THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.420 OF 2016

SENFUKA GEORGE WILLIAM ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Hon. Justice E. K. Kabanda, J dated 13th December, 2016 in Criminal Case No.028 of 2016)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Muzamiru Mutangula Kibeedi, JA
Hon. Lady Justice Irene Mulyagonja, JA

JUDGMENT OF THE COURT

This appeal arises from the decision of Kabanda, J in High Court Criminal Case No.028 of 2016 at Mpigi in which the appellant was convicted of the offence of murder contrary to Sections 188 and 189 of the Penal Code Act. He was sentenced to suffer death.

At the trial, it was the prosecution's case that the appellant on the 22nd day of April, 2007 at Kakoola Village in Mpigi District, unlawfully caused the death of Najjuko Viola with malice aforethought.

The prosecution called 10 witnesses, the appellant gave his defence on oath. The learned trial Judge found that, the prosecution had proved its case beyond reasonable doubt and convicted the appellant as charged. She proceeded to sentence the appellant to suffer death.

The appellant being dissatisfied with both the conviction and sentence now appeals to this Court on the following grounds:-

1. *The learned trial Judge erred in law and fact to try the appellant when she was duly discharged of the subject charges thereby occasioning him a miscarriage of justice.*

In the alternative and without prejudice to the above ground;-

2. *That the learned trial Judge erred in law and fact when she held that the evidence of PW2 proved that the appellant participated in the commission of the offence thereby arriving at an erroneous decision.*
3. *The learned trial Judge erred in law and fact to find that the hearsay evidence of PW8 corroborated the evidence of PW2 thereby wrongly convicting the appellant*
4. *The learned trial Judge erred in law and fact when she discharged the alibi of the accused thereby wrongly convicting the appellant*
5. *The learned trial Judge erred in law and fact when she relied on evidence full of contradictions, inconsistences and fabrications to convict the appellant.*
6. *The learned trial Judge erred in law and fact when she misapplied the facts and failed to properly evaluate the evidence on record thereby occasioning him a miscarriage of justice.*
7. *In the alternative and without prejudice to the above, that the trial Court erred in law and fact when she passed a harsh and severe sentence on the appellant thus occasioning him a miscarriage of justice.*

Representation

At the hearing of this appeal *Mr. Isaac Jurugo Kodiri* learned Counsel together with *Ms. Elizabeth Nyamisigwa* learned Counsel appeared for the appellant who was not in Court but followed proceedings *via* video link to prison due to COVID-19 Pandemic restrictions. *Ms. Fatinah Nakafeero* Chief State Attorney appeared for the respondent.

Counsel for the appellant abandoned ground 3 and was allowed to amend ground 5 by substituting the words 'manifestly excessive' with the word 'severe'.

This Court had earlier, issued instructions to Counsel to proceed by way of written submissions. Both parties complied and at the hearing, both the appellant's and respondent's submissions were on record. It is on the basis of the written submissions that this judgment has been prepared.

The Appellant's case

It was submitted for the appellant on ground 2, that the appellant did not participate in the commission of the offence. He faulted the learned trial Judge for having found that PW2 had positively identified the appellant as the person who had murdered Viola Najjuko whereas not.

It was submitted that PW2 was a single identifying witness who stated in examination in chief that, he saw the appellant wearing a black coat, a yellow cap and blacktrouser. During the trial the same witness identified the shirt that the appellant was wearing in Court as the same shirt he had seen him in at the time of the murder. This evidence according to the appellant's Counsel was rebutted rendering the whole evidence of PW2 unreliable. Therefore Counsel submitted there was no evidence on record to support the findings of the learned trial Judge, that the appellant had been positively identified as the person who committed the offence.

The shirt the appellant was wearing in Court had not been mentioned in PW2'S earlier evidence and ought to have been disregarded. Further that, this evidence contradicted the witness's earlier evidence which had not been mentioned at all.

No other witness observed the clothes the assailant was wearing at the time of the murder and therefore PW2's testimony remained uncorroborated.

Counsel referred us to the decision of this Court in *Francis Bwalaturi vs Uganda, Court of Appeal Criminal Appeal No. 48 of 2011* in which it was stated that

contradiction in evidence as to clothes of an accused person who says he was not at the scene of the crime makes the identification evidence weak.

Counsel implored us to find that, there was no evidence adduced to sufficiently place the appellant at the scene and the trial Judge's finding in that regard be set aside.

In respect of ground 3, it is the appellant's case that the learned trial Judge erred when he relied on contradictory and inconsistent evidence to convict the appellant.

Counsel faults the learned trial Judge for having relied on hearsay evidence of PW2 to come to the finding that the appellant's participation in the commission of the offence had been proved.

Counsel submitted that, there was inconsistency in the evidence regarding the clothes the appellant was putting on at the time the offence was committed.

Further that, PW2 failed to pin point the appellant at the identification parade, choosing two different people. PW2'S testimony was faulted for having first stated that he had seen the appellant three times at the time of the trial and later that he had seen him twice.

Further, Counsel pointed out that PW2 in his testimony stated that an identification parade had been carried out where he was unable to pin point the appellant. He had instead chosen two different persons. This, Counsel pointed out, contradicted the evidence of PW8 a Police Officer who investigated the crime, that no identification parade had been conducted.

Both PW1 and PW2's evidence was contradictory. PW2 had testified that he did not tell PW1 about the incident, however PW1 testified that he had been told by PW2 about it. It was pointed out by Counsel that the trial was concluded on a re-constituted Court file that left out some parts of the testimony of PW2 and as such, his evidence ought not to have been relied upon to convict the appellant.

He pointed out that, the evidence of PW2, that the incident took over 40 minutes contradicted the post mortem report, which concluded that, the cause of death was trauma caused by a sharp object to the neck of the deceased.

Further that, the motive of murder being that the appellant had defiled the victim was merely speculation. He also pointed out that the murder weapon was not exhibited. It was further pointed out that, the evidence of PW5 is that the deceased was 6 months pregnant at the time of her death. This contradicts evidence of PW2 that the deceased was defiled by the appellant in December 2006 and she could not have been six months pregnant in April 2007.

Counsel asked Court to find that the learned trial Judge erred when she convicted the appellant on insufficient and contradictory evidence as to his participation in the commission of the offence.

Ground 4

In respect of this ground, the appellant's Counsel faulted the learned trial Judge for having rejected his defence of *alibi*.

It was submitted that, the prosecution failed to disapprove the *alibi* and the learned trial Judge ought to have accepted it. Further the appellant's defence of *alibi* was corroborated by prosecution witnesses, PW6 who informed Court that the appellant could not have been at the scene of crime at the material time since he was with the witnesses at the former's home.

Counsel asked this court to set aside the Judgment of the High Court on that ground.

Ground 5

The appellant, in the alternative and without prejudice to the earlier grounds submitted that, the trial Judge erred when he imposed upon the appellant the maximum penalty for the offence of murder, which is to suffer death.

Counsel asked this court to find that, the sentence of death was harsh and manifestly excessive in the circumstances of the case.

The Respondent's Reply

In respect of ground 1, it was submitted in reply that, the evidence of PW2, the single identifying witness was credible and the learned trial Judge correctly relied on it. The witness PW2 saw the appellant at 4.00 p.m. in broad day light. He clearly narrated what happened. The appellant cut the neck of the deceased who was seated peeling cassava on a veranda at her parent's home. He was able to see what the appellant was wearing at the time. The witness was firm while giving evidence and the *voire dire* conducted by the Court found that, he possessed sufficient intelligence to understand the purpose of the oath and telling the truth. The court believed him. The question as to the demeanour and truthfulness of a witness is for the trial Judge to determine. He referred us to *Baguma Fred vs Uganda Supreme Court Criminal Appeal No. 7 of 2004* for that proposition of the law.

Further, Counsel submitted that, the learned trial Judge cautioned herself of the danger of relying on a single identifying witness before she relied on that evidence to convict the appellant.

Counsel submitted that, the statement by PW2 in respect of the clothes, the appellant was wearing at the time the offence was committed are not contradictory.

In the first statement the witness, PW2 discusses the clothes but does not mention the shirt. In the next statement he mentions the shirt. Counsel asked Court to find that this is not a contradiction.

In respect of grounds 2 and 3, it was submitted for the respondent in reply that, the inconsistencies set out in the appellant's submission were minor and did not go to the root of the case. The number of times PW2 had seen the appellant after the commission of the crime was not in issue. What was in issue was whether he saw him before the occurrence of the crime and was therefore able to identify him. Counsel referred us to *Alfred Tajar vs Uganda E.A.C.A Criminal Appeal No. 167 of 1969 (unreported),* for the proposition that minor inconsistences, unless they point to deliberate untruthfulness should be ignored.

In respect of the evidence of PW2 regarding the identification parade, Counsel submitted that, the witness may have been confused with identifying the witness at the police as identification parade.

Counsel asked Court to find that, the learned trial Judge correctly ignored the inconsistencies in the prosecution case as they were all minor and did not go to the root of the case.

In respect of ground 4 on the appellant's defence of *alibi*, it was submitted that, PW6's testimony confirmed that the appellant, a resident of Banamwa village in which the witness also lived had seen him about the same time the offence was committed on Sunday 22nd April 2007, with a panga. Counsel submitted that, this corroborated the evidence of the PW2 who had seen the appellant commit the crime in the vicinity at about the same time on the same day.

The appellant being at another place on the same day after the commission of the offence was not sufficient to confirm the defence of *alibi.* Counsel referred us to *Kato John Kyambadde vs Uganda Supreme Court Criminal Appeal No. 0020 of 2014* for that proposition of the law. She asked us to dismiss this ground.

In reply to the alternative ground on sentence, it was submitted that, this court cannot interfere with a sentence of a trial Judge unless the trial Judge ignored to consider an important matter, or principle or the sentence was harsh and manifestly excessive in the circumstances, or the sentence is illegal.

Counsel submitted that the learned trial Judge had taken into account all the aggravating and mitigating factors before she passed the sentence. The age of the victim, the age of appellant and the gruesome manner in which the victim met her death. She referred us to *Karisa Moses vs Uganda Supreme Court Criminal Appeal No. 23 of 2002* in which a 22 year old man murdered his grandfather. The Supreme Court confirmed a sentence of life imprisonment. In *Bashesa Sharif vs Uganda Supreme Court Criminal Appeal No. 82 of 2018,* the Supreme Court confirmed the

death sentence and in *Sekandi Hassan vs Uganda Court of Appeal Criminal Appeal No. 156 of 2002* this Court confirmed a death sentence imposed by the High Court.

Counsel asked the court to uphold the sentence imposed by the learned trial Judge.

The Appellant's Rejoinder

The appellant filed a written rejoinder to the respondent's submission. We have read and considered it. It contains no new issues as the respondent raised none. It simply explains the appellant's case already set out in the main submissions in support of the appeal.

Resolution of the appeal

This is a first appeal and as such we are required to re-evaluate the evidence adduced at the trial and make our own inferences on all questions of law and fact. See: *Rule 30* of the Rules of this Court, *Bogere Moses* and *Another Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.*

The main thrust of this appeal is that, the learned trial Judge erred when she convicted the appellant of the offence of murder on insufficient, contradictory and inconsistent evidence in respect of his participation in the commission of the crime.

It is the appellant's case that he was not at the scene of the crime at the material time, and could therefore not have been identified as the assailant. Further that the prosecution presented a single identifying witness whose testimony was full of contradiction and inconsistences and therefore insufficient to sustain a charge of murder against him.

The law on identification by a single witness has been laid out in several cases. The leading authority is that of *Abdullah Bin Wendo and another vs. R (1953) 20 EACA 583.* The law was further developed in the authorities of *Abdulla Nabulere vs.*

Uganda Criminal Appeal No.9 of 1978 and *Bogere Moses vs Uganda (supra).*The principles deduced from these authorities are that-

i. *Court must consider the evidence as a whole.*

ii. *The court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.*

iii. *The court must caution itself before convicting the accused on the evidence of a single identifying witness.*

iv. *In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant, the distance between the witness and the assailant, familiarity of the witness with the assailant, the quality of light, and material discrepancies in the description of the accused by the witness.*

The single identifying witness in this case was PW2. He testified on 30th September, 2016 and stated that he was 13 years old at that time. The offence was committed on 27th December 2007. Therefore he must have been at least 8 years old at the time the offence was committed. In his testimony he was 5 years old at the time of the offence. This issue was not pursued by the appellant's Counsel during cross-examination, nor did court seek to have it clarified.

We find from the record that the witness PW2 must have been at least 8 years at the time the offence was committed in 2007. His testimony during the trial indicates that, he was 13 years at the time of the hearing, this was never challenged. The material evidence of PW2 in his examination in chief was as follows:-

"I know the accused person in the accused's dock. He is called Ssenfuka. I have ever seen him, I had never known him nor seen him prior to the incident before Court. I saw him when he killed my sister. Accused came from behind the house. I don't remember the actual date. The year was 2007. He came from behind our house. He came to where Viola Najjuko was peeling cassava at the verandah

of the house, he went straight towards Viola Najjuko. He made her bend the neck and cut her neck using a panga. The time of the day was 4:00pm. At home, apart from the deceased there was only other siblings, Nasejje Immaculate, then aged about 3 years. I observed for about 40 minutes. I know to estimate time. He put on a yellow cap, black coat and black trouser. The accused cut the deceased thrice. I was only 10 metres to the scene.

During the course of the incident, the accused said nothing to the deceased. After the incident the accused took the road which goes in the direction of the well. We went with my siblings to our grandmother called Kotrida Nakamate and informed her about the death of the deceased. Before that after the accused left, I witnessed a wound on the neck of Viola."

In cross-examination, he stated as follows:-

"Yes I can certify that the accused is putting on the same shirt he is wearing today.

It is the same shirt the accused was putting on at the time of the incident.

It is true, there was an identification parade at Police. I chose two different people. I never singled out the accused among the parade. It was on identification parade. During the time when the accused was cutting the deceased I took no action.

Since the date when the accused cut the deceased, today is my second time to see him.

When my mother came to the scene, I did not talk to her about the incident or who had killed Viola.

I also did not tell my grandmother about the person who committed the offence because I did not know him."

The witness was able to observe what happened on that fateful day from a relatively short distance in broad day light. He describes the weapon used, the victim who was known to him. He describes the clothes the assailant was wearing.

However, he did not state that he had known the assailant prior to the date of the crime.

Further, he had not been able to pick him out of other prisoners during an identification parade. The police officer PW8 denied the parade ever took place, perhaps because the evidence was not useful to the prosecution's case. Be that as it may the witness was able to describe the clothes the assailant was wearing at the time of the crime. A yellow cap, black coat and a black pair of trousers. He was also able to tell the court that after the commission of the offence he saw the appellant taking the direction towards the well. He informed his grandmother about the incident immediately after. He was able to name the persons who answered the alarm raised by his grandmother.

During cross-examination he was able to tell court that the appellant, while in court, was wearing the same shirt he had been wearing at the time he saw him kill the deceased. The deceased's grandmother, PW6, however stated that she did not know PW2 and she did not go to the scene first. She went the next day. The evidence of this witness, PW2, is inconsistent in some aspects. The law on contradictions and inconsistencies is well settled in *Alfred Tajar vs Uganda E.A.C.A Criminal Appeal No. 167 of 1969 (unreported)*, where it was held that:-

> *"Inconsistencies and contradictions in the prosecution case may be ignored if they are minor or do not point to deliberate untruthfulness on the part of the prosecution witnesses."*

See also: *Sarapio Tinkamalirwe vs Uganda, Supreme Court Criminal Appeal No. 27 of 1989* and *Twinomugisha Alex and 2 others vs Uganda, Supreme Court Criminal Appeal No. 35 of 2002.*

We note that some of the inconsistences may be explained. The fact that the witness did not mention the shirt the assailant was wearing at the time of the commission of

the offence in examination in chief could be that he was not asked this question. This was a minor inconsistence and as such, it did not go to the root of the case

However, since he is the only identifying witness we would be hesitant to rely solely on his evidence. His evidence is such that it requires corroboration.

The legal position is that the Court can convict on the basis of evidence of a single identifying witness alone. However, the Court should always warn itself of the danger of the possibility of the mistaken identity in such a case. This is particularly important in cases where there were factors which presented difficulties for identification at the material time. The Court must in every such case examine the testimony of the single witness with the greatest care and where possible look for corroborating or other supportive evidence, so that it can be sure that there is no mistake in the identification. If, after so warning itself and scrutinising the evidence, the Court finds no corroboration for the identification evidence it can still convict if it is sure that there is no mistaken identity. Corroboration therefore is only a form of aid required where conditions favouring correct identification are difficult. See: *Abdala Nabulere & Another vs Uganda (Supra) Moses Kasana vs Uganda (1992 - 93) HCB 47* and *Bogere Moses & Another vs Uganda (Supra).*

PW3, the deceased's step father met the appellant at about 6.00p.m on a bicycle with a panga. He also stated that the appellant at that time was wearing a yellow cap.

PW5 stated that, on Sunday 22nd April 2007 at about 4.00 p.m he saw the appellant who had a panga seated under a shade in the witness's compound. He also had a bicycle and had come to cut bananas. As he was cutting bananas the witness heard an alarm being raised by one Semakula who was saying that a child had been killed. The alarm was coming from PW3 Mulumba's home. Upon hearing the alarm, this witness stated that, the appellant stopped cutting bananas and run away. He was running to a direction away from where the alarm was coming from, Mr. Mulumba's (PW3) home. This witness said that, the appellant who had already cut the bananas did not return to collect them.

PW8, the police officer who arrived at the scene first told court that, the deceased had a cut around her neck. Her body was found on the verandah of her father's house where she had been peeling cassava. The appellant was the suspect as he had threatened to kill the deceased earlier. He arrested the suspect from his home where he also recovered a panga. The panga had no traceable blood stains. This panga however was not exhibited as it got lost at the police station.

PW9, Kotilida Nakamate in her testimony stated that on 7th July, 2007 while at her home, PW2, her grandson and her granddaughter, Immaculate Nasajje came and told her that Viola, the deceased had been cut dead by a man. They did not know the name of the assailant. She ran to the scene where she found the deceased lying dead on her side with a cut wound on her neck. She was not cross-examined.

In his own testimony, the appellant told Court that he knew the deceased as a daughter of Kiyingi Geoffrey, but they did not stay in the same village. Further that his wife was the deceased's paternal aunt. He knew the deceased very well.

On the day, the deceased was killed, he was 1 Km away from the scene of the crime. He was travelling on a bicycle with a panga. He admitted having been at Ssekitoleko's home where he cut banana for his business. He went to his house with bananas between 5p.m and 6p.m of the same day.

That he was informed by his wife on phone of the death between 6:00 p.m and 6:30p.m that evening while he was at his home. He did not go to the village because he had a sick child, he denied having been to the well that day and having talked to Mutyaba and Katende.

The prosecution evidence regarding cause of death of the deceased was unchallenged.

PW7 testified that the deceased's post mortem indicated that cause of death was a sharp trauma on the neck.

There is evidence to corroborate the evidence of PW2, that the appellant was the person he saw killing the deceased, with a panga on 22nd April, 2007. The witness PW2 stated that the deceased was putting on the same shirt in Court as the one he was putting on at the time of the commission of the offence.

The appellant in cross-examination stated that he knew PW2. That he also knew who his parents were. He could not recall what he was wearing on the day the deceased was killed. He stated that the shirt he was wearing in Court had been purchased in 2015. But immediately thereafter stated that;-

"I was putting it on when I was arrested"

We note that, the appellant was re-arrested in 2015. He admits having been I Km from the scene on the day the deceased was killed. He was on a bicycle and had a panga at the time. His conduct after the commission of the crime is also relevant. He did not go to the vigil, although he was informed of the tragic death of his wife's niece. This was a girl friend who used to stay at his home. He did not bury the deceased and no reason was given why. .

His evidence is insufficient to qualify his defence of *alibi,* because he was in the vicinity of the crime scene at the time the crime was committed. This was his own evidence. This evidence that, he was just within the vicinity cutting bananas with a panga at the time the offence was committed is insufficient to qualify as an *alibi.*

In dealing with the defence of alibi raised by the appellant, this Court is guided by the Supreme Court decision in *Moses Bogere vs Uganda (supra)* where the learned Supreme Court Justices directed as follows:-

> *"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, 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 person was at the scene of crime and the defence not only denies it but also adduces evidence showing that he was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and hold that because of that acceptance per se, the other version is unsustainable."

"An *alibi* is a defence where an accused person alleges that at the time when the offence with which he is charged was committed, he was elsewhere" See: *Obsorn's Concise Law Dictionary Sixth Edition by John Burke at page 23.*

Elsewhere cannot be within the vicinity of the crime scene.

There is evidence of PW1, PW2, and PW8 of previous threats by the appellant to kill the deceased. The reason he threatened the deceased was because he did not want her to reveal the fact that she was pregnant with his child, having defiled her. The deceased was found to have been pregnant at the time of her death.

The witnesses stated that, the appellant had defiled the deceased in 2006. The deceased was found to have been pregnant. The defilement was reported to the Police as confirmed by PW1 on 19th April, 2007, a police file number was opened in respect of that complaint at the Police Station. Three days later, the deceased was killed by a male adult with a panga who said nothing. He just killed her and left.

What would have been the motive of an adult to kill a 16 year old with a panga who was peeling cassava on a verandah? This was in broad day light, the victim had not provoked him. The murder was premediated apparently to silence the victim forever.

We find that, the evidence of PW2, the single identifying witness was sufficiently corroborated by the evidence of the rest of the witnesses as to sufficiently link the appellant to the crime.

We find no reason to fault the learned trial Judge's findings and conclusion that, the appellant caused the death of the deceased with malice afore thought. We accordingly uphold it.

In respect of the alternative ground of sentence, we find that the death penalty is a sentence reserved for the rarest of the rare. This case is gruesome but we cannot describe it as the rarest of the rare.

The death penalty is the maximum sentence for the offence of murder. However, it is not the mandatory sentence any longer.

We find that, it is harsh and manifestly excessive in the circumstances of this case as to amount to an injustice. We accordingly set it aside. Considering that the appellant is a first offender with a family, we consider that a lesser sentence ought to be imposed upon him.

However, he killed a very young girl. The girl was pregnant. The pregnancy followed defilement. He exercised no mercy. The murder was premediated and gruesome.

He deserves a stiff punishment.

We are required to consider the principle of uniformity and consistency of sentences. We have accordingly taken into account sentences imposed upon persons convicted of murder in similar circumstances.

In *Uwihayimana Molly vs Uganda, Court of Appeal Criminal Appeal No. 103 of 2009,* this Court reduced a death sentence to 30 years imprisonment. The appellant had killed her husband.

In *Kisitu Majaidin alias Mpata vs Uganda: Court of appeal Criminal Appeal No. 28* of 2007, this Court upheld a sentence of 30 years imprisonment for murder. The appellant had killed his mother.

We take into account that, the law now sets minimum punishment for life imprisonment at 50 Years. See: *The Law Revision (Penalties in Criminal Matters) Miscellaneous (Amendment) Act, 2019.*

We consider that a sentence of 40 years would meet the ends of justice. Taking into account the period of the appellant spent in pre-trial detention between April 2007 and December 2010 and 2015 and between May 2015 and December 2016, we now order that he serves a sentence of 35 years imprisonment. Commencing from the 13th day of December, 2016 the day he was convicted

We so order.

Dated at **Kampala** this.....12th.....day of .....May..... 2021.

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Kenneth Kakuru
JUSTICE OF APPEAL

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Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

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Irene Mulyagonja
JUSTICE OF APPEAL