

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL APPEAL NO. 784 OF 2014**

*(Arising from High Court Criminal Case No. 85 of 2014, Jinja)*

**1. KAKAIRE IGURU ALI**

**2. BOGERE MUSAMIRU:.....APPELLANTS**

**VERSUS**

**UGANDA:.....RESPONDENT**

**CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA**

**JUDGMENT OF COURT**

The appellants were indicted and convicted of the offence of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act and sentenced to 14 years imprisonment. The appellants were dissatisfied with the sentence passed by Hon. Justice Godfrey Namundi and with leave of court they filed this appeal against sentence on one ground that;

*“The learned trial Judge erred in law when he passed an excessively harsh sentence against the appellants without considering several mitigating factors hence occasioning a miscarriage of justice.”*

## **Background**

On the night of the 18<sup>th</sup> may 2013, the victim Malinda Saidi who was in the company of his wife Namulondo Rashida were sleeping in their house located at Butaba village, Buyanga Sub County in Iganga District. At about 23.30 hours, Namulondo Rasida was awakened when she was beaten with a stick by two men who had entered into their house that she clearly identified as the appellants. The victim immediately jumped and hid under the bed where he was also able to clearly identify the appellants by the aid of the torch light from the torches they were holding. They were also seen clearly holding a knife and panga. They began to demand for the key to the victim's motorcycle and money while assaulting the victim's wife who handed to them two hundred thousand shillings in a bid to save her life.

The appellants also stole an *Itel* mobile phone on Serial Number 8603110378857/ 8031101378864. This forced the victim to come out from hiding to rescue his wife. In the process, the victim was cut on his hand by the appellants. Namulondo Rashida managed to get out of the house and raised an alarm that attracted rescuers who found the appellants had left the scene. The appellants however ran away leaving behind the torch and knife. The matter was reported to police and a knife, torch, brick were recovered at the scene and exhibited. The police also recovered a blood stained shirt belonging to the complainant and the *Itel* mobile phone that was stolen was tracked by the police and recovered from the wife of Bogere Musamiru.

## **Representation**

At the hearing of the appeal, Mr. Dhakaba Ishaq appeared for the appellant while Mr. Peter Mugisha appeared for the respondent.

### **Appellant's submissions**

Counsel submitted that the learned trial Judge did not take into account the young age of the appellants while passing sentence. That the appellants were 22 and 24 years respectively and the 14 year  
5 sentence was harsh and excessive. In addition, the appellants pleaded guilty and did not waste court's time. The appellant's had also spent one year on remand but while sentencing, the trial judge did not take that period into consideration. He prayed that the same be put into consideration and the appellant be given a lesser  
10 sentence.

### **Respondent's submissions**

In reply, counsel opposed the appeal and submitted that the trial Judge considered both the mitigating and aggravating circumstances of the case and passed an appropriate sentence. That the period of 1  
15 year which the appellant spent on remand was not brought to the attention of the trial Judge for consideration. It being a constitutional requirement, he prayed that the same be put into consideration by this court and a sentence of 13 years be meted on the appellants.

The duty of this court, as an appellate court of the first instance, is  
20 very well established and has been expounded in numerous authorities. The most outstanding ones include: - **Pandya vs. R (1957) E.A 336, Okeno vs. R. (1972) E.A. 32., Bogere Moses vs. Uganda Cr. App. No.1 of 1997 (S.C) (unreported) and Kifamunte Henry vs. Uganda Cr. App. No.10 of**  
25 **1997 (S.C) 10 (unreported).** This principle is also confided in Rule 29 of the Rules of this Court which states:-

*"29 (1) on any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the court may: -*  
30 *(a) re-appraise the evidence and draw inferences of fact;"*

An appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda Criminal Appeal No. 143 of 2001(S.C)**)

It is clear from the sentencing order that the learned trial Judge omitted to take into account the remand period. This makes the sentence illegal as it flouts the requirement of Article 23(8) of the Constitution. It provides:

*“23. Protection of personal liberty*

*(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.”*

Although the process is not a mathematical exercise, a sentencing Judge should clearly indicate the mitigating and aggravating factors he/she has taken into account and particularly the remand period. Current jurisprudence has established that if a sentencing Judge does not take into account the remand period while determining the sentence, then the sentence that Judge passes is illegal as it is contrary to the mandatory provisions of Article 23(8) of the Constitution. See **Bukenya Joseph v. Uganda SC Criminal Appeal No. 17 of 2010** and **Kizito Senkula v. Uganda SC Criminal Appeal No. 24 of 2001**. Having found that the trial Judge did not take into account the remand period of the appellants, we have no option but to set aside the sentence of 14 years’ imprisonment as an illegal sentence.

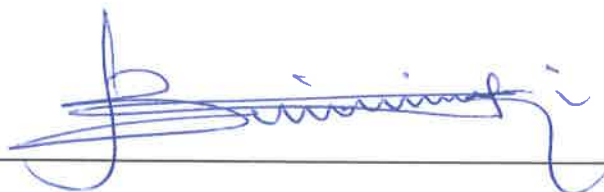
In **Katuku Vs Uganda Criminal Appeal No. 178 of 2014**, the appellants were convicted of aggravated robbery and sentenced to 20

years imprisonment and a fine. On appeal to this court, the sentence was reduced to 12 years imprisonment and the fine set aside.


We now proceed to sentence the appellants afresh under S 11 of the Judicature Act which gives this court the same power of the trial court to impose a sentence of its own. We note that the appellants are first offenders. They were on remand for a period of 1 year and they pleaded guilty thus saving court's time. The stolen property was also recovered and the appellants were remorseful. On aggravating factors, the victims got grave injuries and the offence committed was a serious offence that calls for a deterrent sentence. Having considered all the above factors and the period the appellants spent on remand, we find that a sentence of 12 years will meet the ends of justice in this case. We accordingly sentence <sup>each of</sup> the appellants to 12 years from the date of conviction of 29<sup>th</sup> July, 2014.

We so order.

Dated this 17<sup>th</sup> day of July 2019



**Hon. Justice Cheborion Barishaki, JA**



**Hon. Justice Stephen Musota, JA**

Night Tuhaise

Hon. Lady Justice Percy Night Tuhaise, JA

17.7.19

Appellant's counsel,  
for the appellant;  
for the respondent;  
for the appellant;  
HUSA; Clerk.

CUSA; deposed delivered in the presence of the  
judge.

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