THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL UGANDA AT MBARARA

CRIMINAL APPEAL NO. 715 OF 2015.

Arising from the judgment of the High Court sitting at Kabale (Michael Elubu, J) in Criminal Session Case No. 40 of 2012.

[CORAM: ELIZABETH MUSOKE, STEPHEN MUSOTA, JJA&REMMY KASULE, Ag. JA]

BETWEEN

1. ARAMANTHAN HASSAN]
2. NIYONZIMA RICHARD]:::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

UGANDA:: RESPONDENT

JUDGMENT OF THE COURT

This appeal arises from the judgment of the High Court at Kabale whereby both appellants were tried and convicted of the offences of Murder and Aggravated Robbery contrary to **Sections 188 and 189** as well as **Sections 285** and **289 (2)** of the Penal Code Act.

Each appellant was sentenced to 50 years imprisonment for each offence, the sentence were to be served concurrently.

Background

The facts of the case were that on the night of 4th November, 2010 at Kisoro Hill Village, Kisoro Town Council, the two appellants, together with seven others, were alleged to have stolen a motor cycle registration No.UDM 945M (Bajaji Boxer) from a one Ndatira Dick and immediately before or after the theft, they used

a deadly weapon in the nature of iron bars upon the victim causing him to suffer injuries that resulted into his death.

The two appellants, and seven others, were all arrested, charged of murder and aggravated robbery and on denying the offences they were tried by the High Court at Kabale (Michael Elubu, J) with the prosecution calling 15 witnesses to prove its case. Each accused person gave sworn testimony in defence and called no witnesses.

At the conclusion of the trial, the learned trial Judge found the offences of murder and aggravated robbery proved beyond reasonable doubt against each one of both appellants. Each appellant was accordingly convicted of the offences. The learned trial Judge that no offence had been proved against the other seven accused persons. The said seven were acquitted of the said offences and set free. Each appellant, was sentenced to 50 years imprisonment.

Dissatisfied with the Judgment of the trial court, the appellants lodged an appeal to this court against both conviction and sentence.

At the hearing of this appeal, the appellants were represented by learned counsel Kentaro Specioza on state brief, while learned State Attorney Peter Mugisha was for the respondent.

Due to the Covid-19 pandemic in the country and in compliance with the Government Health Regulations aimed at stopping the spread of that virus, both appellants were not present in the Court room where the Court of Appeal sat in Mbarara. Both

appellants remained confined at the Government Prison premises at Mbarara. However, through video conferencing and communication technology of the Court, both appellants fully participated in the Court of Appeal proceedings throughout the hearing of the appeal and each appellant was in constant touch and communication with his lawyer.

The appellants raised 7 grounds of Appeal, grounds 1 to 4 being by a Memorandum of Appeal filed in Court on 09 03. 2020 and grounds 5 to 7 being in a supplementary grounds of appeal admitted on record with leave of the Court, on 25.06.2020. The grounds of appeal are:

1. The learned Trial Judge erred in law and fact to rely on a charge and caution statement which was obtained under duress.

2. The learned Trial Judge erred in law and fact to act on uncorroborated evidence of the recovered sandals allegedly belonging to the 1st appellant which caused a miscarriage of justice.

3. The learned Trial Judge erred in law and fact to give an omnibus sentence for two different counts which was procedural irregularity.

4. The learned Trial Judge erred in fact to sentence the appellants to 50 years imprisonment which was a harsh sentence.

5. The learned trial Judge erred both in law and in fact to try and convict the appellants without taking a plea.

6. The learned trial Judge erred both in law and in fact to convict the 2nd appellant without summing up to assessors which was a procedural irregularity.

7. The learned trial Judge erred both in law and in fact to convict the appellants without proof of the ingredient of participation and without properly evaluating the entire evidence on record.

Respective counsel for the appellants and respondent proceeded with leave of Court, by way of written submissions.

Submissions for the Appellants

On the first ground, Appellant's counsel submitted that the learned trial Judge was in error to admit and rely on the charge and caution statement made by the 2nd appellant as a confession and to base his conviction of both appellants upon the same when there was evidence that the 2nd appellant made the said charge and caution statement involuntarily by reason of and as a result of the torture that he had been subjected to by the State security personnel at the time of his arrest.

For the same reasons, learned appellant's Counsel argued that the learned trial Judge was also in error to use the same charge and caution statement as evidence implicating the 1st appellant in the commission of the offences, yet the 2nd appellant had denied the validity of the said charge and caution statement.

In support of the above submissions, Counsel relied upon **Section 24 of the Evidence Act** and the case authority of **Andrew Walusimbi and others v Uganda; Supreme Court**

Criminal Appeal No. 28 of 1992, where the Supreme Court held that as to the admissibility of a charge and caution statement, the trial Court must determine whether or not, on the basis of the evidence available to the Court, the confession is in fact true or false. The same Court must also consider the nature of the inducement, if any, and whether or not those inducements led to the confession to be false.

Learned Counsel for the appellants also pointed out the contradictions in the prosecution evidence, in a trial within a trial, whereasPW1, Sebumpete testified that when taking a charge and caution statement from the 2nd appellant he had no police file, while PW2, Bwambale Jonathan, who took the 2nd appellant, to PW1contradicted him by testifying that PW1 had a police file with him.

Counsel also submitted that the learned trial judge was in error in finding that the 1stappellant had admitted having committed the offences in a statement allegedly made by the 1st appellant to PW14, yet in cross-examination, PW14 denied recording any statements from the accused persons including the 1st appellant. He explained that he did not even know whether the OC CID recorded any charge and caution statement from the 1st appellant.

Counsel for the appellants further argued that the learned trial Judge ought to have held the 1st appellant to be innocent of both offences on the basis of the statement taken from him (1st appellant) by the police, admitted in evidence as Exhibit ED1,

whereby the 1st appellant denied participating in the commission of any of the offenses of which he had been charged.

Counsel also faulted the learned trial Judge for first, correctly reminding himself that the confession used against a co-accused as being the evidence of the weakest nature to prove a case against an accused, but then in a very contradicting way, the learned trial Judge committed the error of relying upon the evidence of the very same nature to convict the 1st appellant of the offences charged.

Counsel also pointed out that the evidence of the sandals that were exhibited as having been found at the scene of crime and which were claimed to belong to the 1st appellant, ought not to have been relied upon by the trial Judge. This is because it was never proved beyond reasonable doubt that these sandals, apart from resembling those of the 1st appellant, were actually those of the 1st appellant. Further, the evidence of the sandals were part of the charge and caution statement of the 2nd appellant, which evidence ought not to have been relied upon to convict the 1st appellant.

Counsel prayed that this court allows ground 1 of the appeal.

On the second ground of appeal, learned Counsel for appellants reiterated his submissions made in respect of ground 1 as concerned the issue of sandals. Learned Counsel further argued that there was no clear description of the sandals and there was no any other piece of evidence corroborating the evidence of the recovered sandals to connect them with the 1st appellant.

Counsel prayed this court to allow ground 2 of the appeal.

On the third ground, Counsel submitted that, while sentencing, the trial Judge did not specify the sentence for each offence in respect of the 2nd appellant.

Counsel referred this Court to **Section 2(2) of the Trial On Indictments Act** that provides that when a person is convicted at one trial for two or more distinct offences, the High Court may sentence him or her for those offences to several punishments which the Court is competent to impose, and when consisting of imprisonment, to commence one after the expiration of the other in such order as the Court may direct, unless the Court directs that the punishments shall run concurrently.

Learned Counsel reasoned that it was hard to determine whether the 2nd appellant was sentenced to 50 years imprisonment on either one or both offences. The trial Judge merely stated: "Niyonzima Richard shall serve 50 years." According to Counsel, such a sentence is ambiguous and left the 2nd appellant in suspense; not knowing whether the sentence is for only one offence; or whether the 2nd appellant will have to serve another sentence for the second offence after having served the one of 50 years imprisonment.

Counsel invited this court to set aside the sentence as passed against the 2nd appellant for being ambiguous and omnibus and, in the event that the conviction of the 2nd appellant is not set aside, then this Court carry to pass an appropriate sentence upon the 2nd appellant.

On the fourth ground, appellants' Counsel contended that the sentence of 50 years imprisonment imposed upon each appellant was harsh and excessive in the circumstances. Counsel referred Court to the case of **Naturinda Tomson v Uganda; Supreme Court Criminal Appeal No. 025 of 2015**; where the appellant was sentenced by the trial Court to 18 years imprisonment for aggravated robbery and on appeal, this Court of Appeal reduced it to 16 years imprisonment and on a further appeal to the Supreme Court, the 16 year imprisonment sentence was upheld.

Counsel thus prayed that ground four of the appeal be allowed, by this Court setting aside the sentence of 50 years imprisonment as being too harsh to amount to a miscarriage of justice in respect of each appellant. Learned Counsel further invited this Court that, in the most unlikely event of the convictions of each appellant being maintained, then let this Court, in the exercise of the jurisdiction of the trial Court vested into the appellate Court under Section 11 of the Judicature Act, determine the appropriate sentences for each appellant to be 18 years imprisonment for murder and 16 years imprisonment for aggravated robbery, the said sentences to run concurrently.

On the fifth ground, appellants' Counsel submitted that **Section 60 of the Trial on Indictments Act** required an accused to take a plea to the indictment. However in this case, learned counsel contended that the entire trial Court proceedings do not state anywhere that the appellants pleaded to the offences they were charged, tried and convicted of. They were therefore convicted and sentenced without taking a plea. Counsel relied upon the

case of **Okuja Francis v Uganda; Court of Appeal Criminal Appeal No. 144 of 2014,** where, relying on **Adan v Republic [1973] EA 445,** this Court held that the charge and the particulars of the charge have to be read out to the accused, in his/her own language as far as it is possible. If this is not possible then the same ought to be read to him or her in the language which he/she can speak and understand.

Counsel referred to **Section 51 (1) (a) of the Trial On Indictments Act,** that provides that where an indictment is altered, the accused person is required to plead to the altered indictment. This, according to Counsel, was not done in the instant case when the State Attorney amended the indictment by amending the registration number of the Bajaj motor cycle from UDM 945M to UDM 985W. All this rendered the trial of the appellants to be illegal. Counsel thus prayed that the fifth ground of the appeal be allowed.

On the sixth ground of appeal, Counsel submitted that the summing up was done in respect to the 1st appellant only that no summing up was done in respect of the 2nd appellant. Therefore convicting the 2nd appellant without summing up being done to the assessors as regards the case against the 2nd appellant, rendered the conviction of the 2nd appellant illegal. Appellants counsel thus prayed that the sixth ground of the appeal be allowed.

On the seventh ground of appeal, appellants' Counsel contended that the element of participation of the 1st appellant in the commission of the offences was never proved at all and as

regards the 2nd appellant the trial Judge relied on the charge and caution statement to convict the 2nd appellant, when the same had been involuntarily obtained and thus inadmissible as evidence.

Furthermore, appellant's Counsel faulted the trial Judge for relying on the piece of evidence to the effect that the voters' card belonging to the deceased was found in the room where the 2ndappellant lived according to the testimony of PW5, and for the learned trial Judge to base his conviction of both appellants upon that fact. This is because the 2nd appellant denied having a house in Kisoro and asserted that he had spent 9 months in Rwanda without coming to Kisoro. For the same reason, appellants' Counsel contended, the evidence regarding the voter's card was not credible at all since the 2nd appellant denied having been the owner of the house in which the voter's card of the deceased was found. This 2ndappellant also denied having had a wife by the name of Mbabazi or at all. He maintained that, at all material time he was in Rwanda and that is where he was arrested from. The sixth ground of appeal had thus to be allowed.

Submissions for the Respondent;

Counsel for the respondent conceded to the appeal in respect of the 1st appellant, Aramathan Hassan, but opposed the appeal by supporting the finding and holdings of the learned trial judge as regards the 2nd appellant Niyonzima Richard.

The reasons for respondent's Counsel conceding to the appeal in respect of the 1st appellant are that the learned trial Judge convicted the 1st appellant basing himself on the evidence of

sandals were not formally admitted as an exhibit in the evidence. They were only tendered in Court as an identified article, ID2. It is only the evidence relating to sandals that puts the 2nd appellant at the scene of crime. In the absence of this evidence, the 2nd appellant's had to be vacated, respondent's Counsel conceded.

On first ground, as regards the 2nd appellant, Counsel submitted that the trial Judge properly directed himself on the issue of a retracted confession before he admitted the same, after conducting a trial within a trial, as having been voluntarily made by the second appellant.

Learned Counsel for the respondent relied on the case of **Twamoi v R (1967) E.A 84,** where court held that a confession is not a confession unless it is sufficient by itself to prove the guilt of the person making it of the offence charged. Learned counsel contended that the charge and caution statement made by the 2nd appellant passed the test of being a valid confession of the 2nd appellant and was rightly used by the trial Judge to convict the said the 2nd appellant of both offences of murder and aggravated robbery. Counsel prayed this court to disallow ground one of the appeal as regards the 2nd appellant.

As to ground 2 of the appeal, counsel conceded to this ground for reasons already stated for the respondent conceding to the appeal of the 1st appellant.

On the third ground, Counsel submitted that in respect of the 2nd appellant, the learned trial Judge clearly stated that the sentence he passed against the 2ndappellant was: **"on both counts**

concurrently" This meant that the 2nd appellant was sentenced to 50 years in respect of each offence of murder and aggravated robbery and that the two sentences are to run concurrently. That is that the 2nd appellant is to serve a sentence 50 years for both offences. Counsel therefore prayed this court to disallow this ground of appeal as having no merit at all.

On the fourth ground, Counsel referred Court to the role of the appellate court, as regards interfering with a sentence imposed by the trial Court, as laid out in the case of **Kiwalabye v Uganda; Supreme Court Criminal Appeal No. 143 OF 2001**, where it was held that the appellate Court of first instance will not normally interfere with the discretion of the sentencing trial Judge unless the sentence is illegal or unless appellate Court is satisfied that the sentence imposed by the trial Judge is manifestly too harsh and/or excessive or too low as to amount to a miscarriage of justice.

Counsel contended that the sentence passed against the 2nd appellant was neither harsh nor excessive in the circumstances. He referred to **Karisa Moses v Uganda; Supreme Court Criminal Appeal No. 23 of 2016**, where 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 the Judge exercises his/her discretion. In practice the appellate court will not interfere with the discretion of the sentencing Judge and that each case presents its own facts upon which the Judge exercises his/her discretion.

Learned Counsel also referred to the **Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013,** which provide in their **Paragraph 19 Third Schedule, part 1** in respect of the offence of murder and that of aggravated robbery a maximum sentence of death and the sentencing range for each of the two offences to be from 30 years imprisonment up to death. Therefore the sentence of 50 years imprisonment for each offence falls within the ambit of the stated Sentencing Guidelines. Respondent's Counsel therefore prayed for this court to disallow ground four of the appeal.

On the fifth ground, respondent's Counsel submitted that at trial, the appellants knew very well what they were doing in Court and that is why each one, like the rest of the accused, defended himself against the offence of murder and aggravated robbery.

There was also an interpreter present in Court translating the Court proceedings into the language that appellants understood very well. Thus each appellant followed properly the trial Court proceedings and each one knew what offences he was defending himself against. Counsel also referred Court to the fact that appellants gave sworn testimony to Court at the trial clearly indicating they were aware of the charges each one had to answer. Counsel invited Court to consider **Article 126 (2) (e) of the Constitution of Uganda** that enjoins Court to administer justice without undue regard to technicalities and find that the omission to indicate whether the charge sheet was read to each one of them was not fatal and uphold the conviction of the 2nd appellant of the charges of murder and aggravated robbery.

On the sixth ground, Counsel referred Court to the notes of the trial Judge on summing up to the assessors and submitted that the 2nd appellant was also covered like the other accused persons in the summing up to the assessors. Therefore, there was no error committed by the learned trial Judge and the conviction of the 2nd appellant ought to be upheld as proper in law. Counsel invited this Court to disallow ground six of the appeal.

As to ground 7 of the appeal, the respondent's counsel reiterated the submissions made in respect of ground 1 of the appeal to the effect that the charge and caution statement made by the 2ndappellant and which the trial Judge held, after holding a trial within a trial, to be admissible in evidence, proved the participation of the 2nd appellant in the commission of the offences of murder and aggravated robbery beyond reasonable doubt. Ground 7 of the appeal therefore had no merit at it relates to the 2nd appellant. The same ought to be disallowed.

Counsel prayed this Court to dismiss the appeal as being without merit as regards the 2nd appellant since all the grounds of the appeal were without merit.

RESOLUTION BY COURT:

We have carefully considered the submissions of both counsel and also perused the Court record of the trial Court. We have also carefully gone through the case authorities relevant to this appeal and also taken note of the statutory provisions of the law referred to.

The duty of the first appellate Court is to review and re-evaluate the evidence before the trial Court, by subjecting it to a fresh scrutiny, draw inferences therefrom and reach our own conclusions as to the convictions and sentences passed upon each appellant, bearing in mind that this court did not have the opportunity to hear, see and observe the witnesses testify at trial as the learned trial Judge did. See: **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, Kifamunte Henry v Uganda (SCCA No. 10 of 1997).**

We will therefore proceed to exercise the above duty in resolving this appeal.

The respondent's learned Counsel has conceded that this appeal be allowed with regard to conviction of the 1st appellant, Aramathan Hassan. This Court has to resolve, whether or not the appeal of the 1st appellant be allowed or disallowed, depending on the evidence and both the Court and statutory law authorities adduced and availed to the trial Court. We accordingly proceed to first consider the appeal as it relates to the 1st appellant.

The reasons for the State conceding the appeal as it relates to the 1st appellant are stated in the written submissions of the respondent signed by Nakafeero Fatinah, Ag. Principal State Attorney, dated 19th June, 2020. The reasons are:

"My Lords the respondent concedes to the appeal in respect to the first appellant Aramathan Hassan and opposes the appeal and supports the conviction and sentence imposed by the trial Judge against the 2nd appellant. Our concession therefore disposes off ground 2.

My Lords before I tackle the 2nd appellant's appeal, it is important to inform Court of the reasons why the respondent is conceding to the 1st appellant's appeal and briefly are:

1) ***The learned trial Judge convicted basing on evidence which was not admitted (sandals). See list of exhibits on page 106.***
2) ***There is no other piece of evidence apart from the sandals and which is uncorroborated and not sufficient to sustain the conviction".***

This Court observes with regard to the evidence of sandals, that PW4 D/Sgt Sebahire George who testified that he recovered the light blue sandals stained with blood, 15 paces from the deceased's body at the scene of crime, never identified those sandals before the trial Court.

It is also of significance that, according to the trial Court record, PW1 recovered from the scene of crime sandals that were light blue in colour. However PW10 Nsengayunva Julius who claimed that he had for eight months seen the 1st appellant put on these sandals described the colour of the sandals to be of "blue/green colours". The contradiction in the colour of the sandals as described by PW4 and PW10 raises doubt as to whether the two witnesses were describing and referring to the same pair of sandals. PW10 did not give any other aspect of the sandals, other than their colour, that enabled him to conclude that this particular pair of the sandals is the one that belonged to the 1st appellant.

It is also worthy noting that although the 1st appellant gave a sworn testimony and was cross examined at trial, it was never put to him that this particular pair of sandals belonged to him for him to admit or deny their ownership. No question was put to him at all as regards the pair that was claimed to be his.

The only piece of evidence that put the 1st appellant to the scene of crime where the deceased was murdered and the body left in a pool of blood was the sandals. It is this piece of evidence that would provide a basis to rely upon the charge and caution statement of the 2nd appellant as proving that participation of the 1st appellant as a co-accused of the 2nd appellant in committing the offences of murder and aggravated robbery of which both appellants were charged.

The evidence of DW5, Bitiro Wilberforce, who was a co-accused of both appellants at the trial, is of least value as regards the subject matter of the sandals recovered at the scene of the crime. Under cross-examination DW5 stated on page 58 of the record of the trial proceedings that;

"After bringing Aramathan they also brought some shoes which I knew that they belonged to Aramathan".

Later on DW5 stated under Re-examination that;

"I was arrested first before Aramathan (A1) I mentioned the shoes I knew that belonged to Aramathan".

The Aramathan (A1) this DW5 was referring to in the above quotations must have been the 1st appellant to this appeal.

It is unexplained as to who brought *"some shoes"* which this DW5 knew that they belonged to the 1st appellant. The nature of the shoes, whether sandals or some other type of shoes that were taken to the 1st appellant is not stated. DW5 does not even state the colour of these shoes as the sandals that were *"light blue"* in colour stained with blood that PW4 recovered from the scene of crime, or whether DW5 was referring to the sandals of the *"blue/green"* colours that PW10 Nsengayunva Julius claimed he had seen the 1st appellant put on for eight months. It is also possible that DW5 was referring to a totally different *"some shoes"* that he (DW5) knew belonged to the 1st appellant.

Given the very contradictory and unreliable evidence as related to the sandals/shoes allegedly recovered at the scene of crime, we find that, with respect to the learned trial Judge, he was not justified to conclude as he did on page 99 of the Court record that:

"the prosecution evidence in case of A1, Aramathan Hassan is that his sandals were recovered at the scene of crime. PW10 and A5 Bitiro Wilberforce clearly identified the sandals as belonging to A1".

Specifically, with regard to the charge and caution statement of the 2nd appellant, admitted in evidence as exhibit PE6(a) (Rufumbira language) and PE 6(b) (English Translation) the name stated therein ***Eriya Ramazan*** and not ***Aramathan Hassan***. The 2nd appellant never testified the trial Court that Eriya Ramazan and Aramathan Hassan were one and the same person, that is the 1st appellant. The 1st appellant himself who testified on

oath and was cross examined was never asked whether he was also known as "Eriya Ramazan".DW5 Bitiro Wilbeforce who was a co-accused at the trial and who claimed to have known the 1st appellant as both of them stayed on the same village of Kisoro Hill, never testified to the trial Court that the 1st appellant was also known as "Eriya Ramazan"

PW10 Nsengayunva Julius, who also claimed to know the 1st appellant by the names Hassan Ramathan never testified that the 1st appellant was also known by the names of "Eriya Ramazan".

It is only PW14 D/AIP Ahimbisibwe Chryston, who testified that he headed the group of the Police investigators in the death of the deceased Ndatira Dick in Kisoro District and that on 6th November, 2011, at 2:00am

"At Kisoro Police Station we found Aramathan Hassan aka Eriya had been arrested....."

This witness PW14 does not explain at all as to how he came to know that Aramathan Hassan was also known as "Eriya". The witness admitted under cross-examination that he did not record any statements from any suspects including Aramathan Hassan.

The witness however admitted that Aramathan Hassan recorded a statement to the police in which he denied participating in the robbery. This statement was admitted in evidence as Exhibit DE1.

We have gone through the police statement Exhibit DE1 and we find that nowhere in that statement does the maker of the

statement, Aramathan Hassan, claim that he is also known as "Eriya".

The learned trial Judge ought to have satisfied himself that the "Eriya Ramazan" referred in the charge and caution statement of the 2nd appellant is the "Aramathan Hassan", charged as Accused Number 1 on the charge sheet, who is now the 1st appellant, before convicting him of the offences of murder and aggravated robbery. The learned trial Judge did not do so thus leaving unresolved whether or not Hassan Ramathan was the same person as "Eriya Ramazan". This doubt has to be resolved in favour of the 1st appellant.

Lastly, our scrutiny of the charge and caution statement made by the 2nd appellant Exhibit 6(a) and 6(b) shows that the 2nd appellant was detailed about the role carried out by each one of those, whom he asserts were with him in carrying out the offences of murder and aggravated robbery on 4th November 2010 at Kisoro Hill Village, Kisoro Town Council, Kisoro District.

However the said charge and caution statement, in the main, does not specifically mention the 1st appellant as having played a specific role in carrying out the offences of the murder of the deceased and that of aggravated robbery. Indeed even after the offences had been committed, according to the charge and caution statement of the 2nd appellant, it is not the 1st appellant who removed the motor-cycle from the scene of crime, but rather the motor-cycle was driven away by someone else carrying with him on the same motor-cycle two other persons who were part of the hit squad.

The aspects we have pointed out above as related to the evidence of the sandals/shoes recovered from the scene of crime, the failure by the learned trial Judge to ascertain whether the 1st appellant was also known as Eriya Ramazan or whether that was a name for a different person, and the fact that the 1st appellant is not stated on the charge and caution statement of the 2nd appellant to have played a specific role in the commission of the offences, like is the case in respect of his co-accused, ought to have raised doubt as to whether or not the 1st appellant committed the offences of which he was convicted. This doubt ought to have been resolved in his favour.

We are supported in this conclusion by the Supreme Court decision of **Oryem Richard and Another v Uganda; S.C.C.A No. 2 of 2002**, that;

"It is trite law, that in a case where two or more accused persons are jointly tried for the same offence, a confession by one implicating another, cannot be basis for a conviction of that other. Under Section 28 of the Evidence Act, it may only be used to supplement substantial evidence against the co-accused".

The Court added:

"It is a weak form of evidence, because it is made in the absence of the implicated co-accused and the veracity is not tested through cross-examination".

In the case of the 1stappellant in this appeal, the substantial evidence that moved place the 1st appellant at the scene of the crime was the evidence of the sandals covered with blood that

were allegedly recovered from the scene of crime and were claimed to belong to the 1st appellant.

We have already considered the factors that render that evidence to be unreliable.

In the absence of the evidence of the sandals, there is no other substantial evidence that the charge and caution statement of the 2nd appellant, which itself in its own nature, as already shown, is very weak evidence against the 1st appellant, can supplement so as to maintain a conviction of the 1st appellant of the offences of murder and aggravated robbery.

We accordingly uphold the submissions of Counsel for the 1st appellant and we also find that the learned principal State Attorney for the respondent rightly conceded that the appeal of the 1st appellant as to his conviction for murder and aggravated robbery. We allow the appeal as regards the 1st appellant.

We shall now resolve the grounds of appeal as relate to the 2nd appellant where the respondent maintains that the 2nd appellant's appeal be dismissed both as to conviction and sentence.

We shall resolve the grounds in the order of grounds 1,5,6,7,3 and 4. Ground 2 of the appeal has been resolved while resolving the 1st appellant's appeal.

As to ground 1 of the appeal, having carefully studied the court records of the trial court, we have to resolve whether or not the learned trial judge properly evaluated the evidence and rightly relied on the charge and caution statement of the 2nd appellant to

convict him of both the offences of murder and aggravated robbery.

Section 24 of the Evidence Act provides as follows:

"A confession made by an accused is irrelevant if the making of the confession appears to the courts, having regard to the state of mind of the accused person and to all the circumstances to have been caused by any violence, force, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made".

The above section was interpreted by the Supreme Court in the case of **Walugembe v Uganda, Criminal Appeal No. 39 of 2003.**

The Court held that where an accused person objects to the admissibility of a confession on the grounds that it was not made voluntarily, the Court must hold a trial within a trial, to determine whether the confession was or was not caused by any violence, force, threat, inducement or promise calculated to cause an untrue confession to be made.

In such a trial within a trial, as in any criminal trial, the onus of proof is on the prosecution to prove beyond reasonable doubt that the confession was made voluntarily. The burden is not on the accused to prove that the confession was caused by any of the factors set out in **S. 24 of the Evidence Act.** See: **Rashid v Republic (1969) EA 138.**

The facts of this case are that a charge and caution statement of the 2nd appellant was used to convict the 2nd appellant of the

offences charged. We have studied the Court proceedings, the Judgment of the trial Judge and how he handled the retracted confession of the 2nd appellant.

The trial Judge cautioned himself on the danger of acting solely on a retracted confession statement when the same had not been corroborated in some material matter. He relied on the case of **Tuwamoi v R (1967) E.A 84.**

The trial Judge conducted a trial within a trial to determine the truthfulness or otherwise of confession. He subsequently found the same to be truthful, having been voluntarily made and safe to rely on.

We are therefore satisfied that the learned trial judge followed the law and procedure on admission of the charge and caution statement which had been retracted and repudiated by the 2nd appellant. He also properly handled a trial with in a trial in respect of the admissibility of the confession statement. He properly cautioned himself and the assessors on the admissibility of the statements without first seeking whether there was independent and credible evidence to corroborate the same. The learned Judge then looked for and found that independent and credible evidence.

He then acted upon the said charge and caution statement of the 2nd appellant. We find that the learned trial Judge properly admitted the same into evidence and relied upon the same in compliance with the law. We accordingly disallow ground 1 of the appeal as relate to the 2nd appellant.

In respect of ground 5 of the appeal, Counsel for the 2nd appellants' argument is that the learned trial Judge convicted the appellants without taking plea which was fatal to the whole trial. Counsel contends that throughout the entire Court proceedings it is not indicated that the accused persons took any plea. Even when the Court allowed the prosecution to amend the indictment, a plea on amended indictment, was never taken as required by **Section 51(1) (a) of the Trial On Indictments Act.**

We have closely examined and considered the evidence on record that indicated that from the start of the trial an interpreter (Safari Vincent) was present when the trial commenced. It is also clear that the Court proceedings were being interpreted to the 2nd appellant and others in the language they understood. The 2nd appellant understood what was going on and fully participated in the proceedings including giving his defences.

We have also considered the Judgment of the learned trial Judge where he states in that Judgment that ***"All accused pleaded not guilty at their arraignment".***

We have also been persuaded by the case of **Okuja Francis v Uganda; Court of Appeal Criminal Appeal No. 144 of 2014,** where the appellant pleaded guilty to the offence and was convicted on his own plea of guilt. The trial Judge did not however record the language in which the plea was taken. The Court of Appeal held that the issue was not fatal since there was an interpreter in Court.

We also take cognizance of **Article 126 (2) (e) of the Constitution of Uganda** which stipulates that; In adjudicating cases of both civil and criminal nature, the Courts shall, subject to the law, apply the principle of ensuring that substantive justice shall be administered without undue regard to technicalities. We therefore find that all the accused including the 2nd appellant, took pleas at the trial and each one was fully aware of the case against him throughout the trial. The failure for the Court record to indicate that such pleas were taken and also failure to take plea on the amended indictment were not fatal to vitiate the whole trial of the case. We find no failure of justice to have been caused to the 2nd appellant, let alone the other accused persons, throughout the trial of the case based on the claim that a plea had not been taken in the case by the 2nd appellant, or any other accused person in the case.

In the circumstances ground five of the appeal fails.

The complaint in ground six of the appeal is that the 2nd appellant was convicted when his case was not summed up to the assessors. Counsel for the 2nd appellant submitted that there were missing pages of the assessors opinions and further that the summing up to the assessors for the 2nd appellant was never done. The summing up according to counsel was only done with respect to the 1st appellant. This failure, Counsel argued, renders the conviction of the 2nd appellant to be an illegality.

This Court notes that the summing up to the assessors by the learned Judge was in respect of all the accused including the 2nd appellant.

We have also noted that the learned trial judge clearly stated in his Judgment that the assessors in their unanimous opinion advised him to convict all the accused of both offences of murder and aggravated robbery.

The learned trial judge clearly explains in his judgment why he agrees with the assessors as to finding the 2nd appellant and the 1st appellant, whose appeal has now been allowed, guilty of murder and aggravated robbery and why he does not agree with the assessors on the conviction of the other accused persons. This is because apart from the charge and caution statement of the 2nd appellant, there was no other independent evidence to prove beyond reasonable doubt, that the rest of the said accused persons participated in committing the two offences. We are satisfied as the first appellate Court, that on the evidence available, there was summing up to the assessors in respect of all the accused persons, including the 2nd appellant.

We therefore find no merit in ground six of the appeal.

In ground seven of the appeal, Counsel for the appellants' submission is that the learned trial Judge convicted the 2nd appellant without proof of the ingredient of participation and without properly evaluating the entire evidence.

We find that there was evidence on record implicating and placing the 2nd appellant at the scene of crime in the confession statement of the 2nd appellant which was found to be truthful. We therefore find that the ingredient of participation in the commission of the two offences by the 2ndappellant was proved beyond reasonable doubt.

The 2nd appellant was accordingly rightly convicted of both offences.

In the circumstances ground seven of the appeal also fails against the 2nd appellant.

Ground three of the appeal faults the trial Judge for giving an omnibus sentence for two different counts thus committing a procedural irregularity.

We have carefully perused the Court record of the trial court and noted that the trial Judge did not specify the sentence for each of the offences in respect to the 2nd appellant and it was difficult to determine whether the sentence of 50 years imposed was for either for the offence of murder or aggravated robbery or both.

This ambiguous sentence was inconsistent with **Section 2(2) of the Trial On Indictments Act.** The section provides that; ***when a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the Court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the Court may direct, unless the Court directs that the punishments shall run concurrently.***

The learned trial Judge passed sentence upon the appellant thus:

"Niyonzima Richard shall serve 50 years".

We therefore agree with the submission Counsel for the 2ndappellant that the sentence imposed to the 2nd appellant was omnibus and ambiguous. Ground three of the Appeal therefore succeeds as it relates to the 2nd appellant.

In ground 4 of the appeal, the complaint is that the learned trial Judge imposed a harsh sentence of 50 years imprisonment upon the 2nd appellant.

This Court has carefully reviewed and considered the **Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013,** whereby each one of the offences of murder and aggravated robbery attracts a maximum sentence of death and sentencing range for each offence is between 30 years imprisonment and death.

This Court, as the first appellate Court will only interfere with the sentence imposed by the trial Court, if that sentence is illegal in law, or that the same is manifestly excessive or so low as to amount to a miscarriage of Justice or where the sentencing Court did not take into consideration material factors. See; **Bashir Ssali v Uganda; Supreme Court Criminal Appeal No. 40 OF 2003.**

In determining the appropriate sentence, a Court of law has the duty to follow the principle of consistency and uniformity of sentencing. See: **Mbunya Godfrey v Uganda Supreme Court Criminal Appeal No. 4 OF 2011,** where the Supreme Court held that it is now well settled in law that while no two crimes are identical, Courts of law ought, as much as possible observe consistency and uniformity in sentencing.

In **Ojok Christopher and another v Uganda; Court of Appeal Criminal Appeal No. 183 and 193 of 2013,** the appellants who had robbed shs 2,000,000 and 2 phones from Father Luciano Fulvi and in the course of the robbery, they unlawfully caused the death of the said Father Luciano Fulvi, were sentenced to 30 years imprisonment by the trial Court on both the count of murder and robbery to run concurrently, on appeal, the sentences were reduced to 17 years imprisonment to run concurrently.

This Court finds the sentence of 50 years imprisonment for murder and aggravated robbery was manifestly harsh and excessive which occasioned a miscarriage of justice. We have also held in respect of ground 3 of this appeal that the sentence passed by the learned trial Judge upon the 2nd appellant was omnibus and ambiguous for the already stated reasons.

We therefore allow ground 4 of the appeal. We set aside the sentence passed upon the 2nd appellant by the trial Court for being omnibus, harsh and excessive. The appeal of the 2nd appellant however succeeds as to sentence.

This Court under the powers vested in it by Section 11 of the Judicature Act, Cap 13, whereby this Court for the purpose of determining this appeal is vested with all the powers, authority and jurisdiction of the trial Court, will now proceed to determine an appropriate sentence for the 2nd appellant.

Taking into account the mitigating and aggravating factors, this Court notes that on the aggravating factors, the killing of the victim was very brutal and savage. The victim aged 50 years was

subjected to grave pain before he died. He left his family of a wife and children to whom he was the means of support including personal maintenance, education and health.

The manner of the killing also left the whole community traumatized, more so as the motor-cycle which the deceased had hired to travel on, on that day, was taken across the border to Rwanda where it was sold and the proceeds enjoyed, the 2nd appellant being one of the beneficiaries of those proceeds.

The 2nd appellant was not at all remorseful and remained adamant throughout the trial.

The offences of murder and aggravated robbery were rampant in the region of Kisoro, showing disregard of human life. The maximum sentence for murder as well as aggravated robbery is death for each offence.

On the mitigating side, the 2nd appellant was aged 25 years at the time of conviction. He has therefore an opportunity to reform into a better person. He was a first offender and had spent 4 years on remand.

The Supreme Court in **Criminal Appeal No. 56 of 2015: Bakubya Mazamiru & Jumba Tamale Musa v Uganda (09.04.2018)** upheld the sentences confirmed by the Court of Appeal of 40 years imprisonment for murder and 30 years imprisonment for aggravated robbery against each one of the appellants.

The facts of that case accepted by the Courts were that between 11th and 14th April, 2008 at Tunduma at the boarder of Uganda

and Tanzania, the two appellants robbed one Semakula Moses of 3 motor-vehicles, 2 Passports and other personal effects and documents. In the course of the robbery through use of a deadly weapon the said Semakula Moses was murdered.

The Supreme Court expressed itself thus on the issue of the sentences passed against the appellants.

"First and foremost, we wish to emphasize that sentencing is the discretion of a sentencing Judge. That discretion can only be interfered with if the sentence is excessive and was premised on wrong principles of the law". ***[See: Kyalimpa Edward v Uganda; SCCA No. 10 of 1995]***

The Court continued:

"It is our view that the 40 and 30 years imprisonment sentences were neither premised on wrong principles of law nor excessive. Both a conviction of murder and aggravated robbery attract the death penalty as a maximum sentence. The trial Judge and the Justices of Appeal in exercise of their discretion did not award maximum penalties prescribed by the law for each of the respective offences".

In the case of **Court of Appeal Criminal Appeal No. 33 of 2010: Abaasa Johnson Muhwezi Siriri v Uganda**, the appellants were convicted of murder and aggravated robbery. The Court of Appeal, after setting aside the sentence of life imprisonment for murder and 15 years imprisonment in respect of each count of aggravated robbery, passed upon each appellant, for being illegal in law, proceeded to sentence each appellant to

35 years imprisonment for murder and 15 years imprisonment in respect of each of the count of aggravated robbery, the sentences to run concurrently. The Court of Appeal made allowance for the five years the appellants had spent on remand in arriving at the above stated sentences.

This Court, having considered the aggravating and mitigating factors, as well as the Court precedents stated above and bearing in mind the need for uniformity and consistency in sentencing. sentences the 2nd appellant Niyonzima Richard to 35 years imprisonment for murder and 20 years imprisonment for aggravated robbery.

Out of the sentences passed upon the 2nd appellant, shall be deducted the remand period of 3 years and 3 months since the 2nd appellant was arrested and remanded in prison from 15th April, 2011 up to the date of conviction of 3rd July, 2014, so that the 2nd appellant shall serve a sentence of 31 years and 9 months imprisonment of murder and 16 years and 9 months imprisonment for aggravated robbery.

The sentences shall be served by the 2nd appellant concurrently and the commencement date of serving the sentences is the date of conviction of the 2nd appellant, that is the 3rd July 2014.

In conclusion, we allow the appeal of the 1st appellant Aramathan Hassan as to his conviction for the offences of both murder and aggravated robbery. We order that he be released from prison forth with, unless he is being held in prison on another lawful offence.

We however disallow the appeal as relate to the conviction of the 2nd appellant with the offences of murder and aggravated robbery. We allow the appeal of the 2nd appellant as regards sentence. The 2nd appellant is to serve the sentences passed upon him by this Court in the terms set out above.

Dated at Mbarara this....20th day of ....Nov.....2020.

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ELIZABETH MUSOKE.

JUSTICE OF APPEAL

.....

STEPHEN MUSOTA.

JUSTICE OF APPEAL

.....

REMMY KASULE.

Ag. JUSTICE OF APPEAL