THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MBALE

CRIMINAL APPEAL NO. 136 OF 2016

1. **SADAKA GEORGE**
2. **MULEDHU ELIFAS::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala delivered on 18th day of September 2018 in Criminal Session Case No.126 of 2013 by Hon. Justice Godfrey Namundi)

CORAM: HON. MR. JUSTICE FMS.EGONDA NTENDE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

HON. MR. JUSTICE KIBEEDI MUZAMIRU, JA

JUDGMENT OF COURT

This is an appeal from the decision of the High Court of Uganda at Jinja. The appellants, Sadaaka George and Muledhu Elifazi were indicted and convicted of murder, contrary to sections 188 and 189 of the Penal Code Act. It was alleged that Sadaaka George, Muledhu Erifazi, Musadha Mubi and Muyomba David on 10th February, 2013 at Bugaya Zone in Kamuli District unlawfully killed one Ndhaye Friday.

The background to this appeal is that the appellants were jointly indicted of the offence of Murder. To prove allegations against the appellants, prosecution led

evidence of 6 witnesses and tendered 6 exhibits. The appellants on the other hand raised a defence of alibi and led evidence of 3 witnesses including themselves. Upon conducting an evidentiary hearing, they were convicted and sentenced to life imprisonment.

Being dissatisfied with the decision of the trial Court, the appellants appealed to this court against both conviction and sentence. The Memorandum of appeal contained the following five grounds:

1. ***The learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence on court record, ignored major contradictions in the prosecution evidence and convicted the appellants of Murder.***
2. ***That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence of identification and proceeded to convict the Appellants upon unreliable evidence.***
3. ***The learned Trial Judge erred in law and fact when he admitted and relied upon a dying declaration to convict the Appellants.***
4. ***The learned Trial Judge erred in law and fact when he rejected the Appellants defence of Alibi.***
5. ***The learned trial judge erred in law and fact when he sentenced the Appellants to life imprisonment which sentence was harsh and excessive and without consideration of the pretrial remand period.***

At the hearing of the appeal, Mr. Nagulu Eddy appeared for the two appellants while Mr. Oola Sam, Senior Assistant DPP, represented the respondent.

On ground 1, Counsel for the appellants argued that the evidence led by the prosecution was inconclusive as to who was the perpetrator of the assault against the deceased. That the post mortem report indicated the cause of death as severe hemorrhage and head injury due to deep multiple panga wounds and the prosecution had failed to prove that it were the appellants who , armed with pangas had occasioned the cuts and wounds on the deceased which eventually resulted in his death.

He contended that there was a major contradiction in the nature of injuries as described by the eye witnesses and those indicated in the post mortem report. While the eye witnesses said that he had bruises all over the body and some teeth missing, the report showed that he had multiple external cuts across the skull, multiple arm cuts, left small finger cut off, right thumb cut off and a deep cut at the left arm. Counsel added that there was no evidence on record showing that the appellants had in any manner used a panga or any such like weapon to occasion the deep multiple wounds described in the post mortem report. He argued that the contradictions went to the root of the prosecution's case and rendered it impossible to ascertain malice aforethought on the part of the appellants or who the actual murderers were.

On ground 2, counsel argued that the trial judge's finding that the appellants were well known to the witnesses and that the incident took some time which

enabled clear observation was not premised on any actual or real evidence but merely speculative. He contended that the circumstances were unfavorable and difficult to enable proper identification and gave an example of PW1 whom he said made no mention of knowing A2 prior to the incident and that PW1 was not sure whether the appellants had left the scene of crime by the time he was leaving or not. That there were several people at the scene of crime assaulting the deceased and the time spent at the scene of crime by PW1 and PW3 was unknown as they all rushed to rescue the deceased.

On ground 3 counsel submitted that the utterances as to the cause of death made by the deceased to PW2 and PW3 did not amount to a dying declaration because they were made under no expectation of death and in despair. That the deceased was at the time of making the statements full of life and there was no eminent threat to his life so as to qualify his utterances as dying declarations. He cited **Kizito Enock Vs Uganda Criminal Appeal No.224/2003** where this court whilst considering the admissibility of a dying declaration emphasized that a dying declaration is only admissible where a declaration is made at a point of death and every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth.

On ground 4, Counsel for the appellants submitted that the circumstances under which the events happened were not favorable for proper identification and that the prosecution witnesses could not have placed the appellants at the scene of crime in those circumstances. He argued that the appellants were not

present during the murder of the deceased and they were consistent on their alibi during cross examination.

Counsel further argued that the non-response to the sound of drums by the appellants was not confirmation of their guilt because there is no legal obligation that every citizen must respond to drums sounded in emergency situations. Regarding the discovery of the panga in the appellants' bathing shelter, he submitted that no evidence was led to show that the said panga was subjected to any forensic investigation to prove that it was the weapon that caused the deceased's death and no witnesses identified the panga as the one that was used to injure the deceased. He cited **Lawrence Mwayi and 4 others vs Uganda Criminal Appeal No. 162 of 2001** for the proposition that when an accused person raises a defence of Alibi, the burden to disprove or rebut that defence rests upon the prosecution who should disprove the same beyond reasonable doubt.

On ground 5, Counsel argued that the trial judge disregarded the period the appellants spent on remand and the mitigating factors which included the fact that the appellants were first offenders, remorseful and had subjected themselves to the legal process. That because of their tender age they would be resourceful to the community.

He contended that the sentence imposed was illegal for non-compliance with Article 23(8) of the Constitution and cited **Attorney General vs Suzan Kigula and 417 others constitutional appeal No.3 of 2006** for the proposition that court must take into account the period spent on remand together with the

mitigating and aggravating factors. Counsel also referred to **Abaasa Johnson and Another vs Uganda Supreme Court civil Appeal No.54 of 2016** to say that the omission to consider the pre-trial remand period rendered the sentence illegal.

In reply, Mr. Oola Sam opposed the appeal and submitted that there were no contradictions in the prosecution witnesses regarding the participation of the appellants. He contended that PW1, PW2, PW3 and PW4 each arrived at the scene at different times between 4:00pm-6:00pm. That PW1 and PW3 saw the appellants beating the deceased with thick and thorny sticks and each of them held a panga. That at the time the last person PW2 saw the deceased which was at about 6:00pm, he was in a bad condition, he had blood over all his body, blood oozing from the mouth, had missing teeth and he had bruises all over the body. On ground 2 he submitted that the trial judge properly evaluated the evidence on identification against the appellants and correctly found that they were properly identified at the scene of crime.

Regarding ground 3, Mr. Oola submitted that the deceased was in a critical condition when he told PW1, PW2, PW3 and PW4 that he had been beaten by the appellants who claimed he was a thief. That the deceased knew his assailants very well and the incident happened in broad day light at close proximity between him and the assailants. He contended that trial judge was alive to the law on dying declarations and what would amount to a dying declaration, its admissibility and the need for corroboration. He cited **Uganda vs. George Wilson Simbwa, Supreme Court Criminal Appeal No.37 of 1995** noted that caution

must be taken while receiving evidence of the dying declaration and the necessity for their corroboration.

On ground 4, he submitted that the trial judge was mindful of the law that the prosecution had the duty to disprove the appellants' alibi by placing them at the scene of crime which he said the prosecution had ably done adding that the appellants alibi was rightly rejected as false and untrue and cited **George Wilson Simbwa, Supra and Festo Androa Asenua and another VS Uganda, Supreme Court Criminal Appeal No.1 of 1998** where court held that it is trite that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise doubt in the prosecution case.

In reply to ground 5, he conceded that the trial judge failed to consider the mitigating factors and the period each of the appellants had spent in lawful custody prior to completion of the trial and cited **Rwabugande Moses vs Uganda Supreme Court Criminal Appeal N0.25 of 2014** for the proposition that a sentence of imprisonment arrived at without taking into consideration the period spent on remand by a convict was illegal for failure to comply with a mandatory constitutional provision. He submitted that the appellants had spent 2 years and 7 months on remand and taking into account both the aggravating and mitigating factors, the sentence of 30 years imprisonment from the date of conviction against each of the appellants would serve the ends of Justice.

We have read the submissions of both counsel and gone through the authorities availed to us for which we are grateful. This being a first appeal, this Court is required under ***Rule 30(1) of the Rules of this Court*** to re-appraise the

evidence and make its inferences on issues of law and fact. See ***Bogere Moses and Anor V Uganda, Supreme Court Criminal Appeal No.1 of 1997.***

Counsel for the appellants faulted the trial judge for ignoring contradictions in the prosecution evidence which according to him if they had been taken into consideration they would have negated the appellants' participation in the murder of the deceased. He contended that all prosecution witnesses testified that the deceased suffered a fractured lower limb, bruises all over the body and missing teeth and the post mortem report stated that he had external cuts .That the injuries described by the witnesses and those indicated in the post mortem report were major contradictions which ought to have been resolved in favor of the appellants.

A brief analysis of the evidence shows that PW1, Tigawalana Ronald testified that he met A1, Sadaaka George with his son, Musadha Mubi Erifazi, A2 beating the deceased who was still alive. That A1 was using a big stick while holding a panga (Machete) with the other hand. That the stick was thick about I metre long and the panga had rubber materials at the handle. That Sadaaka was hitting the deceased on the hands, the back and the legs. A2 Musadha Mubi was holding a panga and Erifazi was holding a stick. He pleaded with Sadaaka not to kill the deceased and as he was leaving Musadha Mubi hit the deceased with a panga on the mouth and all his teeth fell out. He hit him again across the face.

According to PW2 Leeta Richard, the deceased told him that Sadaaka A1 and his sons Elifazi and Mubi had beaten him claiming that he was a thief yet he had

come to collect his salary. That when he saw the deceased, he was in a bad condition with one leg broken and he had blood all over the body. Blood was oozing out the mouth and some teeth were missing. He had bruises all over his body on the hands and back. He further testified that by the time they went back at the scene with the LC Chairman the deceased had died and blood was flowing from the head, one small finger and thumb were missing and he had some other cuts.

PW3, Robert Nganda testified that he found the deceased being beaten by Sadaaka, Mubi and Erifazi using sticks cut out of thorn three branches had pangas. That A1 had a spear and panga in the left hand and a stick in the right hand which he was using to hit the deceased. He did not talk to A1, Mubi and A2 as they were violent but pleaded with them not to kill the deceased. That the deceased had bruises and aberrations, one leg was broken and he could not stand. His teeth were missing. That the sticks were long and slightly thick.

According to PW4 Mugaya Dan, he met the people who were violent coming from the scene and A1 who was leading the group and had a stick and a panga, his wife was holding a stick and Mubi was also holding a stick and a panga. That he found the deceased in severe pain having been severely beaten. He had bruises and aberrations due to beatings all over the body and he was bleeding from the mouth and other parts of the body. That when they searched around the home, they found a panga in the bath shelter. He saw a long panga with a black rubber though he could not tell whether it was the same panga he had

seen with A1 the previous day. He also saw two sticks recovered by the police outside A1's home.

We do not find any contradictions between the testimonies of PW1, 2, 3 and PW4 and what is contained in the post mortem report. The report indicates that the deceased had external head injuries to wit; multiple cuts across the skull deep in the middle 5cm,multiple arm cuts, left small finger cut off, right thumb cut off and a deep cut at the left arm and the cause of death as severe hemorrhage and head injury due to deep multiple panga wounds. PW1, 3 and PW4 saw the appellants with pangas and sticks. PW1 saw Musadha Mubi cut the deceased with a panga on the mouth and all his teeth fell out and he hit him again across the face. The beatings, hitting and the cuttings clearly explain the severe hemorrhage and the head injury stated in the post mortem report.

It is trite that inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favor of the accused. However, where they are minor, they should be ignored if they do not affect the main substance of the prosecution's case, save where there is a perception that they were deliberate untruths. See ***Alfred Tajar V Uganda, EACA Crim. App. No.167 of 1969*** and ***Sarapio Tinkamalire V Uganda, Supreme Court Criminal Appeal No.027 of 1989, Twehangane Alfred vs Uganda, Criminal Appeal No. 139 of 2001***,

While we note that there were minor contradictions in the evidence of PW1, 2, 3 and 4, these did not undermine evidence of proof of essential ingredients of

the crime of murder. We find that the inconsistencies were minor and immaterial and did not affect the substance of the case

Ground one fails.

On ground 2, the trial judge is faulted for holding that the conditions under which the appellants were identified were not favorable for proper identification. Counsel for the appellants contended that the prosecution witnesses failed to identify the assailants due to the tense moment at the scene. In support of the trial Judge's decision, the learned Senior Assistant DPP argued that the trial judge rightly held that the appellants were properly identified.

According to PW1`s testimony, it was around 4pm when he went to the scene and saw A1 and A2 beating the deceased .A1 was using a big stick while holding a panga. PW3, Robert Nganda testified that he walked to the scene between 5 and 6pm and found the deceased being beaten by the appellants and Mubi who were using sticks and also had pangas. That Erifazi hit the hands while Mubi was hitting the chest. That appellant 1 had a spear and panga in the left hand and a stick in the right hand which he was using to hit the deceased.

While dealing with this matter the learned trial Judge held as follows;

> *"The offence was committed in broad day light and the people pointed out as assailants were well known to the witnesses as local fellow residents. The incident also took some time, enough for clear observation.*

There was no likelihood of mistaken identity. It is my finding that the accused were properly observed and identified at the scene of crime."

The law regarding identification was set out in the case of ***Abdala Nabulele & Another Vs Uganda, Supreme Court Cr. App. No. 1978 reported in (1979) HCB 77*** that:-

"Where the case against the 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 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 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 mistaken identity is reduced but the poorer the quality the greater the danger....

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there

is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution"

See also: Baingana Akinoni Willy V Uganda, Supreme Court Criminal Appeal No.26 of 2009

The appellants argued that due to the large mass of people, identification could not have been easy especially where one is trying to save the life of another. According to PW4, he met people coming from the scene and among them were the appellants who were carrying sticks of thorn tree and a pangas.

It is apparent that the incident took some time i.e from 4pm to 6 pm in broad day light. These were good conditions which enabled proper identification.

In addition, the witnesses had previously known the appellants as their fellow local residents and could properly identify them inspite of the fact that there were other people at the scene who were merely watching and afraid to help the deceased. The evidence of PW 1 and 3 is corroborated by the evidence of PW4 who met the appellants annoyed and in a violent mood on the way from the scene carrying sticks and pangas.

The trial Judge relied on the evidence of PW1 and PW3 and found that the appellants were all positively identified as having been part of the people that carried out the attack on the deceased at the scene of crime. These testimonies were not broken in cross examination and the trial Judge was right to believe them as against the claims by the appellants and their witnesses that they were

not present at the scene of crime. We find no reason to fault the trial Judge for his finding that the appellants were properly identified.

Ground 2 fails.

On ground 3, the learned trial judge is faulted for having relied on a dying Declaration to convict the appellants. Counsel for the appellants argued that there was no danger to the life of the deceased at the time he was making the utterances and they could not qualify as admissible dying declaration.

Admissibility of dying declarations is provided for under Section 30 of the Evidence Act. It provides that;

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases—

(a) when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question.

PW2, Leeta Richard testified during his examination in chief that at the time he met the accused, he was in a very bad condition, he had blood all over his body, one leg was broken, some teeth were missing, blood oozing from the mouth and had bruises all over his body. That when he asked what had happened to him, the deceased told him that he had been beaten by Sadaaka (A1) and his sons Elifazi (A2) and Mubi.

PW4, Mugaya Dan testified that he found the deceased in severe pain and bleeding profusely having been severely beaten. That he had bruises and aberrations all over the body and was bleeding from the mouth and other parts of the body. The deceased told him (PW4) that he had been beaten by Sadaak and his family claiming that he was a thief. The witness feared to touch him and ran to call the LC Chairman.

The learned trial Judge evaluated the evidence of PW2 and of PW4 regarding the dying declaration and found that;

> *"The defence on the other hand has tried to down play the import of the deceased`s last utterances as the desperate false allegations of a dying thief who was only looking for scape goats. Further that the evidence of PW2 and PW4 in regard to the dying declaration is not corroborated.*
>
> *The circumstances in which the deceased made the utterances referred to have been well explained by PW2 and PW4.The same is corroborated by PW1 and PW3.These also saw the deceased Friday when alive and even failed to assist him due to the condition he was in.*

The evidence of the four witnesses considered together leads to the conclusion that what the deceased uttered was a dying declaration and I so hold."

All the 3 witnesses who saw the deceased testified that at the time they saw him he was in a very bad state and made the statements after being severely beaten and described the appellants as his assailants. The deceased maintained consistency in naming the appellants as his assailants and the prosecution witnesses who witnessed the attack and those who heard from the deceased were all consistent in their testimonies and were not successfully challenged in cross examination.

We have examined the dying declaration made by the deceased and scrutinized the learned trial Judge's findings on this issue and find that the statements made by the deceased to PW2 and PW4 were dying declarations which the deceased made at a time when he was conscious and able to talk.

It is not a rule of law that in order to support conviction, there must be corroborating evidence to a dying declaration as there may be circumstances which go to show that the deceased could not have been mistaken. It is however generally unsafe to base a conviction solely on the dying declaration of a deceased person which is often made in the absence of the accused and not subjected to cross examination unless there is satisfactory corroboration. See ***Tindigwihura Mbahe v. Uganda Cr. App. NO. 9 of 1987.***

The learned trial judge warned himself and the assessors of the need to corroborate the dying declaration and testing its reliability. The evidence of PW2 and PW4 was corroborated by the testimony of PW1 and PW3 who were eye witnesses to the attack by the appellants.The postmortem report which was exhibited as Exh P.1 shows that the deceased`s body had multiple cuts. PW1 testified that he saw Sadaaka hitting the deceased and his son Erifazi was holding a stick. PW5 testified that he found the deceased being beaten by the appellants.

We have examined the dying declaration and scrutinized the judgment and found that the learned trial judge properly directed himself on the law regarding corroboration of a dying declaration and we find no fault in the finding he made.

Ground 3 fails.

The appellants put up an alibi and gave sworn testimony in which they stated that at the material time of attack of the deceased, they had gone to Iganga to nurse A1`s wife Tope. They adduced evidence of witnesses to support their assertion and prove that they were not at the scene of crime.

It is trite that where an accused raises an alibi, the prosecution is under duty to place the accused squarely at the scene of crime. Putting an accused at the scene of crime means proof to the required standard that the accused was at the scene of the crime at the material time. To do so the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces

evidence showing that the accused was at the scene of crime, and the accused not only denies it, but also adduces evidence showing that the accused was elsewhere at the material time it is incumbent on the court to evaluate both versions judicially and give reason why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable **See: Bogere and Anor V Uganda CR. App. No. 1 of 1997**

Counsel for the appellants submitted that all the defence witnesses maintained consistency in their testimoniés that the appellants were not present at the scene of crime. That they had left for Iganga on 9th February to treat the 1st appellant's wife and only returned on the 11th day of February 2019.

According to DW1 Sadaaka, he left for Iganga on 9th February with his son Erifazi Muledhu who was also sick to go and nurse his wife Wotali Tope and on the 10th she underwent an operation to correct her uterus. That after the operation she was discharged and went to stay at her brother's home in Bukyaye. That he returned to Kamuli on the 11th February 2019 at around 8:00 to 9:00am. During cross examination he stated that he neither had a son called Mubi nor did he know any one called Mubi and attributed the accusations to land disputes he had with the people in his area. DW2 Muledhu Erifazi testified that at all material times he was with A1 attending to his mother Tope.

After evaluation of this evidence, the trial Judge concluded that the said defence should have been brought forward as soon as possible to enable investigation of

the alibi. Secondly, it would help to rule out the possibility that the alibi was an afterthought. In **Festo Androa Asenua vs Uganda SCCA No. 1 of 1998** delay to bring up an alibi will ordinarily bring the credibility of such alibi into question.

On this issue of alibi the trial judge concluded that the contradictions in the accused`s alibi as compared to the evidence on identification, dying declaration, and their own conduct make the alibi of the two accused no more than a concoction of lies which were not well thought out. That the alibi had been discredited and the accused had been properly placed at the scene of crime. We agree.

The deceased stated while making his dying declaration that he was beaten by the appellants and his evidence was corroborated by the testimony of PW1 and PW3 who saw the appellants beating the deceased with sticks and pangas.

It was PW2 `s testimony that the drum was sounded very early in the morning on the 11th day of February 2013.This was corroborated by the testimony of PW4 who testified that the drum was sounded around 7:00am

DW2 testified that they reached home from Iganga at around 9am and he took the animals to graze and while there he heard the drum but he didn't go there because he could not abandon the animals. During cross examination, he stated that he did not tell police that he was with his father but instead told them he was at his mother's place. That he heard the drumming at 9.00 am when they reached home before taking the cattle for grazing.

DW3, Namuli Beatrice testified that; *"she came with Mubi .He grew up in that home but after completing his studies he returned to his father's home....That my co-wife was operated upon when she was bleeding. She was still at her home. They had operated her about 8 months earlier."*

The 1st appellant told police that he was at his home at the time the incident happened but in court, he testified that he had gone to Iganga on the fateful day. His alibi therefore came up in court. Be that as it may, he denied knowledge of the panga and Mubi but this evidence was contradicted by DW3 who stated that she came with Mubi when she got married to the 1st appellant and that they have been married for over 18 years. She however claimed that Mubi was only 13 years at the time of the incident.

DW2, the 2nd appellant in his earlier statement to police claimed that he was in the area and at the time of assault of the deceased, he had gone to visit an aunt. During cross examination, he clearly stated that he didn't tell the police that he was with his father, he told them that he was at his biological mother's place. Just like DW1, he changed his statement in court and stated that he had gone with his father to Iganga to see his sick mother.

There were a lot of contradictions in the testimonies of DW1, DW2 and DW3 that discredit the appellants' alibi. These include; where the 2nd appellant was on the fateful day, discrepancy in the time the drum was sounded, the panga and sticks discovered by the police in the bath shelter and the 1st appellant denying knowing Mubi. The 1st appellant testified that the 2nd appellant was sick at the

time they left for Iganga. That Wotali Tope was sick and they had gone to nurse her. However, medical documents submitted from one Dr. Bamudaziza's clinic bear dates of 2012 and 2011. The appellants' evidence that Wotali was the 2nd appellants' biological mother was discredited by DW3 and all these point to untruthfulness of the appellants and their witnesses.

Regarding the weapons which were used to attack the deceased, the two prosecution eye witnesses saw the appellants holding sticks from thorn tree and pangas at the scene of crime. This was corroborated by the evidence of PW4 who met the appellants annoyed and violent while coming from the scene carrying sticks and pangas. The items were discovered by the police in the bath shelter at the 1st appellant's home. The Post mortem report PEx1 further confirmed that pangas were used to assault the deceased.

Putting an accused person at the scene of crime means proving to the required standard that the accused was at the scene of crime at the material time. See: ***Abdu Ngobi vs Uganda, SCCA No.10 of 1991 and Livingstone Sikuku vs Uganda SCCA No.33 of 2003***

We find that the evidence of PW 1 and PW 2 placed the appellants at the scene of crime squarely and points irresistibly beyond reasonable doubt to the appellants' guilt and is incompatible with their innocence. The appellants' defences of alibi were raised while in court and allegations that they were accused due to land disputes and grudges in our view were an afterthought. The

defence of alibi could only stand if it was not discredited **See: Bogere Moses and another vs Uganda Supreme Court Criminal Appeal No.1 of 1997**

We agree with the trial judge's findings that the prosecution's evidence placed the appellants squarely at the scene of crime and their alibi was tainted with falsehoods and untruthfulness and therefore could not stand.

Ground 4 fails.

It was submitted for the appellants that the learned trial judge did not consider their mitigating factors which included the age of the appellants, the fact that the appellants were first time offenders, remorseful and because of their tender ages they were able to be resourceful to the community. Secondly, that while sentencing the appellants, the sentencing judge did not take into account the period they had spent on remand.

The respondent conceded that the trial Judge did take into account the period spent on remand. That the appellants having spent 2 years and 7 months on remand and taking into account both aggravating and mitigating factors counsel for the respondent proposed that a term of 30 years imprisonment against each appellants would serve ends of justice.

When sentencing the appellants, the trial Judge had this to say;

> *"The convicts committed a heinous crime and yet they had no powers to treat a human being the way the deceased was. There was loss of life in the most irresponsible manner. Court takes into account, the ages of the convicts and their family responsibilities. The practice of extra judicial*

actions by members of the public must be discouraged in order to restore the rule of law in this country.

I would have considered a bigger sentence but the convicts should be given a chance to reform. I will sentence each of the convicts to life imprisonment."

It is clear from the excerpt of the judgment that the learned trial Judge was alive to and considered the appellants' mitigating factors while meting out the sentences. The judge did not however consider the period the appellants had spent on remand as provided in Article 23(8) of the Constitution which requires that the period the convict has spent on remand should be taken into account.

An appellate Court will not interfere with a sentence imposed by a trial court which exercised its discretion during sentencing unless the exercise of the discretion was such that it resulted in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignored to consider an important matter or circumstance which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle. See **Kiwalabye Bernard Vs Uganda, Supreme Court CR. Appeal NO. 143 of 2011.**

Article 23(8) of the constitution provides that;

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

The Constitution (sentencing Guidelines for courts of judicature) Practice directions of 2013 in guideline 15 enjoins court to take into account any period spent on remand from the sentence considered appropriate after all factors have been taken into account.

In **Rwabugande Moses V Uganda, Supreme Court Criminal Appeal No.25 of 2014,** the Supreme Court held that;

> *"It is our view that the taking into account of the period spent on remand by a Court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.*
>
> *We must emphasize that a sentence couched in general terms that Court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the Court accounted for the remand period in arriving at the final sentence. Article 23(8) of the Constitution (supra) makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period."*

In a latter decision of **Abelle Asuman V. Uganda Supreme Court Criminal Appeal No. 10 of 2018** the supreme court clarified that the sentencing court must take into account the period spent on remand but this does not mean that the taking into account has to be done in an arithmetical way. That the constitutional

command in Article 23(8) of the constitution is for the court to take into account the period spent on remand.

We therefore, find that the sentences imposed on the appellants were illegal because they did not comply with the requirements of ***Article 23(8)*** of the Constitution and for that reason set them aside.

Having found that the conviction of the appellants was lawful but the sentence unlawful, we exercise the jurisdiction granted to this Court by Section 11 of the Judicature Act and sentence the appellants afresh. The Section places this Court in the same position as the Court which had original jurisdiction to hear the matter. It states thus;

> *"For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated."*

The maximum sentence for murder is death but the trial Judge sentenced the appellants to life imprisonment. The appellants were first offenders, remorseful, subjected themselves to legal process, had family responsibilities and their ages 56 and 26 respectively would need to accord them an opportunity to reform. However, the deceased was beaten to death with horrifying injuries ending up with a broken leg, loss of teeth and the thumb and small finger were painfully cut off. The beating took a long time resulting in a slow and painful death. The

actions of the appellants were detestable and barbaric involving violence with deadly weapons.

In Kamya Abdullah & 4 others vs Uganda SC CrApp.24 of 2015 the Supreme Court emphasised the need to embrace basic sentencing principles of uniformity, consistency and parity as guidelines while sentencing.

We have also looked at the range of sentences imposed in similar offences after considering both aggravating and mitigation factors. In **Atuku Margret Opii vs Uganda Court of Appeal *Criminal Appeal No. 123 of 2008*** the appellant had killed a neighbor's 12 year old daughter by drowning. This Court reduced the death sentence to 20 years imprisonment.

In ***Mbunya Godfrey V Uganda, Supreme Court Criminal Appeal No.4 of 2011,*** the appellant had been convicted of murder of his wife. The Supreme Court set aside the death sentence and imposed a sentence of 25 years imprisonment.

In view of the above, we sentence A1, Sadaaka George to 22 years and 7 months imprisonment and from which we deduct the 2 years and 7months he spent on remand. He will serve 20 years imprisonment commencing from 18th September, 2018 when he was convicted.

A2, Muledhu Elifazi is sentenced to 22 years and 7 months imprisonment. We deduct the 2 years and 7months period he spent on remand therefrom. The 2nd appellant is to serve 20 years imprisonment commencing from 18th September, 2018 when he was convicted.

In the result, the appellants' conviction is upheld. We set aside the sentences of life imprisonment imposed on A1, Sadaaka George and A2, Muledhu Elifazi and resentence them as above.

We so order

Dated at Mbale this 15th day of September 2020.

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HON. MR.JUSTICE FMS EGONDA NTENDE

JUSTICE OF APPEAL

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HON. MR.JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. MR. JUSTICE MUZAMIRU KIBEEDI

JUSTICE OF APPEAL