**THE REPUBLIC OF UGANDA,**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CRIMINAL APPEAL NO 270 OF 2014**

**(ARISING OUR OF HCT – 11 – CR – AA = 01 – 2012 (KABALE)**

**MUNEZERO WILLIAM}.....APPELLANT**

**VERSUS**

**UGANDA}..... RESPONDENT**

*(Appeal from the sentence of the High Court of Uganda at Kabale before His Lordship Mr. Justice J.W. Kwesiga in High Court Criminal Session No HCT – CR – CSC – No 0074 of 2012 delivered on the 13th of March 2013)*

**CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA**

**HON. JUSTICE CHEBORION BARISHAKI, JA**

**HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA**

**JUDGMENT OF THE COURT**

The appellant had been convicted of the offence of Aggravated Robbery Contrary to sections 285 and 286 (2) of the Penal Code Act and sentenced to 20 years imprisonment by the Kwesiga, J on the 13th of March 2013. The appellant now appeals against sentence. Initially the appellants appeal was against conviction and sentence and the memorandum of appeal was that:

1. The learned trial judge erred in law and fact when he failed to correctly evaluate the contradictory and inconsistent evidence on the record, thereby wrongly holding that the appellant was correctly identified and consequently occasioning a miscarriage of justice.

2. The learned trial judge erred in law and in fact when he held that the appellants charge and caution statement was correctly obtained and consequently admitted it in evidence and convicted the appellant based on it thereby occasioning a miscarriage of justice.

3. The learned trial judge erred in law and in fact when he sentenced the appellant to pay harsh and excessive sentence of 20 years in prison.

When the appeal came for hearing Counsel Joanita Tumwikirize State Attorney represented the respondent and Counsel Abenaitwe Emmanuel Represented the appellant. We heard oral submissions for and in opposition to the appeal and in the presence of the appellant.

At the hearing, learned counsel for the appellant abandoned grounds 1 and 2 and with the leave of court sought and granted under section 132 (1) (b) of the Trial on Indictment Act to argue Ground 3 of the appeal on the question of sentence only. Ground 3 was amended to read that; "the learned trial judge erred in law when he sentenced the appellant to 20 years in prison."

With reference to page 42 of the record, learned counsel for the appellant submitted that the learned trial Judge gave his reasons for the sentence. However, he did not mention the time the appellant spent on remand. Counsel submitted that the learned trial judge therefore contravened article 23 (8) of Constitution of the Republic of Uganda. He submitted that article 23 (8) of the Constitution makes it imperative for the sentencing judge to take into account the time spent in lawful custody by the convict while sentencing. This was held in **Abelle Asuman v Uganda Supreme Court Criminal Appeal No. 66 of 2016** page 4 thereof. Furthermore in **Rwabugande Moses v Uganda SCCA No. 25 of 2014** it was held that it was a matter of law that the period of remand should be credited to the convict while sentencing. This may be done arithmetically. Furthermore, the

learned trial judge did not take into account the mitigating factors such as the fact that there was no loss of life in the robbery as held in **Adama Jino v Uganda Criminal Appeal No. 50 of 2006** cited with approval in **Muchungunzi Benon and Muchungunzi Thomas v Uganda Court of Appeal Criminal Appeal No. 008 of 2008**. The court also relied on **Adama Jino v Uganda Criminal Appeal No 50 of 2006** wherein the court took into account that in the robbery, there was no loss of life. Secondly, the appellant appeared repentant. The Court reduced the sentence from death to 15 years imprisonment. Last but not least counsel submitted that this court could interfere with a sentence imposed by the trial court according to the above authorities.

In reply Counsel Joanita Tumwikirize SA conceded to the first ground on illegality of the sentence as passed in contravention of article 23 (8) of the Constitution of the Republic of Uganda but prayed that this court upholds the sentence of 20 years imprisonment appropriate in the circumstances of the case. She submitted that the appellant was not a first time offender and had been convicted of theft of a motor cycle before and had been sentenced to 9 months imprisonment. Furthermore, in this appeal the facts are that the appellant had inflicted bodily injury by cutting the victim on the neck and head with a "panga" (cutlass). In those circumstances the sentence of 20 years imprisonment should be upheld.

We have carefully considered the facts of this appeal and the law. As far as facts are concerned the Court of Appeal has power under **rule 30** of **the Judicature (Court of Appeal Rules) Directions** on any appeal from a decision of the High Court in the exercise of its original jurisdiction to reappraise the evidence and draw inferences of fact. The extent of the power was discussed by the East African Court of Appeal in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123**, where Sir Clement De Lestang V-P, held that the conduct of an appeal

from the High Court in the exercise of original jurisdiction to the Court of Appeal may be by way of a retrial on matters of fact. Secondly, the Court of Appeal is not bound to follow the findings of fact of the trial judge but will review the evidence and may reach its own conclusion:

> "An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

We have accordingly scrutinised the record and the facts of the appeal are not in controversy in this appeal. The victim Mr. Nsabiyunva Sebu testified as PW2 and his cross examination testimony did not make any dent to his testimony – in – chief. He testified that on 10th February 2012, the appellant hired him to take him from Busega stage to Bunagana and he branched off the road and directed PW2 to his brother's home. He asked PW2 to park the motorcycle and shortly thereafter after disembarking and going into the house, emerged with a panga and cut PW2 in several places including the sides of the neck, the head and arm. He threw down the weapon and jumped on the motorcycle and rode away whereupon PW2 chased him. The appellant abandoned the motorcycle and was arrested while PW2 passed out. He found himself hospital after one week. The motorcycle was

recovered. PW3 witnessed the appellant cutting the victim three times. He made an alarm. PW3 was not cross examined by the defence.

The sentencing notes of the learned trial judge indicate among other things that the convict is not a first offender. He noted that this was the appellants second case of theft of the motorcycle and it demonstrates that the appellant had no respect for other people's rights to property. Thirdly, the appellant had not shown any remorse. Fourthly the aggravated robbery was committed with cruelty and violence by mercilessly cutting the victim leading him almost to death. It was a most daring robbery committed at 11.00 am. The appellant had no value or respect for human life. He decided that the appellant should not be treated leniently and that the maximum sentence in the case was a death sentence. Furthermore, the society expected the court to protect it from that type of violence so it was necessary to keep the appellant in custody long enough to warn others and to punish the appellant. He accordingly sentenced the appellant to 20 years imprisonment.

The general rule is that the court will not interfere with the sentencing discretion of the trial judge and what is an appropriate sentence is a matter at the discretion of the sentencing trial judge. This was held in **Ogalo s/o Owoura v. R. (1954), 21 E.A.C.A. 270**, where the East African Court of Appeal laid the law that:

> "The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James v. R.* (1950), 18 E.A.C.A. 147,
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> *'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.' To this we would*

*also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.."*

The issue for consideration from the above decision is firstly, whether when reviewing the sentence passed by the trial court, the trial judge acted upon some wrong principle. Secondly, whether the trial judge overlooked some material factor and thirdly, whether the sentence is manifestly excessive in view of the circumstances of the case. This decision was cited with approval in the recent past by the Supreme Court of Uganda in **Kyalimpa Edward v Uganda in Supreme Court Criminal Appeal No. 10 of 1995** in the judgment of Odoki J.S.C, Oder J.S.C. and Tsekooko J.S.C. The appellant had been charged with murder and was convicted of manslaughter and sentenced to 15 years imprisonment. The appellant appealed against sentence only and the Supreme Court held that:

> "... an appropriate sentence is a matter for the discretion of the sentencing judge, each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice: Ogalo s/o Owoura v R (1954) 21 EACA 270 and R v Mohamedali Jamal (1948) E.A.C.A. 126 ..."

In this case the learned trial judge noted that the appellant's robbery was his second case of theft of a motor cycle. We have however not seen any evidence tendered in court to this effect and the fact of earlier conviction of the appellant is a submission from the bar by the State Attorney at the point of the sentencing hearing. In any case even if there was evidence before the trial judge, that evidence was not recorded as to form part of the record. The above notwithstanding, the appellant was 18 years old at the time of commission of the offence. Secondly, the issue is whether there was

any error in principle to sentence the appellant to 20 years imprisonment. Just like the Supreme Court held in **Kyalimpa Edward v Uganda in Supreme Court Criminal Appeal No. 10 of 1995,** the court will not interfere with the sentencing discretion of the trial judge and what is an appropriate sentence is, a matter for the discretion of the trial judge. An error of law is an error which can form a basis for interference with the sentence according to **Kyalimpa Edward v Uganda** (supra). The period of one year and three months the appellant was in lawful custody before his conviction and sentence by the trial judge on 13th March 2013 was not taken into account by the judge before passing sentence rendering the sentence in contravention of Article 23 (8) of the Constitution of the Republic of Uganda. Article 23 (8) of the Constitution provides that:

> "(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."

The period of remand shall be taken into account in imposing the term of imprisonment. It means that any term of imprisonment shall include the period spent in lawful custody in respect of the offence before conviction and sentence. Mandatory language is used and therefore failure to take the pre – conviction lawful custody period is sufficient to have the sentence set aside.

The above notwithstanding, we have considered another material matter of principle which is the age of the appellant at the time of commission of the offence. The age of the appellant at the time of conviction is a relevant factor in the exercise of sentencing discretion. In **Bikanga Daniel v Uganda Criminal Appeal No 38 of 2000**, this court held, following the earlier decision of **Kabatera v Uganda Court of Appeal Criminal Appeal No 123**

**of 2001,** that the age of an accused person is always a material consideration that ought to be taken into account before a sentence is imposed.

If the appellant was 18 years at the time of commission of the offence, the basis of this appeal, how old was he when he allegedly committed an earlier offence of theft of a motor cycle. Was he a juvenile? The charge sheet indicates that the appellant was 18 years when he committed the offence of aggravated robbery. We note that the fact that the appellant was a second time offender weighed heavily on the trial judge.

In the premises, we would allow the appeal, set aside the sentence passed in contravention of article 23 (8) of the Constitution of the Republic of Uganda and consider a sentence of 15 years imprisonment just on account of his age at the time of commission of the offence. We hereby deduct the period from February 2012 to March 2013 being a period of about 1 year and the appellant shall serve a sentence of 14 years imprisonment from date of conviction on 13th March 2013. We so order.

Dated at Mbarara the 2nd of Oct 2018

**HON. JUSTICE ELIZABETH MUSOKE, JA**

**HON. JUSTICE CHEBORION BARISHAKI, JA**

**HON. JUSTICE CHRISTOPHER IZAMA MADRAMA, JA**