THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 39 OF 2013

MULIGANDE ZYEDI::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Arising from the Judgment of Hon. Lady Justice Faith Mwondha J at Kiboga in High Court Criminal case No.283 of 2012, dated the 24th day of April 2013)

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ

HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA

HON. JUSTICE REMMY KASULE, Ag. JA

JUDGMENT OF THE COURT

Introduction

The appellant was indicted with the offence of murder contrary to **sections 188 and 189 of the Penal Code Act** in count one and simple robbery contrary to **sections 285 and 286 (1) of the Penal Code Act** in count 2.

Background

The brief facts of the case as can be discerned from the record of appeal are the following:-

It was alleged that Muligande Zyedi, Muyinda Ernest, Mushaija George and others still at large on the 16th day of May, 2011 at Kajubya village in Kyankwanzi District, murdered one Mutabazi (the deceased).

The deceased and appellant were friends. Whenever the deceased went to buy chicken in Kajubya village, he normally stayed with the appellant. It was alleged that the deceased later eloped with the appellant's wife. On the fateful day, the appellant met the deceased in Kajubya village and convinced him that he had chicken for sale at his home. Once they reached the appellant's home, the appellant, with others still at large, tied up

the deceased with ropes and beat him with sticks until he started vomiting and became unconscious. It was alleged that the appellant also robbed the deceased's bicycle, a mobile phone and shs.100,000/=.

When the Chairperson of the area was informed that his residents were assaulting a person, he reached the scene and called the police who arrived at the scene and rushed the victim to Equator Clinic in Bukwiri where he later died. The body of the deceased was examined and the post-mortem report showed the cause of death as a result of trauma from severe beatings on the chest.

The appellant was arrested at the scene and others ran away, but were eventually arrested. They were examined on PF 24, found normal and were thus charged with Murder and Simple Robbery.

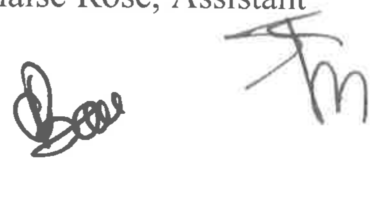
The appellant and two others were tried. The appellant was convicted on both counts and sentenced to 45 years' imprisonment whilst others were acquitted.

Being aggrieved by the decision of the trial Judge, the appellant now appeals to this Court against both conviction and sentence, on the following grounds: -

1. **"The learned trial Judge erred in law when she convicted the appellant of the offence of simple robbery without evidence to prove the offence to the required standard.**
2. **The learned trial Judge erred in law when she passed an omnibus sentence.**
3. **The learned trial Judge erred in law when she did not consider the period spent on remand by the appellant in passing the sentence."**

Representation

At the hearing of the appeal, the appellant was represented by Mr. Kafuko Ntuyo Robert on state brief while the respondent was represented by Ms. Tumuhaise Rose, Assistant Director Public Prosecutions. The appellant was present in Court.



Both counsel filed and adopted their written submissions.

Submissions of counsel

Ground 1

Counsel for the appellant submitted that the learned trial Judge erred in law when she convicted the appellant of the offence of simple robbery without evidence to prove the offence to the required standard.

Counsel submitted that the appellant was indicted in Count 2 with the offence of simple robbery contrary to **sections 285 and 286(1) of the Penal Code Act** but not aggravated robbery as stated in the Judgment of the trial Judge.

Counsel faulted the learned trial Judge for laying down ingredients of aggravated robbery instead of simple robbery as charged on the copy of the indictment. He thus argued that this shows that the trial Judge did not analyse the ingredients the offence of simple robbery which is the offence the appellant was charged with and she as a result, came to a wrong conclusion.

He further contended that the trial Judge in considering the wrong offence of aggravated robbery, did not conclude her discussion on the said offence but rather moved on to discuss the offence of murder. According to counsel, this too was not proper.

Counsel submitted that the trial Judge during sentencing did not address her mind to **section 286 (1) (b) of the Penal Code Act** which prescribes the maximum sentence for simple robbery on conviction by the High Court to be life imprisonment. He argued that the trial Judge wrongly stated during sentencing that the maximum sentence was death as if she was considering murder alone.

It was the appellant's submission that the trial Judge did not comply with the law under **section 86(3) of the Trial on Indictments Act** which requires that the trial Judge while writing his/her judgment specifies the offence and section under which the accused is charged and convicted.

Counsel contended that it is not clear from the trial Court's Judgement whether she considered the offences of robbery and murder at once without separating them. He argued that this caused an injustice to the appellant as the way the trial Judge handled the two counts amounted to being omnibus and contrary to the law.

Counsel therefore prayed that this Court finds that the trial Judge never made any findings against the appellant on the charge of simple robbery. He prayed that the decision of the trial Judge be found to be erroneous in law and be set aside.

He prayed Court to evaluate the evidence on the simple robbery and consider the appellant's argument that there was no phone, money or bicycle recovered from the appellant yet the LC1 and another person went with the appellant to his house. Counsel noted that there were no eye witness to the alleged theft and no exhibits were recorded. He further argued that the time between which the appellant and others were alleged to have started assaulting the deceased and the time the LC1 Chairman came to rescue the deceased was too short for the appellant to have hidden the alleged stolen items from the Chairman and the Police.

He prayed that this ground be allowed and the conviction of the appellant on count 2 of simple robbery be quashed.

Counsel for the respondent, on the other hand, submitted on ground one that the learned trial Judge rightly convicted the appellant of simple robbery contrary **to section 285 and 286 of the Penal Code Act.**

She submitted that the ingredients of simple robbery are:-

(a) That there was theft

(b) That the person used or threatened to use actual violence at, immediately before or immediately after.

(c) That it was the accused who participated in the theft.

Counsel contended that PW1 and PW2 stated that the deceased demanded for his phone and shs.100,000/= from the appellant. That this evidence was not challenged in cross-examination. According to counsel, it was proved beyond reasonable doubt that indeed there was theft.

As regards ingredient two, counsel submitted that PW1 and PW2 testified that the deceased was beaten and was vomiting. That PF 48A clearly showed that the deceased died as a result of trauma from severe beatings on the chest. Counsel noted that all this points to actual violence used at the time the theft was being committed and that this evidence was not challenged at cross examination. She concluded that it was thus proved beyond reasonable doubt that there was use of actual violence on the deceased at the time of the theft.

Counsel submitted that the 3rd ingredient of participation was also proved beyond reasonable doubt with the evidence from PW1 and PW2 who stated that the deceased demanded for his phone and shs.100,000/= from the appellant.

Counsel, however, conceded to the appellant's contention that the trial Judge did not properly evaluate the evidence of simple robbery. She noted that the trial Judge's Judgment made no reference to the simple robbery but focussed on the count of murder having been proved beyond reasonable doubt.

She prayed that this Court re-evaluates the evidence of simple robbery and reach a finding of guilty. She relied on the case of ***Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.***

Grounds 2 and 3

On ground two, counsel for the appellant submitted that the learned trial Judge erred in law when she convicted the appellant in an omnibus manner and also passed an omnibus sentence.

Counsel contended that the appellant was charged with the offence of murder in count one and for the offence of simple robbery in count two but he was convicted in an omnibus manner. He relied on **section 86(3) of the Trial on Indictments Act** which requires a Judge to specify the offence and section under which the convict was charged and convicted in order to fault the trial Judge.

Counsel also faulted the trial Judge for sentencing the appellant with an omnibus sentence. He contended that the appellant was sentenced to 45 years imprisonment by the trial Judge, without specifying whether this was on both count one and count two or only on count one of the counts. He relied on this Court's decision in ***Mutatiina Godfrey & Mushaija James vs. Uganda, Criminal Appeal No.55 of 2013,*** where an omnibus sentence made by the trial learned trial Judge was found to have been wrong and it was set aside.

Counsel prayed that Court finds that the learned trial Judge sentenced the appellant in an omnibus manner to his prejudice and consequently sets aside the sentence of 45 years imprisonment.

On ground three of the appeal, counsel for the appellant submitted that the trial Judge erred in law when she failed to deduct the period the appellant spent on remand before sentencing.

It was counsel for the appellant's contention that **Article 23 (8) of the Constitution of Uganda** enjoins the sentencing Judge to take into account the period the convict spent on remand before giving him/her a definite sentence. He relied on the case of ***Korobe Joseph vs. Uganda, Court of Appeal Criminal Appeal No.0243 of 2013***.

Counsel argued that the trial Judge, while sentencing the appellant, did not comply with the provisions of **Article 23(8) of the constitution**.

Counsel thus contended that the said sentence therefore was a nullity and should be set aside.

He prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside. He also prayed that the Court invokes its powers under **section 11 of the Judicature Act** and passes an appropriate sentence against the appellant or set him free.

Counsel for the respondent, on ground 2, conceded to the appellant's contention that the learned trial judge erred in law when she sentenced the appellant to an omnibus sentence. It was counsel's submission that the trial Judge ought to have sentenced the appellant separately on each count having found the appellant guilty on both counts. She added the mode of sentencing used by the trial Judge was erroneous and not clear as to what the sentence was in respect of each count.

As regards the period spent on remand, counsel for the respondent conceded to the fact that the learned trial Judge failed take into account the period spent on remand.

Counsel, however, submitted that the trial Judge was under no obligation to arithmetically deduct the period spent on remand. She relied on the case of ***Abelle Assuman vs. Uganda, S.C.C.A, No.66 of 2016,*** with the argument that the case of ***Rwabugande*** should not bind courts for cases decided before the 3rd of March 2017. She argued that the sentence in the instant case was to run from the 24th of April 2013 and the trial Judge was under no duty to deduct arithmetically.

Consideration of the Appeal

This is a first appeal and as such this Court is required under **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10** to re-appraise the evidence and make its inferences on issues of law and fact. See ***Bogere Moses and another vs. Uganda, Supreme Court Criminal Appeal No.01 of 1997***.

We have carefully studied and considered the Court record, the submissions of both counsel and the law cited. We are also alive to the standard of proof in criminal cases and the principle that an accused person should be convicted on the strength of the prosecution case and not on the weakness of the defence, save in a few statutory exceptions; see ***Sekitoleko v. Uganda [1967] EA 531***. If there is any doubt created in

the prosecution case, that doubt must be resolved in favour of the accused person. See the case of ***Woolmington v. DPP [1935] AC 462***.

We shall in accordance with the above authorities, proceed to re-appraise the evidence and to make our own inferences on both issues of law and fact.

We shall resolve grounds 1, 2 and 3 together as the issues raised in all the grounds are closely intertwined. This will become clear later in this judgment.

The trial Judge was faulted for convicting the appellant in an omnibus manner without evaluating the evidence on record on the offence of simple robbery and thereafter passing an omnibus sentence.

According to the Indictment on the Court record, the appellant was indicted with the offence of Murder contrary to **sections 188 and 189 of the Penal Code Act** in count one and Simple Robbery contrary to **sections 285 and 286 (1) of the Penal Code Act** in count two.

The trial Judge in evaluation of evidence stated as follows:

> ***"There are three ingredients to be proved beyond reasonable doubt <u>in a charge of aggravated Robbery:</u>***
>
> ***(i). That there was theft.***
>
> ***(ii). That there was use or threat to use a deadly weapon at or immediately before the said robbery.***
>
> ***(iii). That the accused person participated.***
>
> ***The prosecution relied on the evidence which was admitted under S.66 of T.I.A which was contained in the post-mortem report PF 48A. It was established that the cause of death was severe pain due to trauma from several beatings in the chest. PW3 testified that he was allocated the file after the deceased had been killed.***
>
> ***I am satisfied that this 1st ingredient was proved.***

On the 2nd ingredient, it is trite law that every homicide is presumed unlawful unless if it is justified or excusable. See Gusambizi S/O Wesonga [1948] 15 EACA 65. PW1 testified that he was told that there was a person about to be killed by beatings in A1's home. That he went to A1's home where he found the deceased lying and vomiting. The admitted evidence PF 48A established the cause of death to have been pain due to severe beatings. Definitely, the beating could not be accidental or justified since they were directed in the chest, so this ingredient was proved...... "

The trial Judge in conclusion stated as follows:

> ***"After careful evaluation and consideration of the evidence on record as adduced from the prosecution and the defence, I was satisfied that the prosecution had proved its case beyond reasonable doubt as against A1 and he is convicted as charged accordingly."*** *Underlining is ours.*

The appellant with two others were indicted for Simple Robbery and Murder. When the trial Judge commenced the evaluation of evidence, she listed the ingredients of aggravated robbery for consideration. The appellant had not been charged with aggravated robbery.

In her evaluation of the evidence, the trial Judge dwelt on the charge of murder and no mention was made of robbery; whether simple robbery, with which the appellant was charged or aggravated robbery whose ingredients had been listed. The trial Judge clearly did not revaluate the evidence in regard to count 2 of simple robbery before arriving at her decision.

The trial Judge concluded by acquitting the appellant's co-accused, A2 and A3 and she convicted the appellant (A1) as charged. With due respect, the trial Judge erred when she convicted the appellant in an omnibus manner.

Section 86 (3) of the Trial on Indictments Act provides:

"86. Contents of judgment.

3. **In the case of a conviction, the judgment shall specify the offence of which, and the section of the written law under which, the accused person is convicted."**

In the instant case, the trial Judge did not specify the offence and section under which the appellant was being convicted of. The conviction thus contravened **section 86 (3) of the Trial on Indictments Act.**

In the result, we find that the conviction passed by the trial Judge was in error. It is hereby set aside.

In the case of ***Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997,*** Court while considering the duty of a first appellant Court observed and held as follows:

> ***"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen."***

With the above principles in mind, we shall therefore proceed to re-evaluate the evidence on the offence of murder contrary to **sections 188 and 189 of the Penal Code Act** in count one and simple robbery contrary to **sections 285 and 286 (1) of the Penal Code Act** in count 2.

Simple Robbery

The appellant was charged with the offence of simple robbery contrary to **sections 285 and 286 (1) of the Penal Code Act** in count two.

There are three ingredients to be proved beyond reasonable doubt in a charge of simple robbery:-

1. That there was theft.
2. That the person used or threatened to use actual violence at, immediately before or immediately after.
3. That the accused participated in the theft.

The prosecution needed to prove the above listed ingredients beyond reasonable doubt that the appellant stole the deceased's mobile phone, shs.100,000/= and his bicycle. It should be noted that proof beyond reasonable doubt does not mean proof beyond shadow of doubt. Lord Denning made this clarification in ***Miller v. Minister of Pension [1947] 2 AER 372 at 373*** when he held;

> "***That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence...." "of course it is possible but not in the least probable" then the case is proved beyond reasonable doubt nothing short will suffice.***"

In an attempt to prove the above ingredients beyond reasonable doubt, the prosecution relied principly on the evidence from two witnesses, PW1 Walusimbi Charles (LC1 Chairperson) and PW2 Mazi Christine (Vice Chairperson).

On the 1st and 3rd ingredients on theft and participation by the appellant, the prosecution relied on the evidence of PW1 who testified that he met the deceased after he had been beaten by the appellant and that in his presence the deceased asked the appellant to give him back his mobile phone and shs.100,000/= so that he could call his relatives but the appellant never gave them to him. PW2 also testified that the deceased told them that the appellant took his phone and shs.100,000/=. It was argued for the appellant that there was no phone, money or bicycle recovered from the appellant yet the LC1 Chairperson and another person went with the appellant to his house and that there were no eye witness who saw the alleged theft and that no exhibits were recorded. The record does not show that there was a search for the alleged stolen items. The LC1 Chairperson (PW1) simply stated that he went with the appellant to his residence and later called the Police which arrested the appellant. The deceased's dying declaration as stated by PW1 and PW2 is sufficient to place the appellant at the scene of crime as well as his participation in the theft. This evidence was not challenged in cross-examination. We have to consider it as true as was held in the case of ***James Sawoabiri and Fred Musisi vs Uganda, Supreme Court Criminal Appeal No.05 Of 1990*** that: ***"An omission or neglect to challenge the evidence-in-chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue."*** In the result, it is our considered view that it was proved beyond reasonable doubt that there was theft and that the appellant participated in the theft.

For the second ingredient of violence, the prosecution relied on the evidence of PW1 and PW2 who testified that when they arrived at the scene, they found that the deceased had been beaten and he was vomiting. The post-mortem report also showed that the deceased had bruises on the trunk, back and both hands and that he was in severe pain due to trauma from several beatings on his chest. We are satisfied that the degree of force and violence applied on the appellant during the attack was sufficient to cause the death.

In the final result, we find that the prosecution has, beyond reasonable doubt, proved all the essential ingredients of the offence of simple robbery contrary to **sections 285 and 286 (1) (b) of The Penal Code Act**.

We therefore find the appellant guilty and convict him of Simple Robbery contrary to sections **285 and 286 (1) (b) of The Penal Code Act.**

Murder

The appellant was charged with the offence of murder contrary to **sections 188 and 189 of the Penal Code Act** in count one.

The offence of Murder has four ingredients which must be proved beyond reasonable doubt:

1. The person named in the indictment is dead.
2. The death was unlawfully caused.
3. The death was caused with malice aforethought.
4. The accused participated in the death of the deceased.

On the 1st and 2nd ingredients, the prosecution relied on the post-mortem report PF 48A, in which the body of the deceased was identified as that of Mutabazi who is named in the indictment as the deceased. The body of the deceased was examined by a medical officer at Butemba Health Centre who established that the cause of death was as a result of trauma from several beatings on the chest. PW1 and PW2 testified that the deceased told them that the appellant and others beat him up. DW2 Muyinda Ernest, who took the deceased to the clinic on his motorcycle testified that he was told by the OC that the patient he took to the clinic had passed on. PW2 also testified that the deceased died in hospital on that very night. PW3 testified that he was allocated the appellant's/accused's file in which Mutabazi was a victim. It has been a long held position of the law that every homicide is unlawful unless authorised by the law. See the case of ***R. vs. Sharmpal Singh (1962) EA 13.*** The appellant had no claim of legal right to badly assault the deceased. The death was unlawful without any legal justification. There is

no doubt that the prosecution has proved beyond reasonable doubt that death did occur and the death was unlawful.

In respect of the 3rd ingredient of malice aforethought, there was the following evidence; the post-mortem report PF 48A revealed that the deceased had bruises on his trunk, back and both hands, it also established that the cause of death was as a result of trauma from several beatings on the chest. PW1 and PW2 testified that the deceased told them that the appellant and other unknown persons beat him up. PW1 and PW2 found him crying and they both observed that he was vomiting and in a critical condition. PW3, D/Cpl Sasayi Paul Katutebuka, testified that after making some inquiries and talking to several witnesses, he established that the appellant beat up the deceased because he had eloped with his wife. The evidence was not challenged during cross-examination. The appellant beat up the deceased using sticks. It was observed that severe injuries were inflicted in the chest wall of the deceased, which led to vomiting and later caused his death. The injuries inflicted were caused with malice aforethought. We find that there was malice aforethought and therefore the 3rd ingredient was proved beyond reasonable doubt.

The 4th ingredient is whether the appellant was involved in killing the deceased. PW1 testified that the deceased was assaulted at the home of the appellant. PW1 and PW2 stated that they found the deceased in a critical condition, lying on the ground while vomiting. They testified that the deceased told them that it was the appellant and other unnamed people that had beaten him up. According to PW1 and PW2, the deceased even asked the appellant to give him back his mobile phone to call his relatives and also return his shs.100,000/=, but the appellant never gave them back to him. PW2 also testified that the appellant told them that he had beaten up the deceased because he had befriended his wife. PW3 testified that after making some inquiries and talking to several witnesses, he established that the appellant beat up the deceased because he had eloped with his wife.

The post-mortem report PF 48A also corroborated the prosecution evidence when it established that the deceased's cause of death was as a result of trauma from several beatings on the chest.

In Exhibit P2, PF 2B, the appellant made a signed confession in his charge and caution statement in which he confessed to assaulting the deceased from his home but his intention was not to kill him. At the trial, the appellant in his sworn testimony retracted his confession and denied having beaten up the deceased. During cross-examination, the appellant denied having had any misunderstandings with the deceased and confirmed that he made a statement at police of which he signed/thumb printed. The statement made was tendered as Exhibit P2 PF 2B.

It is trite law that once a confession statement is retracted, the Court must hold a trial within a trial, to ascertain if the confession was made voluntarily or not. This position was emphasized in the case of ***Amos Binuge and others vs. Uganda, Supreme Court Criminal Appeal No.23 of 1989***, where Court held:

> ***"It is trite law that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish, by evidence, his grounds of objection... The purpose of the trial within a trial is to decide upon the evidence of both sides whether the confession should be admitted...See: M'Murari s/o Karegwa v R (1954) 21 E.A.C.A. 262 and Mwangi s/o Njerogi v R (1954) 21 E.A.C.A. 377.***
>
> ***We cannot appreciate how a trial judge or Magistrate can, by simply looking at a statement, conclude that it was made voluntarily."***

In the instant case, the trial Judge did not hold a trial within a trial to ascertain whether the appellants charge and caution statement was voluntarily made. In her Judgement, the trial Judge simply stated that although the appellant, in his sworn testimony, denied having beaten the deceased, the prosecution evidence had proved its case beyond reasonable doubt that he was the one that beat up the deceased. We find that the trial

Judge erred when she failed in her duty to conduct a trial within a trial before accepting the confession statement as evidence.

However, having carefully perused the evidence on record and the Judgment, we find that the trial Judge considered the evidence in regards to the offence of murder as a whole without necessarily relying on the said charge and caution statement. The learned trial Judge considered the appellant's defence alongside the prosecution witness evidence and came to a conclusion that the appellant participated in the murder.

We have ourselves re-appraised the evidence adduced at trial. It is clear that even without considering the charge and caution statement, there was overwhelming evidence on record that the appellant participated in the murder. The corroborated evidence from the prosecution witnesses, PW1, PW2 and PW3, as well as the deceased dying declaration evaluated earlier in this Judgment, suffice to prove the appellants participation in the death of the deceased. This evidence was independent of the charge and caution statement.

We are therefore satisfied that it is the appellant who assaulted the deceased and inflicted on him severe chest wall injuries that subsequently caused his death. The 4th ingredient has been proved by the prosecution beyond reasonable doubt.

Upon consideration of the evidence on court record as a whole, the submissions by both counsel for the parties, the law applicable to this matter and our own analysis of the entire case, we find that the prosecution proved the offence of murder against the accused beyond reasonable doubt. Wherefore, the accused is found guilty and convicted of Murder Contrary to **Sections 188 and 189 of the Penal Code Act**.

Omnibus sentence

The trial Judge was also faulted for passing an omnibus sentence of 45 years imprisonment without considering the period spent on remand.

It is well settled law that an 1st appellate Court is not to interfere with a sentence imposed by the trial Court which has exercised its discretion on sentence unless the sentence is illegal or the appellate Court is satisfied that in the exercise of the discretion the trial Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or the sentence was manifestly so excessive or low as to amount to an injustice. See: ***Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No.17 of 1993 [unreported]*** and ***Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No.19 of 1995.***

In the instant case, the learned trial Judge while sentencing the appellant held as follows:

> ***"The convict is a first offender but this offence is very rampant in this area. The maximum sentence for this offence is death. He was high handed, he disregarded the fact that life is sacred. Taking all the above into account, he is sentenced to 45 years imprisonment."***

From the above, the trial Judge did not specify whether he was sentencing the appellant for murder or simple robbery, or both counts. The sentence therefore was omnibus.

In the case of ***Mohammed Warsame v R, [1956] 23 EACA 576,*** Court held as follows:

> ***"An omnibus sentence is unlawful. For every count on which a conviction is had, there must be a separate sentence."***

This Court handled a similar issue in ***Adukule Natal vs. Uganda, Criminal Appeal No.10 of 2000*** and held as follows:

> ***"It is trite law that every conviction must carry a sentence. The learned trial Judge should have pronounced a sentence on each of the counts. An ominibus sentence is illegal. See Mwakepesile vs. R [1965] E.A. 407. We find that the appeal against sentence has merit."***

We therefore find that the omnibus sentence as passed by the learned trial Judge is unlawful.

The learned trial Judge was also faulted for sentencing the appellant without taking into account the period spent on remand.

From the record, the trial Judge while sentencing the appellant did not take into consideration the period that the appellant spent on remand. The sentence given thus contravened **Article 23(8) of the Constitution of Uganda.**

In the result, we find that the sentence of 45 years imprisonment as passed by the trial Judge is illegal and it is hereby set aside.

Having found so, we invoke **section 11 of the Judicature Act (CAP 13)** which provides:

> **"11. Court of Appeal to have powers of the court of original jurisdiction.**
>
> **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."**

We shall therefore proceed to determine an appropriate sentence in the circumstances of this case.

We take note of the fact that the maximum sentence of murder is death and that the maximum sentence for simple robbery is life imprisonment.

The appellant took the law in his hands and took the deceased's life! He deprived the deceased of his right to life. He also deprived the deceased's children of the opportunity to live with their father. We take into consideration of the fact that the appellant was a first offender and was affected by the elopement of his wife with the deceased. That he is capable of reform given his age (he was 47 years old at the time the offence was committed).

As we assess the appropriate sentence for the appellant, we shall consider sentences in similar cases by the Supreme Court.

In the case of ***Ndyomugenyi vs. Uganda, Supreme Court Criminal Appeal No.57 of 2016,*** the Supreme Court confirmed a sentence of 32 years imprisonment for murder as passed by the re-sentencing Judge and confirmed by the Court of Appeal.

In ***Mpagi Godfrey vs. Uganda, Supreme Court Criminal Appeal No. 63 of 2015***, the Supreme Court confirmed a sentence of 34 years imprisonment for murder as passed by the trial Judge and confirmed by the Court of Appeal.

In the case of ***Oryem Richard and Nayebale Peter vs. Uganda, Supreme Court Criminal Appeal No.02 of 2002,*** Court upheld the concurrent decisions of the Court of Appeal and the High Court on a sentence of 10 years for the offence of simple robbery.

In ***Capt. Munyangondo vs. Uganda, Supreme Court Criminal Appeal No. 05 of 2011,*** the appellant was charged and convicted of the offence of simple robbery and was sentenced to 10 years imprisonment by the High Court. On appeal, the Court of Appeal Justices dismissed the appeal against conviction but reduced the sentence to 8 years imprisonment. The Supreme Court upheld the decision of the Court of Appeal.

In the circumstances of the case, considering the authorities above cited and taking into account all the mitigating and aggravating factors, as well as the 1 year and 11 months that the appellant spent on remand, we sentence the appellant as follows:

1. On count 1 of Murder, we consider a sentence of 32 years imprisonment appropriate. However, we deduct the 1 year and 11 months spent on remand. The appellant will therefore serve a sentence of 30 years and 1 month imprisonment.

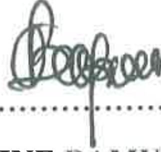
2. On count 2 of Simple Robbery, we consider a sentence of 8 years imprisonment appropriate. However, we deduct the 1 year and 11 months spent on remand. The appellant will therefore serve a sentence of 6 years and 1 month imprisonment.

Both sentences to run concurrently from 24th April, 2013 the date of conviction.

We so hold.

Dated at Kampala this ....3rd........ day of........Feb..............................2020

RICHARD BUTEERA, DCJ
JUSTICE OF APPEAL



CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL

REMMY KASULE
AG. JUSTICE OF APPEAL