THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[Coram: R. Buteera, DCJ. C. Gashirabake, JA, O. Kihika, JA.]

CRIMINAL APPEAL NO. 147 of 2019, 214 of 2020, and 221 of 2020

(Arising from HCT-05-BUS-00-CR-092-2013-CR-CSC-092 0F 2013)

BETWEEN

1. **SSERWADDA CHARLES SSALONGO**
2. **GUMISIRIZA NASUR alias MAX**
3. **KANYESIGYE BENON**
4. **MUHEBWA GERALD..... APPELLANT**

AND

UGANDA ..... RESPONDENT

(Appeal against the sentence passed by Duncan Gaswaga J. delivered at the High Court at Bushenyi, on the 13th of March 2018.)

JUDGMENT OF COURT

Introduction

1.] The appellants were indicted, tried, and convicted of murder contrary to sections 188 and 189 and aggravated robbery contrary to sections 285 and 286, of the Penal Code Act, Cap 120.

2.] The brief facts are that during the night of 22nd July 2013, a Kampala-bound bus registration No. UAS 290Y Isuzu, belonging to the "Jussy" bus company left Kasese district at 10:00 p.m.

3.] There were about 50 passengers aboard. A long the way at a place called Kyomuhanga, the driver of the bus, Waswa Sonko, saw ahead of him a trailer parked almost across the road. The said Wasswa tried to overtake the trailer. There were other vehicles in the line. Immediately a group of thugs emerged from the bush. One of them was armed with a gun. The thieves ordered Sonko to open the door. Another group was breaking the glass windows of the said bus.

4.] The driver out of fear opened his door. He was pulled down and made to lie down. The thugs beat him, searched his pockets, and took everything that he had. The things entered inside the bus. They were armed with pangas and a gun. One of the thugs drove the bus towards Bushenyi Town. The other thugs ordered passengers to surrender everything in their possession Passengers who did not have money were beaten and cut with pangas.

5.] The thugs drove the bus to Kabagarame within Bushenyi District. As soon as they reached there, the passengers were ordered to move out of the bus one by one. One Mugizi Kenneth (the deceased) was shot and cut with a panga after he pleaded with the thugs to spare his life. Meanwhile, the Police had received a report of the robbery. Heavy deployment was done. Police officers followed the bus up to Kabagarame. As soon as they arrived, one thug alerted the others, they started running away from the scene. Police gave chess and shot one of the thugs.

6.] The injured passenger and the thug who were shot were all rushed to Kampala International University Hospital in Ishaka for treatment. A report was officially made at Bushenyi Police Station. Investigation commenced.

7.] Many passengers lost valuable property during the robbery. These included mobile phones hard cash, dollars, motor vehicle bearings, clothes, and others as specified in the indictment.

8.] The appellants were arrested, indicted, tried, convicted, and sentenced to 45 years' imprisonment each for all the counts. Aggrieved with the trial Court findings the appellants lodged this appeal on the following grounds;

1. *The learned trial Judge erred in law and fact when he disregarded the inconsistencies and relied on contradictions and prosecution evidence to convict the appellants.*
2. *The learneds trial Judge erred in law and fact when he sentenced the appellant to a sentence of 45 years' imprisonment that was harsh and manifestly excessive in the circumstances.*
3. *The trial Judge erred in law and fact when he made compensation orders against the 1st Appellant alone hence occasioning a miscarriage of justice.*

Representation

9.] At the hearing of the appeal, the appellants were represented by Mr. Albine Atugabirwe on State brief. The respondent was represented by Mr. Sam Oola Senior Assistant DPP.

Submissions by counsel for the appellants

10.] It was submitted that the appellants are contesting their participation in the robbery. Their submissions are in that regard.

11.] It was submitted that the prosecution's evidence through its witnesses PW1, Kakuba James who told the court that he participated in the robbery and that he had A1 and A2 as his accomplices in the crime. He also told the court that A3 and A4 were not involved in the crime. The trial court accepted PW1's evidence partially regarding the participation of A1 and A2 but rejected part of his evidence when he told the court that A3 and A4 never participated in the crime. The Trial Judge went on to state in his judgment that PW1, left out some of the accused persons for one reason or the other.

Counsel submitted that this contradiction was major and had the trial judge considered the evidence as a whole, he would conclude that A3 and A4 never participated in the robbery.

12.] Further, the trial court was faulted for relying on hearsay evidence of PW3, regarding the participation of A3 and A4. PW3 Lwadda Joseph told the court that Balikudembe Kinuma who was shot at the scene of the crime at Kabagarame, informed him that A3 and A4 too participated in the robbery and that upon the arrest of A3, cooperated and helped them to arrest PW1 who lead them up to Sulait.

13.] The learned Judge is further faulted for relying on the evidence of PW2 Sonko Wasswa, the driver of the bus, who told the court that A3 was the one who pulled him out of the bus and he stood with the assailants at the driver's door. He further testified that he was slapped in his face and thrown in the trench. Counsel argued that the time he spent with his assailants was not sufficient for him to identify his assailant and the fact that he had been slapped in the face, he was too frightened to correctly identify his assailants, whom he had never seen before. Counsel relied on the cases of **Abdalla Bin Wendo V R (1953) 20 EACA 166**, **Roria V R (1967) EA 583,** and **Abdallah Nabulele & 2 others V Uganda, Criminal Appeal No. 9 of 1978,** which establish the conditions of proper identification.

14.] Counsel noted that PW2 had never seen all the assailants, he stated that A3 was standing at the driver's door, meaning that he was off the Bus's light and the witness throughout his evidence, never referred to the use of bus light. The fear that was created by the assailants after slapping the driver while pulling him from the bus could not have allowed him to correctly identify any assailants and therefore the Trial Judge believing in PW2's evidence was in error.

15.] It was counsel for the appellants' submission that the trial Judge failed to consider the contradiction of prosecution witnesses regarding the identification of the appellants which went to the root of the matter. Counsel referred to the Supreme Court decision in the case of **Uganda Vs. Nashaba Paddy S.C.C. Criminal Appeal No. 39 of 2000,** where the court stated that the court will always ignore minor inconsistencies but consider the major ones.

16.] Counsel prayed that the prosecution's evidence should have been disregarded by the Court on account that it consisted of major inconsistencies and contradictions.

17.] On ground 2, counsel submitted that the appellate court would not interfere with the sentence imposed by the trial court unless the trial court failed to consider the important matter or any circumstances that ought to have been considered. This was the position of the Supreme Court Justices in the case of **Kamya Johnson Wavamunno Vs. Uganda, Criminal Appeal No. 16 of 2000.**

18.] Counsel alleged that the learned trial Judge did not take into consideration the uniformity sentencing principle and mitigating factors advanced by the appellants during allocutus. The testimony of PW1 which was the accomplice evidence, that he admitted having committed all the 30 counts. However, upon his conviction, he was only handed 10 years' imprisonment while his counterparts the appellants were handed down 45 years accordingly. Counsel submitted that they were alive to the fact that PW1, pleaded guilty and he never wasted the court's time however a difference of 35 years in sentencing the co-accused persons who had been convicted of 30 counts compared to the appellants who were only convicted on 5 counts was manifestly harsh and excessive contrary to the principle of

uniformity and consistency. The appellants deserved a lesser sentence compared to the convicts who were convicted of all 30 counts and handing them down 45 years' imprisonment was not only harsh but discriminative in nature hence contrary to principles of natural justice.

19.] The appellants through their counsel submitted that they were 1st-time offenders, and had reformed. A1 submitted that he had a family of 5 children and was taking care of his elderly parents 82 and 72 years old, requested for return of his motor vehicle, and that he had all its documents. A2 submitted that he was still a young man with a young family, regretted the incident, and asked for forgiveness from the victims' families and prayed for mercy.

20.] A3 pleaded for lenience because he was HIV positive, had reformed, and had left 6 children at home whom he was taking care of. A4 told the court that he had reformed, asked for forgiveness from the victims, and prayed for a lenient sentence but none of these factors were considered by the trial Judge, had he considered them he would not have handed them a sentence of 185 years' imprisonment in total. Counsel relied on the case of **Anguyo Siliva Versus Uganda COA Criminal Appeal No. 38 of 2014** cited the case of **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015**, where it was held that similar sentences should be awarded in cases of similar offences. Counsel argued that there was no justifiable reason why PW1 was sentenced to 10 years' imprisonment while his accomplices, the appellants were subjected to a harsh sentence of 45 years' imprisonment counsel prayed that this inconsistency should be corrected by this court.

21.] The trial Judge is also faulted for not taking into account the period spent on remand as required under Article 23 (8) of the Constitution of the Republic of Uganda as amended and paragraph 15 of The Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions

Legal Notice No. 8 of 2013. Counsel referred to the Supreme Court decision in the case of **Rwabugande vs. Uganda Supreme Court Criminal Appeal No. 25 of 2014,** which interpreted Article 23(8). Counsel prayed that this court set aside the sentence and give an appropriate sentence.

22.] On ground 3, the trial Judge was faulted for making an order to sell A1's motor vehicle UAK 898 D, and the money be given to the family of the late Mugizi Kenneth. It was contested that the compensation orders against the first appellant alone were discriminatory in nature and unlawful since there was no evidence produced by the prosecution that the said motor vehicle had been acquired using the proceeds of crime.

23.] Counsel prayed that this court finds the trial Judge's orders about the sale of A1's motor vehicle was done in error and be set aside and the motor vehicle be handed over to him or his legal representative in case he is still incarcerated.

Submissions by counsel for the respondent.

24.] Counsel for the respondent acknowledged that it was true that PW1 gave evidence that he did not know where the third and fourth appellants were at the time of the commission of the offences. However, counsel argued that the trial judge considered this in his judgment on page 120 of the record of appeal and rightly observed that this case did not stand solely on PW1's evidence and that he may have left out some co-accused persons in his testimony for one reason or another. It was submitted for the respondent that, there was evidence from other prosecution witnesses. The prosecution adduced the evidence of 11 witnesses to prove its case against the appellants. Counsel cited the case of **Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 on page 12**, where it was held that it

is trite law that no piece of evidence should be weighed except in relation to all the evidence as a whole.

25.] Counsel further argued that from the evidence of PW2, PW4, and PW11, the attackers were about seven or eight in number. Given that the incident happened at night, it is understandable that PW1 might not have identified all the persons who participated in the commission of the offences. There was thus no inconsistency or contradiction in the evidence of the prosecution. If there was any, it was minor, did not go to the root of the case, and was satisfactorily explained.

26.] On the issue of hearsay, counsel for the respondent submitted that it was not premised on any grounds in the Memorandum of appeal. Under **Rule 74 (1) (a) of the Judicature (Court of Appeal Rules) Directions,** it is provided that the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under Rule 67 of the Rules. On this basis, this particular complaint would not be entertained.

27.] Additionally, counsel argued that the information given to PW3 by Balikudembe Kinuma is not hearsay and is admissible under sections 4, 8, and 29 of the Evidence Act. It is important to state that Balikudembe Kinuma was initially indicted together with six other persons in this case. The other persons are PW1, the four appellants herein, and one Tumusiime Asaph alias Sulait, who absconded after he was released on bail. Balikudembe Kinuma pleaded guilty to all the 30 counts in the indictment. He was convicted on all the counts and sentenced to imprisonment terms ranging between 15 years and 21 years, to run concurrently. It was the evidence of PW3 that he met Balikudembe Kinuma on 01/08/2013 and the latter revealed to him that he was involved in the robbery together with PW1, and the appellants. He

disclosed the identity of all the participants and their respective places of residence. Further, he revealed that they were seven in number, traveled in motor vehicle registration number UAK 898D Toyota Corolla belonging to the first appellant, and were armed with a gun, pangas, and knives during the robbery.

28.] The information given to PW3 led to the arrest of the second appellant. The second appellant led to the arrest of PW1. PW1 led PW3 to arrest the third appellant. In the process, exhibit PE16, the gun that was used in the robbery, was recovered. The information also led to the arrest of the first appellant and the recovery of his motor vehicle registration number UAK 898D (exhibit P 13) which was used by the robbers in the commission of the offences, Further, the information led to the arrest of the fourth appellant.

29.] Specifically, and most importantly, Section 29 of the Evidence Act deals with information leading to the discovery of facts. It provides:

> *"Notwithstanding sections 23 and 24, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of that information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*

30.] Notably, the information to PW3 by Balikudembe Kinuma that led to the discovery of several facts and pieces of evidence against the appellants could be proved and was admissible. There is no merit in the complaint by the appellants in this regard.

31.] As regards identification, counsel submitted that this too was not premised on any ground in the memorandum of appeal. Nevertheless, counsel concurred with the citation of the law about identification. In the case of

Bogere Moses and Another (supra), the Supreme Court referred to **Abdulla Nabulere & Another vs. Uganda, Criminal Appeal No. 9 of 1978**.

32.] In the alternative, counsel for the respondent submitted that the incident happened at night. PW2's evidence was that he identified the third appellant because he stood close to him when he got out of the bus and there was moonlight. According to him, the incident took between 15 and 20 minutes. In cross-examination, he stated that he identified the third appellant for about five minutes (meaning he observed him for about five minutes), during which time he (PW2) had refused to open the bus door and was reversing the bus.

33.] Whereas the conditions for identification may have been somewhat difficult, PW2's evidence of identification of the third appellant was corroborated by the evidence of PW3, especially about the recovery of exhibit PE 16 (gun) with the help of the third appellant, PW9's evidence on the fourth appellant's charge and caution statement (confession) in which he implicated himself and the third appellant in the commission of the offences. The evidence of PW2 about the identification of the third appellant could therefore safely be relied on as correct in the circumstances.

34.] In response to the issue of the charge and caution statement, counsel submitted that, the trial Judge held a trial within a trial and found that the fourth appellant voluntarily made the confession and it was true. In the confession, the fourth appellant admitted that he played a part in the commission of the offences of robbery. The confession is corroborated by the evidence of PW9 (who recorded it) and PW3.

35.] Counsel for the respondent concluded that the trial Judge arrived at the proper decision when he found A3 and A4 guilty. He prayed that ground one of the appeal has no merit and should fail.

36.] On ground 2, counsel for the respondent submitted that the principles upon which this court can interfere with a sentence passed by the trial court are well settled. In **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014,** the court cited with approval several authorities in this regard, namely, **Kyalimpa Edward v. Uganda, Supreme Court Criminal Appeal No. 10 of 1995; Kamya Johnson Wavamunno vs. Uganda, Supreme Court Criminal Appeal No. 16 of 2000** and **Kiwalabye Bernard vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.**

37.] Counsel acknowledged that the trial Judge did not take into account the period each of the appellants had spent on remand, by deducting it from the sentences that he deemed appropriate. According to the record, the appellants had spent 4 years, 6 months, and 17 days on remand. Article 23 (8) of the Constitution of the Republic of Uganda and the case of **Rwabugande** (supra) were therefore not complied with. The resultant sentences passed by the trial Judge were therefore illegal and should be set aside. Counsel invited the court to invoke its powers under Section 11 of the Judicature Act to determine the appropriate sentence against the appellants in the circumstances.

38.] Counsel submitted that a sentence of 45 years' imprisonment would be appropriate against each of the appellants for the offence of murder on count one. For the offences of aggravated robbery in counts two, seventeen, twenty, and twenty-four, a sentence of 35 years' imprisonment would be appropriate against each of the appellants. After deducting the period of 4 years, 6 months, and 17 days spent on remand by the appellants, he prayed that each of them be sentenced to 41 years, 5 months, and 13 days' imprisonment for count one and 31 years, 5 months and 13 days imprisonment for each of counts two, seventeen, twenty and twenty-four.

39.] Further, the sentence is consistent with some cases in which this court has passed similar sentences. In the case of **Magero Patrick and Another Vs. Uganda, Court of Appeal Criminal Appeal No. 076 of 2019**, the appellants were convicted of murder and sentenced to 47 years' imprisonment. The deceased had been shot and killed in the course of a robbery at night. On appeal to this court, the conviction was upheld against the first appellant and he was sentenced to 45 years' imprisonment.

40.] On ground 3, it was submitted that the first appellant conceded that the High Court had the power to pass the order of compensation against him. Indeed, the court has the power to do so under section 286 (4) of the Penal Act. His grievance is that the court did not order the co-appellants to pay compensation to the victims of the robbery, in his view, this amounted to discrimination. Unfortunately, no law or authority has been cited to support this submission. Moreover, equity cannot help the first appellant. He offered his motor vehicle to be used by himself and his co-appellants in the commission of the robbery and in the process, the deceased was killed. The trial Judge was well within his power to order the sale of the motor vehicle and the proceeds paid to the deceased's children as compensation if that was the only property available. He did not thereby violate any law. This ground of appeal has no merit and must fail.

41.] In the result, counsel prayed that the appeal against conviction and order of compensation be dismissed and the appeal against sentence allowed in the terms proposed.

Consideration of Court.

42.] We have studied the Court record, and carefully considered the submissions of both counsel and authorities availed to this court and those not availed. This Court must reappraise the evidence and draw inferences of facts.

Additionally, the first appellate court must review the evidence and reconsider the materials before the trial Judge. Thereafter, makes up its mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10,** and the Supreme Court decision in the case of **Kifamunte Henry vs. Uganda, SC Criminal Appeal No. 10 of 1997**.

43.] Ground 1, was premised on the fact that there were contradictions and inconsistencies. The appellant's counsel submitted that PW1 testified that PW3 and PW4 were not involved in the crime. The trial Judge accepted the evidence of PW1, to the effect that A1 and A2 were involved in the crime but rejected the one that exonerated A3 and A4 from the crime. Counsel submitted that this was a major contradiction that the trial Judge ignored.

44.] The law on contradictions and inconsistencies in the evidence of witnesses is now well settled in the case of **Alfred Tajar v. Uganda, EACA Criminal Appeal No. 167 of 1969** cited with approval in the case of **Uganda V George Wilson Simbwa, SCCA No 37 of 1995.** The principles applicable to contradictions and inconsistencies were stated that in assessing the evidence of a witness, his consistency or inconsistency, unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. That minor inconsistency will not usually have the same effect; unless the trial Judge thinks they point to deliberate untruthfulness.

45.] **In Obwalatum Francis Vs. Uganda, S.C.C.A No. 30 of 2015 where the Supreme Court held that:**

> *"the law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored unless*

they point to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily explained."

46.] Having critically scrutinized the lower Court record, the trial Judge acknowledged the inconsistence and noted however that the case did not entirely rest on the evidence of PW1 but was supported by the evidence of PW3, the charge and caution statement, and the evidence of PW9, who recorded the charge and caution statement.

47.] We agree with counsel for the appellants that there were some contradictions pointed out by the appellants' counsel in the submissions, however, our view is that these were explained or watered down by the evidence of PW3 and PW9. In our view, there was no miscarriage of justice occasioned, since the appellants were properly put at the scene of the crime and their participation in the offence was proved.

48.] Counsel for the appellant raised other issues under this ground that were not specifically listed in the grounds of appeal, that is, hearsay, identification, and charge and caution statement. Counsel for the respondent objected stating that this violates rule 74(1)(a) of the Rules of this Court that forbids anyone from arguing a matter that was not raised in the memorandum of appeal. Rule 74(1)(a), provides that:

"74. Arguments at hearing.

(1) At the hearing of an appeal—

(a) *the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or any supplementary memorandum lodged under rule 67 of these Rules*"

49.] The Supreme Court in the Case of **Rwabugande Moses vs. Uganda** (supra) handled a similar issue and held that:

> *"The general rule is that an appellate court will not consider an argument raised for the first time on appeal.* ***Rule 70 (1) (a)*** *of the* ***Supreme Court Rules*** *provides:*
>
> *(1) At the hearing of an appeal—*
>
> *(a) the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or any supplementary memorandum lodged under rule 63 of these Rules;*
>
> *However, there are exceptions to this general rule. For example, as explained in the well-known legal maxim,* "Ex turpi causâ non oritur action", a court of law cannot sanction what is illegal. (**See: Kisugu Quarries vs. The Administrator General SCCA No.10 of 1998**). *The instant case warrants a departure from the general rule since it deals with a constitutional imperative, the issue at hand being like a fundamental right of a convict as guaranteed by the Constitution.* ***Article 2*** *of the* ***Constitution*** *states that the Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda."*

50.] Guided by the position of the law in the **Rwabugande case**, (supra) this case does not present the exceptions to warrant this court to entertain the issues addressed in the submissions by counsel for the appellants. The Supreme Court clearly stated that the issues will be addressed because an illegality cannot be sanctioned by the court. Secondly, the issues raised by the court affect the appellants' rights protected under the Constitution. This is not the same in this case. The appellant raised issues of hearsay, identification,

and charge and caution statements that are neither illegal nor constitutionally protected. We therefore find that this court cannot entertain them.

51.] This ground fails.

52.] Ground 2, is twofold, in that it addresses the issue that the sentence handed down was harsh and manifestly excessive and secondly it was illegal.

53.] In assessing whether the sentence is harsh and manifestly excessive, we are guided by the statutes and the sentencing guidelines that provide the maximum sentence for each offence. In this case, the offence of murder and aggravating robbery carries a maximum sentence of death under sections 189 and 286 of the Penal Code Act. The Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice)Directions Legal Notice No. 8 of 2013 provides for 30 years' imprisonment for both offences of murder and robbery after all factors have been considered. Additionally, the Supreme Court in the case of **Aharikundira Yustina vs. Uganda, SCCA No. 27 of 2015,** held that;

> *"There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is* ***"manifestly excessive".*** *An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation."* (Emphasis ours).

54.] Additionally, principles 6 (c) of The Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice)Directions Legal Notice No. 8 of 2013, provides that the court while sentencing should be guided by the principle of consistency. The principle provides that:

> *"6. General sentencing principles.*

Every court shall when sentencing an offender take into account—
the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances;"

55.] The Supreme Court in **Aharikundira Yustina vs. Uganda,** (supra) held that:

"While sentencing, an appellate court must bear in mind that it is setting guidelines upon which lower courts shall follow while sentencing. According to the doctrine of stare decicis, the decisions of appellate courts are binding on the lower courts. Precedents and principles contained therein act as sentencing guidelines to the lower courts in cases involving similar facts or offences since they indicate the appropriate sentence to be imposed."

56.] We have considered the case of **Opolot Justine and Another Vs. Uganda, SCCA No. 20, 2014**, where the Supreme Court confirmed a sentence of life imprisonment. In the case of **Kaddu Kalule Lawrence Vs. Uganda, SCCA No. 72 of 2018** the sentence of life imprisonment was confirmed as well by the Supreme Court. The appellant contended that the earlier counterparts who pleaded guilty were given shorter sentences and this made the sentence handed down to them harsh and manifestly excessive. It is trite that the sentencing power of the judge is discretionary. Having weighed the facts of the case against the law it is within his powers to grant differential sentences among the appellants under the occurrence of the same offence depending on the circumstances of each case. Therefore, considering the above guiding principles in assessing the severity of the sentence, we find that the sentence was neither harsh nor manifestly excessive.

57.] Turning to the legality of the sentence, Article 23(8) 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."

58.] The Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice)Directions Legal Notice No. 8 of 2013 provides under principle 15 that:

"15. The remand period is to be taken into account.

(1) The court shall take into account any period spent on remand in determining an appropriate sentence.

(2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account."

59.] In interpreting article 23(8) of the Constitution, the Supreme Court in the Case of **Rwabugande** (supra) stated as follows:

*"Article **23 (8) of the Constitution (supra)** makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as the age of the convict; the fact that the convict is a first-time offender; remorsefulness of the convict, and others which are discretional mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision."*

60.] According to the record, the appellants had spent on remand 4 years, 6 months, and 17 days. It is not clear that this period was deducted from the sentence. According to the record, the trial Judge stated that the period spent on remand by each convict should be deducted from the 45 years when calculating the sentence. This offends the principle laid down in the case of **Rwabugande** (supra), which requires the court to arithmetically deduct the years spent on remand since the period is known with precision and certainty. This case was decided on the 13th day of March 2018, so it is bound by the decision in **Rwabugande** (supra).

61.] It was therefore our assessment that the omission of deducting the period spent on remand on the part of the trial Judge was not a proper use of the discretionary power. In the case of **Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995**, it was held that an appellate court shall interfere with the discretion of the sentencing Judge, if the sentence is illegal. Since this sentence is illegal for failure to take into consideration the period spent on remand, it is hereby set aside.

62.] We shall therefore invoke the powers bestowed upon this court under section 11 of the Judicature to hand down a fresh sentence.

This ground partially succeeds.

63.] Ground 3, concerns the grant of compensation it was submitted that the order to sell the 1st appellant's car and give the proceeds to the bereaved family was discriminatory. Among the sentencing orders that the appellant can be given in addition to the sentence is compensation. The appellant acknowledged that the court had the power to make such orders. Considering the facts of this case, this is the car that facilitated the robbery that led to the

death of the deceased, hence it was not discriminatory for the trial Judge to make such an order.

This ground fails.

64.] Accordingly, this appeal partially succeeds.

1. The conviction of the appellants is upheld.
2. The sentence of the lower Court is set aside. For mitigating factors, we have considered the fact that the appellants are 1st time offenders, spent 4 years, 6 months, and 7 days on remand, have learnt from their mistake, and are remorseful. For the aggravating factors, the offences are rampant, the appellants meditated on the offences, and death traumatized the family. The deceased's children are no longer going to school. The appellants took a lot of money during the robbery and it was not recovered. We also note that the offence carries a maximum sentence of death. Having considered the above mitigating and aggravating factors the appellants are hereby sentenced to imprisonment for 45 years. We deduct the 4 years, 6 months, and 17 days spent on remand. The appellants will therefore serve 41 years, 5 months, and 13 days of imprisonment, effective from the 13th March 2018 the date of conviction.
3. The order for compensation by the trial Court is upheld.

We so order

Dated at Kampala this ..... day of 2023

.....

RICHARD BUTEERA

DEPUTY CHIEF JUSTICE

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR KIHIKA

JUSTICE OF APPEAL