THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 078 OF 2010

BYARUHANGA OKOT::APPELLANT

VERSUS

UGANDA :: RESPONDENT

[Appeal from the decision of the High Court holden at Mpigi (The Honourable Lady Justice Elizabeth Nahamya) dated the 12th day of May 2010 in Criminal Session Case *No. 091 of 2010).*

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ

HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

This appeal is from the decision of the High Court of Uganda sitting at Mpigi in High Court Criminal Session Case No. 091 of 2010, in which Elizabeth Nahamya, J convicted the Appellant of the offence of aggravated robbery contrary to *Section 285 and 286(2)* of the Penal Code Act Cap 120 and sentenced him to 38 years' imprisonment.

The facts as established by the prosecution before the trial court are that on the 9th of July 2008, the Appellant whilst in the company of a one Bura John at Mirambi A Village in Mpigi District robbed Nalongo Zaniha Scovia of her money UGX. 60,000/=, a Nokia mobile phone and its charger valued at UGX. 100,000/= and immediately before the robbery threatened to use a deadly weapon. The Appellant denied the allegations and the prosecution led evidence of five witnesses against him. He was later convicted and sentenced to a term of 38 years' imprisonment.

The Appellant now appeals to this Court on the following grounds:

1. *THAT the learned trial Judge erred in law and fact when she disregarded the discrepancies and inconsistencies in the prosecution evidence on record thereby occasioning a miscarriage of justice.*

2. *THAT the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thereby convicting the Appellant basing on unsatisfactory circumstantial evidence.*

3. *THAT the learned trial Judge erred in law and fact when she sentenced the Appellant to 38 years' imprisonment which sentence is manifestly harsh and excessive in the circumstances.*

Representation

At the hearing of this appeal, the Appellant was represented by *Mr. Ambrose Mugweri,* holding brief for *Mr. Richard Kambugu* learned Counsel on state brief while *Ms. Nabaasa Caroline Hope* learned Senior Assistant Director of Public Prosecutions represented the Respondent. The Appellant was in attendance via video link to Prison by reason of the restrictions put in place due to COVID 19 pandemic.

Both parties sought, and were granted, leave to proceed, by way of written submissions.

Appellant's case

On the 1st ground, Counsel for the Appellant submitted that the ingredient of participation of the Appellant in the commission of the alleged offence was not made out against the Appellant and it was erroneous for the learned trial Judge to decide otherwise hence occasioning a miscarriage of justice.

According to Counsel, the prosecution evidence was full of inconsistencies and contradictions which went to the root of the case and had the trial Judge addressed her mind to the same, she would have found that the prosecution witnesses were untruthful and deliberate liars.

Counsel referred court to the evidence of PW1 and PW2 who testified that the robbery happened at 1:00pm while the other witnesses stated that it occurred at

1:00am. Further that, according to PW1, the robbery happened when she was sleeping in her hut which had no door and when she made an alarm, a one Kyabitama Marge, a woman, who was returning from collecting her cattle intervened. Counsel questioned how the said Kyabitama (supra), a woman could have been moving at 1:00am unaccompanied and stated that the only reasonable inference in the circumstances was that the alleged robbery happened at 1:00pm.

Counsel contended that in the circumstances, it was unnecessary to refer to the torch which was not needed during day time and for that reason, the said torch was not exhibited in court. Further, that PW1 harbored a grudge against the Appellant who was working for her co-wife and her man friend, PW2 who confirmed this by testifying that he had known the Appellant for 5 years.

Counsel further contended that the Appellant testified that PW2 was indebted to him and had refused to pay him. Further that, PW3 also admitted that he had money wrangles with Bura John who was the second accused person at that time. According to counsel this should have convinced the learned trial judge that the Appellant was being framed.

It was submitted for the Appellant that PW1 did not identify her attackers even though she testified that she had known the Appellant for some time. Counsel argued that PW1's testimony was that she only suspected the Appellant until her son came and told her that the Appellant was part of the robbers who had first

attacked the hut where the children were and once they did not find her, they had asked her son to escort them where their mother was. Further that even though the evidence of PW1's son was important, he was never brought as a prosecution witness.

Counsel pointed court to the inconsistency in PW1, PW2 and PW3's testimony regarding the arrest of the Appellant where PW3 testified that he had found the Appellant sleeping in his house at Rwojo's place whilst PW1 and PW2 testified that they arrested him from the house of Kuteesa's children. According to counsel this was a fabrication of the story since it was impossible to have arrested the Appellant from two different places at the same time.

It was also submitted that according to PW5, photographs were taken at police of the Appellant and another holding a panga and a phone with its charger whereas the Appellant in his defence asserted that while at the police, the said items were brought in a black *kaveera* and they were asked to hold them as their photographs were being taken.

Counsel referred court to **Candiga Swadick v Uganda, Court of Appeal Criminal Appeal No. 023 of 2012** for the proposition that major contradictions and inconsistences in evidence will usually result in the witness' evidence being rejected unless they can be explained away while minor inconsistences will lead to the evidence being rejected if they point to deliberate untruthfulness on part

of the witness. In Counsel's view, the inconsistencies in this case could not be explained away.

Counsel concluded that had the learned trial Judge addressed her mind to all the contradictory facts, she would have reached the sole conclusion that the Appellant did not commit the crime and acquitted him.

On ground 2, it was submitted for the Appellant that there was no direct evidence connecting the Appellant to the commission of the alleged robbery. Accordingly, in order to arrive at the conviction the learned trial Judge held that the evidence of PW1 regarding the identity of her attackers was hearsay and could not be relied upon but she proceeded to rely on circumstantial evidence that the Appellant had been arrested with the panga that was allegedly used to rob the stolen phone and its charger, and he was accordingly culpable under the *'doctrine of recent possession'*.

According to Counsel, PW1 neither identified her attackers nor the panga which was used in the robbery since she never gave any description of the said panga because she neither saw nor touched it. PW2 testified that he knew the panga since the same belonged to him but it had been taken by the Appellant. Counsel argued that the panga which was used in the robbery was not identified.

Counsel further argued that the learned trial Judge was misguided because the Appellant was found with a panga under his pillow and yet this is a normal practice for people in the pastoral/agriculture sector in that area. As such, it

was normal for one to have a panga on them and where they chose to keep the said panga was a personal choice.

Regarding the evidence on the phone and charger, it was submitted that the learned trial judge erred when she only considered the prosecution evidence and ignored the Appellant's defence that the said items were brought to him and another in a black *kaveera* while at the police station when the police officers asked them to pause and take photographs with them.

Counsel referred court to **Ahimbisibwe Allan and Another v Ugada, Criminal Appeal No. 015 of 2013**, for the proposition that circumstantial evidence should present certainty to the exclusion of all reasonable doubt of guilt of the accused person. He concluded that the circumstantial evidence relied upon by the trial court contained co-existing circumstances that weakened and destroyed the inference of guilt.

On ground 3, it was submitted for the Appellant that the sentence of 38 years imprisonment passed by the learned trial Judge was harsh and excessive in the circumstances since the trial court did not take into account the conventional rule of uniformity in passing sentences. Counsel referred court to the decision of the Supreme Court in **Aharikundira Yustina v Uganda SCCA No. 027 of 2005** for the dicta that consistency is a vital principle of the sentencing regime.

Counsel also referred us to **Pte Kusemererwa and Another v Uganda Criminal Appeal No. 27 of 2005**, where the Appellant had been convicted of three counts

of Aggravated robbery and they were sentenced to 20 years imprisonment on each count. On appeal, the said sentence was reduced to 13 and 12 years imprisonment respectively for each of the Appellants.

Counsel submitted that in his case, the Appellant was a first-time offender aged 26 years at the time of commission of the office. He was a young man taking care of his two siblings and thus capable of reforming. Further that the panga was not used on PW1 and the items stolen save for money were recovered. According to Counsel, had the learned trial Judge addressed her mind to these mitigating factors and the principle of uniformity, she would have arrived at a more lenient sentence.

Counsel prayed that this appeal be allowed and court be pleased to set aside the sentence and substitute it with 12 years considering the time that the Appellant has spent in lawful custody.

Respondent's reply

Ms. Nabaasa for the Respondent opposed the appeal. Counsel submitted that there were no detrimental discrepancies in the prosecution evidence that would go to the root of the case. In Counsel's view, the inconsistencies alluded to in the Appellant's submissions regarding time were merely minor typographical errors for which the court should be pleased to treat as inconsequential.

Counsel referred to the evidence of PW1 who testified that the attack lasted about one hour and occurred at 1:00am and that the Appellant was arrested at 5:00am

while his co-accused was arrested at 7:00am of the same night/morning of the attack. PW3 testified that he was awakened at 1:30am from sleep by PW1 and the team that was searching for the Appellant. Additionally, that the Appellant himself informed court that he was arrested on 9th July 2008 at 5:00am. Counsel argued that throughout the trial, evidence was led to show that the incident occurred at night and there was a torch involved. She concluded that the argument that the robbery occurred at 1:00pm was erroneous, a submission from the bar and thus devoid of merit.

Counsel further argued that Counsel for Appellant's gender-biased insinuations that Kyabitama, a mere woman could not have been moving at 1:00am unaccompanied were unfounded and inconsequential to the issue before this honorable court.

Counsel submitted that there was no contradiction regarding where the Appellant was arrested from. She referred court to the testimony of PW1 who stated that they had been informed that the Appellant had built a hut on Rwojo's land and that, that is where he was staying with David Kuteesa and this is where he was arrested from. This was corroborated by PW2 who stated that PW1 and the team proceeded to Kuteesa's house and arrested the Appellant. In counsel's view this was more of a corroboration than a contradiction.

It was contended that the Appellant failed to demonstrate the gravity of the alleged inconsistencies and their effects on the prosecution case and further that

the same were minor and did not go to the root of the case, and that there was no deliberate untruthfulness told by PW1, PW2, and PW3.

Regarding circumstantial evidence, Counsel argued that the learned trial Judge was alive to the law on circumstantial evidence when she found that Appellant participated in the commission of the robbery. Counsel argued that the circumstantial evidence produced by the prosecution left no doubt that the Appellant committed the offence.

Counsel submitted that the trial judge was mindful of the shaky evidence of direct identification of the assailants which led to the acquittal of A1 in this case. However, she noted that the rest of the circumstances surrounding this case where the Appellant was found in possession of the stolen property, the panga and the torch soon after the incident proved his participation beyond reasonable doubt.

According to counsel, the trial court rightly applied the doctrine of recent possession and that Counsel for the Appellant's submissions on the pastoral ad agricultural settings were made from the bar and not applicable to this case. Further that the trial Judge considered both the prosecution and defence evidence alongside each other and believed the circumstantial evidence against the Appellant.

Regarding the allegation that the stolen items were simply planted on the Appellant when he was asked to pause and take photographs with them, counsel

submitted that the Appellant was found by the trial court to have been a liar who both denied the items and also the persons involved whom he had known for years. Accordingly, court was satisfied that the inculpatory facts against the Appellant were incompatible with his innocence.

Counsel referred court to **Aharikundira Yustina v Uganda Criminal Appeal No. 104 of 2009**, for the proposition that when properly handled, circumstantial evidence may be the best evidence to prove a preposition and concluded that in the present case, the circumstances of the case presented implicating facts that pointed to the Appellant's guilt.

On ground 3, it was Counsel's contention that under the Penal Code Act Cap 120, the maximum sentence for a conviction arising from the offence of aggravated robbery is death and as such the sentence meted out in the case was neither harsh nor excessive.

Counsel submitted that PW1 was a widow living in a hut with no door and she was attacked by the Appellant who beat her all over the body with a panga at 1:00am and took her property and that the aggravating circumstances in this case were overwhelming.

On the contention that the learned trial Judge differed from the principle of uniformity of sentences passed, Counsel referred court to **Aharikundura Yustina (supra)** for the proposition that there is a high threshold to be met for

the appellate court to interfere with the sentence handed down by the trial court and sentencing is not a mechanical process but a matter of discretion.

Counsel further referred to **Sekandi Hassan v Uganda, Supreme Court Criminal Appeal No. 025 of 2019** for the dicta that sentencing must depend on the facts of each case and as a principle court will not normally intervene with exercise of discretion unless it is demonstrated that the court acted on a wrong principle, ignored material factors and took into consideration irrelevant considerations.

Counsel concluded that the sentence of 38 years' imprisonment which automatically became 38 years after taking into account the time spent on remand be upheld.

Resolution

This is a first appeal and as such this Court is required under Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions to re-appraise the evidence and make its inferences on issues of law and fact while making allowance for the fact that we either saw nor heard the witnesses. See: **Pandya v R [1957] E.A 336, Bogere Moses and another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997 and Kifamunte v Uganda, Supreme Court Criminal Appeal No. 10 of 1997.**

It is trite law that an accused person is convicted on the strength of the prosecution case and not on the weakness of the defence. **See: Israel Epuku s/o**

Achouseu v R [1934] EACA 166 and Akol Patrick & Others v Uganda, Court of Appeal Criminal Appeal No. 060 of 2002.

Bearing in mind the above principles of law, we shall proceed to consider the first ground of appeal on the alleged error by the learned trial Judge when she disregarded discrepancies and inconsistencies on record thus occasioning a miscarriage of justice.

The law on discrepancies and contradictions in evidence is settled. In **Twinomugisha Alex and two others v. Uganda, Criminal Appeal No. 035 of 2002**, the Supreme Court had this to say:

> *"...It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored.*
>
> *The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case. What constitutes a major contradiction will vary from case to case.*
>
> *The question always is whether or not the contradictory elements are material, i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but, generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory*

evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central, or that is only collateral to the outcome of the case."

See also **Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, and Uganda v. Abdallah Nassur [1982] HCB).**

The more prominent contradictions and inconsistencies in the prosecution case included the fact that PW1 and PW2 testified that the incident happened at 1:00pm and not 1:00am as testified by the other witnesses. Further that there was an inconsistency in PW1, PW2 and PW3's testimony regarding the arrest of the Appellant where PW3 testified that he had found the Appellant sleeping in his house at Rwojo's place whilst PW1 and PW2 testified that they arrested him from the house of Kuteesa's children. According to Counsel for the Appellant, it was impossible to have arrested the Appellant from two different places at the same time.

While evaluating this evidence on page 7 of her Judgment, the learned trial Judge had this to say:

" As regards this element of theft the prosecution relied on the evidence of Nalongo Zaniha Scovia (PW1) who stated on oath that

she was robbed of her Nokia phone with its charger and shs 60,000/= on the 9th January 2008 at approximately 1:00am from her home when she was attacked allegedly by the accused persons.

Geoffrey Rwojo PW2 stated on oath that on 9th January 2008 approximatey at 1:00a.m while sleeping at home PW1 came with two other people and informed him that her Nokia phone and its charger had been stolen from her that night.

Rutagariza Samuel (PW5) also testified that on 9th January 2008 at 1:30am he was woken up by people who told him that PW1 had been attacked at her home and her Nokia mobile phone and its charger and shs 60,000/= was stolen."

PW1, Nalongo Zaniha Scovia in her evidence in chief at page 10 of the Record of Appeal had this to say:

"I know both of them they were working for my neighour. The one in green is Okot Byaruhanga. On 9th January 2008 at about 1:00pm, I was at my home sleeping when I ha those two people saying Nalongo towa pesa. Byaruhanga had a panga and John Bura had a torch. The torch was on." [sic].

At page 17 of the Record of Appeal following re-examination, both the Assessors and the court asked the witness additional questions and she had this to say:

"Byaruhanga would come to my compound since he was working for my co-wife. I could also make use of him as an errand person to take my cows to the market. The attack took about an hour. By the time people came to rescue us, it was about 1:00am." [Sic].

PW2, Geofrey Rwojo at page 19 of the Record of Appeal and in his examination in chief stated:

"On 9th July 2008 at 1:00pm, I was at my home sleeping when Nalongo came with Gideon Sabiiti to call me."

From our review of this evidence, we note that the attack lasted one hour. The discrepancy with the time of the incidence that is whether the attack happened at night (1:00am) or during day (1:00pm) is a mere typographic error. PW1 testified that the assailants forced one of her children to come and show them her hut, the rest of the children were sleeping and she was awoken by the noise they made asking her for money. PW2 also testified that PW1 came to his home with another who found him sleeping. PW2 stated the same thing. PW1 also confirmed in her examination in chief that it was still night when they went to PW2's place.

We agree with the Respondent's argument that the Appellant was arrested at 5:00am while his co-accused was arrested at 7:00am of the same night/morning of the attack. This was a mere typographic error which in our view is immaterial and the same does not go to the root of the case since it cannot be inferred that

all the witnesses in this case were sleeping during the day. It is accordingly clear and as rightfully ascertained by the learned trial Judge that the incident occurred at 1:00am.

We have also reviewed the evidence relating to the arrest of the Appellant and his co-accused. At page 14 of the Record of Proceedings, PW1 testified that:

> *"Rwojo said that Byaruhanga used to work for him but when he became stubborn, he chased him away but he insisted and built a hut on his land and that's where Rwojo found him with John Bura roasting maize at about 5:00am".*

At page 20 of the Record, PW2 stated thus:

> *"I was there when the accused was being arrested. Byaruhanga was arrested first. He was arrested from Kuteesa's home."*

In his cross examination PW2 stated that:

> *"Byaruhanga was residing with Kuteesa. I had let out my land to Kuteesa."*

Further, regarding this same issue, PW3, Rutagariza Samuel at page 24 of the Record of Proceedings stated:

> *"Afterwards, I sent Gideon Sabiiti and Zaniha Nalongo to go to Rwojo's farm and they saw them at Rwojo's farm and they came back and reported so."*

Our finding is that there was no contradiction regarding where the Appellant was arrested from. From the evidence of PW1, they had been informed that the Appellant had built a hut on Rwojo's land and that, that is where he was staying with David Kuteesa and this is where he was arrested from. This was corroborated by PW2 who stated that PW1 and the team proceeded to Kuteesa's house and arrested the Appellant, and further that he had lent out part of his land to Kuteesa.

Accordingly, we have considered the range and character of the alleged contradictions and inconsistencies so highlighted. We have not found them to be grave in so far as they relate to matters which are peripheral to the central issues in the case. We agree with the learned trial Judge that there was indeed no evidence to suggest that the prosecution witnesses were deliberately untruthful. This ground of appeal must accordingly fail.

Regarding ground 2, it was contended for the Appellant that the learned trial Judge erred in law and in fact when she failed to properly evaluate the evidence on record thereby convicting the Appellant basing on unsatisfactory circumstantial evidence.

The law on circumstantial evidence is well settled as stated by Ssekandi J (as he then was) in **Amisi Dhatemwa Alias Waibi v Uganda, Court of Appeal Criminal Appeal No. 023 of 1977** that:

"It is true to say that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence is capable of proving facts in issue quite accurately; it is no derogation of evidence to say that it is circumstantial, See: R v Tailor, Wever and Donovan. 21 Cr, App. R. 20. However, it is trite law that circumstantial evidence must always be narrowly examined, only because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See: Teper v P. (1952) A.C. 480 at p 489 See also: Simon Musoke v R (1958) E.A. 715, cited with approval in Yowana Serwadda v Uganda Cr. Appl. No. 11 of 1977 (U.C.A).

The burden of proof in criminal cases is always upon the prosecution and a case based on a chain of circumstantial evidence is only as strong as its weakest link.

In **Bogere Charles v Uganda, Supreme Court Criminal Appeal NO. 010 of 1998**, the Supreme Court referred to a passage in **Taylor on Evidence 11th Edition, Page 74** which states:

"The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."

In the case **Lulu Festo v Uganda, Criminal Appeal No. 214 of 2009**, this court found that circumstantial evidence is the best evidence where there are no other co-existing circumstances which would weaken or destroy the inference of the accused's guilt.

Having set out the law on how to deal with circumstantial evidence, we shall now proceed to evaluate the evidence on record.

The incriminating circumstances in this case arise from PW2's testimony that when they arrested the Appellant, he was found with a phone and a small charger belonging to Nalongo in a small sack together with the panga which he had used. PW3 also confirmed that the Appellant had the said items which had been stolen that night from PW1.

While evaluating this evidence the learned trial Judge at page 13 of her Judgment stated thus:

> *"... However, Prosecution adduced strong circumstantial evidence. The law enjoins the court to ensure that there are no coexisting circumstances which would weaken or destroy the inference. In this case, it was the evidence of PW1, PW2 and PW3 that the Appellant was arrested from his home with the panga that was allegedly used to rob*

PW1 and a Nokia mobile telephone with its charger that had been robbed from PW1.

PW4 testified that those exhibits were brought at the same time when the accused persons were brought at police."

We have also reviewed the evidence of PW1, PW2 and PW3 who were found to be consistent and truthful by the learned trial Judge. The three witnesses all testified that the stolen items save for the money were found in the possession of the Appellant.

It was argued for the Appellant that the learned trial judge erred when she only considered the prosecution evidence and ignored the Appellant's defence that he was never found with the said stolen items. Rather, he argued that the said items were only brought to him and his co-accused in a black *kaveera* while at the police station and further that they were asked to pause and take photographs.

From the review of the record, the defence offered by the Appellant was that he and the co-accused were framed by PW1 and PW2. According to the Appellant, PW1 held a grudge against him because he was working for her husband and co-wife whereas PW2 was indebted to the co-accused. While evaluating this the trial judge questioned that if the two were being framed, why is it that the stolen items were only found with the Appellant and not his co-accused.

Our finding is that the learned trial Judge was indeed alive to the 'law on recent possession' when she found that there was no innocent explanation for the Appellant being in possession of the stolen items. The only inference that could be made was that he stole them and as such there were no other co-existing circumstances which would weaken the inference of guilt of the Appellant.

In the present appeal, the Appellant was found with the stolen items as well as a panga that was used in the robbery. Counsel for the Appellant's contention that PW1 could not identify her attacker and as such she was unable to identify the panga is in our view un maintainable. Firstly, because it was a mere submission from the bar and not part of the record and secondly, because the Appellant was not only found with the said panga. He was found with a small torch, a Nokia phone belonging to PW1 and a small charger, the two latter items having been stolen from PW1.

In our view, and as rightly found by the trial court, the Appellant had a duty to give an explanation how the said items came to be in his possession and at his home which he was unable to do. The only explanation advanced was that he was being framed by PW1 and PW2 who did not want to pay him. We agree with the submission for the Respondent that Counsel for the Appellant's argument that the Appellant only got to see the said items at police in a kaveeera for the first time is untrue, a mere submission from the bar and the same was not part of his defence.

On this ground we find that the trial court was justified in drawing the inference that the Appellant committed the offence of Aggravated robbery. In the result, we uphold the conviction and find that there was sufficient evidence to sustain a conviction.

In respect of the alternate ground of sentence, it is now settled that for the Court of Appeal, as a first appellate court, to interfere with the sentence imposed by the trial court which exercised its discretion, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law; or where the trial court failed to take into account an important matter or circumstance, or made an error in principle; or imposed a sentence which is harsh and manifestly excessive in the circumstances. **See: Kamya Johnson Wavamuno v Uganda, Supreme Court Criminal Appeal No. 016 of 2000 (unreported); Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Kalyango Achileo and Another v Uganda, Court of Appeal Criminal Appeal No. 637 of 2015.**

It was submitted for the Appellant that the sentence of 38 years passed by the learned trial Judge was harsh and excessive the trial court did not take into account the conventional rule of uniformity in passing sentence. The Respondent disagreed and submitted that under the Penal Code Act Cap 120, the maximum sentence for a conviction arising from the offence of aggravated robbery is death and as such the imprisonment term of 38 years imprisonment meted out in this case was neither harsh nor excessive

While sentencing the appellant, at page 82 of the Record of Appeal, the trial court stated thus:

> *"I have duly put my mind to what the prosecution has submitted and the aggravating factors and considered counsel's submission in mitigation...This Honourable Court takes cognizance of the callous behaviour of Okot Byaruhanga, the degree of violence that was meted out on the victim (PW1). He was found with a panga which he used as a pillow and the victim's Nokia phone and its charger.*
>
> *Aggravated robbery is such a grave offence for which this court must give a deterrent sentence. Kondoism is so scaring and serious. I would have sentenced Byaruhanga Okot to the maximum sentence of death. However, I will be lenient, he needs to stay alive and learn a lesson and perhaps be reformed as prayed by counsel representing the convict,*
>
> *I hereby sentence you Byaruhanga Okot to a term of imprisonment of 38 years. The period of two years which you have been on remand should be computed against this term." (sic)*

As stated in Aharikundira, there is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The

key word is "manifestly excessive". An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation.

In the **Third schedule to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013,** the sentencing range for capital offences such as aggravated robbery is from 35 years imprisonment to death penalty which is the maximum penalty upon consideration of the mitigating and aggravating factors.

Guideline No. 6(c) of the Sentencing Guidelines provides that:

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

In Aharikundira Yustina v Uganda (Supra), the Court of Appeal had this to say with regard to sentencing:

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

According to Andrew Ashworth, a re-known English Legal Author on Criminal Justice and Sentencing, in his works **Techniques of Guidance on Sentencing [1984] Crim LR 519 at 521**, he states as follows:

> *"...judgments of appellate courts are often substantial and consider sentencing for a whole category of similar offences including the particular offence committed by the accused, it sets down factors which are appropriately considered to be aggravating or mitigating the seriousness of the offence and state the proper range of sentences for the relevant offence.*
>
> *It is therefore the appellate court to consider interrelationships of sentences between the different forms of an offence. Secondly, instead of having to deal with a series of potentially conflicting appellate decisions, sentences in the lower courts are given a specific frame work to operate within."*

We are in agreement with the above passage. It is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts.Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.

Counsel for the Appellant contended that the trial Judge passed a harsh and excessive sentence and referred to a number of cases where the sentence for the same offence was manifestly harsh. On the other hand, we noted that the cases of ***Aharikundira Yustina v Uganda (supra) and Ssekandi Hassan v Uganda (supra)*** which were cited by Counsel for the Respondent were cases relating to murders whereas there was no life lost in this particular case and the Appellant was a first-time offender aged 27 years.

From the above, it is clear that the even though the trial court considered the mitigating and aggravating factors before sentencing the Appellant to 38 years' imprisonment, the sentence passed was excessive and harsh in the circumstances. Considering that the Appellant was aged 27 years, a first-time offender with two brothers to take care of, a long custodial sentence would not meet the intended purpose of reforming him back into society.

Additionally, by passing this sentence, the learned trial Judge diverted from the sentencing principle regarding uniformity of sentences in similar cases. We accordingly allow this ground of appeal and set aside the sentence of 38 years.

We have considered both the mitigating and aggravating factors in this case. In addition, this court is bound to follow the principle of "parity" and "consistency" while sentencing, while bearing in mind that the circumstances under which the offences are committed are not necessarily identical. **See Sentencing Principle No. 6(c) of the Constitution (Sentencing Guidelines for Courts of Judicature)**

(Practice) Directions, 2013- Legal Notice No. 8 of 2013 and **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 027 of 2015.**

In Ouke Sam V Uganda, Court of Appeal Criminal Appeal No.251 of 2002, this Court confirmed a sentence of 9 years imposed on the appellant for aggravated robbery. ***In Adama Jino V Uganda, Court of Appeal Criminal Appeal No.50 of 2006,*** the Court reduced the sentence to 15 years for aggravated robbery where the appellant had been sentenced to life imprisonment while in ***Rutabingwa James V Uganda, Court of Appeal Criminal Appeal No.57 of 2011,*** this Court confirmed a sentence of 18 years for aggravated robbery.

We take the above into account and accordingly set aside the sentence of 38 years passed by the High Court. We now invoke section 11 of the Judicature Act Cap 13 which gives this court power to impose a sentence of its own.

To arrive at the appropriate sentence, we have considered both the aggravating and mitigating factors on record as well as the period of 2 years spent on remand. In light of the fact that a defenseless widow was attacked, the Respondent prayed for the sentence term to be confirmed as a deterrent.

We agree that the offence committed was grave and that the sentence to be given must reflect the enormity of the Appellant's unlawful conduct. On the other hand, it was pleaded in mitigation that the appellant was a first-time offender and was aged 27 years. Considering that the appellant committed the offence at

a young age, we are convinced that it is necessary to give him a prison sentence which will enable him to reform and be re-integrated back into society. Although the appellant was armed with a deadly weapon during the incident, he did not use it on the victim, and neither did the victim sustain any physical injury.

We come to the conclusion that in the circumstances of the case, a sentence of 22 years is appropriate. However, in line with Article 23 (8) of the Constitution and considering that he had already spent 2 years on remand, the Appellant will serve a sentence of 20 years imprisonment which will run from 12th May, 2010, the date of conviction.

We so order.

Dated at **Kampala** this.....11th.....day of .....February..... 2022.

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RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

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ELIZABETH MUSOKE
JUSTICE OF APPEAL

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CHEBORION BARISHAKI
JUSTICE OF APPEAL