# THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA

## AT KAMPALA

# CRIMINAL APEAL NO. 061 OF 2012

*(Appeal from the Conviction and sentence of His Lordship Justice Lameck N. Mukasa, in Criminal Case No. 0492 of 2010 dated 6th December, 2011 at high Court Luweero)*

**1. Sizomu Muhammed**
**2. Kiseka Fred** } :::::::::::::::::::::::: **Appellants**

**Versus**

**Uganda** ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::**Respondent**

**Coram: Hon. Mr. Justice Geoffrey Kiryabwire, JA**
**Hon. Lady Justice Catherine Bamugemereire, JA**
**Hon. Mr. Justice Remmy Kasule, Ag JA**

# Judgment of the Court

**Introduction:**

This appeal is from the decision of the High Court Holden at Luweero (Lameck N. Mukasa, J) in Criminal Case No. 0492 of 2010 delivered on 6th December, 2011. Both appellants were convicted of Murder and Aggravated Robbery contrary to Sections 188, 189 (for Murder) and 285 and 286(2) (for Aggravated Robbery) of the Penal Code Act. Each appellant was sentenced to 25 years imprisonment on the first count of murder and 15 years imprisonment on the second count of Aggravated Robbery. The sentences were to run consecutively.

**The Background:**

The facts of the case as found by the trial Court were that on 19th August, 2009 at Nabutaka village, Butuntumula Sub-county, Luweero District both appellants robbed the late Lubowa John of his motorcycle Reg. No. UDR 493V Bajaj Boxer, red in colour, and in the course of the said robbery used a deadly weapon to wit a knife on the said Lubowa John. He died as a result of the injuries inflicted upon him in the course of the said robbery.

The appellants were identified as the ones who were last with the deceased when they hired him to take them on his boda-boda motor-cycle from Kasana-Kisiro Road Stage to Nabutaka village in Luwero District on 18th August, 2009 at about 8.30 p.m. The deceased never appeared alive again. His dead body was found some days later buried in mud in a swamp at Nabutaka village near a well. The appellants were arrested, charged, convicted and sentenced as already stated above by the High Court (Lameck N. Mukasa) on 6th December, 2011. Both are dissatisfied with their convictions and sentences. Hence this appeal.

**Grounds of Appeal:**

The grounds of appeal are:

***"1. The learned trial Judge erred in law and fact when he convicted the appellants based on weak circumstantial evidence hence occasioning a miscarriage of justice to the appellants.***

***2. The learned trial Judge erred in law and fact when he passed an illegal and manifestly harsh and excessive***

***sentence without due consideration of both periods on remand and mitigating factors."***

On appeal the appellants were represented by learned Counsel Mooli Albert on State brief, while the learned Assistant Director of Public Prosecutions, Ms. Betty Agola was for the respondent.

Written submissions were filed in Court for the appellants and the respondent.

**Submissions:**

**Ground 1:**

**Submissions for Appellants:**

Counsel for the appellants, in his submission on ground 1, contended that the law as regards circumstantial evidence is that such evidence must irresistibly point to the inference of guilty of the accused without any other reasonable explanation to the contrary.

Counsel further argued that once the evidence is circumstantial in nature then caution should be taken by the trial Judge relying on it so as to ensure that there is no miscarriage of justice caused.

Learned Counsel then contended that in the case of the appellants, the evidence relied on was too weak to support a conviction of the appellants. It was not proved beyond reasonable doubt that the appellants were the ones who killed the deceased and robbed him of his motor-cycle. The learned trial Judge thus erred when he held so.

**Submissions for Respondent**:

Counsel for the respondent submitted in respect of ground 1 that the circumstantial evidence that was adduced proved beyond reasonable doubt the charges against each one of the appellants. There was no evidence to weaken in any way the inferences and conclusions drawn from the circumstantial evidence adduced beyond reasonable doubt of each one of the offences commted by each one of the appellants. The learned trial Judge was thus right to convict the appellants.

**Resolution of Ground 1:**

As a first appellate, this Court has the duty to re-appraise the evidence adduced at trial and draw its own inferences and conclusions, all along as it does so, considering and weighing the Judgment of the learned trial Judge. Where this Court agrees with the decision and conclusion of the learned trial Judge then it will uphold such a conclusion and decision. In case this Court finds that the trial Judge erred in any aspect then this Court will so hold and will then vacate the conclusion and/or the decision of the learned trial Judge and substitute the same with its own.

In carrying out this duty this Court, as first appellate Court, cautions itself that it did not have the opportunity to see the parties and witnesses testify at trial, and thus get impressions of their respective demeanours, like the learned trial Judge had. Accordingly on issues of demeanour of any party or witness, unless there is overwhelming evidence to the contrary, this Court will follow the observations of the trial Judge. See: **Rule 30(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10.** See

also: **Peters v Sunday Post [1958] EA 424** and **Byaruhanga Alex v Uganda: Court of Appeal Criminal Appeal No. 088 of 2018 (unreported).**

In resolving ground 1 it is necessary to review the evidence that was adduced.

PW2 (Abbas Mutebi) knew the deceased John Lubowa as both of them were boda boda riders at Kasiro Road Stage, Kasana, Luwero District. On 18th August, 2009 at 8.30 p.m. the deceased told PW2 that he was taking two men to Nabutaka village, Luwero District. PW2 saw the 2 men the deceased was taking. He particularly recognized A1, the first appellant Sizomu Muhammad as being one of the two men that had hired the deceased. He was able to do so because the 1st appellant stood about 6-8 metres from him and there was light that came from an electric bulb that was at one of the shops at Kasiro Road Stage. The 1st appellant was shorter than the other man. The witness was not able to recognize the other man because that other man continued walking about the place.

The deceased on taking the two men to Nabutaka on his boda boda motorcycle never returned to Kasiro Road Stage. Instead it was the wife of the deceased who came to the stage the following day inquiring about the whereabouts of the deceased. A search for the deceased was carried out in Nabutaka village and his body was found buried in mud in a swamp in Nabutaka village.

PW2 participated in the search. He recognized the deceased's body. It was tied with a rope from the neck down to the waist and legs. The deceased had been undressed and was only in an underwear. The deceased was found to have a deep wound on the

chest caused by a blunt object. His nose and mouth had been chopped off.

Later, PW2 identified a Bajaj Boxer motor-cycle Registration No. UDR 493 V, red in colour, as belonging to the deceased. It was this very motor-cycle that the deceased rode his assailants on. This motorcycle was found with the 1st appellant after the death of the deceased. PW2 knew the motor-cycle very well as he used to work with the deceased as boda boda riders on the same stage.

PW3, Yawe John, LCI Chairperson, Nabutaka, knew the deceased since he had a home in Nabutaka and also another one in Kasana. PW3 also knew very well the 1st appellant Sizomu Muhammad, as one Maria, the grandmother of the 1st appellant stayed in Nabutaka. Maria was paternal grandmother to the 1st appellant. Once the deceased went missing, PW3, as LC I Chairperson, led the search team of village mates and other boda boda riders to look for the deceased in Nabutaka. PW3 did not at any one time see the 1st appellant participate in the search of the deceased and did not also attend the burial of the deceased at Nabutaka.

One Kisule Abbey testified as PW4. He had grown up and gone to the same primary school together with the 1st appellant at Nabutaka. He had also grown up with the deceased John Lubowa at Nabutaka. PW4 knew Maria of Nabutaka, the grandmother of the 1st appellant. PW4 on growing up was working as a builder and also a boda-boda rider at Erisa Stage, Kyebando, Kawempe Division, Kampala City.

On the deceased disappearing, PW4 participated in the search for the deceased.

PW4 knew the registration number of the boda boda motor-cycle that the deceased owned. After the burial of the deceased, the 1st appellant, approached him (PW4) told him that he had a Bajaj Boxer motor-cycle registration No. UDR 493 V and was looking for a boda boda stage to operate from in Kyebando, Kawempe Division, Kampala City. PW4 straight away reported what he had heard from the 1st appellant to the police.

Bogere Abdul, PW5, of Bakatadde village Luwero District and also of Bwayise-Kivulu, Kawempe, Kampala City was brother to 1st appellant. His evidence was that after the disappearance of the deceased, the 1st appellant and another man, went to him at his home in Bwayise-Kivulu. The 1st appellant claimed to PW5 that he (1st appellant) had bought a Bajaj Boxer motor-cycle. While the same was being driven by his colleague with whom he went to PW5, an accident whereby a child was knocked by the motor-cycle had happened. The police had seized the motor-cycle and had demanded shs. 300,000= to release the same. The police had however accepted a bribe of shs. 70,000= and had released the motor-cycle. The 1st appellant and the friend he was with wanted to find out from PW5 whether he would assist them to get a different number plate for the motor-cycle. PW5 told them that he could not assist in that regard, as the exercise was impossible. The 1st appellant did not disclose to PW5 the names of the second person he had gone with. Both had left the motor-cycle elsewhere.

Later, after a few days, the 1st appellant and his friend returned to PW5, this time riding a motor-cycle which the 1st appellant showed to PW5. It was a Bajaj Boxer, red in colour with no number plate.

The 1st appellant requested PW5 to allow them to leave the motor-cycle behind at a gate at PW5's home. PW5 allowed the request. The motor-cycle was left at his home. He parked the same at a park yard for 3 days paying shs. 1000= per day. He then rang his elder brother, Swaibu Muwonge, PW6, and told him how the 1st appellant accompanied by another man, had left a motor-cycle in his custody at his home and how he was spending money to keep the same at the park yard since he did not have enough space for the same at his home. It was agreed that PW5 takes the motor-cycle to his elder brother, PW6 for keeping, as PW6 had the necessary space at his home.

Soon thereafter, PW5 and PW6 were arrested by police on allegation of having stolen the said motor-cycle. They explained to police that it was the 1st appellant, their brother, in company of another man, who had taken the motor-cycle to them. Both were released by the Police. PW5, PW6 and PW7, all brothers, denied knowing the 2nd appellant.

From the above evidence, not contradicted and believed by the learned trial Judge, it was established beyond reasonable doubt that the 1st appellant, is one of the two men who hired the deceased, to take them to Nabutaka on his motor-cycle.

The 1st appellant and the deceased were both from and were very well known in Nabutaka village.

When the deceased went missing and a search for him was undertaken resulting in the discovery of his body buried in mud in a swamp at Nabutaka village, the 1st appellant disappeared from

Nabutaka, did not participate in the search and burial of the deceased.

It was however the 1st appellant together with another man, who was never identified, who were in possession of and produced the deceased's motor-cycle Bajaj Boxer, red in colour, registration No. UDR 493 V. The two attempted to change the number plate while they were also in possession of the original one. The 1st appellant also offered to sell the same or to use the same for boda-boda business at any stage in Kyebando, Kawempe Division, Kampala City.

No evidence was adduced at the trial as to how the 1st appellant, and whoever he was with, came to be in possession of the deceased's motor-cycle. Yet it was the 1st appellant and another man colleague who were last seen to be with the deceased while still alive when they hired him to take them to Nabutaka, Luwero District, on the very same motor-cycle.

There was no direct evidence as to how the deceased was killed and which weapon was used. However the doctor's post-mortem evidence was that a blunt instrument was used on the deceased to cause the wound on the chest and fracture of the clavicular bone. A sisal rope was also found tied on the deceased's body from the neck running down at his back to the legs which it tied. The deceased was violently tortured to death through harming his stated vulnerable parts.

On the basis of the above considered evidence, we agree with the conclusion of the learned trial Judge that constructive malice aforethought was established beyond reasonable doubt on the part

of the killers of the deceased. See: **Kooky Sharma vs Uganda Supreme Court Criminal Appeal No. 44 of 2000 [2002] UGSC 18 (15 April, 2002).**

As to who killed the deceased, the evidence adduced was circumstantial. This is evidence of circumstances that must produce moral certainty to the exclusion of every reasonable doubt before a conviction of an accused person is based upon it.

The Court must find, before convicting any one on such evidence, that the inculpatory facts adduced before Court are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than the guilt of the accused. The Court must be satisfied that there are no other co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused. Circumstantial evidence must therefore be treated with caution and be critically examined because the same can easily be fabricated. See: **Tindigwire Mbone vs Uganda: Supreme Court Criminal Appeal No. 9 of 1987.** See also: **Simon Musoke vs R [1958] EA 715 and Teper V.R. [1952] 2 ALLER 447 [1952] A.C. 480.**

The learned trial Judge cautioned himself and the assessors and then proceeded to critically consider the evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 and concluded that the prosecution proved beyond reasonable doubt that the 1st and 2nd appellants robbed the motor-cycle from the deceased and also killed the said deceased.

We have re-evaluated the same evidence. We find that PW2 saw and identified the 1st appellant as one of the two men that hired

the deceased to take them to Nabutaka. PW2 never identified the 2nd appellant as the second man who was with the 1st appellant on that day.

PW3 testified that he met a lady at the home of Maria, the grandmother of the 1st appellant, who told PW3 that the 1st appellant and another man, whom the lady claimed to be her husband, had returned with a motor-cycle which they claimed they had bought and were going to Kampala to find a boda boda stage to operate from using this motor-cycle. This lady never mentioned to PW3 the names of the second man who was with the 1st appellant and whom the lady claimed to be her husband. At any rate what this lady told PW3 was hearsay evidence which was inadmissible. The lady also never testified in the trial Court to point out that the 2nd man who was with the 1st appellant when the two men met PW3 at the home of Maria at Nabutaka village, was the 2nd appellant.

The learned trial Judge was therefore not correct to find that the 1st appellant was with the 2nd appellant when they met this lady at Maria's home. The trial Judge was also not justified to hold that the 2nd appellant was the husband of this lady, when the lady never stated the names of her husband and never testified in Court that the 2nd appellant was her husband or at all.

PW4 also never identified the 2nd appellant, as the second man with whom the 1st appellant was, when the 1st appellant called on him and told him that he had a Bajaj motor cycle for which he wanted to get a registration number plate.

PW5, PW6 and PW7 never claimed to know the 2nd appellant or that he was the one who was in the company of the 1st appellant.

We accordingly come to the conclusion that the evidence adduced never established beyond reasonable doubt that the 2nd appellant committed the robbery of the motor-cycle and that in the course of the robbery killed the deceased.

On the other hand however, the evidence of PW2, PW3, PW4, PW5 PW6 and PW7 proves beyond reasonable doubt that the 1st appellant with another man, who was never identified, hired the deceased to take them to Nabutaka village. The deceased then went missing, only to find him, after some days of search, murdered and buried in mud in a swamp in Nabutaka village. The 1st appellant, though a village mate of the deceased did not appear at the search of the deceased and also at his burial at Nabutaka.

However, after the deceased went missing, the 1st appellant was in possession of the deceased's motor-cycle, claiming the same to be his. The 1st appellant attempted to have a new number plate for the motor-cycle, offered to sale the same, and also looked for a boda boda stage in Kyebando, Kawempe Division, Kampala City, to do boda boda business using the very motor-cycle.

The deceased had been brutally murdered and buried in mud in a swamp in Nabutaka and his motor-cycle was never found where his body was. It must have been robbed from him in the course of killing him.

The 1st appellant, in exercise of his right, kept quiet after the prosecution had closed its case.

We therefore agree with the learned trial Judge as regards the 1st appellant only i.e. Sizomu Muhamed, that the evidence adduced when considered together pointed to nothing else, but that it was the 1st appellant who participated in the robbery of the motor-cycle from the deceased and that it was in the course of the robbery that the deceased was killed. The 1st appellant was therefore rightly convicted of murder of the deceased and of aggravated robbery of the deceased's motor-cycle. Ground 1 is partly allowed in respect of the 2nd appellant, but the same is disallowed in respect of the 1st appellant.

**Ground 2:**

Given how ground 1 has been resolved, the submission and resolutions of ground 2 will only relate to the 1st appellant, Sizomu Muhammed.

**Ground 2:**

**Submission for 1st Appellant:**

In this ground Counsel for the appellants faulted the learned trial Judge for passing an illegal and/or manifestly harsh and excessive sentence without due consideration of both the period spent on remand and the mitigating factors in favour of the 1st appellant.

He submitted that **Article 23(8) of the Constitution of the Republic of Uganda, 1995,** requires that in sentencing a convict, the time spent in lawful custody before the end of the trial should be considered for the benefit of the convict.

Counsel relied on **Tukamuhebwa David and Another vs Uganda: Supreme Court Civil Appeal No. 59 of 2016**, wherein the

Supreme Court stressed that **Article 23(8) of the Constitution** requires that the period spent on remand must be properly ascertained by the sentencing Court bearing the same in mind or consider or be alive to the same when determining the sentence to be passed over the convict.

**Submission for Respondent**:

In response to the above submissions, learned Counsel for the respondent submitted that the learned trial Judge had taken into consideration the mitigating as well as the aggravating and the period spent on remand while sentencing the 1st appellant. **Article 23(8) of the Constitution** had thus been complied with. Relying on **Nalongo Naziwa Josephine vs Uganda: Court of Appeal Criminal Appeal No. 0088 of 2009** which this Court relied on, in the decision in **Bukenya vs Uganda: Court of Appeal Criminal Appeal No. 17 of 2010** where it was held that "taking into account" does not mean that taking the remand period into account should be done mathematically such as subtracting the period from the sentence that Court would give. All that the Court must do is to note in the Judgment that it has actually considered the period spent on remand as a factor in determining sentence for the convict.

**Resolution of Ground 2:**

While resolving this ground this Court is aware of the position in the case of **Rwabugande Moses vs Uganda: Supreme Court Criminal Appeal No. 25 of 2014** which is in tandem with the constitutional provision to the effect that the sentence arrived at without taking into consideration the period spent on remand is

illegal for failure to comply with a mandatory constitutional provision.

The learned trial Judge considered and took into account the period the 1st appellant spent on remand.

In the Rwabugande case, the Supreme Court made it clear that it was departing from its earlier decision in **Kizito Senkulu vs Uganda Supreme Court Criminal Appeal No. 2 of 2001, Kabuye Senvawo vs Uganda Supreme Court Criminal Appeal No. 2 of 2002, Katend Ahamed vs Uganda: Supreme Court Criminal Appeal No. 06 of 2004** and **Bukenya Joseph vs Uganda: Supreme Court Criminal Appeal No. 17 of 2010** in which it held that taking into consideration the time spent on remand does not necessitate a sentencing Court to apply a mathematical formula.

This Court and the Courts below before the decision in **Rwabugande case (Supra)** were following the law as it was in the previous decisions above quoted since that was the law then. After the Court's decision in the **Rwabugande case**, this Court and the Courts below have to follow the position of the law as now stated in the **Rwabugande (Supra).** This is in accordance with the principle of precedent.

The sentencing trial Court however could not have followed the **Rwabugande case** precedent since it was delivered on 3rd March, 2017 yet the trial Court's sentencing decision was made on 16th December, 2011, 6 years before the **Rwabugande case** decision.

The trial sentencing Court considered the submissions of counsel for the 1st appellant and those of Counsel for the State as to sentence. 1st appellant being a youth aged 25 years, a first offender

and one capable of reform, if given a chance deserved a lenient sentence, so submitted appellant's Counsel. The 1st appellant himself prayed for such a lenient sentence.

Learned State Counsel prayed for maximum sentence because the 1st appellant had committed a barbaric and beastly act of killing and robbing the deceased. He had failed to respect the life and property of the deceased. Counsel prayed for a sentence that would punish and deter others.

The learned trial Judge in passing sentence, stressed the necessity to protect life and property in society and the fact that the deceased's family had been put to permanent injury and suffering by the death of the deceased. A punishment that would punish and at the same time reform the 1st appellant was necessary, given his youthful age. The appropriate punishment had to be a warning to others not to commit the same offences and also to protect society from people like the 1st appellant.

We have re-appraised all the evidence that was adduced at the trial in as much as it is relevant to the sentencing of the 1st appellant, and on consideration of the law, both statutory and case law, we have come to the conclusion that the sentences of 25 years imprisonment on the first count of murder and 15 years imprisonment on second count of Aggravated Robbery, to run consecutively, were lawful sentences as regards the 1st appellant. **Article 23(8) of the Constitution** was also complied with by the learned trial Judge. We find no merit in ground 2. The same is disallowed.

In conclusion we partly allow the appeal as against 2nd appellant, Kiseka Fred, for the reasons already stated. He is accordingly acquitted on both counts of Murder c/s 188 and 189 and Aggravated robbery c/s 285 and 286(2) of the Penal Code Act. It is ordered that he be released forthwith unless he is being held on some other lawful charges.

As to the 1st appellant Sizomu Muhammed, the convictions for Murder c/s 188 and 189 and Aggravated Robbery c/s 285 and 286(2) of the Penal Code Act, as well as the sentences of 25 years imprisonment for Murder and 15 years imprisonment for Aggravated Robbery to be served consecutively are hereby upheld.

The sentences are to be served as from the date of his conviction of 6th December, 2011.

It is so ordered.

Dated at Kampala this ....18th.... **day** of ....May..... **2021.**

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**Geoffrey Kiryabwire**
**Justice of Appeal**

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**Catherine Bamugemereire**
**Justice of Appeal**

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**Remmy Kasule**
**Ag. Justice of Appeal**