

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram: Kenneth Kakuru, Muzamiru M. Kibeedi & Irene Mulyagonja, JJA)
CRIMINAL APPEAL NO. 0171 OF 2018

5

KALULE MUSA **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

10 *[Appeal from the Judgment of the High Court of Uganda at Kampala (Hon. Mr. Justice Moses Kazibwe Kawumi) delivered on 13th February 2018 in Criminal Session Case No. 0492 of 2016]*

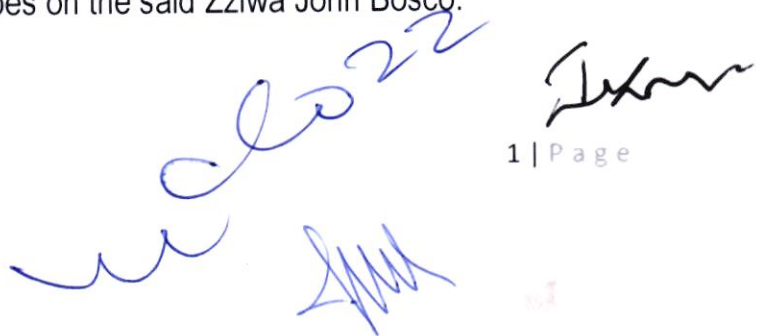
JUDGMENT OF THE COURT

Introduction:

15 The appellant was indicted, tried and convicted of the offences of Murder contrary to Sections 188 and 189 of the Penal Code Act, Cap. 120 and Aggravated Robbery contrary to Sections 285 and 286(2) of the Penal Code Act, Cap. 120.

The particulars of the offence of murder were that Kalule Musa *alias* Sam, Yenga Amanga Blaise and others still at large on the 2nd day of February 2013 around Matugga area in the Wakiso District with malice aforethought unlawfully killed Zziwa John Bosco.

20 The particulars of the offence of Aggravated Robbery were that Kalule Musa *alias* Sam, Yenga Amanga Blaise and others still at large on the 2nd day of February 2013 around Matugga area in the Wakiso District robbed Zziwa John Bosco of his motor vehicle registration number UAS 713M Toyota Premio Silver Grey valued at Twelve Million Five Hundred Thousand Shillings Only (12,500,000/=) and at, immediately before or after the said robbery threatened to use a
25 deadly weapon to wit iron bars, hammer and ropes on the said Zziwa John Bosco.


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The prosecution's case before the trial court was that the deceased, Zziwa John Bosco, was a driver working with Deboro Car Hire Enterprises whose Head Office was located on Diamond Trust Building, Kampala. On 02nd February 2013, at about 6PM, the deceased left the company office while driving the Company motor vehicle registration number UAS 713M
30 Toyota Premio silver in colour. He never returned and as all his phones were off, his superior, Owori Stephen was prompted to report a case of missing person to Central Police Station, Kampala.

On 4th February 2013, a herdsman grazing cattle along Semuto road in Ruzuume village in Matugga found the deceased's body in the swampy sugarcane garden. The herdsman
35 immediately notified the people nearby including the Local Council authorities and the Parish Chief of Ssanga. These in turn notified police.

The crime scene was visited by among others the Inspector of Police, one Kalema Deogratus who revealed that he recovered from the deceased, identification documents bearing the name of Zziwa John Bosco and some telephone numbers. Kalema dialled the telephone numbers
40 and the recipients confirmed to him that he was a special hire driver who had disappeared.

The deceased's body was taken to Mulago hospital for post-mortem examination. The deceased was identified by Owori Stephen and Mutebi Ronald as Zziwa John Bosco. The Police Mortem carried out on Police Form 48B revealed the cause of death as asphyxia following upper airway obstruction in ligature strangulation.

45 Later on 17th March 2014, motor vehicle registration number UAS 713M was recovered in Arua town Uganda with a one Sammy Lety Ondia, a Congolese from the Democratic Republic of Congo (DRC) while bearing a Congolese registration number 2443/AA25. However, the Ugandan registration number UAS 713M was still evident on the window screen and side mirrors. The Police Investigation revealed that Ondia bought the motor vehicle from Abi Adia
50 Sabo in Ariwan DRC. Abi Adia Sabo claimed to have bought the said motor vehicle from

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Yenga Amanga Blaise. Yenga Amanga Blaise was a car broker in DRC who claimed to have received the motor vehicle in issue from the appellant, Kalule Musa, on the 6th of February 2013 for sale in DRC.

Subsequently, in the month of August 2013, the appellant was arrested after he had exported
55 to DRC yet another stolen car, Prado TX, silver in colour, to Yenga Amanga Blaise for sale.

An identification parade was carried out by Police and Yenga Amanga Blaise identified the first accused as a car dealer and the person who brought to him the motor vehicle Premio registration number UAS 713M for sale in the month of February, 2013.

The appellant was then charged before court, tried and convicted and sentenced to 46 years
60 and eight months on each one of the counts after taking into account the pre-trial remand period of 3 years and eight Months.

The appellant appealed to the Court of Appeal against both conviction and sentence on three grounds as set out in the Amended Memorandum of Appeal as follows:

- 65 **1. The Learned Trial Judge erred in law and fact when he relied on weak circumstantial evidence to convict the accused on murder and aggravated robbery thus occasioning him a miscarriage of justice.**
- 2. The Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence as a whole thereby occasioning him a miscarriage of justice.**
- 70 **3. In the alternative and without prejudice to the above, that the trial Court erred in law and fact when it passed a harsh and severe sentence to the Appellant thus occasioning him a miscarriage of justice.**

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Representation:

75 At the hearing of the appeal, Mr. Isaac Jur Kodil and Ms. Elizabeth Nyansingo appeared for the appellant, while Mr. Sam Oola, Senior Assistant Director of Public Prosecutions (DPP), appeared for the respondent. The appellant followed the court proceedings via Video link to prison.

Both parties filed written submissions as directed by court. The appeal was thus disposed of
80 on the basis of written arguments only.

Appellant's Written Submissions:

In his submissions, Counsel joined grounds one and two. Then he submitted on ground three separately.

With regard to grounds 1 and 2, Counsel faulted the trial Judge for relying on the
85 circumstantial evidence of PW5, the circumstances of the proximity of the period of the disappearance of the car from Uganda and its reappearance in Congo, and the discredited alibi of the appellant to place the appellant at the scene of crime.

Counsel submitted that the circumstantial evidence was weak and could not conclusively infer the guilt or the participation of the appellant in respect of the two offences. That PW5's
90 evidence of placing the appellant at the scene of crime was impeached and discredited during cross examination by comparing the evidence he had made in his Statements at the Police vis-à-vis his testimony in Court.

Further, Counsel submitted that the Investigation team influenced PW5 to select the appellant at the identification parade which depreciated his evidence. That the Court Record shows that
95 the Investigating officers gave PW5 the details and information about the appellant prior to the identification. That this contravened the law of credible identification during an identification parade to the effect that you should not influence the identifying witness in any way. For this

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100 submission, Counsel relied on the case of Sentale Vs Uganda, [1968] 1 EA 365. That as a result, the credibility of the evidence on identification of the appellant by PW5 was adversely affected.

Counsel concluded by submitting that the failure of the trial judge to properly evaluate the circumstantial evidence and instead convicting the Appellant on the basis of the weakness of his defence was an error that occasioned the Appellant a miscarriage of justice.

105 With regard to ground 3, Counsel submitted that the sentence imposed by the trial court was harsh and severe on account of the failure of the trial judge to take into consideration all the mitigating factors and how it would affect the appellant as a family man with five children deserving of his care and guidance. Further, that it was out of range with sentences imposed in cases of a similar nature. For this submission, Counsel quoted the case of Ainobushobozi Vs Uganda Criminal Appeal No. 242 of 2014 where the Court of Appeal held that the sentence
110 that was imposed on the Appellant in that case was manifestly excessive and harsh for being out of range with sentences imposed in cases of a similar nature.

Counsel invited this court to allow the appeal and set aside the conviction and sentence.

Respondent's Written Reply:

115 Counsel opposed the appeal and supported both the conviction and sentence against the Appellant by the trial Court.

In reply to grounds one and two of the appeal, Counsel did not agree that the learned trial Judge relied on weak circumstantial evidence to convict the Appellant. Counsel submitted that the circumstantial evidence as accepted by the trial Court was that the deceased was killed on 02.02.2013 around Matugga in Wakiso District and motor vehicle Premio registration number
120 UAS 713M which he was driving was robbed from him. That on 04.02.2013, the Appellant was in possession of the vehicle at Ariwara in the Democratic Republic of Congo looking for a

125 buyer for the same. That PW5, a motor vehicle broker, met the Appellant and connected him to one Bebe Alhaji to whom the Appellant sold the vehicle. That in his evidence, PW5 implicated the Appellant as the person with whom he saw motor vehicle Toyota Premio registration number UAS 713M on 04.02.2013. That subsequently, PW5 was able to identify the Appellant at an identification parade. That there was no evidence adduced to impeach the credibility of PW5. That the alleged statement sought to be relied on by the appellant's counsel to contradict the evidence of PW5 was not tendered into Court. That there is no evidence that the Police investigation team influenced PW5 to select the Appellant at the identification 130 parade held in Luzira Prisons. That there are no co-existing circumstances to weaken the circumstantial evidence against the Appellant as brought out by the evidence of PW5.

Counsel further submitted that in his defence, the Appellant denied ever giving PW5 a vehicle to sell and raised an alibi to the effect that on 02.02.2013 he was an inmate at Luzira Prison where he was serving a sentence. That the evidence by a Court Witness (CW1), ACP 135 Twesigye Celestine showed that as at 02.02.2013, the Appellant was not at Luzira Prisons. That he had escaped on 20.10.2011 and was re-arrested on 17.10.2013 and taken back to Luzira Prisons. That, accordingly, between 02.02.2013 and 04.02.2013 the appellant was at large and therefore he had opportunity to commit the offences charged.

Counsel concluded that the trial Judge was satisfied about the truthfulness of the evidence of 140 PW5, the single identifying witness after warning himself of the danger of convicting the accused on such evidence. That he considered all the evidence on record from the prosecution and the defence and came to the right conclusion that the prosecution had proved both offences against the Appellant. Accordingly, Counsel invited this court to uphold the decision of the trial court and dismiss grounds 1 and 2.

145 In reply to ground three, Counsel submitted that the sentence against the appellant was not a harsh and severe sentence as claimed. That the trial Court considered all the mitigating and aggravating factors. That over and above was the fact that the convict had two past

convictions for the offence of stealing motor vehicles and a conviction for escaping from lawful custody. That he was thus a habitual offender. That no compelling reason has been advanced
150 to warrant this Court interfering with the sentence passed against the Appellant by the trial Court.

Counsel concluded by praying that the appeal be dismissed, and the conviction and sentences against the Appellant be upheld.

Appellant's Rejoinder:

155 In rejoinder to the submissions of the Respondent that the Police Statements of PW5 were never tendered in Court as exhibits so as to be relied upon and/or to prove their contents, Counsel submitted that the contents of those statements can be proved orally without necessary tendering in court the document as long as the person admits their contents and existence. That proof of the contents of documents is either by primary or secondary evidence
160 and that the Court can rely on either of them to assess the proof of a fact in issue. For this submission Counsel relied on Sections 60, 62(a) and 64(1)(b) of the Evidence Act.

Counsel concluded this point by submitting that PW5 gave oral accounts of the contents of the Statements that he made at Arua Police Station and Kasangati Police Station which impeached his credibility by the adverse party during cross examination in accordance with
165 Section 154(c) of the Evidence Act.

In response to the submission by the Respondent's Counsel that the Court Witness discredited the appellant's alibi and led evidence that the appellant was at large and, as such, he had an opportunity to commit the offences charged, Counsel submitted that this by itself was not enough to place the appellant at the scene of the crime. That an accused should never be
170 convicted on the weakness of his defence.



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With regard to the denial by the Respondent's Counsel that the investigation team influenced PW5 to select the accused out of the Parade, Counsel submitted that the court record indicates that PW5 stated in Court that he was told to go and identify Kalule out of others which contravened the Rules of Parade Identification as set out in the **Sentale case** (supra).

175 In rejoinder to ground 3, Counsel submitted that the Appellant was not a habitual offender because in respect of the charge of escape from lawful custody, he appealed, and the conviction and sentence were set aside. That the other charges of stealing vehicles were never heard and concluded which means that the Appellant is still an innocent person. That in
180 essence, the Appellant had only two convictions and that does not fit him within the description of "habitual offender".

Counsel submitted that it was an error for the learned trial Judge to rely on offences that were not yet concluded to punish the appellant harshly since he is still presumed innocent under Article 28(3)(a) of the Constitution.

185 Counsel prayed that this Court finds merit in his submissions to justify interfering with the sentence of the trial Court.

Resolution of the Appeal:

190 The gist of the appellant's complaint in grounds one and two of the appeal is whether the appellant participated in the murder of the late Zziwa John Bosco and the robbery, by aggravation, of motor vehicle registration number UAS 713M Toyota Premio, Silver Grey in colour as indicted.

It is the appellant's case that the circumstantial evidence relied upon by the trial judge to convict the appellant was weak and discredited during cross-examination and did not place the appellant at the scene of crime. On the other hand, it is the respondent's case that there is no



195 basis for faulting the findings and decision of the trial judge which were arrived at after properly evaluating all the evidence on record from both the prosecution and defence.

In those circumstances, it is 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 making allowance for the fact 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.

205 A close analysis of the evidence on the court record shows that the prosecution sought to prove the participation of the appellant in the commission of the offences through linking him to Motor Vehicle Registration No. UAS 713M Toyota Premio which was robbed from the deceased at the time of his murder on or about the 02nd or 3rd of February 2013, taken to the Democratic Republic of Congo (DRC) and allegedly sold by the Appellant using PW5 as the motor vehicle broker.

210 PW6 Steven Owor testified that the deceased was employed as a driver by Deboro Car Hire Enterprises. That he was on night duty. That on 02nd February 2013 at about 6PM he left the company offices then located on Diamond Trust Building, Kampala Road, Kampala while driving the Company Motor Vehicle Registration No. UAS 713M Toyota Premio. He never returned to office. They tried to call his phone number, but it was off. So, he reported his disappearance to Police at the Central Police Station, Kampala. That on 04th February 2013 around 4PM, he received a call from Matugga informing them that Zziwa's body was found in
215 the bush and that he was murdered. And that the body had been taken to Mulago Mortuary. That he went to Mulago Hospital Mortuary and confirmed the dead body to be that of Zziwa. After the postmortem, the body was handed over to the relatives on the same day and it was buried in Masaka.

That after about one year, around the beginning of March 2014, the witness received a call
220 from Arua Police Station informing him about the recovery of the Motor Vehicle Registration
No. UAS 713M, Toyota Premio. That the vehicle was thereafter brought to Kasangati Police
Station. PW6 went to Kasangati Police Station with the original logbook of the vehicle to
confirm that it was the witness's vehicle which the deceased was driving. He found the vehicle
225 had no number plates. But that its registration number engraved on its wind screen and side
mirrors was still visible despite the fact that the marks had been tampered with. That the Police
officers opened the car engine and confirmed that its Engine and Chasis Numbers
corresponded with those in the Logbook presented by PW6. That eventually the vehicle was
handed over to the witness by the police and he acknowledged receipt by signing the Release
Pass Form of the Police.

230 PW1, No. 30503 Detective Corporal Obalang Michael, testified that on 04th February 2013
while on duty at Matugga Police Station, they received a call from one Mugagga Bbosa, the
LC1 Chairman of Buwoozi, informing them about a dead body that had been found lying in
Buzume Village LC1, Sanga along Matugga – Semuto Road. That he, together with some
other Police officers went to the scene. They found a dead body of an unknown man that had
235 been dumped in a swamp with both hands and legs tied. That the witness was able to
establish the identity of the dead man as Zziwa John Bosco using the Voters' Card and photo
on his ID which were found in the pockets of clothes that he was wearing. Thereafter the
witness drew the Sketch Plan of the scene of crime, interviewed some witnesses at the scene
and using the Police Patrol Car transported the dead body to the City Mortuary, Mulago
240 Hospital for postmortem examination.

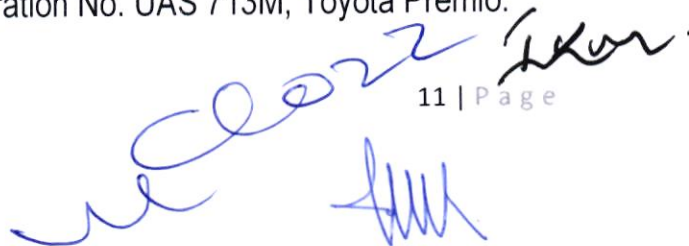
PW3 Dr. Kitayimbwa Mayinja testified that he works for the Uganda Police Force as a
Government Pathologist or Police Surgeon. That at the request of Matugga Police, on 04th
February 2013 he examined the body of the deceased and established that the cause of his
death was suffocation as a result of strangulation by rope in his neck. The Post-mortem

245 Report No. 285/2013 containing his findings was tendered in evidence by the witness as Exhibit PE3.

PW5, Yenga Amanga Blaize, testified that that he was a broker for houses and motor vehicles in the DRC. That on the 04th of February 2013 while he was at his point of work in Ariwara, DRC, the owner of a lodge known as Oseya Dedogi Lodge, approached him and informed him that one of his customers, the appellant, had a business for him namely, sale of his motor vehicle, Toyota Premio UAS 713M. That the Lodge owner was in the company of four others who included the appellant. And that at the time, the vehicle was being kept at the lodge where the appellant was likewise staying. That PW5 offered to find a buyer for the appellant and after a period of two days of searching for buyers, PW5 found a buyer known as Bebe Al-hajji. That the appellant successfully sold the vehicle to Bebe and PW5 got his commission on the sale of 10%.

PW5 further testified that after about one year, on 14th March 2014, he got information that the Uganda Police had impounded the vehicle from a Congolese man who was in Arua at the time. That the Uganda Police subsequently went to DRC to ask for permission to arrest the witness (PW5). That the witness was arrested and taken to Arua to make a Statement. That in the Statement, he stated that he was a mere dealer but the person who brought the vehicle to him for sale was "*Kalule Muganda*".

That he was informed by the police that there was a gentleman known as Kalule who had just been arrested by the Flying Squad of the Uganda Police in respect of another case and that he (PW5) would be taken to Kampala for purposes of identifying whether the person arrested was the one he had dealt with. That from Arua, the witness was taken to Kasangati Police Station in Wakiso District. Thereafter the witness was taken to Luzira Prison where the identification parade was conducted. Out of the 8 suspects on the parade, he was able to identify the appellant, by touching him and confirming that he was the "*Kalule Muganda*" he had all along been referring who brought him Motor Vehicle Registration No. UAS 713M, Toyota Premio.



PW2, Detective Assistant Inspector of Police Opio John Bosco, testified that on 22nd March 2014 while at Kasangati Police Station, he received a file that was transferred from Matugga to Kasangati Police Station for purposes of completing the investigation of the case of murder and robbery by Zziwa John Bosco. That shortly after receiving the file, he received from D/IP Omona Alfred of Arua Police Station, PW5, Yenga Amanga alias Blaise and a motor vehicle. At that time, PW5 was a suspect while the vehicle, Reg. No.UAS 713M Toyota Premio, silver in colour came with the DRC registration number 2443/AA/25.

That upon receiving the suspect and vehicle, PW2 checked the vehicle carefully and found that there were marks of the registration number on the vehicle indicators, mirrors, windows and wind glasses. That it bore UAS 713M which was partly tampered with. That he entered the particulars of the vehicle in the Exhibit Records Book namely: Motor Vehicle Toyota Corona Premio, silver in colour, Registration No. UAS 713M, Engine No.7AG803809, Chassis No. AT2110059588 with the identification marks on glasses.

PW2 also entered in the Exhibits Record Book the DRC number plate found on the vehicle namely, 2443/AA25 which was likewise handed over to him by D/IP Omona Alfred. The Exhibits Record Book was admitted in evidence as Exhibit "PE2".

PW2 further testified that he subsequently interviewed PW5 who told him that on the 6th day of February 2013, the appellant, whom he knew as "Kalule Muganda", went to him in DRC Congo with motor vehicle No. UAS 713M, Toyota Premio, silver in colour. And that PW5, being a property broker, assisted him get a buyer for it in return for a commission.

PW2 went on to state that after he had obtained the information from PW5, the police started questioning themselves as to where Kalule could be. That they subsequently got the information from their counterpart in the Flying Squad who had already known of Kalule's arrest for another case and that he was in Luzira Prison. That PW2 thereafter asked PW5 whether he could identify Kalule if he saw him. PW2 stated that after getting confirmation from

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the appellant, Kasangati Investigation Department wrote to the Prison Headquarters requesting for permission to go to Luzira Prison to interview Kalule and have an identification parade conducted there.

300 That after the Prison Headquarters granted them permission, PW2 and PW4 D/AIP Ngobi went to Luzira with PW5. That PW2 interviewed the appellant after D/AIP Ngobi conducted the identification parade for PW5 to identify the appellant. That after the interview, the appellant refused to sign the Police Statement.

305 PW4, AIP Ngobi Isaac, testified that he is a Police Officer attached to Kawempe Police Station. That in 2014 while he was still attached to Kasangati Police Station, he was approached by his colleague who was the Investigating Officer in this case, D/AIP Opio, with a request to help him conduct an Identification Parade in Luzira Upper Prison where Kalule Musa alias Sam was being held. PW4 stated that at that time he did not know the appellant; it was D/AIP Opio who told him that the suspect was in Luzira. He likewise did not know PW5; he was introduced to him by D/AIP while he was in the custody of Kasangati Police Station.

310 PW4 testified that before proceeding to Luzira with PW5, he interacted with him and briefed him about what was going to happen at the identification parade namely: that he was going to meet a group of people among whom he may or may not find a particular suspect. But that if he found the suspect, he should identify him by touching.

315 That as they had already obtained clearance from the Prisons Authorities, when they reached Luzira Prison, he was given some Prisons Wardens to help him in organizing the parade as he left PW5 in one of the Offices in the Prison.

That after organizing the 8 volunteers who were going to be on the parade, PW4 met the appellant. That he briefed him about the identification parade and the reasons why there was going to be an Identification Parade. That the appellant was okay with his explanation and

320 PW4 told him to join the line. That he told him to take any position he wanted either first, last or in the middle and that then the appellant joined the line.

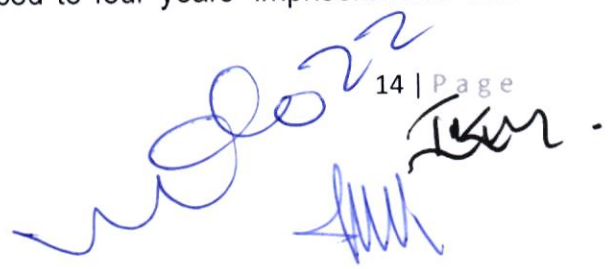
That he thereafter called for PW5 and because he had already briefed him about the parade, on reaching there, he told him to identify the person in question. That PW5 walked and managed to touch the appellant who was in the middle. That all the volunteers signed on the
325 Identification Parade form and so did the appellant. The form was tendered in evidence in court and marked Exhibit PE4.

On his part, the appellant raised the defence of *alibi*. He testified on oath that during the period of 2nd February 2013 when the deceased was found dead and the motor vehicle he was driving robbed; he was an inmate at Luzira Prison. That during that period, he was serving a
330 five and a half years' sentence for smuggling Supper Match cigarettes from Kenya, before he escaped from prison. He denied having been to DRC around that time as stated by PW5.

With regard to the identification parade, the appellant admitted that it was true that it had been carried out at Luzira Prison and that PW5 identified him from the other prisoners. However, he denied having known PW5 before that.

335 On closure of the appellant's defence, the trial judge issued an order on 06.02.2018 directing the Officer in Charge of Luzira Upper Prison to appear as a court witness and specifically produce and exhibit in court the records of the appellant's stay at Luzira Prison for the period from 2010 to the date of the Court Order.

CW1 Twesigye Celestine testified that she was the O/C Upper Prison. That in February 2013
340 the appellant was not an inmate in Luzira Prison as claimed. She testified that Kalule Musa was first remanded to Uganda Government Prison on 30th of July 2010 for two offences of Stealing Motor Vehicle C/S 265 in Criminal Case No.571 of 2010 at Nakawa Court and No.573 of 2010. That the case in file No.571 of 2010 was dismissed on 7th March 2011 while he was convicted in respect of file No.573 of 2010 and sentenced to four years' imprisonment. That

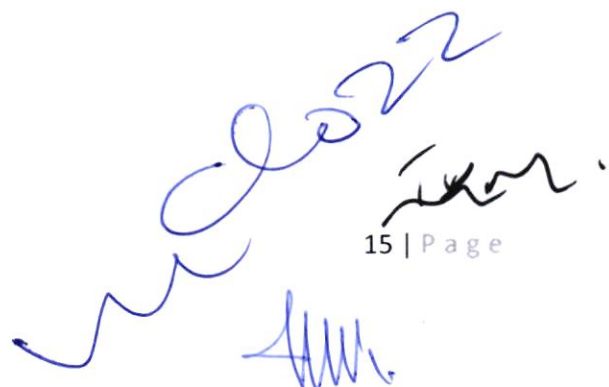


345 while in prison, another charge of stealing a motor vehicle was preferred against him in Criminal Case No.997 of 2009. That he pleaded guilty on 22nd July 2011 and was convicted and sentenced to a term of one and a half years' imprisonment by Nakawa Grade One Magistrate's Court.

CW1 further stated that on 3rd October 2011, Kalule was again charged with the offence of
350 Stealing a motor vehicle in criminal case No.996 of 2009 though there was no record of its disposal. That on the 24th June 2011, he was charged with the offence of stealing a motor vehicle in Nakawa Court Case No.354 of 2011. That this case had several adjournments up to 13th September 2011 and that the Prison had no record of disposal of the case. That the appellant was on 28th June 2011 again charged with the offence of stealing a motor vehicle in
355 Nakawa Court Case No.362 of 2011. That he appeared in court for this case on various occasions till 3rd October 2011 because the case was adjourned to 1st November 2011 for judgment. That unfortunately, the appellant escaped from Kampala Remand Prison (Boma) on 20th October 2011 and the Prison had no court record of disposal of the case. That Kalule Musa was re-arrested on 17th October 2013 and he was taken to Luzira Upper Prison. He was
360 later charged before Luzira Magistrates Court with escaping from lawful custody and on 11th of November 2013 he was convicted and sentenced to three years' imprisonment. That he successfully appealed against his conviction and the sentence of three years was set aside.

That on the 16th of May 2014, Kalule was charged with the offence of murder at Kasangati Court in Case No.24 of 2014. That he escaped from Kasangati Court on 11th July 2014 when
365 he had been produced for mention in this very matter. That he was later re-arrested on 30th July 2016 and brought back to Upper Prison where he was incarcerated to date.

CW1 therefore confirmed that on the 2nd of February 2013, Kalule Musa was at large as he had escaped from Prison during that period.

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When dealing with the issue of participation of the appellant in the commission of the offence
370 of murder of the deceased, the trial judge rightly observed that resolution of the issue was
premised majorly on the circumstantial evidence of PW5. Then he went ahead to evaluate the
evidence of the prosecution and found that through the evidence of PW6, it was proved that
the deceased was last seen on the 2nd February 2013 with the Motor Vehicle and he was
reported dead on the 4th February 2013. That the appellant was seen in possession of the
375 vehicle on the 4th of February 2013 by PW5 at Ariwara, DRC before he sold it to Bebe Alhaj
using the services of PW5 as a broker. That it took PW5 two days from his first interaction with
the appellant to secure the buyer for him, which period constituted ample time and favourable
conditions for PW5 to identify the appellant during that time. That this was confirmed by the
subsequent identification of the appellant from the Parade at Luzira Prison by PW5. That the
380 appellant endorsed the Identification Parade Report which certified that he agreed with the
procedures followed in the exercise. The trial judge then concluded that on account of the
doctrine of recent possession and proper identification by PW5, the appellant had been
squarely placed at the scene of crime by the prosecution. As such, he had to offer an
explanation as to how he had come to be in possession of the stolen vehicle.

385 The accused denied participation in the offences he was charged with and claimed that at the
time the vehicle disappeared and the deceased was found dead he was an inmate a Luzira
serving a prison sentence following his conviction for smuggling cigarettes. However, from the
evidence of the Court witness, court found that the *alibi* was false. That the Prison records
tendered into court by the court witness proved that at the material time the accused had
390 escaped from lawful custody and was at large. And that he had been serving a sentence for
stealing a motor vehicle before escaping from Prison.

The trial judge concluded his analysis thus:

395 *"On evaluating the evidence of both PW5 and that of the accused, I find the
evidence of PW5 relating to the possession of the vehicle by the accused in DRC on
the 4th of February 2013 more credible than the discredited alibi of the accused.*

400 *Why did he have to tell lies about where he was on the 2nd February 2013? Why did the accused have to lie about the offence he had been convicted of before escaping from Prison? Why did the accused also have to lie about the number of times he had escaped from lawful custody? I find the alibi fronted by the accused to be an afterthought that lacks credibility.*

405 *I find the fabricated alibi, the lies about the reasons for being in Luzira Prison, the proximity of the period between the disappearance of the vehicle and the appearance in Congo, to be cogent corroborating evidence circumstantial evidence about the death of Zziwa John Bosco. The accused is by that evidence squarely placed at the scene of crime by the prosecution. Bogere Moses & Anor V Uganda, SC Criminal Appeal No.1/1997”*

With regard to the offence of aggravated robbery the trial judge later in his judgment said:

410 *“It is a fact that the participation of the accused is inferred from circumstantial evidence in this case since nobody saw him commit the offence. The evidence of PW5, who saw him in possession of the motor vehicle on the 4th February 2013 sufficiently linked him to the crime. This was only two days after its disappearance and it is not the kind of item that changes hands at a fast rate, like any other consumables. PW5 ably identified the accused in an identification parade. The evidence of PW5 was further corroborated by the defective alibi raised by the accused...*

420 *I am alive to the need to warn myself of the danger of convicting the accused on the evidence of PW5 as the single identifying witness in this case. I am convinced that he was truthful, he ably identified the accused and his testimony was corroborated by the discredited alibi raised by the accused. I find the accused guilty as charged and accordingly convict him.”*

The analysis of the evidence, application of the law and conclusion of the trial judge cannot be faulted. His approach to the resolution of the issue of the appellant’s participation was in accordance with 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:

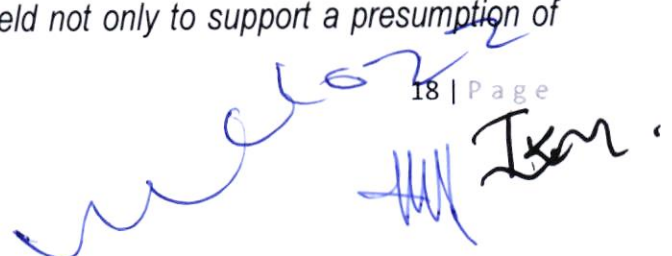
425 *“... It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eyewitnesses’ evidence of identification in a nocturnal event. This is especially so*

430 *because invariably the former is independently verifiable, while the later solely depends on the credibility of the eyewitnesses”.*

In the instant case, the appellant was seen by PW5 in possession of the robbed vehicle on 06th February 2013 while looking for a buyer for it in DRC. This was after a period of only four days from the date of 02nd February 2013 when the deceased was last seen alive by PW6 at around
435 6PM at their offices in Kampala while the deceased was taking the robbed vehicle to do their usual special hire work. This period was too short for any other person who robbed the vehicle from the deceased to have sold off the same to the appellant since a vehicle by its nature is not one of those items that easily change hands. This raised a presumption that the appellant was either the robber or the receiver of the robbed vehicle. In those circumstances, the
440 appellant had the onus to give a reasonable explanation as to how he came in possession with the recently robbed vehicle. The appellant did not offer any explanation. Instead, he set up an alibi to the effect that at the time the deceased was found dead and the motor vehicle he was driving robbed, he was an inmate at Luzira Prison. But this alibi was proved false by the O/C Upper Prison, CW1 Celestine Twesigye, who produced the Prisons records which confirmed
445 that at the material time the appellant had escaped from Prison. In the premises, the trial Judge cannot be faulted for finding that the appellant had participated in the robbery.

It is worth noting that the doctrine of recent possession of the same recently robbed vehicle was likewise used by the trial Judge to convict the appellant on the count of Murder. The murder of the deceased having taken place simultaneously with the robbery of the vehicle,
450 which was found in the possession of the appellant, the trial Judge cannot be faulted for extending the application of the doctrine of recent possession to the murder charge in the circumstances. In R. Vs Bukai s/o Abdallah (4) (1949) 16 E.A.C.A 84 which was quoted with approval by the Supreme Court of Uganda in Izongoza William Vs Uganda, Cr. Appeal No. 6 of 1998, it was observed thus:

455 *“That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of*



burglary or of breaking and entering but murder as well, and if all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal.”

460 Accordingly, grounds one and two of the appeal fail.

Ground Three – Sentences:

The complaint of the Appellant under this ground is that the trial Court erred in law and fact when it passed a harsh and excessive sentence to the Appellant thus occasioning upon him a miscarriage of justice. Counsel submitted that the Court in passing out a harsh and severe
465 sentence of 46 years and 4 months to the Accused/Appellant did not take into consideration all the mitigating factors and how it would affect him as he is a family man with five children deserving of his care and guidance.

On the other hand, Counsel for the respondent submitted that no compelling reason had been advanced by the appellant to warrant this Court interfering with the sentence passed against
470 the Appellant by the trial Court. That the trial Court considered all the mitigating factors. Further, the appellant was a habitual offender with two past convictions for the offence of stealing a motor vehicle and a conviction for escaping from lawful custody. That the court referred to him as a specialised car thief.

While sentencing the appellant, the trial court stated:

475 *“The maximum sentence for a person convicted of murder is death. The same is the maximum penalty for aggravated robbery. I will however not consider the death penalty. I have taken the fact that the convict has a family that deserves his care as a mitigating factor, I have also considered that at 33 years he can reform and be useful to society if he chooses to take that direction. Aggravating factors are that he
480 is a specialised car thief as evidenced by the past two convictions for the same offence and there are two more files pending judgment. The convict has also on two occasions escaped from the lawful custody. This is not a conduct of a person determined to reform. The convict lied on oath and did not show any remorse for his past conduct.*

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Considering all the above, I sentence the convict to 50 years for aggravated robbery and 50 years for murder, both sentences to run concurrently. As provided by Article 23(8) of the Constitution, I will deduct the three years and eight months the convict has spent on remand. He will serve 46 years and 4 months starting from today the 21st day of February 2018.”

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From the above, it is quite clear that the trial court while sentencing the appellant took into consideration all the mitigating factors and the status of the appellant as a family man. The appellant has no basis for faulting the trial judge on that basis.

However, the sentence of 50 years' imprisonment on each count appears to be out of range with decided cases of the Supreme Court and Court of Appeal for similar offences and facts.

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In Muhwezi Bayon Vs Uganda, Court of Appeal Criminal Appeal No. 198 of 2013, this court after reviewing numerous decisions of the Supreme Court and the Court of Appeal in respect of sentences in murder cases stated thus:

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“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.”

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More recently, in Senfuka George William Vs Uganda, Court of Appeal Criminal Appeal No. 420 of 2016 a sentence of 40 years' imprisonment was imposed by this Court in our judgment dated 18th May 2021. In that case, the appellant defiled the deceased in 2006 and the defilement was reported to the Police in 2007. Three days later, the appellant killed the victim, then a 16-year-old who he found at her home on a verandah peeling cassava, by fatally cutting her neck using a panga. In passing the sentence of 40 years' imprisonment, this court *inter alia* took into account the law, The Law Reform (Penalties in Criminal Matters) (Miscellaneous Amendments) Act, 2019, which now sets the minimum punishment for life imprisonment at 50 years.

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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

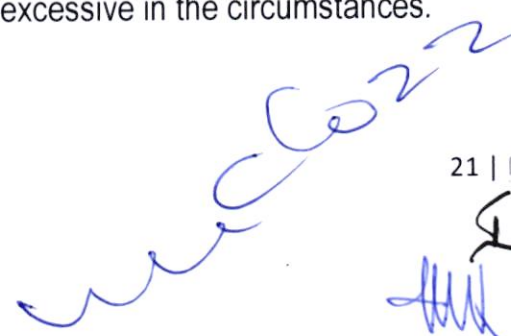

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murder convictions only. In Ojangole Peter Vs Uganda, Supreme Court Criminal Appeal No.34 of 2017, the Supreme Court confirmed a sentence of 32 years' imprisonment imposed by the
515 Court of Appeal for the offence of aggravated robbery after deducting 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
520 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
525 murder that was given by the trial judge.

According to 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 Vs Uganda, Supreme Court Criminal Appeal No. 27 of 2015, the trial Court was under a legal obligation to consider the principle of “parity” and “consistency” in sentencing. As such,
530 the failure of the trial judge to consider the principle of consistency in sentencing of the Appellant occasioning injustice would entitle this court to intervene and invoke Section 11 of the Judicature Act, Cap. 13. According to the often quoted case of Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported) this court, as a first appellant court, may interfere with the sentence imposed by the trial court if it shown that the
535 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.


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We accordingly set aside the sentences imposed by the trial judge which were manifestly excessive in the circumstances of this case for being out of range with decided cases of similar facts and circumstances. 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.

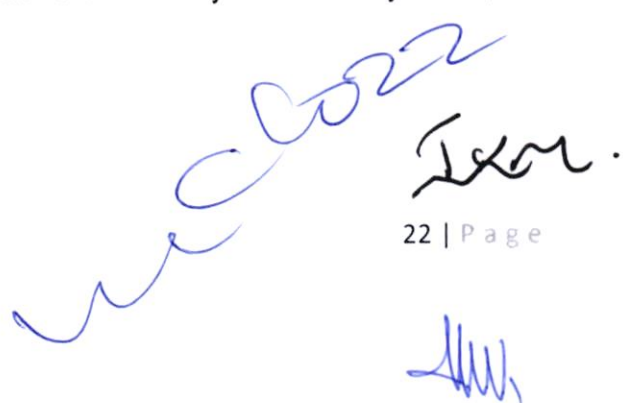
For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated'

In our exercise of the above mandate, we hereby considered the factors and sentencing reasons given by the trial court and, in line with the principle of parity and consistency of sentences, consider the term of imprisonment of 40 years to be appropriate for each of the counts of murder and aggravated robbery.

Decision.

1. The conviction of the appellant of the offences of murder contrary to Sections 188 & 189 of the Penal Code Act and Aggravated Robbery contrary to Sections 285 & 286(2) of the Penal Code Act is upheld.
2. The appeal against sentence is allowed and, accordingly, the sentences imposed by the High Court against the appellant for the offences of murder and aggravated robbery are hereby set aside. We now substitute the sentences as below.
3. We sentence the appellant to 40 years' imprisonment on each one of the counts. Taking into account the 3 years and eight months spent by the appellant in pre-trial detention, he will serve a term of 36 years and four months' imprisonment on each of the Counts indicted. Both sentences shall run concurrently from the 13th day of February 2018, the date of conviction.

We so order.



Signed, dated and delivered this 26th day of Aug 2022.



KENNETH KAKURU
Justice of Appeal



MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal



IRENE MULYAGONJA
Justice of Appeal