THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Mulyagonja & Mugenyi, JJA

CRIMINAL APPEAL NO. 141 OF 2018

5 **NAKALYAKA FABIANO::: APPELLANT**

VERSUS

UGANDA ::: RESPONDENT

(Appeal against the decision of Elubu, J, delivered at Iganga on 31st January 2017 in Jinja High Court Criminal Session Case No.

10 ***113 of 2013)***

JUDGMENT OF THE COURT

Introduction

The appellant was indicted on two counts, aggravated robbery contrary to

15 sections 285 and 286(2) and murder contrary to sections 188 and 189 of the Penal Code Act. After a full trial, he was acquitted on the count of aggravated robbery but convicted of murder. He was sentenced to 31 years' imprisonment.

Background

20 The facts that were accepted by the trial judge were that on 12th August 2012, at around 8:30pm at Bugonza Village, Namugongo Sub County in Kaliro District, the deceased, Anthony Kasajja, was in his shop with his brother, Lagwe Ronald, and other people who had come to while away the evening at the shop. The appellant and two others parked their motorcycle

a short distanced away from the shop and one of them got off and walked into the shop. He said he wanted to buy chewing gum but the deceased did not have any, so the man returned to the motorcycle. The other two men, one of whom was the appellant, then walked to the shop which was lit by lamps. The appellant ordered everyone to lie down demanding that the deceased hands over money to them. Kassajja resisted the order but the appellant told him that he would die if he did not give them money.

One of the men that remained outside the shop then entered it with a gun and cocked it, at which Kassajja lay down. A third man entered and turned off the lamp after which Ronald Lagwe seized the opportunity to ran out of the shop, making an alarm, as he fled. He heard gun shots going off as he fled. The assailants shot at him but he got away, though one of them unsuccessfully tried to block his way and stop him.

When Lagwe got home he informed their father, Kakaire Chrysostom, about the attack and the two returned to the shop. They were informed that Kassajja was shot at and injured but he was rushed to Kaliro Hospital. He was transferred to Iganga Hospital but on the way there, Anthony Kasajja informed his father that Fabiano, the son of Leo, was one of the assailants that attacked them. At Iganga Hospital, Kakaire Chrysostom was advised to take his son to Mulago Hospital because his injuries could not be managed at Iganga. However, just before they set off, Kasajja died.

The appellant was arrested when he went to the Police to report that villagers were threatening to kill him. He was subsequently charged with aggravated robbery and murder but was acquitted of the aggravated robbery and convicted of murder for which he was sentenced to

imprisonment for 31 years. He now appeals against both conviction and sentence on the following grounds:

1. The learned trial judge erred in law and fact when he failed to evaluate the evidence on record as regards identification or participation of the appellant thereby occasioning a miscarriage of justice to the appellant.
2. In the alternative but without prejudice to the above, the learned trial judge erred in law and fact when he sentenced the appellant to 35 years' imprisonment which sentence was manifestly harsh and excessive in the circumstances.

The appellant prayed that this court allows the appeal, quashes the conviction and/or sets aside the sentence and substitutes it with one deemed more appropriate. The respondent opposed the appeal.

Representation

When this matter came up for hearing on 17th August 2023, Ms. Shamim Nalule represented the appellant. The respondent was represented by Ms. Sharifah Nalwanga, Chief State Attorney in the Office of the Director of Public Prosecutions who was holding the brief for Ms. Immaculate Angutoko, Chief State Attorney.

Analysis and Determination

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules, SI 13-10. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be

cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda; Supreme Court Criminal Appeal No.1 of 1997)**

We observed the principles above in resolving this appeal. We carefully
5 reviewed the record of appeal that was set before us and considered the submissions of both counsel, the authorities cited and those not cited that were relevant to the appeal. The grounds of appeal were resolved in chronological order and the submissions on each of them were reviewed by the court immediately before determination.

10 **Ground 1**

The appellant complained that the trial judge did not evaluate the evidence before him properly and thus erred when he found that he participated in the murder of the deceased.

Submissions of Counsel

15 Ms. Nalule, for the appellant stated the duty of the first appellate court in rule 30(1) of the Rules of this court and cited **Kifamunte Henry v Uganda; Criminal Appeal No. 10 of 1997** for its interpretation. She further submitted that the burden of proof in criminal cases is on the prosecution throughout the trial. She then asserted that the ingredient of participation
20 was not sufficiently made out by the evidence adduced by the prosecution and that therefore, it was erroneous for the trial judge to convict the appellant.

She contended that to prove this particular ingredient, the prosecution relied on the evidence of two witnesses; the brother and the father of the

deceased. She pointed out the Lagwe Ronald (PW1) the deceased's brother testified that on that fateful day at 8.30 pm, an unidentified man entered his brother's shop and asked for Orbit chewing gum; there were five people at the shop. That the man turned off the lamp and the appellant entered the shop and ordered them to lie down. Further that when the assailant with a gun cocked it, Lagwe ran away but heard gun shots behind him. That he further testified that when he returned to the shop, he found his brother holding his gut. She went on to contend that PW1 stated that the appellant was a neighbour and a *boda boda* rider but he did not say that it was he that was holding a gun. She added that when PW1 was cross-examined, he said he did not see anything because first person who entered the shop turned out the lamp. She insisted that this person was not the appellant.

Counsel for the appellant went on to submit that though there were 3 other people at the shop, they did not testify. She opined that this meant that the evidence that the trial judge relied upon to convict the appellant was that of a single identifying witness. She referred court to the principles on identification in such cases which were laid down by the Court of Appeal in **Abdalla Nabulere & Others v Uganda; Criminal Appeal No. 9 of 1978**. She contended that the conditions for identification at the scene of the crime at the time the assailants shot at the deceased were poor.

Counsel for the appellant further submitted that PW1 did not explain the distance from which he observed the appellant. That according to his narrative, everything happened so fast that the witness could not have had sufficient time within which to observe the assailants. That as a result, the trial judge was wrong when he relied upon the uncorroborated evidence of PW1 to convict the appellant.

Counsel went on to submit that the trial judge also relied on the evidence of an uncorroborated dying declaration. She asserted that the deceased and PW1 could have been mistaken as to the identity of the assailant due to the poor conditions under which he was identified. She contended that PW1 returned to the shop after his brother was shot at and there is a possibility that the two of them discussed the incident. And that during that discussion the deceased disclosed to PW1 who he thought his assailant was. She asserted that the deceased was mistaken, and if he was so mistaken then PW1 was also mistaken. She prayed that for those reasons the conviction be quashed.

In reply, Ms. Nalwanga for the respondent contended that the trial judge properly evaluated the evidence of the appellant's participation. That the evidence of the single identifying witness was corroborated by the evidence of the dying declaration. She too relied on **Abdalla Nabulere & Others v Uganda** (supra) and stated that the trial judge carefully considered the conditions and examined the circumstances under which the identification was made. She opined that the quality of the identification evidence was very good and there was no danger of mistaken identity.

Counsel for the respondent emphasised that the evidence was corroborated by the deceased's dying declaration. She referred to **Mibulo Edward v Uganda; Criminal Appeal No. 17 of 1995**, and submitted that the evidence of a dying declaration can corroborate that which is adduced by a single identifying witness. She urged this Court to find that the trial judge properly evaluated the evidence of PW1 and PW2 and arrived at a correct finding that the appellant's participation was proved beyond reasonable doubt.

In rejoinder, counsel for the appellant reiterated her earlier submissions on this point and prayed that this court quashes the conviction and sets the appellant free.

Resolution of Ground 1

5 The issues flowing from the submissions of counsel for the appellant that have to resolved are two: i) Whether the trial judge properly relied upon the evidence of a single identifying witness, and if so, whether such evidence has to be corroborated by other evidence; and ii) whether he properly relied upon the dying declaration which was disclosed in the 10 testimony of PW2. We dealt with the two questions in the same order.

Identification

The trial judge's analysis and decision on identification of the appellant was at pages 8-10 of his judgment, page 50-52 of the record of appeal. Given the evidence that the lamp in the shop was blown off during the 15 attack, the assailant forced the occupants of the shop to lie down and PW1, Lagwe Ronald, fled from the scene during the attack and was not present when the assailant shot at and injured the deceased, the trial judge was mindful of the principle that he had to be cautious in coming to his decision. At page 8 of his judgment he stated thus:

20 *"The court in these circumstances needs to closely examine this evidence of identification. It is pertinent that there was only one identifying witness called. In such circumstances the law is that a fact may be proved by a single witness and court may rely on a single identifying witness. However, the court must seriously warn itself of the need for testing with the greatest 25 care the evidence of this single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. The court ought to advert to the danger of a single witness being honest but mistaken (See **Roria v Rep [967] 583**). I here warn myself of*

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this danger considering that PW1, Lagwe Ronald was a single identifying witness in difficult conditions."

The trial judge summarised the principles that were restated in **Abdalla Nabulere** (supra) and then analysed and set out the evidence that was the basis of his decision. We therefore cannot fault him in this regard because he came to his decision about the facts with the correct principles in his mind. We followed the same principles in reappraising the appellant's defence vis-à-vis the evidence of identification.

The appellant set up an *alibi* and alleged that the deceased and his father both bore grudges against him. In his elaborate sworn testimony at pages 25, 26, and 27 of the record of appeal, the appellant set out to account for his whereabouts at the time that the crime was committed in part, as follows:

> *"I know nothing about the killing of Kasadha. I knew Kasadha Anthony. He was my neighbour. I had known him from birth. His home was about 70 metres from mine. The deceased died. I don't know how he died but he died. On 10/08/2012 I was at my home at 6.00am and left for a funeral at the deceased person's father. Kasadha did not die on the 10th of August, 2010. He died on the 9/08/2012. I was from work place on the 09/08/2012 but I do not remember the exact time but about 8.00 pm from Kaliro town. I met people at a junction where our road leads to District Headquarters and to Namugongo Hospital. It is 2km from my home. These people were running in the direction I was heading. They were very many people and I did not count them. They were holding pangas, stones and sticks. I did not recognise any. I drove past them. I then went to my home. When I reached home I heard an alarm coming from the neighbour's place and there were very many people. They were very many. This was about 8.40 pm. I parked my motorcycle and went to the home of Kasadha. The people I founded there told me that Kasadha had just been robbed. I did not see Kasadha. I learnt of Kasadha's death at 2.00 am. I was (in) my house sleeping. I heard an ambulance passing and making noise. When I got up the ambulance was branching to Kasadha's father's house. I followed the ambulance and they were returning Kasadha's dead body. I know Lagwe Ronald; he is a brother*

to Kasadha. I know nothing about what Lagwe stated that I killed Kasadha. At 8.30 pm I had responded to the alarm made at Kasadha's home. I had known Lagwe from birth. I had a grudge with Lagwe over a motorcycle. In 2011 in June Ronald had a motorcycle of Wako which was removed from him and handed over to me. They were 5 motorcycles. From that time, I had a grudge against Ronald even if I meet him he would not greet me and if he met me he would turn around. I know Kakaire the uncle. I had known him from my birth. I saw him that day when the alarms were being made. This was where the late operated a shop. He lied to the Court when he said that his son had told him that I shot him. I had a grudge against him. I had three bulls used for extracting/ squeezing sugar cane juice. He had a sugar cane plantation and requested me to squeeze sugar cane for him. I told him I could not because I had other commitments."

The appellant also narrated how he was arrested. He stated that Isabirye, an uncle to the deceased, threatened to kill him because he took people to Kasajja's house who killed him. That when he told his relatives about the threat, they advised him to report to the police but when he got there he was instead arrested for the murder of Kasajja. In cross-examination, he strenuously denied that he participated in the crime at Kasajja's shop.

Before we go on with our analysis, it is pertinent to point out that we observed that the deceased was referred to in the documents and testimonies of the witnesses interchangeably as Anthony Kasadha and Anthony Kasajja. We shall refer to him in this judgment as Anthony Kasajja because that is the name that was reflected in the Post Mortem Report and which the trial judge used all through his judgment, though the indictment referred to him as Kasadha Anthony.

For the prosecution, Lagwe Ronald (PW1) testified that on 16th August 2012, he was at his brother's shop at Bugonza. He was inside the shop and his brother, Kasajja Anthony was tending to the shop. At 8.30 pm a motor cycle rode towards the shop and one man got off. He entered the

shop and asked for Orbit chewing gum, ostensibly to buy it, but Kasajja told him he did not have any. He exited the shop and returned to the motor cycle. PW1 explained that there were 5 people at the scene: Eliphazi Bulima, Robert, Yokana, his late brother Anthony Kasajja, and he.

With regard to identification of the appellant at the scene of the crime, the main contention in this appeal, we deemed it useful to set down the crucial part of PW1's testimony in which he stated that he identified the appellant. It appeared at page 15 of the record and was as follows:

> *"When he returned to the motorcycle I saw Nakalyaka and another one walking at the left and another on the right. They said all of you lie down don't sit up. It was the accused who said that. I knew the accused he is a village mate. I recognised him by (the) lamp. There was a lamp inside and another outside. The accused was waving his hand and demonstrating for all to lie down. My brother refused to lie down. Then a man with a gun came towards us. Yokana was a strongman. He cocked the gun and Yokana lay down. The other person entered the shop and put out the light. I then ran out of the shop and started making an alarm. When I made an alarm they then started shooting. One Martin tried to block me but I dodged him and ran away. They were shooting and I ran up to the Church. The Church is nearby. I found the villagers now running towards where the shooting was coming from. They were from Nyera's family. I saw them on a motorcycle now leaving. I did not see how many were on the motor cycle. The person, Nakalyaka, came and said you are not giving us money but you do not know that you are going to die. He said this immediately after he put out the light."*

Counsel for the appellant cross examined PW1 about the people that participated in the crime. At page 18 of the record, he stated that he did not know the first person who entered the shop to ask for chewing gum but he knew Nakalyaka, the appellant, before the incident. That he saw the appellant when he came in and told them to lie down. That the light was still on before they were ordered to lie down. But by the time the appellant entered the shop the first person that entered the shop had

blown out the light and it was dark. He also explained that it was the appellant that told the deceased that he would die if he did not give them money. He further stated that the appellant used to come to the shop before that and on that day, he saw him enter the shop. That he did not see what was done to his brother, nor did he see anyone take anything from the shop.

Ronald Lagwe was re-examined by prosecuting counsel. He explained that the assailants first put out the light inside the shop. He also clarified that it was at the point they put out the lamp outside the shop that he seized the opportunity to flee. He also clarified that he knew the voice of the appellant very well.

The court asked PW1 some questions. He explained that the appellant's home was next to their home. That the appellant was born in that home. Further, that the motor cycle was parked about 15 metres away from the shop. He maintained that the appellant used to frequent the shop before the incident occurred.

Counsel for the appellant contended that it was dark and so PW1 could not see the assailants. However, his testimony and cross examination proved that there were two lamps at the scene of the crime. One outside and the other inside the shop. The lamp inside the shop was blown out first by the man who asked to buy chewing gum when he returned to demand for money. The lamp outside the shop was blown out after the appellant told all the occupants to lie down.

Apparently, PW1 clearly heard the appellant when he threatened the deceased with death if he did not hand money over to them. The appellant

did not deny that he was well known to PW1, so he could easily identify him by his voice. Instead, at page 26 of the record, he stated that he had known PW1 *"from birth."* He also admitted that he used to go to Kasajja's shop 'to buy items' at 7.00 pm. Having known him from birth and as a frequent customer at his brother's shop, it was easy for PW1 to identify the appellant, even under the difficult circumstances that the group was placed during the attack. Counsel for the appellant did not challenge PW1's testimony about the appellant's voice by cross examination in the lower court. Neither did he challenge it in this appeal, though the trial judge relied upon it, because at page 52 of the record he stated thus:

> *"Lastly the accused ordered everybody to lie down. Lagwe stated that he knew the accused person's voice well. The Supreme Court of Uganda has held it is possible for a witness to recognise an accused person by voice and for court to rely on that identification {See* ***Muhwezi & Anor v Ug SCCA 25/2005*** *(unreported)}."*

It is therefore clear from PW1's testimony that he positively identified the appellant as his village mate whom he had known for a very long time before the incident. The appellant's *alibi* that he was at his home when the crime took place, and that PW1 had a grudge against him were not tenable in the face of the evidence adduced by PW1. The trial judge therefore cannot be faulted for relying upon PW1's identification of the appellant to come to the finding that he participated in committing the crime.

The dying declaration

As to whether the trial judge properly relied upon the dying declaration to convict the appellant of murder, the judge's findings on that point were at page 10 of his judgment, page 52 of the record of appeal, where he stated thus:

"Secondly the deceased told his father that he had been shot by Nakalyaka Feb the son of Leo. He repeated this several times before he eventually passed away. The statement is relevant by virtue of s. 30 (a) of the Evidence Act. The East African Court of Appeal in ***Okethi Okare v R (1965) EA 555*** *held with regard to dying declarations that:*

...

This court is mindful of these cautions the East African Court of Appeal gives. The accused was properly identified in the instant case as seen in this court's finding with respect to the evidence of PW1 Lagwe. In the same vein the deceased must have properly and accurately identified the accused. PW1 and the deceased made the identification under identical conditions. For this reason, this court will receive Kasajja's dying declaration and treat it as accurate."

Counsel for the appellant argued that PW1 did not see the person who shot at the deceased. He contended that it was not proved that the appellant shot at the deceased for various reasons that he advanced, and we accept his submissions. It is true that within his dying declaration, the deceased did not identify the appellant as the person who discharged the bullet that injured him. Instead, PW2 disclosed the dying declaration in his testimony at page 17 of the record of appeal as follows:

"... We got an ambulance to take him to Iganga. In the ambulance he said the people who attacked me included Fabiano s/o Leo. He said it was Fabiano Kantoloze. The accused person. I knew the accused person before, his father is Leo. I knew where he was staying in Bugonza. ..."

The name *"Kantoloze,"* an alias used by the appellant, was not included in the intitulation of this case in the lower court. It was therefore not included in the intitulation when the appeal was registered in this court. However, the indictment, at page 7 of the record, shows that it was brought against *Nakalyaka Fabiano alias Kantoloze.* D/IP Onyango Alexander, PW3, who arrested the appellant stated that at the time of his arrest the appellant

identified himself as *"Nalyaka Fabiano Kantoloze."* The error in the appellant's surname where he was referred to in parts of the record as *'Nalyaka'* is understood to be just that; a clerical error that was also made in the Indictment. It was there corrected to read *'Nakalyaka'* and countersigned for the prosecution. There is therefore no doubt in our minds that the person referred to in the dying declaration as Kantoloze was the appellant.

We further observed that in the statement that PW2 made on 29th May 2012 he narrated the deceased's dying declaration to the Police. The statement was admitted for identification and the trial judge stated that he would make a decision whether to admit it in evidence in his judgment. At page 11 of his judgment he admitted it because in his opinion, it was accurate. We examined PW2's first statement to establish whether the deceased clearly identified the appellant to him as the person who shot him. In the statement, at page 61 of the record, PW2 stated thus:

> *"I was in the ambulance taking my son Kasajja Anthony to Iganga Hospital. I asked my son Kasajja Anthony who might have shot you with the bullet. Kasajja Anthony told me that Febi resident of Bugonza was the one and others who shot me with the gun. My son continued telling (me) it was Febi son of someone called Leo of Bugonza village. I asked my son Anthony Kasajja if at all he did identify others but still Anthony Kasajja repeated saying he identified Febi s/o Leo."*

Although it is not clear from the testimonies of PW1 and PW2 that it was the appellant who fired the bullet, the dying declaration put him at the scene of the crime at the time that the deceased sustained the injuries that led to his death. It must therefore be determined whether the trial judge erred when he convicted the appellant of the offence of murder in the absence of conclusive evidence that it was he that fired the bullet.

There is no doubt that the appellant was one of three assailants who attacked the deceased, brandishing a gun, with the intention to steal from his shop. In addition, PW1 heard the appellant telling the deceased that he would die if he did not hand over money to them. Consistent with the wound that was found on the body of the deceased, PW1 said he clearly heard bullets going off at the scene of the crime as he fled. D/IP Onyango Alexander testified that when they visited the scene they recovered empty bullet cartridges. Though the appellant was charged with aggravated robbery and murder, there was no evidence adduced to prove that the assailants stole money from the deceased. The appellant was therefore acquitted on the count of aggravated robbery but convicted of murder.

The circumstances of this case bring to mind the provisions of section 20 of the Penal Code Act, which provides as follows:

> **20. Joint offenders in prosecution of common purpose.**
>
> **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.**

The Supreme Court considered the application of the provision above in **Kamya Abdulla & 4 Other v Uganda, Criminal Appeal No. 24 of 2015; [2018] UGSC 12**. In that case the appellants were convicted of the murder of a person whom they beat up till he died because they suspected he was a thief. This court upheld the conviction but on appeal to the Supreme Court, the appellants challenged the decision that the doctrine of common intention applied to them. They contended that the prosecution did not prove the ingredient of malice aforethought against them and so they

ought to have been convicted of manslaughter instead of murder. Finding for the prosecution, the court relied on the decision in **R. v. Okute s/o Kiliebi & Gadimba s/o Oumo [1941] 8 EACA 80,** where the Court of Appeal for Eastern Africa considered the implications of then section 23 of
5 the Uganda Penal Code Act. The court held that:

> *"Where several persons together beat another, then, though each may have a different reason and though some may join in the beating later than others, it is plain that all have what the law calls a "common intention," which does not necessarily connote any previous concerted agreement between them."*

10 The conviction and sentence were upheld because all the five appellants were seen by an eye witness at the scene of crime and they did not deny it. They were seen beating the deceased with different objects including sticks and this resulted in his death.

The application of the doctrine of common intention was explained by the
15 Court of Appeal for Eastern Africa in **Wanjiro d/o Wamerio & Another (1956) 12 EACA 521**, at 523, where it was held that:

> *"We think that in order to make the section applicable it must be shown that the accused had shared with the actual perpetrators of the crime a common intention to pursue a specific unlawful purpose*
20 *which led to the commission of the offence charged."*

The ingredients of the doctrine of common intention that were laid down by the Singaporean Court in **Vihay s/o Kahevasan & Others v Public Prosecutor [2010] 4 SSLR 1119** were considered with approval by the Court of Appeal of Kenya in **Eunice Musenya Ndui v Republic [2011]
25 eKLR.** The court identified 4 ingredients as: i) the criminal act (ii) the common intention (iii) whether the criminal act was done in furtherance of the common intention and (iv) whether there was the requisite

participation of the accused in the criminal act. We found this synthesis of the equivalent of section 20 of the Penal Code Act persuasive and instructive. We therefore applied it to the facts of this case.

According to the testimony of PW1, Lagwe Ronald, the assailants went to the deceased's shop with the common intention of carrying out a criminal act; robbery with aggravation. The appellant who was a frequent customer and well known to PW1, the deceased and their father PW2, was also resident just a few metres away from their home and the shop. He was a *boda* rider who apparently enlisted the help of two others who had access to a gun. The three then, fortuitously, rode on a *boda* which they parked near the deceased's shop. Using the power of the gun held by his partner in crime, the appellant forced the deceased and his comrades to lie down and told them that they would die if they did not give them money. This shows that he associated himself with the use of the gun to achieve their plan. PW1 described the parts played by each of the three assailants that accosted them at the shop. They each participated equally as though they had planned the attack.

However, PW1 was courageous. When the two lamps that lit up the inside and outside of the shop were blown out, he seized the opportunity to run away and make an alarm. The assailant with a gun then started firing bullets. One of them must have been directed at the deceased who had refused to lie down. It is not in dispute that he suffered a gunshot wound described in the post-mortem report to have been in the right lumber region, exiting on the left side of the abdomen. It led his small bowel to ooze out of the left side of the wound. The doctor who carried out the post mortem examination concluded that the deceased sustained severe trauma and bleeding leading to shock and death.

We therefore find that though it was not proved that the appellant discharged the bullet that killed Anthony Kasajja, he participated in the common intention to commit the offence of aggravated robbery, using a loaded gun. The gun was used to fire bullets after the appellant promised the deceased and his comrades that they would die if they did not hand over money. One of the bullets hit the deceased as a result of which he died. Though he did not advert to the doctrine of common intention to commit aggravated robbery, the trial judge made no error when he convicted the appellant of the resultant offence of murder. Ground 1 of the appeal therefore must fail.

Ground 2

The appellant's grievance in this ground was that the trial judge imposed a sentence upon him that was manifestly harsh and excessive in the circumstances of the case.

Submission of Counsel

Counsel for the appellant found fault with the trial judge for failing to take the mitigating factors into account and opined that he thereby arrived at a harsh and excessive sentence in the circumstances of the case. It was also her submission that the judge departed from the rule of uniformity in sentencing. She referred to **Aharikundira Yustina v Uganda; SCCA No. 27 of 2005** for the submission that consistency is a vital principle in sentencing.

Counsel went ahead to draw our attention to various authorities of the Supreme Court and this court where lesser sentences were imposed for the offence of murder. She referred court to **Oyita Sam v Uganda; CACA**

No. 307 of 2010 where the death sentence was reduced to 25 years' imprisonment; **Francis Obwalatum v Uganda; CACA No. 48 of 2011** where a sentence of 50 years on each count of murder was reduced to 20 years' imprisonment on each count, to run concurrently; **Kakubi Paul & Muramuzi David v Uganda; CACA No. 126 of 2008** where the death sentence was reduced to 20 years' imprisonment and **Nalule Sarah v Uganda, CACA No.0003 of 2013** where a sentence of 30 years was reduced to 25 years' imprisonment.

Counsel restated some of the mitigating factors advanced in favour of the appellant and prayed that this court sets aside the sentence of 35 years and substitutes it with the more lenient one of 18 years' imprisonment.

In reply, counsel for the respondent clarified that the trial judge had in fact sentenced the appellant to 31 years' imprisonment after deducting the period he spent on remand and not 35 years as stated by counsel for the appellant. She restated the principle in **Kiwalabye Bernard v Uganda; SCCA No. 143 of 2001** and **Kyalimpa Edward v Uganda; SCCA No. 10 of 1995** on the circumstances under which an appellate court may interfere with the sentence imposed by the trial court. It was also her submission that the trial judge took into account both the mitigating and aggravating factors before sentencing the appellant. She asserted that the sentenced passed was therefore legal.

Regarding the issue of consistency, counsel for the respondent submitted that the sentence imposed falls within the range prescribed by law and it is consistent with sentences imposed by this court and the Supreme Court. She cited **Wamutabanewe Jamiru v Uganda, SCCA No. 74 of 2007** where the final sentence imposed for murder was 34 years'

imprisonment; **Sunday Gordon v Uganda, CACA No. 103 of 2006** where a sentence of life imprisonment was upheld by this court; **Sebuliba Siraji v Uganda, CACA No. 575 of 2005** where this court also upheld life imprisonment as the sentence for the offence of murder; **Florence Abbo v Uganda, CACA No. 168 of 2013** where a sentence of 40 years' imprisonment was upheld and **Magero Patrick v Uganda; CACA No. 076 of 2019** where 45 years' imprisonment was upheld. Counsel urged this court to uphold the sentence imposed upon the appellant and dismiss the appeal.

In rejoinder, Ms. Nalule submitted that much as the trial judge imposed a legal sentence, it was manifestly harsh and excessive in the circumstances. Citing **Ogalo s/o Owoura v R (1954) 21 EACA 270** and **R v Mohammed Jamal (1948)15 EACA 126**, she maintained that the mitigating factors were not taken into account, as well as other pre-sentencing requirements.

She reiterated her earlier submission that the trial judge ignored the consistency principle. To this end she referred court to **Bamanya Happy & Katumba Rashid v Uganda, SCCA No. 22 of 2016,** where this court reduced a sentence of 37 years imposed by the lower court to 20 years' imprisonment**, Sekajja Fred v Uganda, SCCA No. 78 of 2020,** where the Supreme Court set aside the sentence of 45 years imprisonment for aggravated robbery and substituted it with a sentence of 14 years, 4 months and 2 weeks imprisonment, **Okao Jimmy alias Baby & Others v Uganda; CACA No. 55, 62 & 67 of 2016**, where this court substituted the omnibus sentence of 25 years imprisonment for the offences of murder, aggravated robbery and attempted murder with sentences of 18 years for murder, 15 years for aggravated robbery and 10 years' imprisonment for

attempted murder. She also referred to **Koreta Joseph v Uganda; CACA No. 243 of 2013** where this court reduced the sentence of 25 years' imprisonment for murder to 14 years' imprisonment. She prayed that this court be pleased to allow this ground of appeal.

5 **Resolution of Ground 2**

The time honoured principle with regard to sentencing is that sentence is within the discretion of the trial judge. Secondly, an appellate court will not interfere with the sentence imposed by the trial court except upon finding that the judge applied a wrong principle which makes the sentence
10 illegal, or that he/she imposed a sentence that was harsh and excessive in the circumstances, or that it was so low and amounted to an injustice. [See **Ogalo s/o Owoura v R (1954) 21 EACA 270, R v Mohammed Jamal (1948) 15 EACA 126** and **Kyalimpa Edward v Uganda, SCCA No. 10 of 1995**]

15 The appellant's complaints about his sentence are two: first, that the trial judge did not consider the mitigating factors before sentencing him; and secondly, that the judge did not consider the principle of consistency and uniformity in sentencing. We considered his complaints in the same order.

In order to guide our analysis of the issues raised, we found it useful to
20 set out the trial judge's decision on sentence. At page 41-42 of the record, he reasoned and held as follows:

> *"The convict is treated as a first offender who has spent 4 years on remand. The Court will consider that he was a young man in his mid-twenties at the time that the offence was committed. The convict prays for the lenience of*
25 *the Court. He has stated that his family disintegrated since his incarceration. His home was demolished and his wife abandoned his children with his mother.*

It is true however that this was a brutal and callous act. The deceased was an enterprising young man who despite his youth was already running a shop. This promising life was brutally cut down. It is even worse that it was the convict who was a neighbour who was responsible. It is clear that the commission of this offence was a pre-arranged meticulous operation. Such actions must be curbed in society. A young man should know that the road to earning is through enterprise like the deceased and not crime like the convict chose.

In the circumstances those of a like mind must be deterred. These kinds of actions punished. (sic) In the result, the starting point is 35 years. This offence carries a maximum sentence of death. I find a sentence of 35 years appropriate. I shall reduce that by time on remand of 4 years and accordingly sentence the convict to 31 years' imprisonment."

The excerpt above shows that the trial judge had the mitigating factors that were advanced for the appellant at the back of his mind because he mentioned them in the first and second paragraphs of his ruling. However, the third paragraph shows that when he settled on the sentence to impose upon him, he settled on imposing a deterrent sentence, only. He did not say that he considered the mitigating factors in his favour at all.

The position on mitigation of sentences was stated by the Supreme Court in **Aharikundira Yustina** (supra) as follows:

"The trial judge therefore ignored putting in consideration the mitigating factors raised by the appellant while passing the sentence.

The same trend prevailed in the Court of Appeal when it failed in its duty to re-evaluate the mitigating factors. We disagree with the respondent's argument that the Court of Appeal does not have to handle mitigation and that (the) mitigation process is done only in the trial court as was done in the instant case.

In the instant case, since the trial judge did not weigh the mitigating factors against the aggravated factors this automatically placed a duty on the Court of Appeal to weigh the raised factors (sic).

...

From the foregoing, we find that the Court of Appeal erred in law when it failed to re-evaluate and re-consider the mitigating factors before it came to its conclusion. This court as (a) second appellate court and court of last resort can interfere with a sentence where the sentencing judge and the first appellate court ignored circumstances to be considered while sentencing; See ***Kyalimpa Versus Uganda (supra), Kiwalabye Benard Vs Ug*** *(supra)."*

This renders taking the mitigating factors advanced for the appellant into account far from discretionary; it is prudent to take all of them into account before sentencing, as the Supreme Court did in the case of **Aharikundira** (supra).

In addition, paragraph 19 of the Constitution (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions, 2013, provides as follows:

19. Sentencing ranges in capital offences.

(1) The court shall be guided by the sentencing range specified in Part I of the Third Schedule in determining the appropriate custodial sentence in a capital offence.

(2) In a case where a sentence of death is prescribed as the maximum sentence for an offence, the court shall, considering the factors in paragraphs 20 and 21 determine the sentence in accordance with the sentencing range.

The sentencing range for the offence of murder is stated in Part I of the Third Schedule to the Sentencing Guidelines to have a starting point of 35 years' imprisonment. It is further stated that the appropriate sentence is to be determined after taking into account the factors aggravating and mitigating sentence in each case and should range from 30 years up to death.

Paragraph 21 of the Sentencing Guidelines provides that in considering imposing a sentence of death, the court shall take into account the 15

factors that are laid down therein. They include a subordinate or lesser role in a group or gang involved in the commission of the offence, the fact that the offender is a first offender with no previous conviction or no relevant or recent conviction, remorsefulness of the offender, advanced or youthful age of the offender and family responsibilities.

The appellant was a youthful offender who was 24 years old when he committed the offence; he had a family comprised of children and a wife, as well as an old mother who was blind. He prayed for the leniency of the court but the trial judge did not consider any of the circumstances that would have mitigated his sentence. He imposed a sentence at the starting point of 35 years from which he deducted the period of 4 years that the appellant spent on remand and came to a sentence of 31 years which he imposed.

We therefore find that the trial judge erred when he considered only the aggravating factors before he imposed his sentence upon the appellant. We therefore set it aside for the judge did not consider a relevant principle that he ought to have taken into account before imposing sentence.

We shall next consider the complaint that the trial judge did not observe the principle of consistency in sentencing. This is provided for in paragraph 6 (c) of the Sentencing Guidelines where it is stated that a sentencing court shall take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances. Though the trial judge was careful to consider the sentencing range provided for in the Sentencing Guidelines in respect of the offence committed by the appellant, he did not advert to the principle of consistency at all. He thus

erred when he did not observe this important sentencing principle. It is therefore incumbent upon this court to impose an appropriate sentence upon the appellant, pursuant to section 11 of the Judicature Act.

The Supreme Court in **Aharikundira** (supra) emphasised that it is the duty of the appellate courts while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. The court further observed that consistency is a vital principle of a sentencing regime and it is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation. We will therefore consider sentences that have hitherto been imposed for the offence of murder in order to come to an appropriate sentence for the appellant.

As it often happens in such cases, while counsel for the appellant presented cases with lower sentence than that which was imposed upon the appellant by the trial judge, counsel for the respondent commended higher sentence to us as appropriate in the circumstances of this case. The result is that we must on our own review sentences that have been handed down for similar offences in order to come to an appropriate sentence for the appellant.

In **Tumusiime & Another v Uganda [2016] UGCA 73**, the appellants were convicted of murder contrary to sections 188 and 139 and aggravated robbery contrary to sections 285 and 286 (2), both under the Penal Code Act, and sentenced to I6 years and 14 years' imprisonment, respectively, on each count to run concurrently. This court was of the view the sentence was inordinately low and amounted to a miscarriage of justice due to the circumstances of the case in respect of the of offence of murder because it was premeditated, and compounded by aggravated robbery. The court

stated that had the appellants raised a complaint about the severity of their sentence, it would have been enhanced to 35 years' imprisonment.

In **Bakubye & Another v Uganda [2018] UGSC 5**, the appellants were indicted and convicted of murder and aggravated robbery. The trial judge sentenced them to 40 years' imprisonment on count I and 30 years' imprisonment on count 2, with the sentences to run consecutively. On appeal against the sentence, this court found that the sentences were neither harsh nor excessive and thereby upheld the conviction and the sentences imposed by the trial judge. The Supreme Court confirmed the sentences.

In **Onyabo Bosco v Uganda [2017] UGSC 198,** the appellant was indicted and convicted of the offence of murder and aggravated robbery and sentenced to 45 years' imprisonment in respect of the offence of murder while the sentence in respect of aggravated robbery was suspended. On appeal, this court set aside the sentence and sentenced the appellant to 20 years' for the offence of murder and 18 years' imprisonment for the offence of aggravated robbery.

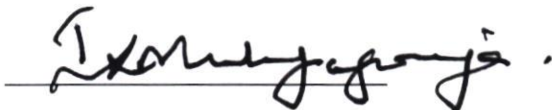
We have considered the aggravating and mitigating factors in this case. Although the other assailants got away and were not indicted for the offences, the appellant and his conspirators committed a wanton offence against a young man in his prime. The offence was premeditated and it appears they had no compunction whatsoever about killing in order to gain access to property.

However, we have also considered the fact that the appellant was a young man who was 24 years old with a family to fend for and there is a probability that he may reform. In view of the sentences that we have

reviewed where offenders were indicted with both murder and aggravated robbery, we are of the view that the sentence of 35 years that was proposed by the trial judge before he deducted the period spent on remand was on the high side in view of his youthful age. We think that a sentence of 30 years' imprisonment would serve the cause of justice in this case. From that we are duty bound to deduct the period of 4 years that he spent on remand before he was convicted and hereby sentence the appellant to 26 years' imprisonment. The sentence shall commence on 31st January 2017, the date on which he was convicted.

Dated at Kampala this 26th day of October, 2023.

Richard Buteera
DEPUTY CHIEF JUSTICE



Irene Mulyagonja
JUSTICE OF APPEAL

Monica K. Mugenyi
JUSTICE OF APPEAL