THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT KAMPALA

(Coram: Kenneth Kakuru, Muzamiru M. Kibeedi, & Irene Mulyagonja, JJA)

CRIMINAL APPEAL NO.373 OF 2017 & 281 OF 2017

1.MUTUNGYI MUSA alias TURYATUNGA ERIPHAZ

2.MUJUNI RONALD alias CHRIS "KULISI"::: APPELLANTS

VERSUS

UGANDA ::: RESPONDENT

[Appeal from the decision of the High Court of Uganda siting at Entebbe before His Lordship Hon. Dr. Justice Joseph Murangira, dated 12th July 2017 in Criminal Session case N0.989 of 2016]

JUDGMENT OF THE COURT

The appellants were indicted and tried for the offence of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap. 120 and Aggravated Robbery contrary to Section 286(2) of the Penal Code Act, Cap. 120.

The particulars of the offence of murder as set out in the Amended Indictment were that Mutungyi Musa, Mujuni Ronald and others still at large on the 25th day of December 2012 at Katonga Village in Wakiso District, unlawfully and with malice aforethought murdered Lubowa Henry.

The particulars of the offence of Aggravated Robbery were that Mutungyi Musa, Mujuni Ronald and others still at large on the 25th of December 2012 at Katonga Swamp robbed Lubowa Henry of a car (Toyota Ipsum Reg. No. UAQ 668Q) and immediately before or immediately after the time of robbery caused his death.

The prosecution's case before the trial court was that the deceased was before his death a special hire/ cab driver of Toyota Ipsum Registration No. UAQ 668Q. His work base was Wandegeya Car Park in Kampala District. On the 25th of December 2012 at around 2300 Hours

when the deceased was at his work place located in Wandegeya, he was approached by four men who hired him to drive them to Bulenga. The deceased never returned to his work base/stage.

On 26.12.2012, the deceased's body was found by a passer-by in a swamp at Katonga, Lukwanga village in Wakiso District but his car was not there.

On the same date, the deceased's family members who were concerned that the deceased had strangely missed the appointments he had earlier scheduled with his clients, and that he had not returned home the previous night, reported his disappearance to the police at Kampala Central Police Station. A search was mounted for the deceased and his motor vehicle.

On 27.12.2012 the deceased's body was examined at the Kampala City Mortuary and found to have severe multiple injuries. The cause of death was established to be manual strangulation.

On 03.01.2013, Mujuni Ronald Chris (A2) approached one Baguma at his garage in Wandegeya and offered to sell five stolen motor vehicles to him. These included the deceased's motor vehicle Toyota Reg. No. UAQ 668Q, which he was selling at three million Uganda shillings (Ugshs. 3,000,000/=). A2 introduced Turyatunga Eliphaz aka Mutungyi Musa (A1) and Ssempala (still at large) as his colleagues and the "boss" in the deal.

The information was leaked to police and a trap was laid to arrest the appellants. The appellants were arrested on the 05.01.2013 at Kitintale Fuel Station where they had gone to deliver the deceased's vehicle and receive payment for the same. The appellants had arrived in the said vehicle with two other men who escaped from the scene.

A1 and A2 were arrested and charged with murder and aggravated robbery. They denied having committed the offences and each one of them put up an alibi. After a full trial both appellants were convicted of the offences of murder and aggravated robbery. Each appellant was sentenced to 40 years' imprisonment for each one of the offences after deducting the remand period of 5 years.

The Appellants were dissatisfied with the judgement of the trial court and each one of them filed a separate Notice of Appeal which was given a separate reference number by the Registry of this court as follows:

- Civil Appeal No. 373 of 2017 Mutungyi Musa alias Turyatunga Elphaz Vs Uganda; and
- Civil Appeal No. 281 of 2017 Mujuni Ronald alias Chris "Kulisi" Vs Uganda.

Both appellants subsequently filed one Joint Memorandum of appeal before this Court in which they set out 5 grounds of appeal as below:

1. ***The Learned Trial Judge erred in law and fact when he held that the participation of the Appellants in causing the death of the deceased had been proved beyond reasonable doubt by circumstantial evidence.***
2. ***That the learned trial judge erred in law and fact in relying on prosecution witnesses' testimonies that were full of grave contradictions and inconsistences hence leading to a wrong conviction.***
3. ***That the learned trial judge erred in law and fact in shifting the burden of proof on the appellants and holding that the appellants put forward a weak defense of alibi thus leading to a miscarriage of justice.***
4. ***That the learned trial judge erred in law and fact in treating the Appellant with alter (sic!) prejudice and bias throughout trial and thus failing to accord the appellant justice (sic!) and fair hearing.***
5. ***That the learned trial Judge erred in law and fact when he sentenced the appellant to severe, manifestly harsh and excessive sentence of 45 and 40 years' imprisonment without taking into account the mitigation raised by the appellants thus amounting to an illegality.***

Representation.

At the hearing of the appeal, Mr. Emmanuel Muwonge appeared for both appellants while Ms. Immaculate Angutoko, Chief State Attorney, appeared for the respondent.

Due to the COVID-19 Pandemic restrictions, the appellants were not in court physically but attended the proceedings via video link to the Prison. Both parties sought, and were granted, leave to proceed by way of written submissions which were already on the court record.

The appellants' Counsel orally applied to abandon ground No.4 of the appeal in respect of bias of the trial judge and the application was granted by court.

Appellant's Submissions.

Regarding ground 1, Counsel for the appellants submitted that in the instant case, the State adduced 11 witnesses none of whom had directly seen the appellants participate in the murder or the robbery of the deceased. That the trial court relied on very weak circumstantial evidence to convict the Appellants which did not pass the test set out in the case of ***Simeon Musoke v R 1958 (EA) 715*** to the effect that in the case depending exclusively upon circumstantial evidence, the court must find before deciding to convict that the inculpatory facts are incompatible with the innocence of the accused and incapable of an explanation upon any other reasonable hypothesis than that of guilty.

He further submitted that the offences for which the appellants were convicted happened during the night of 25/12/2012 and that all the prosecution witnesses did not identify the appellants as the ones who had gone with the victim on the fateful night. That each of the accused denied participating in the attack or being at the scene of robbery at the material time. That the 1st appellant raised an *alibi* and testified that at the material time he was at his home in Bulenga with his wife and daughter who attested to the same.

Counsel prayed that this honorable court takes into consideration the fact that the prosecution did not prove its case beyond reasonable doubt.

With regard to ground 2, Counsel submitted that in the instant case, the conditions for identification were difficult. So, there was need to look for other evidence which was supportive of the identification evidence. That at the very least, there was need for the court to warn itself of the danger of convicting based on the unsupported identification evidence.

Counsel further submitted that PW2 was the last person to see the deceased and the only one who would place guilt on the appellants. But that he did not recognize the appellants and was thus an unreliable witness. That he could not confirm the appellants as the last persons he saw with the deceased. That PW2 testified that he owned a car, yet he had previously said that he was just there to keep cars at Wandegeya. That this amounted to inconsistences and contradictions and proof that he did not identify the Appellants.

That PW3 in his testimony mentioned a person who called him using the deceased's phone. That this person was never arrested or inquired into. Counsel submitted that this person would have been the best person to inquire from how he had got the deceased's phone. That the failure to do so created doubt in the prosecution's case and that the learned trial judge erred when he did not pay any attention to the circumstance.

Counsel further submitted that according to PW5's testimony, none of the suspected spare parts of the alleged stolen vehicle were found at the 1st appellant's place when the search was conducted there. That the items (spare parts) that were recovered like a photocopy of the logbook for motor vehicle UAK 351K and logbook for motor cycle UDP 397A, among others, had no evidential value. That such evidence does not point to the guilt of the appellants.

Counsel submitted that the testimony of PW6 was based on hearsay evidence as he referred to what his brother and neighbors told him. That he could not even identify the 1st appellant by name but just identified him by his dressing. That his entire testimony was hearsay evidence and ought to be rejected in its entirety.

Counsel further submitted that the Prosecution witnesses' contradictions were worsened by the accused persons who stated that they were arrested at different places. That A1 was arrested by one Grace Kavi at Kitintale while PW7 and PW9 talked of Bugolobi and Kireka respectively. A2 stated that he was arrested at Nakasero Police Post and later taken to Kyambogo Police Post.Counsel faulted the trial judge for not even hinting on such inconsistences and contradictions before arriving at his decision to convict the appellants. Counsel submitted that had the trial judge properly evaluated the prosecution circumstantial evidence and been alive to

the serious and grave inconsistences in the prosecution evidence, he would have resolved all the doubts in favor of the appellants and acquitted them.

With regard to ground 3, Counsel submitted that while the learned trial judge was conscious of the law that places the burden on the prosecution to disprove the defense of alibi, there is no indication that he was similarly conscious of the requirement to consider the evidence as a whole. That in the instant case, the learned trial judge considered and accepted the prosecution evidence alone, and then rejected the defense summarily simply because he had accepted the prosecution evidence. That this was a gross error and caused a miscarriage of justice. For this submission Counsel relied on the case of ***Bogere Moses and Anor vs Uganda, Supreme Court Criminal Appeal, No. 10 of 1996***, where the Supreme Court of Uganda held that where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defense not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. That it is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable.

In ground 5 Counsel submitted that from the record of proceedings, when the Trial Judge was sentencing the Appellants to 40-year imprisonment terms on all counts, he did not take into consideration the mitigating factors and the period spent on remand. Counsel submitted that failure to deduct the periods spent on remand by the appellants rendered the sentences illegal. Counsel relied on the case of ***Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*** and **Article 28(3) of the 1995 Constitution of the Republic of Uganda** in support of his submission.

Counsel further submitted that the learned trial Judge imposed a harsh sentence of 40 years against the Appellants, yet the Appellants had prayed for leniency on the grounds that they were family men and were still useful to the society.

Counsel prayed that this Honorable Court invokes its powers and sets aside the sentences against the Appellants for being illegal since they were imposed without the trial Court first taking into consideration the period spent on remand.

Respondent's Arguments.

Counsel for the respondent opposed the appeal.

With regard to ground 1, Counsel submitted that the prosecution relied on very strong and well corroborated circumstantial evidence to prove the participation of both appellants in both the aggravated robbery and the murder. That PW1 on the 26/12/2012 identified the 1st appellant in the company of four others in a motor vehicle that matched the description of the deceased's. That PW2 who used to park at the same stage offered a similar description as well as the deceased's brother as Ipsum, blue in colour). It was PW1's testimony that the 1st appellant and others came and parked at PW6's home from where they cleaned the said vehicle and spent about 2 hours and left. That PW1's evidence was never subjected to cross examination. That this was corroborated by the evidence of the recovery of the deceased's vehicle from the appellants as they attempted to sell it. Counsel referred to the testimony of PW7 and PW9 who participated in the arrest of appellants as they attempted to escape, and retrieved exhibit PEX 27, a blue Ipsum, registration No UAQ 668Q from them.

Counsel invited this honourable court to consider the doctrine of recent possession which raised a strong presumption of participation in the commission of the offences which could only be rebutted by the appellants offering an innocent explanation of their possession. For this submission, counsel relied on the case of ***Kakooza Godfrey v Uganda SCCA No.3 of 2008.***

Counsel further submitted that the appellants having offered no reasonable explanation of the possession of the deceased's motor vehicle shortly after its robbery and the murder of the deceased, then the trial court could not be faulted for holding that the appellants participated in the commission of the offences charged.

Counsel further submitted that the conduct of the appellants of attempting to escape upon being intercepted was not innocent. PW7 and PW9 in their testimonies stated that the appellants attempted to run away but were intercepted. That one jumped off the motor vehicle Reg. No. UAQ 668Q but was arrested. Counsel contended that the above pieces of circumstantial evidence irresistibly pointed to the guilt/participation of the appellants, and are incompatible with the innocence of the appellants and incapable of any other reasonable hypothesis than that of guilt, as was held in **Simon Musoke v R (1958) E.A 715**.

On ground 2, Counsel submitted that the prosecution did not rely on any direct evidence of identification but purely on very strong pieces of circumstantial evidence that proved each and every ingredient of each count. That the learned trial judge in his judgment properly evaluated the evidence as a whole regarding each ingredient of the 2 counts.

Counsel contended that the need for caution would not arise where the circumstantial evidence was overwhelmingly corroborated by other pieces of independent evidence such as the PF48 which was admitted with consent of both parties, and the testimonies of PW1, PW2, PW3, PW5, PW6, PW7, PW8 and PW9.

Counsel further submitted that PW2 and PW3's evidence had no contradictions; any such perceived contradictions were rectified during re-examination. That, in any case court did not only rely on PW2's evidence but other pieces of corroborative evidence as well. That PW6's evidence could not be regarded as hearsay since he simply confirmed having received a phone call from the 1st appellant seeking to park the car at his home and he relayed the same information to PW1 who was taking care of his home at the time. That PW9's testimony had no major contradictions and it was not in any way discredited during cross examination.

Counsel stated that be that as it may, if this honourable court finds that there were minor inconsistencies, they did not go to the root of the case. Counsel relied on the case of **Alfred Tajar vs Uganda (1969) EACA Cr. Appeal No.167 of 1969.**

With regard to ground 3, Counsel submitted that the learned trial Judge did not at any one point shift the burden onto the appellants. That the trial Judge clearly stated that the burden of proof was upon the prosecution, then went ahead to state the other relevant legal principles such as the principle of innocence until proven guilty, among others.

Counsel further submitted that each of the appellants put up a defence of *alibi*. The *alibi* was analysed by the trial Judge and he found that it was negated by the prosecution. He relied on the case **R v Sukha Singh s/o Wazir Singh & Others (1939)6 EACA 145.**

Counsel submitted that none of the appellants raised their *alibi* at the earliest possible moment as was seen in Exh. PEX 28 and PEX 29 in which the 1st appellant did not raise such *alibi* but introduced it during hearing of his defence. The prosecution, nevertheless discharged its burden of disproving the *alibi*. First and foremost, by adducing very strong, well corroborated circumstantial evidence to disprove/destroy the evidence in support of *alibi*. Counsel reiterated their submissions in Ground 1 in regard to participation and further submitted that the a*libi* was destroyed by evidence of PW1, PW2, PW8, PW9, PW10 and PW11 whose evidence placed the appellants at the scene of crime.

Counsel contended that the learned trial judge based his decision on the evaluation of the evidence as a whole and came to a correct conclusion.

About ground 5, Counsel submitted that it is settled law that sentence is at the discretion of a trial judge and an appellate Court will only interfere with a sentence imposed by the trial Court if it is evident that the court acted on a wrong principle or overlooked some material fact, or if the sentence is manifestly harsh and excessive in view of the circumstances of the case. For this submission Counsel relied on the case of **Kiwalabye Bernard v Uganda, SCCA No.143 of 2001.**

Counsel submitted further that the offences of murder and aggravated robbery contrary to sections 189 and 286(2) Penal Code Act (respectively) attract a maximum sentence of death. That the learned trial judge while sentencing considered the law and "... All the mitigating factors

for a reasonable sentence against each convict that were advanced by both counsel for the parties in their respective submissions".

Further, that the trial Judge did not just take into account the close to 5 years period that the 1st appellant spent on remand but arithmetically deducted/reduced the 5 years from the 45 years he would have imposed, thus fully complying with the requirements of Article 23(8) of the Constitution of the Republic of Uganda and the decision in ***Rwabugande Moses v Uganda SCCA 25/2014*** in which it was held that the taking into account of the period spent on remand by a court is necessarily arithmetical.

Counsel invited this honourable court not to interfere with the discretion of the learned trial Judge as no illegality was occasioned and all material factors were duly considered in imposing the sentence.

Counsel prayed that this appeal is disallowed and that the convictions and sentences be upheld.

RESOLUTION BY THE COURT

We have carefully read the submissions of both Counsel and the authorities cited. We have also carefully perused the record of appeal. We are also mindful of our duty, as the 1st appellate court, to reappraise all material evidence that was adduced before the trial court and come to our own conclusions of fact and law while taking into account the fact that we neither saw nor heard the witnesses testify. See Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions, **Baguma *Fred Vs Uganda SCCA No. 7 of 2004, Kifumante Henry Vs Uganda SCCA No. 10 of 1997, and Pandya Vs R [1957] EA 336.***

Grounds 1, 2 and 3.

A close analysis of the appellants' complaints in grounds 1, 2 and 3 shows that the gist of the three was whether the appellants participated in the commission of the offences of murder and aggravated robbery as indicted.

The prosecution's evidence relevant to the issue of the participation of appellants in the commission of the offences was circumstantial as no single prosecution witness witnessed the commission of the offences which took place during the night of 25th December 2012, after the deceased was hired by some four gentlemen to transport them to Bulenga and killed by manual strangulation. His motor vehicle was also stolen.

On the other hand, the appellants in their defence not only denied participation in the commission of the offences but also set up the defences of *alibi*. In those circumstances the obligation of the trial court, as reiterated by the Supreme Court in ***Natete Sam Vs Uganda, SCCA No. 053 of 2001,*** was as follows:

> *"... where an accused pleads an alibi as a defence, the prosecution must do more than placing him or her at the scene of crime. They must disprove or otherwise discredit the defence of an alibi. The mere putting the accused at the scene of crime is not enough. We can only reiterate what we said in the* ***Bogere Moses Case (Supra):*** *Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judiciously and give reasons why one and not the other version is accepted. It is a discredit to accept the one version and then hold that because of that acceptance perse the other version is unsustainable."*

We shall bear the above position of the law in mind while reappraising both the prosecution and defence evidence in respect of the participation of the appellants in the commission of the offences for which they were indicted.

The prosecution evidence relevant to the issue of identification of the appellants was contained in the testimonies of PW1 Lubwama James, PW2 Hussein Kalanzi, PW6 Mutebi Sharif Byekwaso, PW7 No. 281199 Detective Sergeant Ainebye Wilson, PW8 No. 35836 Detective Sergeant Segujja Andrew, PW9 Kaswigiri Paul Yoweri, PW10 Reverend Canon Balongo and PW11 Mugisha Ahamed.

PW2 who used to work at the same Special Hire Taxi stage at Wandegeya with the Late Lubowa testified that the deceased was a Special Hire Car Driver. He used to drive an Ipsum car, blue in colour, whose registration number he could only remember the first three letters

namely, UAQ. That the deceased was hired in the night of 25.12.2021 (around 11PM) by four persons whose identities he could not remember. The deceased informed PW2 that he was taking the four passengers to Bulenga and that he would thereafter return to the Stage and take other passengers to Entebbe. The deceased used his motor vehicle which PW2 described as Ipsum, blue in colour. The deceased never returned from that assignment.

PW1 testified that on 26.12.2012 while he was at the home of his elder brother, PW6 Mutebi Sharif Byekwaso, at Nankuwadde Bulenga, he received a phone call from PW6 at around 2PM informing him that there was a neighbour waiting at his gate who needed assistance to park his car at their place because he had nowhere to park it. At that time, PW6 had travelled to Kiboga for the festive season leaving his brother, PW1, at his (PW6's) home at Nankuwadde Bulenga. PW1 opened the gate and the 1st appellant in the company of four others, in an Ipsum car blue in colour, drove in and parked at PW6's home. The car had no number plate. PW1 had known A1 as his brother's neighbour for about 2 months before that.

After parking the car inside PW6's gate, A1 and his colleagues cleaned the said vehicle and then left. All this lasted about two hours.

In the meantime, the deceased's younger brother (PW3) and the other family members of the deceased were searching for him and reported the disappearance of the deceased to the Police on 26.12.2012. PW3 found the deceased's body in Mulago Mortuary on 27.12.2012 following a phone call he received from someone using the deceased's phone in which he was informed that the owner of the phone (deceased) was killed and his body dumped at Mukwanga in Wakiso.

PW7 D/Sergeant Ainebye Wilson testified that following a tip-off, on 05.01.2012 he together with other policemen laid a trap for the appellants and arrested them at Bugolobi near Tuskeys Supermarket (Opposite Egen Petrol Station) while they were in the process of selling the stolen vehicle, Ipsum Car Registration No. UAE 668Q blue in colour, to Captain Alex Barigye and Corporal Baguma who posed as buyers. That they succeeded in arresting only A1 and A2 while the other person who was driving the motor vehicle escaped during the scuffle that ensued

during the arrest. After the arrest, A1 and A2 were taken to Jinja Road Police to answer charges of being in possession of a stolen vehicle. The said motor vehicle was exhibited as Exh P27.

PW9 testified that he was a Crime Preventer attached to Bugolobi Police Station. That he came to know A1 and A2 on 5/01/2013 as he was assigned to be part of the Police team headed by PW7 Ainebye to arrest the suspects. That initially they were to meet the suspects at Egen Station at Bugolobi, but that the suspects changed their program and they met at Super Oil Super Market, Kireka. That they took positions and within two minutes the suspected stolen motor vehicle arrived. That PW7 Ainebye and two informants who pretended that they were going to buy the vehicle approached them. That the suspects became suspicious, jumped off the vehicle and wanted to run away. That the driver of the stolen vehicle escaped but they arrested A1 and A2 after a scuffle. That after arresting A1 and A2, they handed them to the Officer in Charge of Jinja Road Police Station. That it was he that arrested A2. That the police and its allies had travelled in a private motor vehicle from Egen at Bugolobi to Tuskers.

From the above review of the prosecution evidence, participation of A1 and A2 in the commission of the offences indicted was proved by virtue of their possession of the stolen vehicle at two different times, namely: on 26th December 2012 when they parked the stolen vehicle in the compound of A1's neighbour at Nankuwadde Bulenga; and on 05.01.2013 when they were arrested by PW7 and PW9 while they were attempting to sell the stolen vehicle. This satisfied the doctrine of "recent possession" which was reiterated by the Supreme Court in the case of ***Kakooza Godfrey v Uganda SCCA No.3 of 2008*** thus:

> *" ... It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witnesses' evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the later solely depends on the credibility of the eye witnesses".*

In his defence, A1 testified under oath that he did not know the Ipsum vehicle and had never parked at his neighbour's compound in Nakuwadde, Bulenga in Wakiso District. That neither did he know PW1 Lubowa Henry, nor Mujuni Ronald, the co-accused person. That he spent both

the day and night of 25/12/2012 at his home in Bulenga with wife, Ms Annet Kiconco (DW3) and his daughter, Ahumuza Bright (DW4). That he left his home very early in the morning of 26th December 2012 and went to Busia on his normal business trips as a dealer in produce. That he returned from Busia on 28.12.2012 and proceeded to his home in Bulenga. That he was arrested from Kitintale by one Grace Kavi, and he did not know why he was arrested. That neither did Grace Kavi testify in court.

A1 called his wife, DW3 Kiconco Annet, daughter DW4 Ahumuza Bright and one of the neighbours, DW5 Namiyingo Teddy, to prove his alibi.

In dealing with A1's alibi, the trial court stated that:

> *"The alibi raised by A1 as it is being evaluated, the murder and robbery happened in the night of 25/12/2012. Much as A1 says that he went to Busia on 26/12/2012 in the morning hours, the deceased was discovered dead on the morning of 26/12/2012 and for the fact A1 was seen by PW1 when he parked the deceased's Ipsum motor vehicle (Exh P27) at PW6's compound on the morning of 26/12/2012, such alibi by the accused does not hold any water at all."*

The trial judge cannot be faulted. His approach to resolution of the issue of A1's alibi was in line with the decision of the Supreme Court in ***Jamada Nzabaikukize Vs Uganda, Supreme Court Criminal Appeal No.01 of 2015*** where it was held that an alibi can be discredited either by prosecution evidence which squarely places an accused at the scene of the crime or by prosecution evidence which directly negates or counteracts the accused's testimony that he was in a particular place other than at the scene of the crime.

In the instant case, there was no doubt whatsoever that A1 and PW6 were neighbors in Nakuwadde, Bulenga in Wakiso District. PW1, the brother of PW6 who stayed at PW6's home at the material time (25th and 26th December 2012), had known A1 for about two months before the 26th December 2012 when he opened the gate of PW6 at around 2PM to enable A1 and his four colleagues drive in and park the then numberless blue Ipsum car in PW6's compound. PW1 subsequently saw A1 and his colleagues drive out of the gate in the same Ipsum vehicle after about two hours. The conditions for identification of the A1 by PW2 were favourable in that it was broad day light and A1 was already known to PW2 for a period two months. There was no

possibility of mistaken identification of A1 by the witness. With such evidence, A1's alibi was discredited by the prosecution evidence.

As for the *alibi* of A2, he stated under oath as DW2 that during the Christmas holidays, he was with his family at his home in Hoima District. That on 25/12/2012 he went to church for Christmas in Dulega Church of Uganda after which he went back home with his family. On 5/1/2013 he left home for his duty station in Arua District where he worked as the Chief Accountant in BAT Company. That he arrived in Kampala on the same date between 9.30AM and 10AM and he was arrested and taken to Nakasero Police post from where he was taken to Kyambogo Police Post. That he did not know the officers who arrested him. That he was never taken to Jinja Road Police Station. That he was never taken to his home for a search and was never arrested at Kitintale. That he did not know A1 and that he first saw A1 at Wakiso Police Station. That neither did he know Baguma John.

A2 called his wife, DW6 Sarah Ayesiga, to testify in support of his *alibi*. DW6 stated said that she spent the Christmas holidays of 2012 with A2 full time. That on the 25th of December 2012, she and A2 went to church, Ddologa Cathedral. That A2 was a godfather to a child known as Kemigisha Lydia, a daughter of a family friend known as Martin Katabazi. That at around 3:00 PM they went for baptism of the child which was held at the home of the child's father in Hoima. That they returned home at around 10:30 PM with her husband and children. That the husband spent the night of 25th December 2012 in the house with her. That on the 26th of December 2012 they went to church and prayed. That on 5th January 2013, A2 informed her that he wanted to go back to Arua on duty. That on the following day she received a call from A2 that he had been arrested and he did not to know the reason for his arrest. She confirmed that by the time A2 was arrested, he had been working with BAT (Arua) since 2006.

The prosecution's evidence to negate and discredit A2's evidence on the *alibi* was in the testimony of PW10 Reverend Canon Barongo Francis and PW11 Mugisha Ahamed.

The trial court while evaluating the evidence about A2's alibi stated thus:

"Mujuni Ronald alias Chris "Kulisi" equally put up an alibi. In his defence he stated he was an employee of British, American Tobacco Company(BAT) and stationed in Arua, but had a home in Hoima Municipality. On the night of 25/12/2012 he attended it with his family as they corroborated with the family of his friend, a one Katabazi at the baptism of the latter's daughter. That in that very baptism A2 was one of the godparents of the said infant child. According to Exh PBAT, a document authored by BAT on its letter head, A2 has never been an employee of that company.

Then in respect of the baptism card that A2 presented to court and the birth certificate were negatived by PW 10, Rev.Canon Barongo Francis and PW11, Mugisa Ahmed, the Senior Assistant Town Clerk. In their respective evidence, they proved to court that the said documents which were uttered in court by A2 Mujuni were forgeries.

Upon Mujuni Ronald(A2) learning that his forgeries had been exposed to court by the Prosecutor through cross examination, A2 jumped bail and immediately went into hiding A2's conduct of jumping bail after he had closed his defence and his lawyers abandoning court after pre-maturely filing in court written submissions in favour of A2.

It is my considered opinion, is not a conduct of an innocent person ..."

The evaluation of the evidence of A2's alibi and the conclusion arrived at by the trial court that the same was negated by the prosecution evidence cannot be faulted.

After a close reappraisal of both the prosecution and defence evidence, we are satisfied that A1 and A2 participated in the murder of the deceased by strangulation during the night of 25th December 2015 after which they robbed him of his vehicle and dumped his dead body in a swamp at Katonga, Lukwanga Village in Wakiso District. The conviction of the appellants in respect of each one of the two counts is accordingly upheld.

Ground 5

In ground 5, the appellants' complaint against the sentences imposed by the trial court was set out in the following terms:

*"**That** the learned trial Judge erred in law and fact when he sentenced the appellant[s] to severe, manifestly harsh and excessive sentence[s] of 45- and 40 years' imprisonment without taking into account the mitigation raised by the appellants thus amounting to an illegality."*

We have closely reviewed the Record of Appeal. It indicates that the trial court sentenced each one of the appellants to 40 years' imprisonment in respect of each one of the two counts.

Further, the factors considered by the trial court while sentencing the appellants were set out as follows:

1. *"All the [m]itigating factors for a reasonable sentence against each convict that were advanced by both counsel for the parties in their respective submissions.*
2. *Judicial notice (is taken to the effect) that the cases of murder and aggravated robbery are rampant in this jurisdiction. Certain people in this area according to media reports have continued to commit such capital offences against the innocent Ugandans.*
3. *It is the duty of the courts to pass against convicts deserving sentences in order to maintain public order in society.*
4. *Ugandans must live peacefully in respective societies, free from wrong elements who commit crimes against humanity.*
5. *The offences the convicts have been convicted of were premediated by the convicts.*
6. *The deceased, Lubowa Henry died a brutal death.*
7. *The death of the deceased was cruel.*
8. *The convicts from the beginning of the trial up to the time they closed their respective defenses were not remorseful, at all.*
9. *A1 has been in prison for a period coming to 5 years, which period shall be considered when determining the sentence. A2 has been on bail and jumped bail and he is in hiding."*

Thereafter, the trial court stated:

> *"I would have sentenced each convict on each count to 45 years' imprisonment. I now [deduct] the period of about 5 years the convict (A1) has been on remand. Therefore, the convicts are sentenced;*
>
> *On count 1 on charge of murder.*
>
> 1. *A1, Mutungi Musa alias Turyatunga Eliphaz is sentenced to 40 years ... imprisonment.*
> 2. *A2, Mujuni Ronald alias Chris "kulisi" is sentenced to 40 years (forty) imprisonment.*
>
> *On Count 2 of aggravated robbery;*
>
> 1. *A1, Mutungi Musa alias Turyatunga Eliphaz is sentenced to 40 (forty) years imprisonment.*
> 2. *A2, Mujuni Ronald alias Chris "kulisi" is sentenced to 40 years (forty) years imprisonment."*

From the above, faulting the sentences passed by the trial court on the basis of not taking into account the mitigation raised by the appellants or the remand period has no basis at all.

However, we note that the trial judge did not consider the principle of parity and consistency of sentences which resulted in imposition of sentences that were out of range with decided cases of similar offences and facts.

As far as murder is concerned, this court in *Muhwezi Bayon Vs Uganda, Court of Appeal Criminal Appeal No. 198 of 2013,* after reviewing numerous decisions of the Supreme Court and the Court of Appeal stated thus:

> *"Although the circumstances of each case may certainly differ, this court has now established a range within which these sentences fall. The term of imprisonment for murder of a single person ranges between 20 to 35 years' imprisonment. In exceptional circumstances the sentence may be higher or lower."*

In ***Bandebaho Benon Vs Uganda, Court of Appeal Criminal Appeal No. 319 of 2014*** the appellant killed his wife using a panga. The deceased was cut on the head and the neck. She also had cut wounds at her back and the waist was almost severed from the rest of the body. A sentence of 30 years' imprisonment was imposed.

In ***Kyatereka George William vs Uganda: Court of Appeal Criminal Appeal No. 713 of 2010*** Court of Appeal upheld a sentence of 30 years for murder .

In **Aharikundira Yusitina vs Uganda, *Supreme Court Criminal Appeal No. 27 of 2015*** where the appellant brutally murdered her husband and cut off his body parts in cold blood, the Supreme Court set aside the death sentence imposed by the trial court and substituted it with a sentence of 30 years imprisonment.

Recently in ***Kintu Mapeera Vs Uganda, Court of Appeal Criminal Appeal No.320 of 2010*** where the appellant was found to have killed a helpless nursery-going child by strangulation after kidnapping it from its parents' home in Masanafu - Lugala Village, Rubaga Division in Kampala District under circumstances which the trial court termed to "appear to depict child sacrifice in some form" in order for the appellant to get rich, a sentence of 30 years imprisonment for the offence of murder was found by this court to meet the cause of justice in the matter.

On the other hand, the sentence range for persons found guilty of committing aggravated robbery simultaneously with murder has not been different from the sentencing range in murder convictions only. ***In Ojangole Peter Vs Uganda, Supreme Court Criminal Appeal No.34 of 2017,*** the Supreme Court confirmed a sentence of 32 years imprisonment imposed by the Court of Appeal for the offence of aggravated robbery. The appellant and another were first sentenced to suffer death by the High Court. But following the decision in the case of *Attorney General vs Susan Kigula and 417 Others, SC Constitutional Appeal No.03 of 2006,* the death sentence was reduced to 40 years imprisonment by the High Court in the resentencing procedure. On appeal to the Court of Appeal, the sentence was reduced to 35 years, which was further reduced to 32 years after deducting the period of 2 years and a half the appellant had spent on remand.

In ***Guloba Rogers vs Uganda, Court of Appeal Criminal Appeal No.57 of 2013*** where the cause of Death of the deceased was multiple organ failure due to damage to the brain and the cervical spinal cord, the Court of Appeal set aside the sentence of 47 years' imprisonment imposed on the appellant for the offences of murder and aggravated robbery and substituted it with a sentence of 33 years and 7 months' imprisonment after deducting the period of 1 year and 5 months that the appellant spent on remand.

In ***Budebo Kasto vs Uganda, Court Appeal Criminal Appeal No.0094 of 2009.*** The Court of Appeal upheld the sentence of life imprisonment for the offences of aggravated robbery and murder that was given by the trial judge.

This court, as a first appellant court, is authorized to interfere with the sentence imposed by the trial court if it 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 ***Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported); Wamutabanewe Jamiru Vs Uganda, Supreme Court Criminal Appeal No. 74 of 2007 and Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014.***

We find that the sentences imposed by the trial judge were out of range with decided cases of similar facts and circumstances and thus manifestly excessive in the circumstances of this case. They are accordingly set aside. We shall now proceed to sentence the Appellants afresh pursuant to **Section 11** of the **Judicature Act** which provides as follows:

> '***11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> *For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'*

In our exercise of the above mandate, we hereby adopt the factors and sentencing reasons considered by the trial court including the mitigating and aggravating factors and, in line with the principle of parity and consistency of sentences, consider the term of imprisonment of 30 years to be appropriate for each of the counts of murder and aggravated robbery.

DECISION.

1. The conviction of each one of the appellants on both Counts is hereby confirmed.
2. The appeal against sentence is allowed and, accordingly, the sentences imposed by the High Court against each one of the appellants for the offences of murder and aggravated robbery are hereby set aside. We now substitute the sentences as below.
3. Taking into account the 5 years spent by A1 (Mutungyi Musa alias Turyatunga Eriphazi) in pre-trial detention, we now sentence A1 to serve a term of 25 years' imprisonment on Count I (Murder) and 25 years' imprisonment on Count II (Aggravated Robbery). Both sentences shall run concurrently from the 12th day of July 2017, the date of conviction.
4. A2 (Mujuni Ronald alias Chris alias "Kulisi") is hereby sentenced to serve a term of 30 years' imprisonment on Count I (Murder) and 30 years' imprisonment on Count II (Aggravated Robbery). Both sentences shall run concurrently from the date on which A2 was arrested and produced before the trial court to start serving his sentence since he had jumped bail shortly before the trial court delivered its judgment convicting him.

We so order.

Signed, dated and delivered this 14th day of February 2022.

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KENNETH KAKURU
Justice of Appeal

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MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

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IRENE MULYAGONJA
Justice of Appeal