THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.098 OF 2009

KATONGOLE BADRU::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Arising from the decision of the High Court by J.B. Katutsi J in High Court Criminal Case No.0111 of 2004, dated the 17th day of March 2009)

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ

HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE MUZAMIRU M. KIBEEDI, JA

JUDGMENT OF THE COURT

Introduction

The appellant, Katongole Badru was indicted with the offence of Aggravated Robbery contrary to **Sections 285 and 286 (2) of the Penal Code Act.** He was convicted and sentenced to suffer death by J.B. Katutsi, J on the 17th day of March 2009.

Background to the appeal

The facts as discerned from the record are that on the 1st day of April 2003, at Katuse village in Wakiso District, at around 12.00am. Busisi John (the complainant) was at home sleeping with his family. Suddenly, they heard a bang on the door. Three men forced the door open while two of them were armed with pangas and another armed with an axe. They entered the house flashing torches at the complainant. The assailant's took the complainant's money shs.574,000/= and his motorcycle Reg. No. UBC 455T Yamaha mate green in colour and ran away.

The complainant reported the incident to Namayuba Police Post.

On 1st May, 2003, an informant reported to Semuto Police Post about a suspected stolen motorcycle that was in possession of the appellant. The appellant was subsequently arrested.

The complainant later went to Semuto Police Post and identified the motorcycle as the one that was stolen from him. The appellant was handed over to Kakiri Police Post and he was charged with aggravated robbery.

The learned trial Judge found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant for the offence of Aggravated Robbery. He sentenced the appellant to suffer death.

Being aggrieved by the decision of the trial Court, the appellant now appeals before this Court against Conviction and sentence on the following grounds:

1. **"The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby convicting the appellant basing on unsatisfactory circumstantial evidence.**
2. **Without prejudice to the foregoing, the learned trial judge erred in law and fact when he sentenced the appellant to suffer death, which is illegal, harsh and excessive thereby occasioning a miscarriage of justice."**

Legal Representation

At the hearing of the appeal, the appellant was represented by Mr. Kumbuga Richard on State brief while the respondent was represented by Ms. Vicky Nabisenke, Assistant Director of Public Prosecutions. Due to the COVID-19 pandemic restrictions, the appellant was not physically present in Court but attended the proceedings via video link using Zoom technology from Luzira Prison.

Both Counsel filed and adopted their written submissions.

Submissions of Counsel

Ground 1: The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby convicting the appellant basing on unsatisfactory circumstantial evidence.

The appellants case.

Counsel for the appellant submitted that the ingredient of participation of the appellant in commission of the alleged offence was not proved by the prosecution.

He argued that there was no direct evidence linking the appellant to the commission of the robbery but rather circumstantial evidence deduced from the various witnesses and conduct of the appellant.

Counsel contended that the evidence of PW1, Busisi John (the complainant) is instructive. He argued that whereas the complainant claimed that he made no positive identification of his attackers, he stated that the appellant at one point spent a night at the complainant's home. Counsel wondered how the complainant could not have recognised the appellant face to face nor by his voice on the night of the robbery.

On the evidence from PW2, Sgt Makama, who testified that the matter was reported to Police on 12th April 2003 by a one Matiya Mugerwa, counsel argued that if the robbery actually happened on 1st April 2003, why did Matiya Mugerwa report the matter but not the complainant himself. Counsel further questioned why the robbery was reported on 12th April 2003, 11 days after the alleged robbery.

Counsel further submitted that the evidence from PW3, SPC Abdu Nasiri was quite shaky and argued that the trial Judge ought not to have relied on it. He averred that whereas PW3 stated that the report from the informant was to the effect that the motorcycle was at Mijenje, this was in contradiction with the evidence from PW2 who stated that the informant's report indicated that the motorcycle was at Makai Village.

He added that PW3 stated that the appellant tried to run but was overtaken and arrested. According to counsel, the aspect of overtaking the appellant means that he was on a motorcycle or in a car. He argued that the fact that the appellant was overtaken on either a motorcycle, contradicts PW3's testimony when he stated that the motorcycle was found hidden somewhere in the banana plantation. According to counsel, this raises questions as to the truthfulness of PW3's testimony.

Counsel submitted that the appellant in his defence admitted to having spent a night at the complainant's home. He added that the appellant told Court that the complainant at one point suspected him of having an affair with his wife. As to the stolen motorcycle, the appellant stated that he did not steal or rob the appellant of anything. That the appellant further told Court that he was arrested at Semuto from where he was taken to where the motorcycle was, he was tied to it and was ordered to ride it to Police. Counsel argued that the appellant's testimony was given on oath and the prosecution never impeached his allegations at all.

Counsel contended that the law as regards to circumstantial evidence was discussed in ***Bogere Charles vs. Uganda, Supreme Court Criminal Appeal No.10 of 1996,*** where Court noted that before drawing an inference of the accused's guilt from circumstantial evidence, the Court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

Counsel concluded that the contradictions in the prosecution witness evidence discussed earlier weakened or destroyed the inference of guilt on the appellant. He submitted that, had the learned trial Judge addressed his mind to all these facts, he would have reached a conclusion that the circumstantial evidence against the appellant was unsatisfactory and the inference of guilt was weakened.

The respondent' case.

Counsel for the respondent submitted that the law regarding circumstantial evidence is laid out in the case of ***Lulu Festo vs. Uganda, Court of Appeal Criminal Appeal No. 214 of 2009,*** where circumstantial evidence was said to be the best evidence especially

where there are no other co-existing circumstances which would weaken or destroy the inference of the appellant's guilt.

Counsel submitted that the evidence that was led by the prosecution and relied on by the trial Judge as proof of the appellant's guilt was from PW2 who testified that he received information that the stolen motorcycle was in possession of the appellant and indeed when he sent SPC's to search for it, they returned with the appellant together with the stolen motorcycle whose number plates had been tampered with.

She submitted that PW3, who was one of the SPC's who went to recover the stolen motorcycle, testified that when the appellant saw the Policemen, he tried to run away but they chased him and managed to arrest him whereupon he led them to a banana plantation where the stolen motorcycle had been hidden and the same was recovered.

Counsel submitted that the appellant, on his part, denied the robbery, stated that he had no grudge with the complainant and tried to insinuate that his arrest was as a result of one Binsanze/Busanze who had threatened to 'deal' with him for having had an affair with his wife.

Counsel contended that, from the foregoing, it is clear that the appellant's guilt was founded on circumstantial evidence to wit, his attempt to run away from Police as well as the fact that he is the one who led Police to the recovery of the stolen motorcycle.

Counsel cited the case of ***Lulu Festo*** *(supra),* where Court found that the appellant's conduct of running away from the scene of crime was incompatible with his innocence. She therefore submitted that the appellant's act of attempting to run away when he saw the Police was conduct of a guilty person.

Counsel argued that the appellant's guilt was further strengthened by the fact that he is the one who led Police to the recovery of the stolen motorcycle which had been hidden in a banana plantation. She added that the fact that the motorcycle had been hidden in a banana plantation and its number plate has been tampered with, was evidence that it was indeed a stolen item and the appellant's knowledge of its whereabouts inferred possession on his part.

She referred to **section 2 (v) of the Penal Code Act** which defines 'Possession' to include:- **"...not only having in one's own personal possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person..."**

Counsel contended that the above definition captures the appellant's actions as amounting to having possession of the stolen property. According to counsel, since the property was recovered with his help, then the principles of recent possession apply to the appellant. She relied on the case of ***Izongosa William vs. Uganda, Supreme Court Criminal Appeal No.6 of 1998,*** where Court held:- ***"...possession by an accused person of the property proved to have been very recently stolen may not only support a presumption of burglary....but of murder as well and if all circumstances of the case point to no other reasonable conclusion, the presumption can extend to any charge however criminal."***

She added that in Izongosa William (Supra), Court further stated that:- ***"In the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduces adequate evidence to show that the accused was found in possession of goods recently stolen or taken as a result of robbery, the accused must offer some credible explanation of how he or she came to possess the goods otherwise the evidence of recent possession would justify his or her conviction."***

Counsel argued that the appellant did not challenge the evidence of PW3 who stated that it was the appellant who led Police to the recovery of the stolen motorcycle and neither did he explain how he came to know of its whereabouts and why he had it in his possession. She averred that, the appellant's only attempt to explain about the motorcycle was when he stated that a one Binsaze had threatened to deal with him and after one month, some four men found him, handcuffed him onto the motorcycle and told him to ride it to Police. Counsel argued that the appellant's defence was so disjointed that it is difficult to relate the said Binsaze to the instant case or the complainant whom the appellant admitted to knowing prior to the commission of the crime.

Counsel submitted that since the appellant was found in possession of the recently stolen motorcycle and attempted to run away when he saw the police, his conduct draws no other inference or conclusion than that of guilt on his part.

She prayed that Court finds that there was sufficient circumstantial evidence implicating the appellant of the robbery. She prayed that the conviction be upheld and this ground of appeal be dismissed for lack of merit.

Ground 2: The learned trial Judge erred in law and fact when he sentenced the appellant to suffer death, which is illegal, harsh and excessive thereby occasioning a miscarriage of justice.

The appellants case.

Counsel for the appellant submitted that the learned trial Judge did not properly take into account the mitigating factors thereby arriving at a harsh and excessive sentence.

Counsel submitted that the learned trial Judge stated: "***There was a robbery, a motor-cycle that was robbed was recorded (sic). Though the robbers were armed, there was an (sic) injury inflicted. This is where I would have to proceed to custodial sentence. But as to Supreme Court has at finally pronounced itself on the matter (sic), I will pass sentence that is authorised by the law. That is the convicted is to suffer death in a manner authorised by the law.***"

Counsel argued that, from the above holding, the learned trial Judge was referring to the decision of Supreme Court case of **Attorney General vs. Susan Kigula & 417 others, Constitutional Appeal No.3 of 2006.** He submitted that the learned trial Judge passed a death sentence as dictated by law, arguing that since the Supreme Court had not pronounced itself on the matter, this was still good law.

Counsel contended that the learned trial Judge decided per incuriam since by the time he delivered Judgment on 17th March 2009, the Supreme Court had on 21st January 2009 delivered judgment in ***Susan Kigula*** *(supra),* and guided that the death sentence was not mandatory

and that Judicial Officers while sentencing had the discretion to take into account the mitigating factors to arrive at a Judicious sentence.

He relied on the case of ***Pte Kusemererwa & another vs. Uganda, Court of Appeal Criminal Appeal No.83 of 2010,*** where the appellants were indicted and convicted of aggravated robbery. The appellants were both sentenced to 20 years imprisonment. On appeal, their sentences were found to be manifestly excessive and were reduced to 13 years and 12 years respectively, having considered the mitigating factors.

Counsel submitted that, in the instant case, the appellant was a first offender, aged 28 years at the time of sentencing and had spent six years on remand, implying that he was 22 years at the time of commission of the offence, hence youthful with a chance to reform. He added that the motorcycle in question was recovered and handed over to the complainant. He further argued that, although the assailants were armed, they inflicted no injury upon the complainant and neither did they assault him in anyway. Counsel therefore submitted that, had the trial Judge addressed his mind to these mitigating factors and this Court's decision in ***Susan Kigula*** (*Supra*), he would have arrived at a more lenient sentence.

He prayed that Court finds the death sentence, harsh and excessive and substitutes it with a fairer and more lenient sentence of 15 years imprisonment, taking into account the period spent on remand.

The respondent' case.

Counsel for the respondent submitted on ground 2 that it is trite law that an appellate Court should only alter the trial Court's discretion on sentence, only if the sentencing Judge acted on a wrong principle, overlooked some material factor, or if the sentence was illegal, harsh or manifestly excessive. See: ***Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No.25 of 2014.***

She submitted that a careful review of the sentencing notes of the learned trial Judge on page 19 of the record of appeal revealed that the trial Judge was under the mistaken belief that the death sentence was

still a mandatory sentence. Counsel conceded with counsel for the appellant that by the time the trial Judge sentenced the appellant, the Supreme Court had already pronounced itself in the case of **Susan Kigula** (*Supra*) on 21st January 2009, that the death sentence was not mandatory and trial Judges have the discretion to take into account the mitigating and aggravating factors in order to arrive at a judicious sentence.

Counsel referred to the case of ***Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No.27 of 2015***, where Court found that the lower Courts' failure to evaluate and consider all the mitigating factors raised on behalf of the appellant rendered the sentence erroneous and thus set it aside.

Counsel submitted further that **Article 23 (8) of the Constitution of the Republic of Uganda, 1995 (as amended),** makes it mandatory for Courts to take into account the period spent in lawful custody when imposing sentences and failure to do so renders the sentence illegal. See: ***Rwabugande*** (*Supra*).

Counsel therefore conceded that the sentence passed by the learned trial Judge was illegal and erroneous for failing to take into account the period spent on remand by the appellant, as well as the mitigating and aggravating factors submitted in allocutus by the prosecution and the defence.

She prayed that Court invokes the provisions in **section 11 of the Judicature Act, Cap 13**, which grant this Court the same powers as that of the trial Court to impose a sentence that the Court may consider appropriate.

Counsel prayed that Court considers the following aggravating factors; the fact that the appellant was convicted of aggravated robbery, an offence which carries a maximum sentence of death, with the starting point being 35 years by the sentencing guidelines, the seriousness of the offence and the fact that the offence of robbery was reported to be on the rise as well as the need to deter would be offenders.

She contended that among the objectives of the sentencing Guidelines is the need to provide a mechanism that will promote uniformity, consistency and transparency in sentencing. Counsel relied on the case of ***Saavu Sedu Tonny vs. Uganda, Court of Appeal Criminal Appeal No.0600 of 2014***, where Court analysed various sentences confirmed in previous cases of aggravated robbery that ranged between 15-32 years and concluded by sentencing the appellant to 20 years. She further cited the case of ***Kigozi Livingstone & anor vs. Uganda, Court of Appeal Criminal Appeal No.365 of 2016***, where Court stated: ***"With regards to aggravated robbery, the tendency of this Court has been a term of imprisonment ranging from 12-25 years."***

Counsel submitted that, based on the foregoing, a sentence of 25 years will be appropriate given the circumstances of this case.

She prayed that Court upholds the conviction of the appellant and sentence him to 25 years imprisonment.

Consideration by Court

It is our duty as the first appellate Court to subject the evidence adduced at trial to a fresh re-appraisal and to determine whether or not the trial Judge reached the right conclusions, and if not, then to draw our own conclusions and inferences, bearing in mind however, that we did not have the opportunity to see the witnesses testify and thus be able to determine whether their demeanour was truthful or not. see: **Rule 30 of The Judicature (Court of Appeal Rules) Directions SI 13-10, *Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997*** and ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.***

In re-appraising the evidence, we bear in mind that in a criminal prosecution the burden to prove each and every one of the ingredients of the charge beyond reasonable doubt is upon the prosecution throughout the trial. See: ***Woolmington v. DPP 1935 AC 462*** and ***Mushikoma Watete alias Peter Wakhoka and 3 others vs Uganda, Supreme Court Criminal Appeal No.10 of 2000.***

Resolution of ground 1

The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record thereby convicting the appellant basing on unsatisfactory circumstantial evidence.

It was counsel for the appellant's contention that the ingredient of participation of the appellant in the commission of the offence was not proved and that it was erroneous for the learned trial Judge to convict the appellant when there was no direct evidence linking the appellant to the crime.

The principles on circumstantial evidence were laid down in the case of ***Katende Semakula vs. Uganda, Supreme Court Criminal Appeal No.11 of 1994,*** where the Court held:

> ***"Another requirement concerning circumstantial evidence is that it must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. It is, therefore, necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See Teper v. R. (1952) A.C. 480 at 489; Simon Musoke v. R. (1958) E.A. 715 cited with approval in Yowana Serwadda v. Uganda, Crim. Appl. No. 11 of 1977 (U.C.A.) (unreported) and in Amis Dhatemwa Alia Waibi v. Uganda, Criminal Appl. No. 23 of 1977 (C.A.U) (unreported)."***

In the instant case, the aspects of circumstantial evidence as analysed by the learned trial Judge stemmed from the evidence of PW1, Busisi Joseph, PW2, Sgt. Makuma Godfrey and PW3, SPC Abdu Nasiri Mutebi.

PW1, Busisi Joseph (the complainant), testified that he knew the appellant as he had ever spent a night at his home before the alleged robbery and later found him at Semuto Police Post. He stated that on 1st April 2003, at around 12,30 am, he was at home sleeping when he was suddenly awakened by a bang. Three men, dressed in dark coats and armed with panga's and axe's approached him in his bedroom,

while flashing a torch in his face. He stated that he could not recognise any of the three men. PW1 testified that the assailant's demanded for money and took the 574,000/= that he had left on the table in his bedroom. As one assailant guarded PW1 with an axe, the other two assailants took out his motorcycle and they all left. PW1 stated that he went outside the house and made an alarm which was first answered by a one Matiya Mugerwa and later joined by others. That they tried to look for the assailants in vain. PW1 reported the matter to Namayumba Police at 1.30 a.m.

PW1 further testified that while he was in Kampala on the 1st of May 2003, he received a call from Namayumba Police. He went to Namayumba Police where he was informed that his missing motorcycle was at Semuto Police Post. PW1 went to Semuto Police Post, identified his motorcycle and learnt that it was the appellant who was arrested with it. He noted that the motorcycle's number plate had been tampered with. According to PW1, he recognised the appellant as the man who had previously spent a night at his home. He stated that the appellant was taken to Kakiri Police Station. He noted that the appellant also alleged that his accomplices were at Kakiri but they did not find them there. He concluded that his motorcycle was then returned to him.

PW2, Sgt. Makuma Godfrey, testified that on 12th April 2003, he was attached to Semuto Police Post and while on duty, a one Matiya Mugerwa reported to him that a motorcycle UBC 455 T had been robbed from Namayumba Wakiso District. Matiya told PW2 that the assailants had ran off towards the Semuto direction. PW2 accordingly noted down the said number plate.

On 1st May 2003, very early in the morning, an informant told PW2 that the suspected motorcycle was seen with the appellant at Makai L.C. Semuto. PW2 stated that he sent two SPC's to Makai to search for the suspect and after two hours, they returned with the appellant and the motorcycle. He noted that he checked the motorcycle's number plate and found that it had been tampered with to read UBC 655 B instead of UBC 455 T. PW2 put the appellant in the Police cell and communicated to Namayumba Police Post. He stated that the Police officer from Namayumba went with the owner (the complainant) to Semuto Police

Post, along with documents to prove ownership of the said motorcycle. PW2 concluded that he handed over the appellant and the motorcycle to the Police Officers of Namayumba Police Post.

PW3, SPC Abdu Nasiri Mutebi, testified that he knows the appellant as he arrested him on the 1st of May 2003, at 9:00am. He stated that they received a report that there was a suspected stolen motorcycle in Mijenje. That when the accused saw the Policemen, he tried to run away. According to PW3, they chased the appellant and managed to overtake him and arrested him. PW3 testified that the appellant led them to where the suspected motorcycle was hidden in a banana plantation. The SPC's took the motorcycle to Sgt Makuma (PW2) at Semuto Police Station. Pw2 stated that, after a day or two, two people including a Police officer from Namayumba Police, went to Semuto Police Station claiming for the said motorcycle. He stated that the appellant and the motorcycle were handed over to the Namayumba Police officers.

During cross examination PW3 testified that he was accompanied by SPC Kyeswa and the informer when they were dispatched to go and arrest the appellant. He noted that the informer knew the appellant. He further stated that the motorcycle number plate had been tampered with.

Katongole Badru (the appellant) stated that he was aged 28 years and lived in Kirinya Luwero district. He testified that he knew the complainant as his brother and was from his village but he had never been his friend. The appellant confirmed that he had ever visited the complainant's home when he was with the complainant's brother who stays in his village. In his defence, the appellant stated that on the 1st of April 2003, he was in Kirinya at his home all day. He noted that he was staying with his uncle. He stated that his uncle was not with him because he was working in the garden.

The appellant testified that on the 20th of March 2003, a one Binsanze threatened to kill him for having an affair with his wife. According to the appellant, he reported the matter to Semuto Police and he was asked to provide the money for fuel to arrest Binzanze but he did not have the money. That a month later, Bisanze threatened to deal with him.

The appellant further testified that on the day of his arrest, he went to Semuto town to buy pesticides and on his way back to the uncle's home at around 4.30 pm, four men armed with guns arrested him. He stated that the said men took him to the banana plantation near his uncle's house and removed a motorcycle. He testified that they handcuffed his hand on the motorcycle handle and told him to ride the motorcycle with them seated on the passenger's seat, up to Semuto Police Station. He stated that he was put in Police cells and told that he had stolen the motorcycle. He concluded that he had no grudge with the Complainant.

Our analysis of the circumstantial evidence above all pointed to the inference of guilt of the appellant. Although the complainant was unable to recognise the assailants during the robbery, the evidence led by the prosecution in regards to the appellant's participation in the said robbery was proved by the evidence from PW2 and PW3.

Once the Police officer's at Semuto received information that the suspected stolen motorcycle was in the appellant's possession, they acted quickly and searched for the appellant. The appellant tried to run away when he saw the Police men but he was later arrested. PW3 testified that the appellant led them to where the motorcycle was hidden the banana plantation. The said banana plantation was said by the appellant, to have been near his home. The appellant in his defence did not explain how he came to be in recent possession of the said suspected motorcycle but rather came up with an unrelated story about a one Binsaze who threatened to kill him for having an affair with his wife.

Since the appellant was found to have been in recent possession of the stolen motorcycle, a question arises as to whether the appellant was a thief or a mere receiver. In the case of ***Izongoza William vs. Uganda, Supreme Court Criminal Appeal No.6 of 1998,*** Court held:

> ***"In the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduces adequate evidence to show that the accused was found in possession of goods recently stolen or taken as a result of robbery, the accused must offer some credible explanation of how he or she came to possess the goods otherwise the evidence of recent possession would justify his/her conviction.***

In <u>DPP v Neiser (1958) 3 WLR</u> 757, The doctrine of recent possession was said to be merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused person must be incompatible with the innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt according to particular circumstances. It is open to a court to hold that unexplained possession of recently stolen articles is incompatible with innocence. But guilt in this context may be guilt either of stealing or of receiving articles in question. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen whether it be of a kind that readily passes from hand to hand, and the trade or occupation to which the accused person belongs can all be taken into account. A shopkeeper dealing in secondhand goods would naturally suggest receiving rather than stealing."

In the instant case, the appellant could not be considered an innocent receiver since he was found in recent possession of the stolen motorcycle without a logbook to show proof of ownership and neither did he have a credible explanation as to how he came to know where the said motorcycle was hidden in the banana plantation. His lack of a credible explanation, clearly points to his guilt.

On counsel for the appellant's argument on why the matter was reported to Police by a one Matiya Mugerwa on 12th April 2003 but not by the complainant himself on 1st April 2003, the day the crime was committed, this was clearly explained in the complainant's testimony. The complainant stated that when he made an alarm, it was Matiya Mugerwa who first answered. The complainant noted that he personally reported the matter to Namayumba Police at 1.30am, the night of the robbery. The report made by Matiya Mugerwa at Semuto Police Station on 12th April 2003, was made after the complainant himself had personally reported the matter. This explains why PW2 stated that when he arrested the appellant with the motorcycle, he communicated to Namayumba Police Post who informed the complainant and they proceeded to Semuto Police Station.

As regards to counsel for the appellant's contention that the evidence of PW3 was inconsistent with that of PW2, in regard to the report made by the informant on the location of the said motorcycle and whether the appellant was overtaken on foot, in a car or on motorcycle, we find that these inconsistencies were minor as they did not point to the deliberate untruthfulness of the witnesses. See: ***Obwalatum Francis vs. Uganda, Criminal Appeal No. 30 of 2015.***

We find that the evidence of recent possession and all the circumstantial evidence discussed earlier all pointed to the guilt of the appellant. It can safely be inferred that the appellant participated or was privy to the robbery of the said motorcycle.

As a result, we find that the learned trial Judge rightly convicted the appellant as charged. The conviction is hereby upheld.

Ground 1 is dismissed.

Resolution of ground 2

The learned trial judge erred in law and fact when he sentenced the appellant to suffer death, which is illegal, harsh and excessive thereby occasioning a miscarriage of justice.

It is trite law that sentencing is a discretion of the trial judge. This Court can only interfere with that discretion when it is apparent that the Judge acted on a wrong principle or overlooked a material fact or if the sentence is illegal. This Court can also interfere where the sentence is manifestly excessive or low in view of the circumstances of the case. See: **James s/o Yoram versus Rex (1950) 18 EACA 147** and ***Jackson Zita vs. Uganda, Supreme Court Criminal Appeal No.19 of 1995.***

In the instant case, the learned trial Judge while sentencing stated as follows:-

> ***"There was a robbery, a motor-cycle that was robbed was recorded. Though the robbers were armed, there was an injury inflicted. This is where I would have to proceed a custodial sentence. But as to Supreme Court has at finally***

pronounced itself on the matter, I will pass sentence that is authorised by the law. That is the convicted is to suffer death in a manner authorised by the law."[sic]

Although the grammar in the above portion of the sentencing notes is not so clear, our understanding of the sentence ***"...But as to Supreme Court has at finally pronounced itself on the matter, I will pass sentence that is authorised by the law..."*** is that, according to the learned trial Judge, the Supreme Court had not yet pronounced itself in ***Attorney General vs. Susan Kigula & 417 others, Constitutional Appeal No.3 of 2006,*** and therefore passed the only sentence authorised by law for murder, which was the death penalty. We agree with both counsel that the learned trial Judge erred to have sentenced the appellant to the mandatory death sentence on 17th March 2009 after the Supreme Court had pronounced its decision in ***Attorney General vs. Susan Kigula*** *(supra)* on 21st January 2009.

The trial Judge ought to have considered the mitigating and aggravating factors as well as the period spent on remand while sentencing the appellant in order to come to an appropriate sentence in the circumstances of this case.

In the result, we find that the mandatory death sentence as passed by the trial Judge was illegal.

Having found so, we invoke **section 11 of the Judicature Act (CAP 13)** which vests this Court with powers of original jurisdiction and determine an appropriate sentence in the circumstances of this case.

As we assess the appropriate sentence for the appellant, we shall consider sentences in similar cases by the Supreme Court.

The Supreme Court in ***Bogere Asiimwe Moses and another vs. Uganda, Supreme Court Criminal Appeal No.39 of 2016,*** upheld a concurrent sentence of 20 years imprisonment for the offence of aggravated robbery. In this case, there was no violence or injuries inflicted on the complainant's, the appellants were at a youthful age of 22 years and 23 years respectively and some of the property stolen was recovered.

In ***Tukamuhebwa David Junior and another, Supreme Court Criminal Appeal No.59 of 2016,*** Court considered a sentence of 20 years imprisonment appropriate for the offence of aggravated robbery and only reduced it to 16 years and 5 months imprisonment, having taken into account the period that the appellant spent on remand.

In the present case, the appellant committed a serious offence which carries a maximum sentence of death. The appellant and others at large broke into the complainant's home and threatened the complainant and his family with panga's and axe's and stole his money and motorcycle. We note that the appellant was a first time offender at a youthful age of 22 years at the time the offence was committed. No injuries were inflicted on the complainant and his family although the appellant was armed. The motorcycle was recovered and given back to the complainant.

In the circumstances of the case, considering the authorities above cited and taking into account all the mitigating and aggravating factors, we sentence the appellant to 20 years imprisonment. Taking into account the 6 years and 10 months that the appellant spent on remand, the appellant will therefore serve a sentence of 14 years and 2 months' imprisonment. The sentence shall run from 17th March, 2009 the date of conviction.

Dated at Kampala this 14th day of FEB 2022

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RICHARD BUTEERA
DEPUTY CHIEF JUSTICE

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CHEBORION BARISHAKI
JUSTICE OF APPEAL

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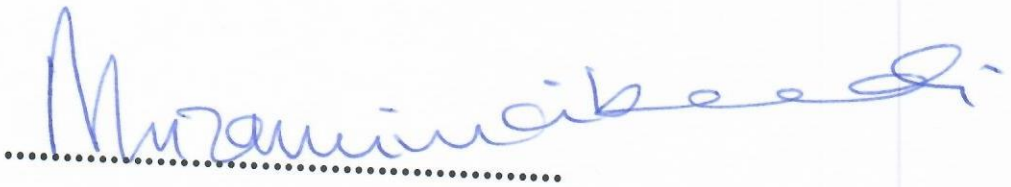

MUZAMIRU M. KIBEEDI
JUSTICE OF APPEAL

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