B 24.

[9] He further submitted that the evidence relied on by the prosecution is insufficient because there is no photographic evidence showing where the exhibits were recovered and that the trial court did not confirm whether Adimo Chemi, from whom a blood sample was drawn for DNA analysis, was the mother of Mansuli. Adimo Chemi is alive but she was not brought to court to testify and the medical personnel who drew the blood also never testified to show court how they drew blood from her. Mr. Bwiruka also submitted that there was no evidence to show that Mansuli Hamisi was anywhere near the company of the appellants on the night of 20th September 2014 due to the fact there were many revellers at the Mariana Lodge & Bar that night.

[10] Mr Bwiruka further argued that the respondent tried to connect the incident of the appellant and gate keeper chasing a thief to infer that the thief is the missing person but there is no evidence to point to that since there were many people at the bar that night and anyone could have been caught and beaten as the thief. He submitted that the mattresses that were recovered in the store were not recovered in the presence of the appellants and that many people who were at the bar that night were not summoned to testify.

[11] Counsel for the appellants further submitted that the conduct of the appellants does not point to guilt. Appellant no.1 reported the theft of his phone and explained his role in instructing the workers to remove valuables in the broken into room. He co-operated with the police during the search. He submitted that appellant no. 2 willingly explained the events of the night before his arrest. However, that on the other hand, the conduct of the police is questionable as it

detained the appellants for close to a month without charging them and made no effort to either track the missing phone or search for the missing person. He urged this court to exercise caution in view of the weak circumstantial evidence on record as there is a possibility of Mansuli re-appearing.

[12] In reply Mr Bwiso cited Simoni Musoke v R [1958] 1 EA 715 to restate the law governing cases depending entirely on circumstantial evidence. He submits that PW3 and PW5 in their testimony stated that they had last seen the missing person at Mariana Bar & Lodge on the night of 20th September 2014 thereby placing the victim at the scene of the crime. He further submitted that the trial judge extensively evaluated the evidence of PW7, PW8 and PW10. According to PW7, they found blood, two human teeth, broken glass, human hair, a sack of soil with blood between Mariana Bar & Lodge and Rwenzori Tourists Hotel which suggests that Hamis Mansuli was taken away by force by the appellants. Mr. Bwiso submitted that PW8 corroborates the evidence of PW7 with regard to the exhibits that were recovered.

[13] Further Mr Bwiso argued that PW4 corroborated the evidence of PW8 and PW7 who stated that upon carrying out a search, they found the toilet window of room 8 broken. Further, counsel for the respondent submitted that the missing person is the thief that was beaten up by the appellants.

[14] Mr. Bwiso, in relation to ground 5, relied on section 20 of the Penal Code Act that provides for common intention. He also relied on Sekitoleko Yuda Tadeo v Uganda Supreme Court Criminal Appeal No. 33 of 2014 (unreported) and contends that the appellants' common intention is established at the moment when the phone was stolen and they pursued the person they suspected to be the thief thus leading to his disappearance. He submitted that the appellants are responsible for the disappearance of the thief who in this case was the missing person.

[15] Counsel for the respondent submitted on ground 6 that the learned trial judge properly evaluated the evidence and arrived at the proper conclusion. He contended that the trial court first evaluated the prosecution evidence and then evaluated the defence evidence and in conclusion believed the evidence of the prosecution as opposed to that of the defence.

[16] Mr. Bwiruka submitted on ground 7 that the prosecution relied on the plain statements made by appellant no.1 to point out some inconsistencies in the appellant's testimony which was of no legal effect. He contended that the plain statements were inadmissible in evidence because they are obtained from a suspect in circumstances contrary to article 23 (3) of the Constitution. Further, that the appellants were not cautioned before taking the statements which was contrary to Rule 4 and Rule 5 of the Evidence (Statements to Police Officers Rules) SI 6-1. He relied on R v Salimu Kaggwa s/o Mugema [1961] 1 EA 153 where court held that such a statement was inadmissible for non-compliance with the above rules. In reply Mr. Bwiso submitted that the rules cited by the counsel for the appellants provide for confessions whereas what was admitted into evidence was a plain statement. He concludes that the plain statement was properly admitted into evidence to show inconsistencies in the defence case

[17] Counsel for the appellants submitted on ground 8 that the learned trial judge did not take into account the period of 1 year and four months appellant no.1 spent on remand before he was granted bail thus rendering the sentence illegal. He also submitted that the learned trial judge considered death as an aggravating factor yet there was no proof of death. The trial court did not also take into consideration the respective ages of the appellants and the fact that they were first time offenders and therefore imposed manifestly excessive sentence. In reply, counsel for the respondent, conceded that the learned trial judge did not take into consideration the period the appellant spent on remand. He prayed that this court substitutes the sentence with an appropriate sentence.

[18] Finally Ms. Wakabala prayed that the conviction be quashed and sentence set aside by virtue of the fact that the trial was irregular. He prayed that this court should not order for a retrial because the evidence on record is not sufficient to prove the offence of kidnap with intent to murder. On the other hand, Counsel for the respondent prayed that this court orders a retrial given the irregularities in the trial.

Analysis

[19] It is our duty as a first appellate court to review and re-evaluate the evidence before the trial court and reach our own conclusions of fact and law taking into account of course that we had no opportunity to hear and see the witnesses testify. See Rule 30 of the Judicature (Court of Appeal) Rules Directions S.I.

No. 13-10, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20. We shall proceed to do so.

[20] The case for the prosecution is that at around 8:00 pm on 20th September 2014, Mansuli Hamisi together with his brother Manutwalibu Hamis (PW3) went to Mariana Bar & Lodge. His brother left him at the lodge with a one Bakati Swaleh (PW5), who left the bar at 10:00 pm leaving the missing person playing pool in the company of unidentified revellers. At around 1:00 pm, an unidentified thief stole appellant no.1's phone and ran off in the corridors of the hotel. One of the bouncers, Muhindo Xavier arrested the thief but it appeared that he had already passed on the phone to another person. The suspected thief was a male customer. Upon arrest, he was assaulted by appellant no.1, appellant no. 2 and other bouncers leading the thief to presumably lose a lot of blood. The following day, an informer informed police of a suspected murder at the lodge that had been committed the previous night. The police visited the scene of the crime at around 5:00 pm that same day and retrieved some evidence. The appellants were thereafter arrested and charged with the offence of murder. The appellants were subsequently committed to the High Court but the Director entered a nolle prosecui and thereafter charged the appellants with the offence of kidnap with intent to murder Hamis Mansuli. To date, Hamis Mansuli is believed to be a missing person.

Ground one

[21] The appellant's main contention was that it was irregular for the Director of Public Prosecutions not to issue a fresh charge against the appellants for the offence of kidnap with intent to murder upon entering a *nolle prosecui* for the offence of murder. The appellants argued that this was contrary to section 1 of the Trial on Indictments Act and section 168 of the Magistrates Courts Act. Section 1 of the Trial on the Indictments Act states:

> 'The High Court shall have jurisdiction to try any offence under any written law and may pass any sentence authorised by law; except that no criminal case shall be brought under the cognisance of the High Court for trial unless the accused person has been committed for trial to the High Court in accordance with the Magistrates Courts Act '

[22] Section 168 (1) of the Magistrates Courts Act provides:

> 'When a person is charged in a magistrate's court with an offence to be tried by the High Court, the Director of Public Prosecutions shall file in the magistrate's court an indictment and a summary of the case signed by him or her or by an officer authorised by him or her in that behalf acting in accordance with his or her general or special instructions'

[23] The appellants were charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act and were later indicted and committed to the High Court for trial. The Director of Public Prosecutions later entered a *nolle prosequi* under section 134 of the Trial Indictments Act but they were not discharged as the law requires. Instead, the Director of Public Prosecution tendered in a new indictment for the offence of kidnap with intent to murder contrary to sections 243(1), (a), (b) and 243(2) without charging the appellants afresh in the Magistrates court. The respondent does not dispute these facts.

[24] In consideration of the law stated above, the appellants ought to have been charged on a fresh charge and committed to the High Court for trial. Generally committal proceedings are held to give notice to the accused persons of the offence or offences and the evidence in support thereof for which they will be tried in the High Court. It is also an indication that the state is ready to commence with the trial of the accused persons. We heard from the bar that the appellants were served a new indictment with a different offence and a summary of the case and committed again for trial in the High Court before the Chief Magistrates Court of Fort Portal. The failure to issue a fresh charge before committal proceedings is a minor irregularity that did not lead to a miscarriage of justice to render their trial a nullity. It would be different if the appellants had not been committed for trial to the High Court.

[25] Section 34 (1) of Criminal Procedure Code Act and section 139 of the Trial On Indictments Act permits this court to ignore procedural errors and omissions if no substantial miscarriage of justice has been caused. Section 34 (1) of Criminal Procedure Code Act states:

> '34 (1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other

> ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

[26] Section 139 of the Trial on Indictments Act provides:

> **'139. Reversability or alteration of finding, sentence or order by reason of error, etc.**
> a) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.
> b) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings'

[27] Therefore in light of the above ground 1 fails.

Ground two

[28] Mr. Bwiruka faulted the learned trial Judge for having failed to give the appellant an opportunity to object to the assessors assigned to the appellants' case at the trial and not indicating the particulars of the assessors. The respondent conceded to the above contentions raised by the appellants but is of the view that the irregularities were minor and did not occasion a miscarriage of justice.

[29] Upon perusing the record of proceedings of the trial court, there is no indication that the appellants were given or denied an opportunity to object to the assessors assigned to their case. Section 68 (1) of the Trial on Indictments Act states:

> '(1) The accused person or his or her advocate, and the prosecutor
> may, before an assessor is sworn, challenge the assessor for cause on any of the following grounds-
> 1.presumed or actual partiality;
> 2.personal cause such as infancy, old age, deafness, blindness or infirmity;
> 3.his or her character, in that he or she has been convicted of an offence which, in the opinion of the judge, renders him or her unfit to serve as an assessor;
> 4.his or her inability adequately to understand the language of the court.'

[30] This court in Mawanda Patrick v Uganda [2015] UGCA 101, under similar circumstances stated:

> 'It would therefore be a violation of the law and the rules of natural justice if an accused person was to be tried by court assisted by an assessor who may be biased or who may have a personal interest in the outcome of the trial. In this case however, it has not been alleged that any of the assessors had an interest in the outcome of the trial or could have been biased. There is no indication that the appellant would have objected to any of the assessors had he been given opportunity to do. We find therefore, that no substantial miscarriage of justice had been caused by this omission."

[31] In our view failure to record the particulars of the assessors or give an opportunity to the appellants to object to the assessors does not, without more, occasion a miscarriage of justice. It is not shown that the appellants intended to object to the assessors but were denied an opportunity to do so. In Byaruhanga Fodori v Uganda [2002] UGCA 4, this court stated:

> 'Where the defence is represented by counsel and no objection is raised, the accused cannot be said to have been prejudiced when he only remembers to raise such a matter on appeal.'

[32] Counsel for the appellants also faulted the learned trial Judge for not having summed up to the assessors at the close of the trial. Counsel for the appellant conceded to this contention. Having perused the record of the trial court, there is no record that the learned trial judge summed the law and the evidence to the

assessors. There are no summing up notes on the record. At page 49 of the record of appeal, the trial court indicated that the matter is for summing up but the court only recorded the opinion of the assessors.

[33] Section 82 (1) of the Trial on Indictments imposes a mandatory obligation on trial courts to sum up the law and the evidence in the case to the assessors before asking for their opinion and recording the same. It states as follows:

> '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.'

[34] In Sam Ekolu Obote v Uganda [1995] UGSC 7 the Supreme Court while considering section 81(1) of the Trial on Indictment Decree now section 82(1) of the Trial on Indictments Act stated:

> 'We think that these provisions impose a statutory obligation on a trial Judge to sum up the law and the evidence in a case to the assessors. The provision are different from those of *section* 283(1) of the Tanzanian Criminal Procedure Code, in which the word "may" was used instead of the word "shall", used in Section 81(1) of our T.LD. The Tanzanian Statute was considered in Miligwa s/o ***Mwinje and Another V. R.*** (1953), 20, E.A.C.A., 255; ***Washington s/o Odinga V. R.*** (1954) 21. E.A.C.A. 392, and ***Andrea s/o Kuhinga and AnotherKR.***(1958)E.A.684.
>
> In these cases it was decided that the Tanzanian Statute imposed no such obligation.
>
> In the instant case there is no evidence on the record that the learned trial Judge summed up the case to the assessors after the close of the case of both sides. This in our view amounted to a failure to comply with the obligatory requirement of Section 81(1) by the learned trial Judge. It was a procedural error, which was fatal to the appellant's conviction.'

[35] This court while considering this point in Byamukama Francis v Uganda, Court of Appeal Criminal Appeal No. 397 of 2015 (unreported) followed the decision

of the Supreme Court in Sam Ekolu alias Obote v Uganda (supra) in holding that failure to sum to the assessors was a fatal irregularity to the conviction of the appellant.

[36] In Byamukama Dominic v Uganda Court of Appeal Criminal Appeal No. 220 of 2011 (unreported) this court reached a different conclusion that such irregularity was cured by section 34 of the Criminal Procedure Code Act for as long as it had not occasioned a miscarriage of justice. This latter decision of this court did not refer at all to Sam Ekolu alias Obote v Uganda (supra).We are obliged to follow Sam Ekolu alias Obote v Uganda (supra) as it is a Supreme Court decision on this particular point.

[37] There is no record to show that the opinion of the assessors was guided by the necessary directions of the learned trial judge. We find that the failure to sum up to the assessors is an irregularity that occasioned a miscarriage of justice. It is incurable under sections 139 of the Trial on Indictments Act and 34 of the Criminal Procedure Code Act. The trial was rendered a nullity.

[38] For the above reasons the appeal against conviction succeeds and we do not find it necessary to consider the rest of the grounds.

[39] Counsel for the respondent requested that we order for a retrial which we have declined to do on the ground that the evidence available to the prosecution is insufficient to support the offence of kidnap with intent to murder.

[40] Sections 243 (1) (a), (b) and 243 (2) provide:

> **'243. Kidnapping or detaining with intent to murder, etc.**
> (1) Any person who by force or fraud kidnaps, abducts, takes away or detains any person against his or her will—
> (a) with intent that such person may be murdered or may be so disposed of as to be put in danger of being murdered;
> (b) with knowledge that such person will probably be murdered; or
> (c) with intent to procure a ransom or benefit for the liberation of such a person from the danger of being murdered,

> commits an offence and is liable on conviction to suffer death.
> (2) Where a person so kidnapped or detained is thereafter not seen or heard of within a period of six months or more, the accused person shall be presumed to have had the intention and knowledge stipulated in subsection (1) (a) and (b).'

[41] The prosecution had the burden to prove beyond reasonable doubt; (a) the taking away or seizure by force or fraud of Mansuli Hamisi by the appellants; and (b) the specific intent to cause the victim to be murdered or put him in danger of being murdered which can be presumed if the victim has not been seen or heard within a period of six months. These elements must be contemporaneous. See Mukombe Moses Bulo v Uganda (1998-2000) HCB 1, Chris Rwakasisi & Anor. V Uganda [1991] UGSC 2

[42] There is no direct evidence pointing to the taking away of Mansuli Hamisi by force or fraud save for circumstantial evidence. The trial court relied on mainly the evidence of PW3, PW5, PW7, PW8 and PW10 to arrive at the decision that the element of taking away by force had been ably proved by prosecution. This evidence falls short in suggesting that the appellants took away or participated in the taking away of the missing person against his will or by force or fraud.

[43] The evidence on record suggests that Mansuli Hamisi was last seen at Mariana Bar & Lodge, the alleged scene of the crime on the night of 20th September 2014. PW3 testified that he left the victim at the entrance of Mariana Bar & Lodge that night and PW5 stated in his testimony that he left the missing person at the lodge at 10:00 pm. Thereafter, Mansuli Hamisi has never been seen up to date. PW7 D/AIP Adama Joseph in his testimony stated that he visited the scene of the crime at 5:00pm on 21st September 2014 and found blood at the reception on the wall, a pool of blood mixed with water, two human teeth, broken glass, human hair, a sack of soil with blood between the corridor of Mariana Bar & Lodge and Rwenzori Tourists Hotel. That when they inquired from appellant no. 1 what had happened, he informed them that they had arrested a thief the previous night who stole his phone but he managed to escape from their custody. The matter was reported to police. He also testified that the appellant no.1 took them to the room whose toilet window was broken (room 8) and found that it had a broken door with two beds without mattresses. He stated that one of the workers told him that the room was in that state because the thief escaped through that window in the room. PW7 stated that his team carried out a search in the lodge and recovered the two mattresses and two bedsheets dotted with

blood. On cross examination, he stated that toilet window in room 8 was so small for a person to pass through.

[44] PW8 (D/Sgt Kahangwa Eliab) corroborated the evidence of PW7. He stated in his testimony that they went to the scene of the crime following a report by some unidentified person of a case of murder at the lodge. He stated that he is the one who collected the exhibits at the scene of the crime. He testified that he was one of the people who got the samples from Mansuli Hamis' mother at Kilembe hospital because of her poor health while for his brother and the appellants, the samples were taken from GAL for DNA analysis. The evidence of PW10, the lead investigator, corroborates the evidence of PW7 and PW8. He stated that he is the one who received communication of the murder and took the mother, and brother to the missing person and the suspects to retrieve blood samples. He also stated that he interviewed appellant no. 1 who stated that on the night of 20th September 2014, his phone was stolen by a thief. The thief attempted to ran but his bouncers Xavier and Kigongo and brought him outside the bar but he still attempted to escape from the corridor between the bar and Rwenzori hotel whereupon a scuffle started between the bouncers and the thief. The thief managed to escape but with some injuries and also the bouncers sustained some injuries. He stated that after the incident, the appellants together with other bouncers went to room 8 and upon discovering that it had been broken into, he instructed the bouncers to transfer the mattresses to the store.

[45] PW9, the Government Analyst working at Government Analytical Laboratory stated in his testimony that the exhibits presented to the laboratory. He stated that his findings indicated that Adimo Chemi was related to the individual whose blood was found on the mattresses and the sack. In essence, his findings show that it was Mansuli Hamis' blood.

[46] DW1 (appellant no.1) in his testimony stated he was at Mariana Bar & Lodge (his business) on the night of 20th September 2014 from around 9:30 pm to 5:00 am when his phone was stolen and room 8 was broken into. He informed his gatekeepers Kigongo and Muhindo about the theft and in the process of inquiries they saw a suspicious man who they wanted to search but he managed to escape through the corridor between the lodge and Rwenzori Tourist hotel. They did not pursue the thief because there was no power in the corridor and it was dark. He further stated that he was informed by the receptionist and the cleaner that rooms 8 and 11 had been broken into but upon investigations, he found that only room 8 had been broken into. He stated that he left the premises at around 7:30am for his home and came back to the lodge to ask for information

about the intruders, thereafter he went to police to report the theft and returned to the lodge until police came at 5:00 pm. That later that evening, he went back to police to do a follow up and he was detained.

[47] DW2 (appellant no.2) stated in his testimony that on that fateful night at 2:00 am, appellant no. 1 told him about the loss of his phone and asked him whether he had seen anyone running. Further that he advised appellant no.1 to report the incident to police the following morning and that he also saw him go out. Appellant no.1 later came back.

[48] The above evidence does not prove that the Mansuli Hamisi was taken away by force by the appellants. Even PW4, a neighbor to the lodge did not see the appellants kidnap the missing person. In her testimony she stated that she was sleeping at around 4:00 pm when she heard some glass falling down and some people fighting outside her window but they did not talk and later she had people closing the door of a car. The evidence adduced is circumstantial and suggests that a crime may have been committed though it is insufficient to prove which crime was committed and the persons who committed it.

[49] There are many decided cases which set out the relevant principles which courts apply in deciding cases based on circumstantial evidence. In the case of Simoni Musoke Vs. R [1958] 1 EA 715 at page 718, the Court of Appeal for East Africa held that:

> 'in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt' See also Audrea Obonyo & Others Vs. R (1962) EA 542, Baitwabusa Francis v Uganda [2017] UGSC 26, Mulindwa v Uganda [2017] UGSC 6

[50] In Obwalatum v Uganda [2017] UGSC 26, the Supreme court stated:

> 'As already indicated the case against the appellant is dependant on circumstantial evidence and the question is whether the Courts below subjected it to close scrutiny as is required. The requirement to subject circumstantial

evidence to close scrutiny was emphasised in the case of Katende Semakula vs. Uganda (Supreme Court Criminal Appeal No. 11/ 1994) where it was stated as follows:-
"Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference..."'

[51] In the instant case there are several inferences that can be drawn from the circumstantial evidence that destroys the inference of kidnap with intent to murder. First and foremost, besides the prosecution failing to prove that the appellants kidnapped the missing person, the evidence could lead to an inference that the missing person is dead. For the offence of kidnap with intent to murder to stand, the prosecution must prove that the appellants took away person who was alive, at the time of kidnap. The other scenario is that of murder. Looking at the evidence adduced in court, given the violence depicted by the scene of the crime, it could lead to an inference that the victim was murdered and the body later disposed of. This explains why the initial indictment against the appellants was for murder. The other inference that can be drawn was that the victim was caught after being suspected of stealing the phone, was violently assaulted by the appellants or other people but eventually managed to escape.

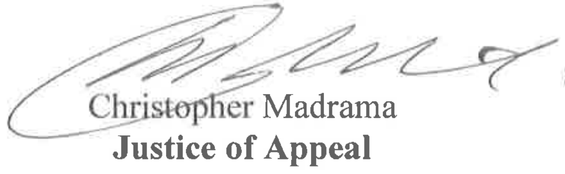
Decision

[52] For the foregoing reasons we decline to order a re-trial. We quash the conviction of the appellants and set aside the sentence imposed upon them. We order their immediate release unless held on some other lawful charge.

Dated, signed and delivered at Fort Portal this 30th day of July 2019

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal



Christopher Madrama
Justice of Appeal