THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT GULU

CRIMINAL APPEAL NO.55, 62 & 67 of 2016

1. **OKAO JIMMY alias BABY**
2. **OGWANG PATRICK alias OSINDE**
3. **OGWANG ANDREW SALEH** ..... **APPELLANTS**
4. **OWOO GEORGE**
5. **OGWAL RAMADHAN**

VERSUS

UGANDA..... **RESPONDENT**

(An appeal from the decision of the High Court at Gulu before Her Lordship Hon. Lady Justice Dr. Winfred Nabisinde dated the 8th day of April, 2016 in Criminal Session Case No. 0110 of 2014)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice F.M.S Egonda- Ntende, JA
Hon. Lady Justice Hellen Obura, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of *Dr. Winifred Nabisinde J,* in High Court Criminal Case No. 0110 of 2014.

Brief background

The facts as accepted by the learned trial Judge were that, on the 6th day of January, 2014, at Ireda Lumumba, Central division in Lira District, the appellants robbed

Ug.shs. 65 million from Akidi Susan Eryau and immediately before or immediately after they shot her dead and also injured Enamu Jonathan the deceased's son.

The appellants were indicted in the High Court on three counts. The first count was murder contrary to *Sections 188* and *189* of the Penal Code Act, the second count was aggravated robbery contrary to *Sections 285* and *286 (2)* of the Penal Code Act and the third count was attempted murder contrary to *Section 204* of the Penal Code Act. The learned trial Judge convicted all the five appellants on all the three counts, the 1st appellant was convicted on his own plea of guilt and was sentenced to 25 years imprisonment, the 2nd, 3rd 4th and 5th appellants were each sentenced to 65 years on count one, 50 years imprisonment on count two and 35 years imprisonment on count three. The sentences were to run concurrently.

The appellants being dissatisfied with both conviction and sentence appealed to this Court. They filed separate memoranda of appeal.

The 1st appellant's grounds of appeal are set out as follows:-

1. *The learned Judge erred in law and fact when she convicted the appellant on count one without ascertaining whether he had understood the charge against him.*
2. *The learned trial Judge erred in law and fact when she did not read count two to the appellant before asking him to plead to it.*
3. *The learned trial Judge erred in law and fact when she failed to read and explain the charge in count two to the appellant before having him plead to the indictment.*
4. *The learned trial Judge erred in law and fact when she admitted and made the appellant to reply to facts presented yet it was clear that they never related to this particular appellant.*
5. *The learned trial Judge pronounced only sentence for the appellant without guiding on which of the counts the sentence was for.*

6. *The learned trial Judge erred in law and fact when she passed a sentence which was harsh and excessive in the circumstances.*

The 2nd appellant's grounds of appeal are as follows:-

1. *The learned trial Judge erred as to the burden of proof and standard of proof and erred in disregarding or overlooking some or not sufficiently considering all the evidence given by the appellant in his defence especially that of alibi.*
2. *The learned trial Judge erred in law and fact when she failed to evaluate the whole evidence on record but relied on the unsubstantiated evidence of PW5.*
3. *The learned trial Judge erred in law and fact when she convicted the appellant on the charges of murder, aggravated robbery and attempted murder without subjecting him to plea and oath taking.*
4. *The learned trial Judge erred in law and fact when she based her decision to convict the appellant on the evidence of the co-accused and other circumstantial evidence which was not sufficiently corroborated by other independent evidence.*
5. *The learned trial Judge erred in law and fact when she ignored the outcome of the identification parade which did not implicate the appellant of being present at the scene of the crime and instead relied on the extra-judicial statement of PW5 which was not sufficiently corroborated by other independent evidence.*
6. *The learned trial Judge disregarded the proper sentencing principles when she illegally and injudiciously sentenced the appellant together with other accused to an omnibus sentence of 65 years imprisonment and compensation of Ug. Shs. 25,000,000 which sentences were illegal, too harsh and excessive in the circumstances.*
7. *The learned trial Judge erred in law and fact when she failed to properly evaluate the whole evidence on record and she wrongly convicted the appellant relying on the co- accused's uncorroborated evidence. The above errors,*

irregularities, omissions, non-directions or misdirection constituted and or caused a miscarriage of justice to the appellant.

The 3rd and 4th appellants' grounds of appeal are as follows:-

1. *That the learned trial Judge erred in law and fact when she found that Ogwang Andrew Saleh (A3) and Owoo George (A4) had been placed at the scene of the crime by prosecution.*
2. *That the learned trial Judge erred in law and fact when she based her conviction of A4 on speculation and conjecture.*
3. *That the learned trial Judge erred in law and fact when she ruled that A1 testifies after his plea of guilt before being sentenced.*
4. *That the learned trial Judge erred in law when she passed illegal and confusing sentences to the appellants.*
5. *That the learned trial Judge erred in law and fact when she failed to subtract the remand period from the sentence passed.*

The 5th appellant's grounds of appeal are set out as follows:-

1. *That the learned trial Judge erred in law and fact when she convicted the appellant on uncorroborated evidence of an accomplice Okao Jimmy alias Baby (PW5) and/ or on the basis of overwhelming circumstantial evidence concerning him with the prosecution case.*
2. *That the learned trial Judge erred in law and fact when she heavily relied on the advice of the two assessors to convict the appellant which Assessors had not been sworn and one absented himself during part of the proceedings.*
3. *That her lordship the learned trial Judge erred in law and fact when she improperly denied the appellant's defence of alibi.*
4. *That notwithstanding the above, the learned trial Judge erred in law when she meted an omnibus sentence on the appellants and/or imposed excessive and*

unlawful sentence(s) by failing to practically deduct the remand period of 2 years and 6 months from the final sentence(s).

5. *That the learned trial Judge erred in law and fact when she failed to put most of the prosecution witnesses i.e. PW1, PW3, PW4, PW6, PW7, PW8,PW9,PW11 and PW12 on oath and wrongly relied on their testimonies to arrive at a conviction.*
6. *That the learned trial Judge erred in law and fact when she failed to properly evaluate the whole evidence and thus left out other pieces of evidence that exonerated the Appellant (Ogwal Ramadhan).*

At the hearing of this appeal, learned Counsel *Mr. Levi Etum* (RIP) appeared for the 1st appellant, *Mr. Willy Olweny* appeared for the 2nd appellant, *Ms. Susan Wakalaba* appeared for the 3rd and 4th appellants on state brief and *Ms. Madina Kabagenyi* appeared for the 5th appellant on state brief while *Mr. Andrew Odiit* Senior Assistant Director of Public Prosecutions appeared for the respondent. Counsel with leave of the Court, were allowed to proceed by way of written submissions. It is on the basis of the written submissions that this appeal has been determined.

The 1st Appellant's case

Mr. Etum argued grounds 1, 2, 3 and 4 together. He submitted that, the learned trial Judge erred when she convicted the appellant on the basis of a defective indictment as the summary of the case did not disclose reasonable information relating to the three counts contained in the indictment. He argued that, the learned trial Judge failed to read and explain the charges against the appellant and a plea of guilt was entered against him without ascertaining whether he had understood the charges.

Counsel contended that, had Court addressed its mind to the law and facts presented, the appellant would not have pleaded guilty to the three counts. Further that, statement of facts are very important and lack of it renders the plea of guilty improper and the conviction and sentences a nullity. For the above proposition, he

cited *Adan vs R (1973) EA 448 and Juma Nkunyingi & Another vs Uganda, Court of Appeal Criminal Appeal No. 217 of 2012.*

In respect of ground 5, Counsel submitted that, the learned trial Judge erred when she pronounced a single sentence without specifying on which of the three counts the sentence was imposed. He argued that the sentence of 25 years imprisonment was harsh and manifestly excessive in the circumstances of the case.

He asked Court to quash the conviction and set aside the sentences imposed.

The 2nd appellant's case

Mr. Olweny argued grounds 1, 2, 4, 5 and 7 together. He submitted that, the appellant pleaded not guilty and set up a defence of *alibi* which was disregarded by the learned trial Judge. Court relied on the telephone print outs from MTN as circumstantial evidence against the appellant, as well as testimonies of PW7 Ajar Solomon and PW8 Omara Jimmy Brown who averred that, the appellant disclosed to them plans of robbing the deceased. PW5 Okao Jimmy testified that, he was with the appellant at the scene of the crime and that it was the 2nd appellant who shot the deceased after grabbing from her a bag containing money. Counsel contended that, PW5 made the testimony after he was convicted but before he was sentenced and as such it was wrong for the learned trial Judge to rely on his testimony since he was trying to exculpate himself, further that his testimony did not destroy or shake the appellant's defence of *alibi.*

Counsel argued that, the learned trial Judge heavily relied on the confession of PW5. The confession was secured under peculiar circumstances, as it was made after his conviction but before his sentence and Court did not consider any other evidence. The evidence adduced to Court did not prove the participation of the appellant in the commission of the offence. Court did not take into consideration the testimony

of the appellant and his mother rather it considered mainly the evidence which implicated the appellant.

In respect of ground 3, Counsel contended that, the oath taking was not conducted by the learned trial Judge for most of the witnesses. She argued that the witnesses were not bound to tell the truth hence the conviction and sentence meted on the appellant was irregular and illegal and as such it occasioned a miscarriage of justice.

In respect of ground 6, Counsel submitted that, the learned trial Judge erred when she passed omnibus sentences against all the appellants without considering individual circumstances. The learned trial Judge did not take into account the period the appellants had spent on remand, failure to do so renders the sentence a nullity. He asked Court to quash the conviction and set aside the sentence.

The 3rd and 4th appellants' case

Ms. Wakalaba argued grounds 1 and 2 together, she submitted that, there was no evidence linking the 4th appellant to the participation in the commission of the offence. The learned trial Judge relied on the testimonies of PW1 Eryau Francis and PW5 to infer the 4th appellant's participation. PW5 stated that, the 4th appellant is his brother and escorted him to pick his money further that, 5 people participated in the robbery but did not specifically mention the 4th appellant as having participated in the commission of the offence.

Counsel contended that, the evidence that linked the 3rd appellant to the commission of the offence was too weak to sustain the conviction passed against him. The evidence that was adduced by PW5 was not corroborated to place the appellant at the scene of the crime.

In respect of ground 3, Counsel argued that, the learned trial Judge erred when she relied on the evidence of PW5 who had pleaded guilty to the charges against him but

sentence had not yet been passed. PW5 was trying to exonerate himself. She also contended that the sentence passed was confusing, harsh and illegal.

In respect of grounds 4, 5 and 6, Counsel submitted that, the learned trial Judge erred when she passed an omnibus sentence of 65 years imprisonment in respect of count one, 50 years imprisonment in respect of count two and 35 years imprisonment in respect of count three against all the appellants without considering individual circumstances. The learned trial Judge did not take into account the period the appellants had spent on remand and failure to do so renders the sentence a nullity.

On the consequential order, Counsel argued that, the amount of money stolen from the deceased was 65 million Uganda Shillings. Further that the compensation order was apportioned to 4 people yet she had convicted 5 appellants. She asked Court to quash the conviction and set aside the sentence.

The 5th appellant's case

Ms. Kabagenyi, submitted that the learned trial Judge erred when she convicted the appellant on uncorroborated evidence of an accomplice PW5. She argued that such evidence had to be treated with caution since PW5 was trying to exonerate himself. In his extra-judicial statements he denied having participated in the commission of the offence and as such it was wrong for the learned trial Judge to base her conviction on the testimony or evidence of PW5.

In respect of ground 2, Counsel argued that, the learned trial Judge erred when she heavily relied on the advice unsworn assessors, further that one of the assessors absented himself during part of the proceedings yet as a rule of practice all assessors should attend the whole proceedings. She asked Court to find that the judgment was a nullity as it was arrived at in breach of the principles of a fair trial.

For the above proposition she relied on *Mpagi Geoffrey vs Uganda, Supreme Court No. 63 of 2015.*

On ground 3, Counsel submitted that, the appellant pleaded *alibi* in his defence which the prosecution failed to discredit or disprove, there was no assessment by Court to verify whether it was true or false. He submitted that, the learned trial Judge erred when she disbelieved the *alibi* of the appellant and convicted him on circumstantial evidence. She contended that, the *alibi* of the appellant was not sufficiently destroyed and as such the appellant was not placed at the scene of the crime. She asked Court to allow this appeal.

On ground 4, Counsel submitted that, the learned trial Judge erred when she passed omnibus sentences against all the appellants without considering individual circumstances. The learned trial Judge did not take into account the period the appellants had spent on remand, failure to do renders the sentence a nullity. She also added that, the learned trial ignored the mitigating factors in favour of the appellant and she asked Court to quash the conviction and set aside the sentence.

In respect of ground 5, it was submitted that, the learned trial Judge erred when she heavily relied on statements of unsworn witnesses. She argued that witnesses not bound by oath can state and aver wrong information which is at the detriment of the appellant.

On ground 6, the gist of this ground is that the learned trial Judge failed to evaluate the evidence on record as a result of which she came to a wrong conclusion. It was submitted that there were a lot of evidence adduced which the trial Judge failed to consider but rather she heavily relied on the evidence of PW5 and arrived at a conclusion that the appellant had been sufficiently placed at the scene of the crime. She asked Court to quash the conviction and set aside the sentence.

Respondent's reply.

Mr. Odiit Senior Assistant Director of Public Prosecutions filed written submissions in respect of the 1st, 2nd and 5th appellants only.

In respect of the 1st appellant, Counsel argued grounds 1, 2, 3 and 4 together. He submitted that, the learned trial Judge properly administered the plea of guilty. The indictment was read and explained twice at the request of the appellant upon which he changed his plea from a plea of not guilty to a plea of guilty. Counsel conceded to the fact that the summary of the case never presented the facts of aggravated robbery and murder however, he argued that, prosecution adduced sufficient evidence in respect of the offences that were committed by the 1st appellant. Prosecution offered all the relevant information to the appellant before trial and during pre-trial disclosure. The summary of the case is meant to give the appellant an idea of what the case is about.

In respect of ground 5 and 6 Counsel conceded to the fact that the learned trial Judge passed erroneous sentences. He submitted that the appellant was convicted after pleading guilty but no sentence was passed against him as per the record of appeal. He contended that failure to pass sentence against the appellant can be cured by this Court under Section 11 of the Judicature Act. He asked Court to dismiss the appeal and sentence the appellant accordingly.

In respect of the 2nd respondent, Counsel argued grounds 3, 6 and then 1, 2, 4, 5 and 7 together.

In respect of ground 3, Counsel submitted that, even though the record did not indicate that the appellant took oath, the oath was actually taken however the learned trial Judge skipped to record it. He argued that, the appellant would not have been cross-examined if he had not taken oath. He submitted that, Court can by implication arrive to the fact that the oath was administered. Counsel contended

that failure on the part of the learned trial Judge to clearly indicate on the record whether or not the appellant and the witnesses made sworn or unsworn statements did not cause any injustice to the appellant.

In respect of ground 6, Counsel adopted his earlier submissions earlier made in respect of the 1st appellant.

On grounds 1, 2, 4, 5 and 7, they are in respect of the burden of proof, standard of proof, the defence of *alibi,* lack of corroborative evidence and evidence of an accomplice. Counsel submitted that, the learned trial Judge adequately evaluated the evidence adduced by both the prosecution and defence. She did not shift the burden of proof to the appellant as contended. He argued that the evidence adduced by the prosecution squarely placed the appellant at the scene of the crime. The mobile phone print out showed that the appellant's phone was among the phones used for communication between the appellants on the fateful day. The learned trial Judge rightly disapproved the appellant's alibi.

Counsel contended that, the evidence of PW5 an accomplice was well corroborated by the testimonies of other witnesses PW2 Enamu Jonathan, PW7 and PW8, whose testimonies pointed to the participation of the appellant in the commission of the offence. However, he submitted that, Section 132 of the Evidence Act provides that, Court may properly convict upon uncorroborated evidence of an accomplice provided it warns itself and the assessors. But in the instant case, there was sufficient corroboration.

On the contention of the testimony of an accomplice, Counsel adopted his earlier submissions made in respect of the 1st appellant. He argued that, it was proper and prudent for the learned trial Judge to first hear the evidence of PW5 as an accomplice after pleading guilty and before sentencing him in order to understand the role he played in the commission of the offence. He submitted that, the learned

trial Judge had the discretion to sentence PW5 an accomplice before or after his testimony.

He asked Court to dismiss the appeal.

Reply to submissions of the 5th appellant.

In respect of ground 1, Counsel adopted his earlier submission and prayers in respect of the 2nd appellant. He argued that the evidence of PW5 was sufficiently corroborated by the testimonies of PW7 and PW8, he clarified that although PW7 and PW8 had been previously charged the charges against them had been withdrawn, he contended that the two witnesses were not accomplice witnesses but were rather eye witnesses.

In respect of ground 2, Counsel submitted that, the assessors were duly sworn in by the learned trial Judge. He conceded to the fact that one of the assessor was absent during part of the hearing, however Counsel noted that the assessor simply came in late and later proceeded with the trial. He submitted that, Court can under Section 69 of the Trial on Indictments Act proceed with one assessor in the absence of a second assessor. He asked Court to dismiss this ground of appeal.

In reply to ground 3, Counsel submitted that the evidence adduced by the prosecution profoundly placed the appellant at the scene of the crime. There was close vicinity between the scene of the crime and the place where the appellant claimed to have been at the time the crime was committed. DW13 testified to have met the appellant at 8pm at White House Hotel, but he failed to explain where the appellant was at 7pm, the time the offence was committed. He asked Court to find that the defence raised by the appellant was destroyed by the prosecution.

Ground 4, Counsel adopted his earlier submissions in reply to ground 5 and 6 of the 1st appellant.

Ground 5, Counsel adopted his earlier submissions in reply to ground 3 of the 2nd appellant.

In respect of ground 6, Counsel submitted that, the learned trial Judge properly evaluated the whole evidence adduced at the trial, she did not rely on the evidence of PW5 solely as contended by the appellant. He asked Court to dismiss the appeal.

Resolution

We have carefully perused the record and considered the submissions of both Counsel. We are alive to the fact that this Court has a duty as the first appellate Court to re-appraise the evidence and come up with its own conclusions. See:- *Rule 30(1)* of the Rules of this Court, *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997* and *Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.*

We shall first determine ground 2 for the 5th appellant, the learned trial Judge is faulted for heavily relying on the assessors opinion yet they had not been sworn in and one was absent during the trial. Ms. Kabagenyi pointed out an irregularity in the proceedings before the trial Court which we think is a substantive issue. She argued that the learned trial Judge permitted an assessor who has absented himself from part of the trial and did not hear the evidence of one of the defence witnesses to proceed with the trial. Counsel contended that such an irregularity was fatal to the whole trial.

The law governing swearing in of assessors is *Section 67* of the Trial on Indictments Act. It provides as follows:-

> *"At the commencement of the trial and, where the provisions of section 66 are applicable, after the preliminary hearing has been concluded, each assessor shall take an oath impartially to advise the court to the best of his or her knowledge, skill and ability on the issues pending before the court."*

We note at page 41 of the record of appeal that, the assessors clearly took their oath. It reads as follows:

> *"Court:*
>
> *The two Assessors to take oath*
>
> 1. *Ojungu Edward, Protestant, 40 years old*
> 2. *Akwat Thomas Patrick, male adult 58 years, Protestant."*

From the above we find that the assessors were duly sworn in.

The appellant also contended that one of the assessors was absent during part of the hearing. From the outset we wish to point out that the absence of assessors from a trial is not a mere irregularity. The law governing absence of an assessor in a trial before the High Court is provided by *Section 69 (1)* of the Trial on Indictments Act. It stipulates as follows:-

> *"(1) If, in the course of a trial before the High Court at any time before the verdict, any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself or herself, and it is not practicable immediately to enforce his or her attendance, the trial shall proceed with the aid of the other assessors.*
>
> *(2) If more than one of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of different assessors"*

In the instant case, hearing started on 19th March 2015 with two assessors, Ojungu Edward and Akwat Thomas Patrick who were duly sworn in as indicated above. On 3rd December 2015 one of the assessors was absent during part of the hearing. He missed part of the evidence of DW12 Ocepa Geoffrey and he resumed later. The trial Court proceeded with both assessors, summing up was made to both assessors on

1st February 2016 and their joint opinion was delivered in Court on 8th February 2016. The record indicates as follows:-

"We are ready with our opinion and we are presenting a joint opinion."

In their joint opinion the assessors advised Court to convict the appellants on all the three counts. We are of the view that the second assessor, having absented himself from part of the trial and did not hear the evidence even of only one witness should not have been permitted to resume participation and give opinion in the case. See:-*Abdu Komakech vs Uganda [1992 -93] HCB 21,and Mukiibi Emmanuel vs Uganda, Court of Appeal CriminalAppeal No 43 of 1996 (unreported)*

Allowing the assessor to resume participation in the trial was a fundamental irregularity which occasioned a miscarriage of justice. The assessor's opinion was based on incomplete evidence and it could have influenced the decision of the Judge.

Section 34(1) of the Criminal Procedure Code Act provides as follows:-

> *"The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."*

Taking into account the provisions of the law, we hereby allow the appeal, quash the conviction and set aside the sentences imposed upon the 2nd, 3rd, 4th, and 5th appellants.

We find no point of considering the rest of the grounds in respect of the above appellants. We accordingly order a retrial before a different judge. The appellants therefore must be kept in custody pending the retrial. They are at liberty to apply to the High Court to be released on bail pending their retrial.

We shall now proceed to resolve the grounds of appeal in respect of the 1st appellant. He was convicted on all the three counts on his own plea of guilt. We shall determine grounds 1, 2, 3 and 4 together. In those grounds the appellant faults the learned trial Judge for having failed to follow the legally established procedure of recording a plea of guilt.

The law governing the taking of plea in the High Court, by any person indicted of an offence triable by the High Court, is in *Section 60* of the Trial on Indictments Act (TIA). It stipulates as follows:

> *"The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy."*

Section 63 of the Act provides that upon the accused person pleading guilty, the Court shall record the plea of guilt; and may convict the accused person on it. It is worthy to point out that while the Act provides that an accused person may be convicted upon his own plea of guilt to the indictment, it is now a well-established and mandatory requirement founded on Court decision. See: *Adan vs Republic [1973] E.A. 445,* that

after Court has entered the plea of guilt, the prosecution must state the facts of the case. It is only after the accused person has admitted that the facts as stated by the prosecution are correct, that Court may proceed to convict the accused person on his or her own plea of guilt.

In *Sebuliba Siraji vs Uganda, Court of Appeal Criminal Appeal No. 0319 of 2009*, the Appellant was ambivalent in his plea; changing from plea of not guilty, to that of guilty. Finally, he pleaded guilty to murder after notifying Court that his lawyer had explained to him the consequences of pleading guilty to the indictment. He also confirmed that the statement of facts of the case, as presented by the State Counsel was correct; following which the trial judge then convicted him on his own plea of guilt. This Court recast a passage from *Adan vs Republic* (supra) at, p. 446, and stated as follows:-

> *"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter, the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he admits, his answer should be recorded as nearly as possible in his own words and then plea of guilt formally entered.*
>
> *The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the Court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."*

We note from the record of appeal that appellant requested to change his plea from a plea of not guilty to a plea of guilt, the learned trial Judge was informed and she read and explained the charges again to the appellant upon which the appellant pleaded guilty on all the three counts. The record of the proceedings of the plea taking attests to this. It reads as follows: -

> *"Court: The indictment is read and explained to the accused person in Lango language.*
>
> *Count 1:*
>
> *Court: Indictment read again and facts to Accused 1.*
>
> *Court: Have you understood the 1st Count in this case.*
>
> Accused: *It is true*
>
> *Court: Plea of guilty*
>
> *Count II*
>
> *Court: Have you understood the 2nd Count*
>
> *Accused: Yes I have understood. It is true*
>
> *Court: Plea of guilty*
>
> *Count III*
>
> *Court: Have you understood the third Count in this case*
>
> *Accused: Yes I have understood*
>
> *Court: What is your plea?*
>
> *Accused: It is true"*

It was after this that the learned trial Judge entered the plea of guilty against the appellant on all the three counts. After the trial Judge had recorded the plea of guilty, State Attorney presented the facts of the case; which the learned trial Judge recorded. The

statement of facts disclosed the circumstances under which the appellant had committed the crimes. Upon the presentation of the facts by the State Attorney the appellant replied as follows: -

"Accused: Facts are true and correct."

Following the admission of the correctness of the facts by the appellant, the learned trial Judge then convicted him in the following words: -

"Court: Accused 1 Okao Jimmy Alias Baby is convicted on all 3 counts of

- *Murder c/s 188 and 189 of the Penal Code Act on Plea of guilty*
- *Attempted Murder c/s 204 Penal Code Act on Plea of guilty and Aggravated Robbery c/s 285 and 286(2) of the Penal Code Act on own plea of guilty."*

We note from the record that the indictment was read over again and explained to the appellant and from his response, it is quite apparent that he understood that she had been indicted with the offence of murder, aggravated robbery and attempted murder. Had the indictment not been explained to him it would not have amounted to a plea of guilty for the counts with which he had been indicted. Court would then have erred to enter a plea of guilty for charges against him

Furthermore, the statement and particulars of the offence in the indictment were in agreement with the statement of facts presented by State Counsel after the plea of guilt, which the appellant accepted as being correct. In the circumstances then, we find that the appellant was unequivocal in his plea of guilty on the counts with which he was indicted. We also find that whatever omission that there was, in the plea taking process, such failure occasioned no miscarriage of justice to the appellant. We find no merit in grounds 1, 2, 3 and 4 of this appeal.

In respect of grounds 5 and 6, it was contended that, the sentence imposed by the learned trial Judge was illegal, harsh and manifestly excessive in the circumstances of the case.

As an appellate Court, we are constrained not to interfere with a sentence imposed by the trial Court, merely because we would have imposed a different sentence had we been the trial Court. We can only interfere with sentence where it is either illegal, or founded upon a wrong principle of law, or a result of the trial Court's failure to consider a material factor, or where it is harsh and manifestly excessive in the circumstances of the case. *See:- James vs R. (1950) 18 E.A.C.A. 147, Ogalo s/o Owoura vs R. (1954)24 E.A.C.A. 270.*

In the case of *Kyalimpa Edward vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995,*the Supreme Court clarified on these principles as follows: -

> *"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 court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."*

See: *Kiwalabye Bernard vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001.*

Furthermore, in the exercise of its discretion during the sentencing of a convict, while being cognizant of the fact that no two cases are the same, Court must always have in mind the need to maintain consistency or uniformity in sentencing. It should also be noted that murder convicts fall in different categories, as some are first offenders, some plead guilty or remorseful. The circumstances under which the offences are committed are also different which Court should take into account in the exercise of its discretion during sentencing.

In this case the appellant premeditated the robbery. He used a gun, a deadly weapon while committing the offence and killed an innocent victim before taking away her money. These are aggravating factors.

However, there are mitigating factors in favour of the appellant. He was first offender. He was relatively young aged 25 years at the time of the commission of the offence. He was remorseful. He had each spent 2 years and 4 months on remand. He pleaded guilty to the offence and did not waste Court's time.

In *Mbunya Godfrey vs Uganda, Supreme Court Criminal Appeal No. 4 of 2011,* the Appellant was convicted for the murder of his own wife by cutting her neck. The Supreme Court imposed a sentence of 25 years in prison. Amongst the factors, which the Court considered in that case, was the need to afford the appellant, a first offender, the opportunity for reform and reconciliation with the community where he had committed the crime.

In *Kereta Joseph vs Uganda, Court of Appeal Criminal Appeal No. 243 of 2013,*this Court reduced the sentence of 25 years imprisonment, which the trial Court had imposed on the Appellant for murder, to 14 years in prison; on the grounds that the appellant was of advanced age, and was remorseful.

In *Marani Adam & Another vs Uganda, Court of Appeal Criminal Appeal No. 829 of 2014,* the appellant was convicted of murder and sentenced 40 years imprisonment. This Court reduced the sentence to 27 years imprisonment.

In *Olupot Sharif & another vs Uganda, Court of Appeal Criminal Appeal No. 0730 of 2014,* the appellant was convicted of the offence of aggravated robbery and was sentenced to 40 years imprisonment. On appeal, this Court reduced the sentence to 32 years imprisonment.

Taking into account all the aggravating and mitigating factors and bearing in mind the decisions in the above cited cases, we hereby set aside the omnibus sentence of

25 years imprisonment and substitute it with 18 years in respect of count one, 15 years imprisonment in respect of count two and 10 years imprisonment in respect of count three to run from 19th March, 2015 the date of his conviction, all the three sentences to run concurrently.

We so order.

Dated at **Kampala** this 2nd day of May 2019.

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Kenneth Kakuru
JUSTICE OF APPEAL

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F.M.S Egonda -Ntende
JUSTICE OF APPEAL

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Hellen Obura
JUSTICE OF APPEAL