THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

Coram: Buteera DCJ, Mulyagonja & Luswata, JJA

CRIMINAL APPEAL NO. 0119 OF 2011

MUHINDO CRESCENT :::::::::::::::::::::::::::::::: APPELLANT

AND

UGANDA :: RESPONDENT

(Appeal from the decision of Akiiki Kiiza, J., delivered on 7th April, 2011 in Fort Portal High Court Criminal Session Case HCT-01-CR-SC-0069 of 2009)

JUDGEMENT OF THE COURT

Introduction

This is an appeal from the decision of the High Court of Uganda sitting at Fort Portal in which the trial judge convicted the appellant of the offence of aggravated robbery and sentenced him to 20 years' imprisonment.

Background

The facts that were accepted by the trial judge were that in the night of 21st October 2010 at Bundikayanja Village, Katumba Kirumya in Budibugyo District, the appellant and others still at large entered Erisania Sunday Muhindo's house using a huge boulder which they threw at the door to force it open. They had bright torches which aided them to see. They also had *pangas* and iron bars. The appellant then used a hoe to cut Erisania Muhindo on the head and he sustained an injury that required him to be hospitalised for treatment. After he was injured, Erisania Muhindo's wife fled into the bush while making an alarm to which village mates responded. However, the

assailants fled taking with them money, mobile phones and other household property.

The appellant was subsequently arrested, indicted and prosecuted for aggravated robbery. He denied participation in the crime but the trial judge found sufficient evidence to convict him of the offence and sentenced him as stated above. Being dissatisfied with both conviction and sentence, he appealed to this court stating four (4) grounds of appeal as follows:

1. The learned trial judge erred in law and fact holding that the appellant was properly identified as one of the perpetrators of the robbery and thereby came to an erroneous decision which occasioned a miscarriage of justice.
2. That the learned trial judge erred in law and fact when he convicted the appellant of aggravated robbery on evidence that was contradictory and inconsistent thereby occasioning a miscarriage of justice.
3. That the learned trial judge erred in law and fact when he sentenced the appellant to an illegal sentence of 20 years' imprisonment.
4. In the alternative, the sentence of 20 years' imprisonment on the appellant was harsh and excessive in the circumstances.

Representation

At the hearing of the appeal on 5th September 2022, the appellant was represented by learned counsel, Cosma A Kateeba on State Brief. Ms Harriet Adubango, Chief State Attorney, represented the Director of Public Prosecutions.

Counsel for both parties filed written arguments before the hearing as directed by court. They each prayed that the arguments be adopted as their submissions in the appeal and their prayers were granted. This appeal was therefore disposed of on the basis of written arguments only.

Determination of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda; Supreme Court Criminal Appeal No. 1 of 1997**)

In resolving this appeal, we considered the submissions of both counsel and the authorities cited and those not cited that are relevant to the appeal. Counsel for the appellant addressed the grounds of appeal in chronological order. We reviewed the submissions of counsel in respect of each of the grounds immediately before we disposed of each of them.

Ground 1

Submissions of Counsel

In ground 1, the appellant complained that the trial judge did not evaluate the evidence properly and so came to a wrong finding that the complainants properly identified the appellant. Counsel submitted that the trial judge did not follow the principles for identification that were laid down by the former Court of Appeal in **Abdalla Nabulerere v Uganda, Court of Appeal Criminal Appeal No. 009 of 1978**. That he erred when he came to the conclusion that the conditions were favourable for the correct identification of the appellant at the scene of the crime, and that PW1 and PW2 were able to clearly see and identify the appellant among their assailants.

He went on to submit that the trial judge did not consider the fact that though the victims stated that they knew the appellant before the attack he denied that he knew any of them. Counsel contended that the attack of the victims took place at 2.00 am in the night and so the conditions for identification

were difficult. That the witnesses stated that the assailants used light from torches but it was not stated how many these were and whether they were shone on the assailants. That in particular, though PW1 testified that the appellant called one Kadogo to bring him a gun, PW2 did not state what the said Kadogo looked like.

Counsel further submitted that the trial judge did not take the appellant's defence of *alibi* into account. That the prosecution failed to place the appellant at the scene of the crime and so the trial judge erred when he found that the appellant was positively identified at the scene of the crime.

In reply, counsel for the respondent submitted that the trial judge properly evaluated the evidence on identification and arrived at the correct decision. That the trial judge made a general analysis of the evidence of both the prosecution and the defence and he believed the witnesses called by the prosecution and found that the appellant was a liar.

Counsel further submitted that the conditions for identification were favourable and that at page 33, line 33, the trial judge found that both PW1 and PW2 were familiar with the appellant. That PW2 had seen the appellant in Bundibugyo town for over a period of 2 years. With regard to the sufficiency of light during the attack, counsel submitted that the evidence of PW2 dispelled the fact that there was insufficient light when she stated that though it was night, all the assailants had torches and the whole house was well lit from their light. That she maintained her narrative during cross examination and it was not shaken. She further submitted that PW2 testified that the attack on their home went on for about 20 minutes and she observed the assailants for about 10 minutes. Counsel thus asserted that there was sufficient time for the witness to correctly identify the appellant because this too was corroborated by PW2 who stated that the assailants had torches and he was close enough to them to recognise the appellant. That there was

therefore no need for the trial judge to warn himself of the dangers of relying on the evidence before him.

With regard to the submission that the trial judge did not consider the fact that the witnesses were frightened, she submitted that the fright did not affect the identification in any way. That PW2 testified that though she was frightened, she saw four people who entered the house. That PW2 stated that he only got scared when the appellant asked for a gun when he had already been injured on the head with a hoe. She prayed that court finds that the issue of fear was not relevant since the victims were able to identify the assailants at the scene of the crime.

Resolution of Ground 1

The principles that guide the courts in the evaluation of the evidence of identification were restated by the Court of Appeal in the case of **Abdalla Nabulerere** (supra) where the court enumerated them in the following passage:

> *"A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken. For this reason, the courts have over the years evolved rules of practice to minimise the danger that innocent people may be wrongly convicted. The leading case in East Africa is the decision of the former Court of Appeal in Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166 cited with approval in Roria v. R. (1967) EA 583. The paragraph which has often been quoted from Wendo (supra) is at page 168. The ratio decidendi discernible from that case is that: -*
>
> *(a) The testimony of a single witness regarding identification must be tested with the greatest care.*
>
> *(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.*
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> *(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.*

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

The safe-guards laid down in ... are in our view adequate, if properly applied, to reduce the possibility of a miscarriage of justice occurring. It will be observed that there is no requirement in law or practice for corroboration."

We take cognisance of the principles above but note that in the case now before us, there were two main witnesses that testified about the attack on their home by assailants. The principles, though applicable in view of the fact that the offence took place in the dead of night did not apply in as far as they require the court to guard against the mistaken identity that may arise from a single identifying witness in difficult circumstances.

However, we reappraised the evidence on the record. Nzabake Elizabeth, PW1 was the wife of PW2, Muhindo Erisania. She stated that while they were asleep at about 2.00 am on the 21st October 2010, they were awakened by a loud bang and the rear door broke open. That the appellant entered the house, held her husband and began to hit him. She explained that there were many people but she identified two of them, the appellant and another called Ashraf who fled after the crime and was never arrested. The most important part of her testimony with regard to circumstances under which she identified the appellant and other assailants was as follows:

"There were many people, but I identified 2 of them. Accused and one Ashraf, but Ashraf ran away when they wanted to arrest him. They came 6 of them. It was at night but they had torches and they were switched on and the whole house was well lit by the light from these torches. I identified accused when he was picking the hoe from the floor. This was after he had demanded money from my husband, that's when he picked the hoe. After picking the hoe, he cut the victim on the head then accused told one Kadogo to go and get a gun and finish him off. After this, Kadogo came with a panga he hit me with it on the shoulder, then he by passed me, and took the gun to the accused person. Then, for me I rum away, while raising an alarm, knowing that the victim had been killed. The attackers had panga, torches and gun. When I ran outside, I went to the bush, where I also found our Chairman - he had also been frightened. He asked me what had happened, and I told him."

Mr Kateeba for the appellant cross examined the witness about the assailants. She explained that when the assailants hit the door they woke up and saw light in the house. That by the time she woke up the assailants were in the house. That they (inhabitants) were scared/frightened when they woke up and saw lights in the house. Further that four people entered the house and the rest remained outside and among those that entered, she identified the appellant and Ashraf. That the appellant had a torch and another had a *panga* and a gun. She clarified that the other two assailants that entered the house were clad in jackets and they had torches and *panga*s but she did not identify them. She further explained that the appellant was wearing a white T-shit and a red jumper. She confirmed that by the time she woke up the assailants were already in the house.

Similar to the trial judge, we are of the view that the testimony of PW1 was very clear with regard to the identification of the appellant. She knew him before the attack, she observed everything that he did during the attack, including picking up a hoe and hitting her husband with it, and even described what he wore at the time. It is also clear to us that she observed him until his request for a gun made her so frightened that she fled into the bush to save her life. It is also clear from her testimony that there was ample light from the torches that were flashed around by the assailants during the attack to facilitate her to see those that she knew before, the appellant and Ashraf. We are also of the opinion that had she been the only witness to testify, her evidence would have still been sufficient to prove that the appellant was positively identified at the scene of the crime.

Erisania Muhindo, PW2, also testified to identify the assailants. The relevant part of his testimony, at page 11 of the record, was as follows:

> *"On 21/7/2008, for 2 a.m. (sic) I was at home sleeping with my wife (PWI). That I heard something like a gun go off. I woke up, but saw the door of the house fall down. There and then attackers had reached my bed. There were 4 people*

who entered the house passing through the door and windows. They started beating me and demanding for money. They had iron bars and pangas I tried to run away but I failed. They overpowered me. Then accused got a hoe and hit me on the head. They wanted money from me. Accused then called those who were outside to bring him his gun so that he finishes me. They were all using Rukonjo language. I recognized some of them. They included Matte Wilson, then Ashraf - I only heard his voice and recognized it as he used to stammer. I also recognized the accused person and Matte Wilson. I had known the accused person before this case. I used to see him in Bundibugyo town for about 2 years. Accused had a torch and others also had torches. I was next to him, as he was holding me. Accused was putting on a white T-shirt and a red jumper. The struggle took about 15 - 20 minutes. I never gave them what they wanted. PWI after they hit me with a hoe, she run outside I had to run outside. When I was only in an under wear and I found neighbours outside, these included Matundu who was the Chairman I told him what had happened to me and reported accused had injured me."

The witness was cross examined about his testimony. He clarified that when he woke up at the loud bang that sounded like a gun, he saw light through the windows and the door. That he was not frightened so he got a spear and threw it at the assailants but it missed them. That he only got frightened when the appellant asked another person to bring him a gun. He asserted that he saw the gun with a person who was standing by the door. That the appellant told Ashraf to bring the gun so that he could kill him but by that time he was bleeding. That the appellant's request that one of the assailants bring him a gun was what scared him but before that he was fighting the assailants. He insisted that four assailant entered the house, including the appellant and Ashraf.

There is therefore no doubt at all in our minds that because he already knew the appellant for a period of two years and the latter held him close when he got a hoe and hit him, PW2 also positively identified the appellant by the light of torches that were flashed around the scene by the assailants. The trial judge therefore made no error at all when he held that the conditions for the correct identification of the assailants at the scene were favourable, and that

PW1 and PW2 properly identified the appellant among the attackers during the crime.

Ground 1 of the appeal must fail.

Ground 2

The appellant's gist of the complaint in this ground of appeal was that the learned trial judge convicted the appellant of the offence of aggravated robbery on evidence that was contradictory and inconsistent and he thereby occasioned a miscarriage of justice.

Submissions of Counsel

With regard to this ground, counsel for the appellant submitted that the trial judge erred when he found that though there was neither evidence that anybody lost a life, nor medical evidence to show that PW2 sustained grievous harm, the court established that a deadly weapon was used during the robbery. Counsel went on to submit that there was no evidence that *pangas*, guns or iron bars were used because none of these was tendered in evidence at the trial. That therefore, the trial judge relied on speculation when he found that the injury that was sustained by PW2 was the result of use of a deadly weapon.

Counsel went on to challenge the testimony of PW1 because she did not state that iron bars were used but only said the assailants had *pangas* and a gun. Further, that none of the witnesses claimed that the assailants entered the house with a hoe and that this presupposes that the hoe belonged to the victims and was found in their house. That however, the witnesses did not describe the implement; neither did they claim that it was among the property that was stolen during the incident. He added that PW2 did not testify about the extent of his injuries and that without such evidence, the trial judge had no basis for concluding that there was a deadly weapon used by the

assailants. He relied on the decision of the Supreme Court in **Mutesasira Musoke v Uganda; SCCA No 17 of 2009**, where the court held that unless the weapon used is adduced in evidence, the reliance on the injury alone is insufficient to prove the ingredient that a deadly weapon was used during the theft.

He concluded that there was insufficient evidence to support the finding that a deadly weapon was used in the alleged attack. He thus prayed that this court finds that the prosecution failed to prove the commission of the offence beyond reasonable doubt.

In reply, counsel for the respondent submitted that there was no contradiction between the testimonies of PW1 and PW2 about the weapons that were used by their assailants. That both witnesses stated that the assailants had *pangas* and that the appellant used a hoe to strike PW2 on the head. That the only difference between what they stated was that PW2 added that some assailants carried iron bars. She asserted that no two witnesses can see exactly the same things of an incident or relate the evidence in exactly the same way.

Counsel went on to submit that the witnesses identified the weapons ably because they were ordinary articles commonly used in rural areas. That the weapons were not produced in evidence because they belonged to the assailants who left the scene of the crime with them and they were not recovered.

With regard to the contradictions in the evidence of PW1 and PW2 about the number of assailants that entered the house, and whether they saw them before they entered the house or after, counsel for the respondent submitted that the said contradictions were minor and did not go to the root of the case. In support of her submissions, she referred to the decision of the Supreme Court in **Sarapio Tinkamalirwe v Uganda, Criminal Appeal No. 27 of 1989,**

where it was held that the law on inconsistencies and contradictions will result in the evidence of witnesses being rejected unless they are satisfactorily explained away. Further that minor inconsistencies will lead to rejection of evidence if they point to deliberate untruthfulness on the part of the witness.

Resolution of Ground 2

The principles relating to contradictions and inconsistencies in evidence has been stated by this court time and again. It was correctly stated by counsel for the respondent as it was restated by the Supreme Court in **Sarapio Tinkamalirwe** (supra).

Regarding the number of assailants, PW1 stated that there were six (6) of them. Four (4) entered the house while two (2) remained outside. She was consistent about this even during cross examination. Consistent with PW1, PW2 also stated that there were four (4) people who entered through the door and the windows which were also broken. During cross examination, PW2 did not waver. He insisted that four people entered the house; two through the door and two through the windows. We therefore find that save for the point through which they gained entry, the two witnesses both stated that there were four assailants who entered their house on the night of the robbery.

As to when the assailants entered the house, in cross examination PW1 sated thus:

> *"The incident took place at 2 a.m. By then I was sleeping, when they banged the door, we woke up and we then saw light in the house. By the time we woke up, the attackers were already in the house. When we were afraid and scared and even we saw the lights in the house." (sic)*

On his part PW2 stated that after the loud noise that sounded like a gun, he woke up and saw the door fall inside. That the assailants then entered and went straight to his bed. It appears from the two testimonies that PW2 woke up before PW1 because he saw the assailants enter the house. PW1 on the

other hand said she saw them when they were already in the house. However, they all stated that they entered after the loud bang, which resulted from breaking the door down.

Regarding the assertion that there were inconsistencies or contradictions between the witnesses as to the types of weapons that the assailants had during the attack, PW1 did not testify about the weapons during her examination in chief. However, she stated that the assailants hit her husband as soon as they got to their bed and demanded for money. She then saw the appellant pick up a hoe with which he hit her husband on the head. She also said that after the appellant hit her husband on the head, he called to one Kadogo to bring the gun so that he could *"finish him off."* She further stated that the same Kadogo hit her on the shoulder with a *panga*. And that is when she, in fear, ran out of the house to the bush.

During cross examination, PW1 stated that she saw the gun. In her testimony in chief, she stated that she saw the gun three times. She also stated that she told the police that she saw the gun. She denied that she told the police in her statement that there was no gun with the assailants. On his part, PW2 stated that the assailants had *pangas* and iron bars. And though he too stated that the appellant called for a gun from the assailants who stayed outside the house, he did not say he saw the gun. However, he too stated that the appellant got a hoe and hit him on the head with it. He too stated that it was after they hit him on the head with the hoe and the appellant called for a gun that his wife ran out of the house.

The series of events, according to the two witnesses, appear to us to be consistent in both testimonies. What is not consistent is the detail of the weapons. While PW1 said she saw a gun, PW2 did not see it though he heard the appellant call for it. It therefore seems to us that calling for the gun was a ruse that the assailants used to scare their victims. As a result, PW1 ran

away from the scene and left PW2 alone. This could have detracted her attention from the identity of the assailants but it is clear from her testimony that she had already identified some of them. The testimonies are also consistent with each other in that both witnesses saw the *pangas* that the assailants carried during the attack.

We agree with the submission of counsel for the respondent that no two witnesses can state their evidence in exactly the same way, even if they witnessed the incident together and at the same time. We therefore find, on the basis of consistency of the testimony of the two witnesses about the particular fact, that the assailants carried *pangas* and that the appellant used a hoeto hit the appellant on the head.

Counsel for the appellant submitted, on authority of the decision of the Supreme Court in **Mutesasira Musoke** (supra), that the absence of the medical examination report about the injuries of PW2, put together with the fact that none of the weapons alleged to have been used by the assailants was produced in evidence, would lead to the inference that no deadly weapon was used in the robbery. And that therefore, the prosecution failed to prove that ingredient of the offence beyond reasonable doubt.

In **Mutesasira Musoke** (supra) the knife which was allegedly used in the robbery was never produced in evidence. Neither did the prosecution lead evidence of any witness to state that he or she saw the knife that was used. The prosecution relied on the evidence of a medical doctor who examined the victim 24 days after the incident in which the victim was attacked. The doctor testified that on examination, the victim had a deep cut wound in the neck and lacerations which he graded as harm. The Supreme Court found that use of a deadly weapon could not have been proved on the basis of a medical examination report alone. The appellant was acquitted of the offence of

aggravated robbery and convicted of simple robbery. However, regarding proof of use of a deadly weapon, the court held that:

> *"In cases where an accused person is indicted for aggravated robbery, failure by the prosecution to exhibit in court the deadly weapon used in robbery will not be fatal to the prosecution's case as long as there is other reliable evidence adduced to prove that a deadly weapon was used. See, for example Haruna Turyakira & Others v Uganda, Criminal Appeal No 07 of 2009."*

The situation in the instant case is the reverse. While there were witnesses who testified that the assailants carried and used a weapon that seems to have been found in the house when they attacked them, there is no medical report to show that PW2 had a wound resulting from the alleged assault by the appellant with a hoe. We note that section 285 (2) and (3) of the Penal Code Act provides that:

> **(2) Notwithstanding subsection (1) (b), where at the time of or immediately before or immediately after the time of the robbery, an offender is in possession of a deadly weapon, or causes death or grievous harm to any person, the offender or any other person jointly concerned in committing the robbery, shall on conviction by the High Court, be liable to suffer death.**
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> **(3) In subsection (2) "deadly weapon" includes-**
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> **(a) (i) an instrument made or adapted for shooting, stabbing or cutting and any imitation of such an instrument;**
>
> **(ii) any substance,**
>
> **which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm, and**
>
> **(b) any substance intended to render the victim of the offence unconscious."**

From the provisions above, it is clear that the offence of aggravated robbery is created when one steals and attendant to that uses an instrument that is described in subsection (3) of section 285 of the Penal Code Act. While coming

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to his conclusion on this point, the trial judge, at page 31 of the record, found and ruled as follows:

> *In the instant case, both PWI and PW2 told court that, the attackers were armed with pangas and iron bars and at one stage one called for a gun. It is my considered view that pangas and hoes are instruments designed to cut or stab within the meaning of S. 286(3)(a) (i) of the Penal Code Act. Both PWI and PW2 told court that their attackers had these pangas. Actually even PW2 said a hoe was used to inflict a blow on his head and other injuries on his body and that of PWI which was caused by pangas. There is no any other evidence before me to contradict their evidence, on this point. In the premises therefore, I find that the prosecution has proved beyond reasonable doubt that, the attackers on PWI and PW2, used deadly weapon during the robbery.*

Following the principle that was stated by the Supreme Court in **Mutesasira Musoke** (supra) we find that the trial judge came to the correct decision after a careful evaluation of evidence on the record. Ground 2 of the appeal therefore also fails.

Ground 3

The appellant's grievance in this ground of appeal was that the sentence of 20 years' imprisonment imposed by the trial judge upon him was illegal and ambiguous.

Submissions of counsel

In his submissions, Mr Kateeba for the appellant contended that while sentencing the appellant, the trial judge did not comply with the provisions of Article 23 (8) of the Constitution. He submitted that the provision is couched in mandatory terms. Further that in **Rwabugande Moses v Uganda, Supreme Court Criminal Appeal No. 25 of 2014; (2017) UGSC 8**, it was held that taking into account the period spent in custody before completion of the trial means that this period should be subtracted from the sentence that the court imposes.

He pointed out that the trial judge did not do so. He set out an excerpt from the sentencing ruling and asserted that the sentence was ambiguous because the trial judge did not consider the mitigating factors in favour of the appellant when he stated that he *"put everything into consideration."* He again referred us to the decision in **Rwabugande** (supra) to support this submission. He concluded that the trial judge erred when he did not take the period spent on remand into account and that this court should set the sentence aside.

In reply, Ms Adibango submitted that the sentence was neither illegal nor ambiguous. That the trial judge took the mitigating factors into consideration at page 37 of the record of appeal. That he also took into account the period of 2 years and 4 months that the appellant spent on remand. That it was not necessary for the trial judge to subtract it from the sentence imposed as long as he stated that he had taken it into account. That counsel's argument that he ought to have subtracted the period of remand was a misapplication of the decision of the Supreme Court in the case of **Rwabugande** (supra) which was handed down on the 3rd March 2017, way after the appellant was sentenced by the trial court. That it therefore could not bind the trial judge. She prayed that the sentence be upheld.

Resolution of Ground 3

It is trite law that the provisions of Article 23 (8) of the Constitution are mandatory. However, there is disagreement about its meaning and there is a long line of authorities in which this court and the Supreme Court have construed it and rendered decisions. [See **Kizito Senkula vs. Uganda SCCA NO. 24 of 2001; Kabuye Senvewo vs. Uganda SCCA No. 2 of 2002; Katende Ahamad v Uganda SCCA NO.6 of 2004 and Bukenya Joseph vs. Uganda SCCA No. 17 of 2010; Rwabugande Moses v Uganda SCCA No. 25 of 2014, Abelle Asuman v Uganda SCCA No 66 of 2016; Sebunya Robert**

& Another v Uganda, SCCA No. 58 of 2016 and **Karisa Moses v Uganda, SCCA No. 50 of 2016,** among others**].**

However, we note that the construction of the provision, though riddled with controversy over time, has never been set before the Constitutional Court for interpretation as it is required by Article 137 (3) of the Constitution. Perhaps it is time that the matter was given a comprehensive interpretation by that court in order to put a stop to the controversy, and if necessary, the Supreme Court will consider the matter on appeal from the Constitutional Court. But as the question stands now this court is guided by precedents that have been handed down by the Supreme Court, which are binding on us.

Article 23 (8) of the Constitution provides as follows:

> **(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial *shall be taken into account in imposing the term of imprisonment*.**
>
> ***{Emphasis supplied}***

In the case now before us, while sentencing the appellant, the trial judge made observations and then imposed the sentence on the appellant, as it is shown on page 9 of the record of appeal, as follows:

> *"Accused is allegedly a first offender. He has been on remand for about 2 years and 4 months. I take this period into account, while considering the sentence to impose on him. He is said to be 35 years old, and is said to be having a family and a wife of 3 children. (sic) He is said to be remorseful and has prayed for leniency.*
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> *However, accused has committed a serious offence. The maximum sentence could be up to a death penalty. This shows how serious the law treats robbers. Accused is a Youngman who appears to be physically fit and could earn a descent and honest living. However, he chose to reap where he did not saw. (sic) This cannot be allowed by this court. He deserves a stiff sentence in the circumstances of this case. In court citizens must be protected from people like the accused person. Putting everything into consideration I sentence accused to 20 (twenty) years imprisonment."*

We accept the submission of counsel for the appellant that in **Rwabugande** (supra) the Supreme Court held that compliance with the provisions of Article 23 (8) requires the sentencing court to subtract the period spent on remand from the sentence that is imposed upon a convict. We also observed that this is required by paragraph 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, wherein it is stated that:

> **15. Remand period to be taken into account.**
>
> **(1) The court shall take into account any period spent on remand in determining an appropriate sentence.**
>
> **(2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.**

This position was thus taken by the court in its decision in **Rwabugande Moses** and **Abelle Asuman** (supra). However, in **Karisa Moses v Uganda** (supra) the Supreme Court clarified that the decision in the case of **Rwabugande** (supra) has no retrospective effect. And in **Abelle Asuman** (supra) the same court observed and held that:

> *"This Court and the Courts below before the decision in **Rwabugande (supra)** were following the law as it was in the previous decisions above quoted since that was the law then.*
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> *After the Court's decision in the **Rwabugande case** this Court and the Courts below have to follow the position of the law as stated in **Rwabugande (supra).***
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> *This is in accordance with the principle of precedent. We cite **Black's Law Dictionary**, 18th Edition page 1214:*
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> > ***"In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law."***
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> *A precedent has to be in existence for it to be followed. The instant appeal is on a Court of Appeal decision of 20th December 2016.*
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> *The Court of Appeal could not be bound to follow a decision of the Supreme Court of 03rd March 2017 coming about four months after its decision. The case of **Rwabugande (supra)** would not bind Courts for cases decided before the 3rd of March 2017."*

Similarly, in view of the fact that the sentence in this case was handed down on the 7th April 2011, several years before the Supreme Court made the decision in the case of **Rwabugande**, the precedent clearly does not apply to this case.

Nonetheless, it still has to be decided whether the trial judge complied with the mandatory provisions of Article 23 (8) of the Constitution when he held that he had *"taken into account"* the period of 2 years and 4 months that the appellant spent on remand before conviction.

The wording in the sentencing ruling was one of the factors that were dealt with in **Abelle Asuman** (supra) where the Supreme Court held thus:

> *"What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.*
>
> *Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.*
>
> ...
>
> *This Court and the Courts below before the decision in **Rwabugande (supra)** were following the law as it was in the previous decisions above quoted since that was the law then.*
>
> *After the Court's decision in the **Rwabugande case** this Court and the Courts below have to follow the position of the law as stated in **Rwabugande (supra).**"*

We have already held that the decision by the trial court was made six years before the decision preferred by counsel for the appellant espoused in the case of **Rwabugande** (supra). We observed that the trial judge took the period

spent on remand *"into account"* as it is stated in Article 23 (8) and as was required at the time and stated in his ruling that he did so. He therefore complied with the provisions of Article 23 (8) of the Constitution. The sentence that he imposed was a legal one, and we find so.

Going on to whether the trial judge considered the mitigating and aggravating factors in his decision, it is clear from the ruling which we have set out above that he did so. We therefore find that there was no ambiguity in the sentence that he imposed.

Ground 3 of the appeal therefore also fails.

Ground 4

In this alternative ground of appeal, the appellant complains that the sentence of 20 years imprisonment that was imposed by the trial judge was harsh and excessive in the circumstances.

Submissions of Counsel

For the appellant, Mr Kateeba submitted that the sentence of 20 years in a case where no person died was harsh and excessive. He referred to the decision in **Aliganyira Richard v Uganda; Court of Appeal Criminal Appeal No. 19 of 2005,** where the appellant had been sentenced to death for aggravated robbery, but this court set the sentence aside and substituted it with a sentence of 15 years' imprisonment.

Counsel went on to refer to the case of **Namanya Abdalla v Uganda, Court of Appeal Criminal Appeal No. 55 of 2017**, where the appellant had been sentenced to imprisonment for a period of 20 years for the offence of aggravated robbery. He submitted that this court set that sentence aside and substituted it with a sentence of 16 years' imprisonment. He also drew the attention of court to its decision in **Asiimwe Brian v Uganda, Criminal**

Appeal No. 54 of 2016, in which the appellant was sentenced to a period of 17 years' imprisonment for aggravated robbery. He submitted that this court sets it aside the sentence and substituted it with a sentence of 15 years' imprisonment. Counsel then prayed that we set the sentence of 20 years aside and exercise our powers under section 11 of the Judicature Act to impose our own sentence.

In reply, Ms Adubango for the respondent submitted that in the case now before court, the aggravating factors outweighed the mitigating factors. That it is the law that sentence is within the discretion of the trial judge. Further, that the appellate court will only interfere with the sentence imposed by the trial court if it is evident that the court acted upon a wrong principle or overlooked some material factor, or if the sentence is manifestly harsh and excessive in view of the circumstances of the case. In support of her submissions, she referred us to the decision of this court in **Blasio Ssekawooya v Uganda, Criminal Appeal No. 107 of 2009,** which was cited with approval in **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001**.

Counsel then concluded her submissions with the assertion that the trial judge judiciously exercised his discretion. That this court should therefore find so and uphold the sentence that was imposed. She prayed that the whole of the appeal be dismissed and both the conviction and sentence upheld.

Resolution of Ground 4

It is a well settled principle that sentencing is within the discretion of the trial judge. It is also the settled position of the law that an appellate court will only interfere with a sentence imposed by a trial court where the sentence is either illegal or founded on a wrong principle. An appellate court will also exercise its discretion to interfere with a sentence if it is shown that the trial court did not consider a material factor in the case; or where the court has imposed a

sentence that is harsh and manifestly excessive in the circumstances. [See **Bashir Ssali v Uganda [2005] UGSC 21; Ninsiima Gilbert v Uganda [2014] UGCA 65** and **Livingstone Kakooza v Uganda [1994] UGSC 17**, among others.]

In the case now before us, the appellant's counsel raised the legal principles which in his view were not observed by the trial judge and submitted about them in the third ground of appeal. We did not find substance in his submissions and we dismissed ground 3. The appellant now calls upon this court to exercise its discretion only because the trial court imposed a sentence that was not similar to those imposed in the cases that were commended to us, but with no further reason that the trial judge failed to observe a legal principle that was required of him.

We observed that in the decisions of this court that were commended to us by counsel for the appellant, this court interfered with and set aside the sentences that had been imposed by the trial court on the basis of established legal principles that the trial court did not comply with. To that extent, the precedents are not useful to us in making our decision to interfere with the sentence. However, this court is concerned about the disparity in sentences that are handed down by trial courts for similar offences by offenders that are then sent to the same prisons. It is a principle that is set out in the Sentencing Guidelines for the Courts of Judicature, 2013, where paragraph 6 (c) requires a sentencing court to 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. The trial judge did not do so which justifies our interference with the sentence that he imposed.

We observed that sentences for aggravated robbery in the cases that were commended to us by counsel for the appellant range from 12 years to 16

years' imprisonment. We therefore set aside the sentence of 20 years' imprisonment that was imposed by the trial judge and substitute it with a period of 17 years' imprisonment. Since we are imposing a fresh sentence, we now deduct the period of 2 years and 4 months that the appellant spent in prison before his trial was completed, with the result that the appellant will serve a period of 15 years and 8 months in prison.

In conclusion, this appeal partially succeeds. The conviction is upheld but the appellant shall serve a period of 15 years and 8 months' imprisonment which will commence on 7th April 2011, the date on which he was convicted.

Dated at Fort Portal this 23rd day of December 2022.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Eva Luswata
JUSTICE OF APPEAL