THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama JJA*]

CRIMINAL APPEALS NO. 147 OF 2013 & 27 OF 2015

(*Arising from High Court Criminal Session Case No.008 of 2011 at Rukungiri)*

BETWEEN

Turyasingura Joshua ========== Appellant no.1
Natuhwera Naboth alias Kabina ========== Appellant no.2

AND

Uganda========== Respondent

(*An appeal from the Judgement of the High Court of Uganda [Elubu, J] delivered on 17th January 2015*)

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act in count 1 and aggravated robbery contrary to section 285 and 286(2) of the Penal Code Act in count 2. The particulars of the offence in count 1 were that the appellants and another still at large on the 26th day of November 2011 at farmer's trading centre in Rukungiri district unlawfully and intentionally caused the death of a one Arinaitwe Robert. For count 2, the particulars were that the appellants and another still at large on the 26th day of November 2011 at farmers trading centre in Rukungiri district robbed Arinaitwe Robert of a mobile Phone Nokia 1110c with card No 07773998612 and UGX 5,000 and during the said robbery caused the death of Arinaitwe Robert.

[2] Appellant no.1 was convicted on his plea of guilty and sentenced to 50 years' imprisonment on both counts to run concurrently while appellant no.2 was tried, convicted, and sentenced to life imprisonment.

[3] Being dissatisfied with the decision of the trial court, the appellants separately appealed to this court. Both appeals were heard together as they stemmed from the same original case before the trial court.

[4] Appellant no.1 appealed against the sentence only on the following grounds:

> '1. The learned Trial Judge erred both in law and fact to sentence the 1st Appellant to an illegal sentence of 50 years' imprisonment on each of the counts without considering the period spent on remand.
>
> 2. The learned Trial Judge erred in fact to sentence the 1st Appellant to 50 years' imprisonment on each of the two counts which was harsh and excessive in the circumstances'

[5] Appellant no.2 appealed against the conviction and sentence on the following grounds:

> '1. The learned Trial Judge erred in law, fact and practice when he convicted the 2nd appellant basing on the insufficient corroboration of the testimony of an accomplice, who even lacked credibility.
>
> 2. The learned Trial Judge imposed a harsh and excessive sentence of imprisonment for life in the circumstances on the 2nd Appellant.'

[6] The respondent opposed both appeals.

[7] At the hearing, appellant no.1 was represented by Ms. Kentaro Spesioza on state brief, appellant no.2 was represented by Mr. Paul Tusubira on private brief and the respondent was represented by Mr. Kyomuhendo Joseph, Chief State Attorney in the Office of the Director of Public Prosecutions. The parties relied upon their written submissions on record.

Submissions of Counsel

Criminal Appeal No. 27 of 2015 (By Appellant No. 2)

[8] Regarding ground one, counsel for appellant no.2 contended that there was no evidence implicating the appellant in the commission of the crime Mr. Tusubira set out the position of the law on accomplice evidence. He cited section 132 of the Evidence Act. He relied on Uganda v George Wilson Simbwa Supreme Court Criminal Appeal No. 37 of 1995 (unreported), Ntambala v Uganda [2018] UGSC 1 and Kings v Baskerville [1916] 2 KB 658 on his submissions on what amounts to corroboration of accomplice evidence. Counsel argued that the evidence of PW5 (appellant no.1) merely showed that the witness' confession was trustworthy but did not corroborate his evidence. He argued that PW5 identified appellant no.2 to the police when they had arrested the appellant which was erroneous. He was of the view that an identification parade ought to have been carried out.

[9] Mr. Tusubira further contended that the prosecution did not sufficiently disprove appellant no.2' s alibi as required by the law. He argued that save for the testimony of PW5, an accomplice, there no other evidence from other sources that supported the testimony of PW5 and connected appellant no.2 to the commission of the crime. He submitted that accomplice evidence is the weakest kind of evidence and cannot be used to form the basis of the case against a co-accused. Counsel relied on Ezra Kyabanamaizi v R (1962) EA 309 for this submission.

[10] Counsel for appellant no.2 also challenged the credibility of PW5 basing on the contradictions in the witness testimony and his charge and caution statement. The contradictions were regarding how PW5 came to know appellant no.2 and as payment that was made to PW5 after the commission of the offences. He contended that the fact that the appellant only made the confession after his brothers had been arrested and the existence of contradictions and inconsistencies in his evidence pointed to untruthfulness.

[11] In reply, counsel for the respondent submitted that the learned trial judge was alive to the laid down principles that courts must take into consideration when dealing with accomplice evidence. Mr. Kyomuhendo submitted that the learned trial judge relied on section 132 of the Evidence Act, he emphasized the need for corroboration of accomplice evidence and warned the assessors and himself against the danger of

relying on uncorroborated evidence of an accomplice. He relied on Senoga Sentumbwe v Uganda [2013] UGCA 31.

[12] Counsel for the respondent submitted that the evidence of PW5 was corroborated in part in light of R v Baskerville (1916) 2 KB 658. He contended that the lies in appellant no.2's evidence corroborated the prosecution case. He relied on Chesakit Matayo v Uganda [2009] UGCA 21 for the submission that proved lies can be used to corroborate the prosecution case. He argued that appellant no.2 's false alibi corroborated the prosecution case. He referred to Androa Asenua & Anor v Uganda [1998] UGSC 23 and Kato Kajubi v Uganda [2021] UGSC 57. Mr. Kyomuhendo argued that contrary to appellant no.2's denial of knowing appellant no.1, there is overwhelming unchallenged evidence on record that he knew PW5. Counsel relied on Saowabiri & Anor v Uganda Supreme Court Criminal Appeal No. 005 of 1990 (unreported). Counsel argued that proved lies can be used to corroborate the prosecution case. He argued that appellant no.2 's false alibi corroborated the prosecution case.

[13] Regarding ground 2, counsel for appellant no.2 submitted that the sentence of life imprisonment is harsh given the range of sentences imposed for the offence of murder. She relied on Mboinegaba v Uganda [2016] UGSC 80, where this court substituted the sentence of death with 30 years' imprisonment for the offence of murder. He prayed that this court reconsiders appellant no.2' mitigation factors and imposes a sentence of 20 years' imprisonment. He contended that the appellant was a first offender, was on remand since March 2012 and is currently 46 years. Counsel prayed that this court gives appellant no.2 a sentence that will enable him to reunite with his family and children before his death.

[14] In reply, counsel for the respondent submitted that the sentence of life imprisonment is legal and lenient given the way the deceased was murdered. Counsel relied on Kiwalabye Bernard v Uganda Court of Appeal Criminal Appeal No. 143 of 2001 (unreported) for the principles under which an appellate court can interfere with a sentence imposed by the trial court. He contended that the aggravating factors outweighed the mitigating factors in this case and that as was stated in Karisa Moses v Uganda Supreme Court Criminal Appeal No. 23 of 2016 (unreported), there is no need to interfere with a sentence where the learned trial judge followed the law.

[15] Counsel for the respondent further relied on Busiku v Uganda [2015] UGSC 3 for the submission that the right to a fair hearing necessitates that courts must take into consideration not only the rights of the accused but also the rights of the victim as well as public interest while sentencing. He contended that the Supreme Court in Kato Kajubi v Uganda [2021] UGSC 57, overlooked the principle of consistency in sentencing and upheld the sentence of life imprisonment against the appellant because the aggravating factors outweighed the mitigating factors. The appellant had murdered the victim for ritualistic purposes just like this instant case.

[16] Mr. Kyomuhendo further submitted that an appropriate sentence is a matter of discretion of the sentencing judge since each case presents its own facts. He relied on Kyalimpa Edward v Uganda Supreme Court Criminal Appeal No. 10 of 1995 (unreported). He referred to Ssekawoya Blasio v Uganda [2018] UGSC 6 and Turyahabwe and 12 Ors v Uganda [2018] UGSC 17, where the supreme court upheld sentences of life imprisonment for the offence of murder.

Criminal Appeal No. 147 of 2013 (By Appellant No.1)

[17] For appellant no.1, counsel for the appellant abandoned ground 1 of appeal. Regarding ground 2 of appeal, Ms. Kentaro submitted that courts should take into consideration the need for consistency while sentencing. Counsel relied on Kasode & Anor v Uganda [2020] UGCA 105 where this court was of the view that except in exceptional circumstances, the sentencing range in murder cases is between 20 to 30 years' imprisonment. She also relied on Aharikundira v Uganda [2018] UGSC 49 where the Supreme Court substituted a sentence of death with one of 30 years' imprisonment

[18] Counsel was of the view that a sentence of 20-year imprisonment is appropriate in this case because the appellant pleaded guilty and did not waste court's time. She contended that according to paragraph 32(g), (h) of the sentencing guidelines, while sentencing for aggravated robbery, court should take into consideration the remorsefulness of the offender, the value of the property or the amount of money stolen. She argued that the appellant pleaded guilty in this case which was a sign of remorse and the value of the phone stolen could not have been more than UGX 50,000 although it was not proved. Ms. Kentaro submitted that in Prince v United

States 357 US 322 (1957), the Supreme Court of the United States considered a sentence of 20 years imprisonment for aggravated robbery excessive. In light of the above, counsel for appellant no.1 prayed for a sentence of 10 years' imprisonment.

[19] On the other hand, counsel for the respondent reiterated the principles upon which an appellate court can interfere with sentences imposed by the trial court. He contended that the sentence of 50 years' imprisonment was lenient in the circumstances of the case. He contended that sentencing is discretionary and depends on the nature of the case but not on the range of sentences in previous cases. She relied on Kiwalabye Edward v Uganda (supra) and Kyalimpa Edward v Uganda (supra).

[20] Mr. Kyomuhendo submitted that the learned trial judge took into consideration both the mitigating and aggravating factors. He was of the view that the although the appellant pleaded guilty and saved court's time and resources, he and his accomplices committed a heinous offence in a brutal manner. The murder was meticulously premeditated, and it deprived the country of a very resourceful person. He contended that the sentence of 50 years' imprisonment was fair in the circumstances given the fact that the maximum penalty for murder is death. Counsel thereafter reiterated her submissions in reply to appellant no.2's submissions on ground 2.

Analysis

[21] This being a first appeal, this court has a duty to re-evaluate all the evidence adduced at the trial and to arrive at its own findings of fact and law, bearing in mind that we did not have the opportunity to observe the witnesses testify. See Rule 30 (1) Judicature (Court of Appeal Rules) Directions S.I 13-10 and Kifamunte Henry v Uganda [1998] UGSC 20.

[22] The facts of this case, according to the prosecution, are that prior to the murder of the deceased, the appellants were in Rukungiri prison together where they became friends. Appellant no.1 (PW5) was in prison on a charge of theft while appellant no.2 was on a charge of murder. The two were eventually released and appellant no.1 went to live with appellant no.2 at his home in Kifunjo. It was then that appellant no.2 hired appellant no.1 and a one Ben to kill the deceased. On 26th November 2011, appellant no.2 told appellant no.1 that they would kill the person

that day. Appellant. No.2 led them to a spot where they would waylay the victim. Between 10:00 pm and 11:00 pm. the deceased came walking while talking on the phone and the group ambushed him, hit him severely on the head with an iron bar and a brick. When the deceased died, they dragged his body and dumped it in a trench.

[23] Appellant no.1 took the deceased's phone and started using it. The police tracked the phone which led to the arrest of the appellant who admitted to having committed the offence and named appellant no.2 as an accomplice who was also arrested and charged. Appellant no.1 pleaded guilty to the charge and was sentenced to 50 years' imprisonment on both counts to run concurrently. He testified on behalf of the prosecution as PW5.

[24] In his unsworn testimony, appellant no.2 denied having committed the offence and raised the defence of alibi. He stated that he was in Kampala from the 23rd November 2011 to 29th November 2011, on business.

[25] We shall first resolve the appeal of appellant no.2 then proceed to resolve appellant no.1's appeal.

Ground 1 for Appellant no.2

[26] The gist of counsel for appellant no.2's contention is that the prosecution did not prove the participation of the appellant in the commission of the crime. Counsel argued that the evidence of PW5, an accomplice was not corroborated. Mr. Tusubira also challenged the credibility of PW5.

[27] The only evidence that directly implicates appellant no.2 is that of PW5. We shall proceed to set out the evidence in part:

> 'I pleaded guilty. I knew the Accused person. The Accused person is Natuhwera Naboth Kabina. The Accused found me in prison here in Rukungiri Government Prison.
> I was on a charge of theft. He was on a murder case. We became friends. He told me that upon my release from prison I pass by his home in Kifunjo.
> We were both at prison at that time.
> He told me that he wanted me to do for him some work. At the time I had been released at his home. The

Accused had been released first. I went to his home at Kifunjo. I worked for him in his car as a turn boy. It was a dyna Vehicle. It was carrying sand here in Rukungiri Town.
I worked for him for a month. I was staying at his home in Kifunjo.
He told us (me and Ben) that he had work for us. Ben was arrested and released. This was before I was arrested. Ben lived in Omukirya ben was just in town (unemployed).
He told us there is a person he wanted us to kill. Ben and 1. We told him that pay us money and we do it. Ben asked for 2,000,000/= (Two million shillings) for me I asked for a saloon and he takes me to Kampala in that Saloon there.
We did not know the person and he said that he would show us the victim.
We moved and he showed us that person. Before showing us that person. He first showed us the path the person passes it is at Kirofa at Kiseruti. At about between 10:00 p.m. and 11 p.m. the victim came talking on phone. The victim was Arinaitwe. He showed us that he was the one when he was about to reach where he stayed.
Ben hit him with an iron bar. He grabbed the iron bar. I picked a brick and hit him. We started beating him. When he was about to die. There was a stone there and Kabina picked a stone and hit him as he was still struggling. We believed he had died. Kabina found him still breathing and he finished him off. We pulled him and put him on a trench. Ben searched and I searched in the behind pockets.
Ben removed 5000/= and a phone I had never got a phone I told Ben to give me that phone. We went to Holly Wood and then finally to Kabina home.
But before going, Kabina had a bottle and tapped the blood of the deceased. We reached the room of Kabina and sat in the sitting room and Kabina went to his bedroom we found him in sitting room. He gave Been 200,000/= and gave me 100,000/=.
This was in payment. Ben said he should pay Ben in full and they part ways. For me I knew any time he would take me to Kampala to give me a Saloon.'

[28] PW5 went on to testify of how he was arrested after the police tracked the stolen phone. He first denied having committed the offence but later

confessed to having participated in the murder of the deceased. His confession was recorded by PW4 in a charge and caution statement.

[29] We agree with the learned trial judge that PW5 was an accomplice and rightly treated his evidence as such. The learned trial judge correctly stated the position of the law in respect to the evidence of an accomplice at page 9 of his judgment as follows:

> 'Clearly PW5 is an accomplice in the instant case as he pleaded guilty to this very same offence in an earlier High Court session siting on the 23rd of October 2013. S.132 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.
> In spite of this provision the courts have evolved rules of practice with regard to accomplice evidence. Courts have held,
> 'In a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge or magistrate to warn himself that, although he might convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law and where a judge or magistrate has failed to warn himself in accordance with it, the conviction should be quashed..." (See Ayor and Anor v Uganda [1968] 303) This court is alive to this practise and I warn myself now as I warned the assessors about the danger of acting on the uncorroborated evidence of PW5 as an accomplice."

[30] Section 132 of the Evidence Act provides:

> 'An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. '

[31] Whereas corroboration of accomplice evidence is not mandatory under the law, as a matter of practice, accomplice evidence ought to be corroborated. A court wishing to rely on uncorroborated accomplice

evidence should caution itself on the dangers of relying on such evidence before convicting the accused. This rule of caution only applies where the testimony of the accomplice has been found to be trustworthy. See Senoga Sentumbwe v Uganda [2017] UGSC 39, Baluku Samuel and Anor v Uganda [2018] UGSC 26.

[32] This position of the law regarding evidence of an accomplice evidence and the requirement of its corroboration has been discussed in numerous decisions by this court and the Supreme court. In R v Baskerville [1916] 2 KB 658, the *locus classicus* of the law on accomplice evidence from which all authorities stem, Viscount Reading CJ stated:

> 'There is no doubt that the uncorroborated evidence of an accomplice is admissible in law *see R v Atwood and Robbins* (1). But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence: *See r v Stubbs (2) and R e Meunier* (3)...'

[33] He further stated:

> 'We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him – that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute "implicating the accused" compendiously incorporated the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration,

except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true; not merely that the crime has been committed, but it was committed by the accused. Corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime…'

[34] While arriving at the decision that there is sufficient evidence corroborating the evidence of PW5, the learned trial judge stated:

'As seen from the testimony of PW5 he obtained a phone from the deceased person which he then started using. The deceased person's wife informed the police that the deceased had a phone whose number she provided. Detective AIP Turyamye Franke then started tracking this phone and the number given. The trail led to PW5 who was arrested and charged. He initially denied any involvement in the offence but later admitted complicity. As seen earlier he named the accused who was arrested. The fact that the phone was proved to be used by PW5 corroborates his statement.
PW5 told the court that after they had beaten the deceased they dragged his body to a trench. PW1 testified that the body of the deceased was found in a trench. PW2 told court that there were marks of violence around the body when he found it and that it was in a trench lying in a pool of blood.
Lastly the Turyasingura Frank, PW5 stated that he went to the home of the accused in a place called Kifunjo and lived there with him. The accused in his testimony stated that his home was located in a place called Kifunjo.
The statement of PW5 was admitted at the time of his plea. In it he states that the deceased was hit by one Ben with an iron bar on the head while PW5 hit him, again on the head with a brick. In his testimony in court he does not go into this level of detail but states the deceased was beaten with an iron bar and a brick.
The post-mortem shows that the deceased suffered several cut head injuries with missing teeth.
It is my finding that these pieces of evidence corroborates the testimony of the witness.
The question now would be whether this was evidence of corroboration and was it sufficient for that purpose.

> Regarding corroboration the East African Court of Appeal had this to say,
> 'Corroboration does not mean that there should be independent evidence of that which the accomplice relates, otherwise his testimony would be unnecessary. The principal is that if an accomplice is corroborated not only may that part of his evidence which is corroborated be relied on but also that part which is not corroborated, the corroboration of a material part being a guarantee of the truth of his evidence as a whole.' (See Rex v Taibali Mohamedai 10 EACA 60). This holding was cited with approval in Susan Kigula v Ug. SCCA No. 1 of 2004 where it was summed up that corroboration in part corroborates the whole.
> I find that the cited pieces of evidence in the testimony of PW5 corroborate material parts of his testimony and therefore serve as a corroboration of his testimony and according a corroboration of a part of it corroborates the whole.'

[35] This could not have amounted to corroboration of PW5's evidence in light R v Baskerville (supra). It is our view that what was required to be corroborated was in respect to appellant no.2's participation in the offence because PW5 pleaded guilty which means it was clear that he participated in the murder of the deceased. In that respect, the learned trial judge was in error.

[36] Upon perusal of the record, we find that the evidence of PW5 was not corroborated. The question before us then is whether this is one of those rare cases in which evidence of an accomplice would be sufficient to sustain a conviction without corroboration. In Canisio s/o Walwa v The Republic (1956) 23 EACA 453, the East African Court of Appeal stated the rule of practice as to convicting an accused on the uncorroborated evidence of an accomplice as follows:

> "Generally speaking it is a practice, founded upon prudence when applying the rule as to the onus of proof, not to convict without any evidence corroborating that of accomplices. But there are exceptional cases in which a departure from that general practice is justified. The criterion as to whether such an exceptional case has arisen is the credibility of

> the accomplice or accomplices combined with the weight to be attributed to the facts to which they testify. The principal factors to be considered when assessing their credibility are not only their demeanour and quality as witnesses but also their relation to the offence charged and the parts which they played, in connection therewith, that is to say, the degree of their criminal complicity in law and in fact. A departure from the general rule of practice is only justifiable where, on applying that criterion in that manner, it clearly appears that the accomplice evidence is so exceptionally cogent as to satisfy the Court beyond reasonable doubt, and where accordingly the judge or judges of fact, while fully conscious of the general inherent danger of any such departure, is or are convinced that in the particular instance concerned the danger has disappeared."

[37] Counsel for appellant no.2 challenged the credibility of PW5 relying on the inconsistencies in his charge and caution statement and testimony in court. He contended that there was an inconsistency relating to how PW5 came to know appellant no.1. Counsel submitted that while PW5 stated in his charge and caution statement that he went to stay with appellant no.2 after being discharged from prison, in his testimony before court he stated that he found the appellant in prison, and they become friends. It is true that PW5 omitted the fact that he came to know appellant no.2 from prison. He testified that he first came to know appellant no.2 from prison, and they became friends. This evidence was never challenged in cross examination.

[38] Counsel for appellant no.2 also argued that there were contradictions as to how and who paid PW5 after the murder of the deceased. It was PW5' testimony that he was paid UGX 100,000 and Ben UGX 200,000 by appellant no.2 when they went to appellant no.2's home after leaving Hollywood night club. In his charge and caution statement, he stated that it was at the Hollywood night club that appellant no.2 paid Ben UGX 200,000 and from that money Ben gave him UGX 90,000. Upon cross examination, PW5 maintained that its appellant no.2 who paid him and that he paid him from his home.

[39] Is this inconsistency minor or not? If it is minor does it point to deliberate untruthfulness? These are questions we need to determine. Before we do

so let us remind ourselves on the law on this point. In Baluku Samuel and Anor v Uganda [2018] UGSC 26, the Supreme Court stated:

> 'We are aware that in assessing the evidence of a witness and the reliance to be placed upon it, his or her consistency or inconsistency is a relevant consideration. This Court in **Sarapio Tinkamalirwe v. Uganda, Criminal Appeal No. 27 of 1989 (SC)** held as follows:
> **"It is not every inconsistency that will result in a witness testimony being rejected. It is only a grave inconsistency, unless satisfactorily explained, which will usually, but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies will not usually have the effect unless the Court thinks they point to deliberate untruthfulness.'**

[40] PW5 according to his testimony was a hired contractor together with Ben, not before the court. The question of who paid cannot be minor. It goes to the root of his participation in the crime. If on one hand in an earlier statement he states that it was Ben who paid him from what Ben received from the appellant but in his testimony, he states that it is the appellant that paid him directly this may be a deliberate falsehood. Even if it were regarded as minor, the possibility of being a deliberate falsehood renders the testimony of this witness against the appellant unsafe.

[41] This is not one of the inconsistencies that can be ignored. A conviction based on the evidence of such a witness, whose evidence is uncorroborated would not be safe.

[42] We need to add that the appellant put forth an alibi. The duty of demolishing the appellant's alibi lay on the prosecution. The prosecution did not attempt in any way to do so, either by adducing evidence to show that it could not be correct by tracking the appellant through his phone records and establish where he was at the material time, or take statements from his neighbours as to his whereabouts on the material day. Neither did the prosecution attempt to adduce independent evidence about the relationship of PW5 and the appellant, including the fact that they met in prison, and at the time the offence was committed that PW5 was living in the home of the appellant. This would have established that

the appellant's statement that he did not know PW5 is a lie. As it is, it is now the word of one person against the other.

[43] We find that the conviction of the appellant on the 2 counts of murder and aggravated robbery is unsafe and cannot be upheld. It is quashed and the sentence set aside. Unless the appellant no. 2 is being held on some other lawful ground, we order his immediate release.

[44] It is unnecessary in the circumstances to consider ground 2 in relation to sentence.

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[45] Counsel for the appellant abandoned ground 1 but we find it essential to resolve this ground upon examining the sentencing order. Counsel for appellant no.1 had faulted the learned trial judge for not taking into consideration the period spent on remand while sentencing the appellant.

[46] It is a mandatory constitutional requirement to take into account the period that the convict spent on remand while sentencing. Failure to consider the remand period renders the sentence illegal. See Rwabugande v Uganda [2017] UGSC 8.

[47] Article 23 (8) of the constitution states:

> '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.'

[48] While sentencing the appellant, the learned trial judge stated:

> **'SENTENCE:-**
> In passing the sentence against the convict, the following are taken into account:-
> 1)The mitigating factors advanced by:-
> **(i)The prosecutor**

(ii)the defence counsel
2)By pleading guilty, this is a sign of being remorseful and repentant.
3)The death of the deceased was caused by the convict and other get to be tried in a brutal manner as shown in the post-mortem report:-
(I)Scalp cut wound of 15cm

(II)Upper and lower lip cut wounds.

(III) Cut wound on the maxillary area

(IV) Some teeth were missing

The internal injuries were:-

Extructural hematoma extending from the frontal to occipital area.

4)The innocent man died a brutal death.

From the factors abovementioned the convict would be sentenced to death. However, considering the above factors and the factors advanced by the both counsels for the parties, I sentence the convict to **fifty (50) years imprisonment in prisons on count-I**

Further, the convict is sentenced to **50 (fifty) years imprisonment in prison on count -II'**

[49] Counsel for appellant no.1 in mitigation stated that the appellant had been on remand since March 2012 which was about 1 year and 7 months. The appellant was convicted on his own plea of guilty on 22nd September 2013. Other than stating that he was taking into account the mitigating factors advanced by the prosecution and defence, there is no indicator in sentence that the learned trial judge considered the remand period. The remand period should be taken into account specifically after the appropriate sentence has been determined by court before the court pronounces the term to be served. It must be considered, and that consideration must be noted in the judgment. See Abelle Asuman v Uganda [2018] UGSC 10.

[50] We therefore find that the learned trial judge did not take into consideration the period the appellant spent on remand. This renders the sentences illegal.

[51] We set aside the sentence of 50 years' imprisonment imposed against appellant no.1 on each count. We now invoke section 11 of the Judicature Act which gives this court power to impose a sentence of its own.

[52] The mitigating factors were that appellant no.1 pleaded guilty, is a young man of only 27 years, was remorseful and was on remand for 1 year and 7 months. The aggravating factors were that both the offences for which the appellant was convicted of are serious and carry the maximum penalty of death. The deceased was a young man with a wife and children that depended on him. His services as a teacher were terminated prematurely.

[53] We also note that there is need for parity in sentencing. In Kakooza v Uganda [1994] UGSC 17, the Supreme Court was of the view that sentences imposed in previous cases of a similar nature do afford material for consideration while this court is exercising its discretion in sentencing. We are obliged to maintain consistence or uniformity in sentencing while being mindful that cases are not committed under the same circumstances.

[54] In Anguyo v Uganda [2016] UGCA 39, the appellant was convicted of murder on his plea of guilty, he was sentenced to 20 years of imprisonment. On appeal, upon finding that the remand period was not taken into consideration, this court imposed a sentence of 18 years' imprisonment. In Sande v Uganda [2014] UGCA 11, the appellant was sentenced to 18 years' imprisonment on her plea of guilty to the offence of murder. This court confirmed the sentence.

[55] In Onyabo Bosco V Uganda [2017] UGCA 98, the appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to section 286(2) of the Penal Code Act and sentenced to 45 years' imprisonment in respect to the offence of murder while the sentence in respect to aggravated robbery was suspended. On appeal, this court set aside the sentence and sentenced the appellant to 20 years' imprisonment for the offence of murder and 18 years' imprisonment for the offence of aggravated robbery.

[56] In light of the above, we find that a sentence of 15 years' imprisonment would be appropriate in the circumstances, on each count from which we deduct 1 year and 7 months that appellant no.1 spent on remand.

[57] We therefore sentence appellant no.1, on each count he was convicted of, to **a term of imprisonment of 13 years and 3 months to be served concurrently, from 22nd October 2013**, the date of conviction.

[58] The appeal for appellant no.1 therefore succeeds.

Other Remarks

[59] Before we take leave of this matter, the learned Chief State Attorney, Mr Kyomuhendo, raised a preliminary objection at the hearing of this matter. He contended that the appellants cannot be represented by the same counsel due to conflict of interest. At the beginning of the trial, Ms. Kentaro Specioza stated that she was acting for both appellants on state brief. Appellant no.2 was also represented by Mr. Paul Tusubira on private brief. It was resolved during the hearing that Ms. Kentaro represents only appellant no.1 in the interests of justice.

[60] In Tumusiime Henry v Uganda Court of Appeal Criminal Appeal No. 85 of 2010 (unreported), the appellant and a one Rose Mpairwe were convicted of the murder of Innocent Mpairwe. During the hearing of the trial both the appellant and his co-accused were represented by the same advocate. The appellant and co-accused had conflicting interest in respect to their defences. The co-accused gave an unsworn testimony in which she testified against the appellant. The co-accused had also made an unsworn statement on the advice of the advocate. This meant that the appellant could not cross examine the co-accused on her evidence. The appellant upon the advice of the same advocate opted to remain silent. This court in its holding stated:

> 'It is not farfetched to assume that the advocate was more concerned about the case against A1 than against the appellant. As submitted by counsel for the appellant, whereas the appellant, being a minor could only get a maximum sentence of 3 years imprisonment, his co-accused an adult, could face the death penalty. It was only natural for the defending advocate to concentrate on the case of the adult co-accused, Rose Mapirwe, so as to save her from being convicted and sentenced to death, and to pay less attention to the case of the minor appellant, who stood only to be sentenced to a maximum of three (3) years in case of a conviction. We therefore find that it was not possible,

in the circumstances of this case, for the same advocate to have duly ably and fairly represented both the appellant and the co-accused, Rose Mpairwe (A1) without causing prejudice to the case of one of them. We find that, in this case, the appellant was not accorded a fair hearing and we so hold.'

[61] Articles 28 and 44 (c) guarantee the right to a fair hearing which is non-derogable. Appellant no.1 gave evidence against appellant no.2. Therefore, they could not be represented by one advocate as it would lead to conflict of interest and inevitably lead to the infringement of one or both of the appellants' right to a fair trial.

Signed, dated and delivered this 3rd day of March 2022.

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal