THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL

(Coram: Egonda-Ntende; Bamugemeire & Mugenyi, JJA)

CRIMINAL APPEAL NO. 226 & 227 OF 2019

1. **ZOLEKA CHRISTOPHER**
2. **AROHO ISMAIL**
3. **KOBUSINGYE ALEXIA ..... APPELLANTS**

VERSUS

UGANDA ..... RESPONDENT

(Appeal from High Court of Uganda at Masindi (Bitature Mugenyi, J) in Criminal Case No. 60 of 2019)

JUDGMENT OF THE COURT

A. **Introduction**

1. This is a first appeal against the decision of the High Court in Masindi (Bitature Mugenyi, J) in which Messrs. Christopher Zoleka and Ismail Aroho ('the First and Second Appellants') were on 10th July 2019 convicted on their own plea of guilt of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 and aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. On the basis of their respective plea bargain agreements, the two appellants were sentenced to 30 years' imprisonment on each count, which sentences were to run concurrently. Ms. Alexia Kobusingye ('the Third Appellant') does also appeal her conviction on 19th July 2019 for the offence of murder and subsequent sentence to a custodial sentence of 50 years. The facts of this case as accepted by the trial court are that on 10th February 2016 at Mundama Kimbugu village in Hoima District, the Appellants robbed Mr. David Kamusiime ('the deceased') of his Nokia Cellphone Serial No. 354939060287811 and, in the course of the robbery, caused his unlawful death.

2. Dissatisfied with the decision of the trial court, the First and Second Appellants lodged this Appeal in this Court challenging their respective sentences on the sole ground that '**the trial judge erred in law and fact when (s)he failed to consider the pre-conviction period spent by the appellants on remand prior to conviction which occasioned a miscarriage of justice**.'

3. The Third Appellant, on the other hand, appeals her conviction and sentence on the following grounds:

    I. *That the learned trial judge erred in law and fact when she based on unreliable circumstantial evidence to convict the Appellant.*

    II. *That the learned trial judge erred in law and fact when she held that the Appellant had been placed at the scene of crime whereas not.*

    III. *That the learned trial judge erred in law and fact in admitting the charge and caution statement of the 1st Appellant, which had been obtained through torture and a lot (of) illegalities thus occasioning a miscarriage of justice.*

IV. *That the learned trial judge erred in law and fact when she failed to take note of the grave and major contradictions and inconsistencies of the prosecution case while convicting the Appellant thus occasioning a miscarriage of justice.*

V. *That the learned trial judge erred in law and fact in sentencing the Appellant to 50 years imprisonment, a sentence which is deemed illegal, manifestly harsh and excessive in the circumstances.*

4. At the hearing, the First and Second Appellants were represented by Mr. Mugisa Richard Rwakatooke, while Mr. Geoffrey Chan Masereka holding brief for Mr. Emmanuel Muwonge represented the Third Appellant. The Respondent was represented by Ms. Grace Amy, a Senior State Attorney holding brief for Ms. Vicky Nabisenke, an Assistant Director for Public Prosecutions.

B. **Parties' Legal Arguments**

5. We propose to consider the First and Second Appellant's appeal against sentence only prior to a determination of the Third Appellant's appeal against conviction and sentence. It is acknowledged on the said appellants' behalf that sentencing is discretionary in nature, such discretion not to be interfered with unless a sentence is illegal, so manifestly excessive as to amount to an injustice or where a material consideration was overlooked. Reference is made to **Kyalimpa Edward vs Uganda, Criminal Appeal No. 10 of 1995** in that regard.

6. Counsel for the First and Second Appellants nonetheless considers the failure by the trial judge to take into account the period spent on remand, as required by Article 23(8) of the Constitution and paragraph 15(2) of the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* ('the Sentencing Guidelines'), to amount to an illegality. He cites **Twesigye Fred vs Uganda, Criminal Appeal No. 43 of 2016**, where the Supreme Court considered a sentence that had not been arrived at with due consideration of the time spent on remand to have been an illegal sentence and set it aside. He further relies upon **Ogalo s/o Owoura v R. (1954) 21 EACA 270** for the proposition that '(an) **appellate court will alter a sentence imposed by the trial court if it is evidence that it acted on a wrong principle or overlooked some material factor**.'

7. Conversely, State Counsel contends that the trial judge did take into account the period spent on remand when she sentenced the First and Second Appellants to '*30 years for both counts less time spent on remand.*' It is argued that the Commitment Warrant clarified the applicable sentence in the phrase '*... each sentenced to thirty (30) years imprisonment, minus three (3) years, three (3) months and sixteen (16) days spent on remand.*' Nonetheless, in Counsel's view, any lingering ambiguity in the crafting of the sentence may be resolved by this court.

8. For the avoidance of doubt, the trial court discharged itself as follows when sentencing the First Appellant:

> *A2 has voluntarily pleaded guilty on both counts and has also agreed to be sentenced to 30 years for the two counts less the time spent on remand and the sentence is to run concurrently.*

9. With regard to the Second Appellant, the trial judge held:

> *A2 has voluntarily pleaded guilty on both counts and has agreed to be sentenced to 30 years for both counts to run concurrently less the time spent on remand.*

10. The foregoing sentences reflect the terms of the plea bargain agreements that were executed by the two appellants in which their pleas are reflected as follows:

> *I hereby freely and voluntarily plead guilty to the charge(s) above and agree to be sentenced to within the range of 30 years – (minus) Remand period.*

11. Article 23(8) of the Constitution imposes a constitutional duty upon courts to taken into account the period spent on remand in determining appropriate sentence. That constitutional prerogative was in **Rwabugande vs Uganda (2017) UGSC 8** construed to necessitate the deduction of the remand period from the sentence contemplated by the sentencing court. In so doing, the court in effect underscored the provisions of paragraph 15(2) of the Sentencing Guidelines, which directs sentencing courts to '**deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account**.' At any rate, the provision for deduction of the period spent on remand after all other factors have been taken into account would suggest that a plea bargain agreement that

addresses all the requisite factors would nonetheless be subject to the requirement for the deduction or crediting to the convict of the period spent on remand. Since this was not done in this case, the First and Second Appellants sole ground of appeal is allowed. We would accordingly deduct the 3 years and 3 months spent on remand from the 30 years' imprisonment agreed upon under the plea bargain agreement to yield a custodial sentence of 26 years and 9 months.

12. Turning to the Third Appellant's grounds of appeal, we note that *Grounds 1, 2* and *4* were argued together, followed by the separate consideration of *Grounds 3* and *5*. Under *Grounds 1, 2* and *4* it is conceded that the prosecution established the three ingredients of the offence of murder, namely, the fact of death, that the death was unlawful and it was caused with malice aforethought. What is contested herein is the Third Appellant's participation in the said offence. It is proposed that the prosecution case on that element of the offence hinged on the testimonies of John Bosco Ruhangaariho (PW1), Esther Alimanya (PW2) and D/T AIP Dema Bayo Modesto (PW3), which entailed unreliable hearsay and circumstantial evidence.

13. Whereas it is conceded that PW1 heard the fatal gun shots as he was nearby when the deceased was shot, it is argued that he neither saw the Third Appellant at the scene of crime nor any of the attackers as he arrived after the deceased had died. On the other hand, PW2's evidence is alleged to have been unreliable given the inconsistencies engrained therein. It is argued that although PW2 claimed to have known the Third Appellant before the deceased's death because she had threatened to kill him; under cross-examination the witness confessed no prior knowledge of the appellant and did not adduce any proof of the alleged threats, admitting that she was informed about them by her deceased husband. Meanwhile, Counsel seeks to discredit the evidence of PW3 for allegedly flouting ethical and professional conduct insofar as the witness was the arresting and investigating officer, as well the one that recorded the First Appellant's charge and caution statement. In his view, not only was that confession illegally procured, it was riddled with falsehoods and material inconsistencies that go to the root of the case.

14. Arguing that the shortfalls in the foregoing evidence rendered the circumstantial evidence unreliable, Counsel cited the case of **Byaruhanga Fodori vs Uganda (2004) UGSC 24**, where the circumstances under which courts may solely rely on circumstantial evidence for a conviction were clarified. He further relies on **Tindigwihura Mbahe vs Uganda, Criminal Appeal No. 9 of 1987** (SC) where the apex court espoused the need for caution and considerable scrutiny before recourse is made to circumstantial evidence for a conviction, care being made to ensure that there are no other co-existing circumstances which would weaken or altogether destroy an inference of guilt on the basis of circumstantial evidence. It is further proposed that courts should disregard minor contradictions or discrepancies unless they point to deliberate untruthfulness while major contradictions should, unless satisfactorily explained, ordinarily lead to the rejection of a testimony.

15. In relation to *Ground 3*, it is argued that once PW3 conceded at the trial within a trial that the First Appellant had been tortured, the acceptance of the said appellant's charge and caution statement by the trial judge occasioned a miscarriage of justice. Reference in that regard was *inter alia* made to **Walugembe vs Uganda (2005) UGSC 22**, where judicial practice when faced with a repudiated confession was highlighted as follows:

> Where an accused person objects to the admissibility of the confession on grounds that it was not made voluntarily, the court must hold a trial within a trial to determine if the confession was or was not caused by any violence, force, threat, inducement or promise calculated to cause an untrue confession to be made. In such a trial within trial, as in any criminal trial, the onus of proof is on the prosecution to prove that the confession was made voluntarily. The burden is not on the accused to prove that it was caused by any of the factors set out in S. 24 of the Evidence Act, See **Rashid vs. Republic (1969) EA 134**.

16. Without citing any statutory provision, the trial judge is faulted for accepting and relying on a charge and caution statement that was recorded by the investigating officer, which in Counsel's view amounted to an illegal and involuntary procurement of a confession.

17. Under *Ground 5*, on the other hand, the trial judge is faulted for imposing a 50-year sentence on the Third Appellant without taking into consideration either the three-year period spent on remand or the applicable mitigating factors, to wit, the appellant having been a widow and single mother. Reference is made to **Moses Rwabugande vs Uganda** (supra), where a sentence arrived at without consideration of the period spent on remand was adjudged to have been illegal; as well as **Kiwalabye Bernard vs Uganda, Criminal Appeal No. 143 of 2001** (SC) where cognizance was made of the discretionary nature of sentencing, which is not to be interfered with unless a sentence is illegal, so manifestly excessive as to amount to an injustice or where the trial judge acted on a wrong principle. To illustrate the harshness of the 50-year sentence in issue presently, Counsel cites comparable cases where lesser sentences were confirmed by this Court. In **Akbar Hussein Godi vs Uganda (2015) UGSC** and **Manige vs Uganda (2022) UGCA 62**, custodial sentences of 25 years and 20 years and 10 months respectively for the offence of murder were upheld. Meanwhile, in **Tumwesigye Anthony vs. Uganda (2014) UGCA 61** a custodial sentence of 32 years for the same offence was substituted by this Court with a 20-year sentence, and similarly in **Atiku vs Uganda (2016) UGCA 20** a sentence of life imprisonment for murder was substituted with a term sentence of 20 years.

18. Conversely, addressing *Grounds 1, 2, 3* and *4* together, it is State Counsel's contention that the prosecution case was substantially built on circumstantial evidence which, as was observed in **Lulu Festo vs Uganda (2016) UGCA 15**, is the best evidence where there are no co-existing circumstances that would weaken or destroy the inference of guilt. It is further contended that the circumstantial evidence was corroborated by the confessions of the First and Second Appellants, which were properly admitted in evidence.

19. PW1 and PW2 are opined to have attested to the motive for the murder of the deceased, testifying that the deceased had reported a case against the Third Appellant's husband emanating from land wrangles between the two men. When the appellant's husband later died, she believed he had been bewitched by the deceased and retaliated with death threats to him. Reference is made to **Uganda vs George William Ssimbwa, Criminal Appeal No. 37 of 1995** (SC) for the

proposition that a recent and proximate threat issued by an appellant constitutes circumstances that could link him/ her to the murder. Similarly, in **Kato Kyambadde vs Uganda (2017) UGSC 32** it was observed that '**evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder**.'

20. In Counsel's view, the evidence of PW1 and PW2 was corroborated by the First and Second Appellants' charge and caution statements that were admitted in evidence as Prosecution Exhibits (PEX) 3(a) and PEX10. It is argued that not only did they admit therein that they were the ones that organized the shooting of the deceased, they shed light on the Third Appellant's role in the murder as the person that hired them to kill him. It is opined that the fact that the two appellants subsequently pleaded guilty after listening to the unassailable evidence of PW1, PW2 and PW3 underscores their participation in the deceased's murder. It is further argued that the said confessions satisfied the requirements of section 23 of the Evidence Act, Cap. 6, admitted all the ingredients of the offence of murder and were recorded in accordance with the process laid out in **Festo Androa Asenua vs Uganda (1998) UGSC 23**. The trial judge is thus opined to have correctly relied on the statements within the precincts of section 27 of the Evidence Act.

21. It is opined that the attestation in the confessions that the Third Appellant hired them to kill the deceased was corroborated by PW3 and PW4, the officers that recorded the confessions. The Third Appellant's own evidence is alleged to have corroborated the charge and caution statements insofar as she admitted to residing in Mabale village, being a wife to one Karara (deceased) who had land wrangles with the deceased and to having known the Second Appellant prior to the murder. Further circumstantial evidence linking the Third Appellant to the murder is opined to be reflected in the call data records that were admitted in evidence as Exhibits PXI, PXII and PXIII, and revealed that the Second Appellant was in constant contact with the Third Appellant between January 2016 and the day the deceased was murdered. PW4's evidence is alleged to have clarified that the call data revealed that all the three appellants were within close vicinity of each other before, during and after the deceased's murder.

22. It is thus argued that the foregoing circumstances point to no other inference but one of the Third Appellant having played a role in the deceased's murder by hiring the First and Second Appellants to kill him. Section 19 of the Penal Code Act is cited to make the point that s/he who aids and abets the commission of an offence is deemed to have participated in its commission, a principle that is reiterated in **Rwabugande vs Uganda** (supra) where the doctrine of common intention was espoused. The notion that there were any inconsistencies in the prosecution evidence is roundly dismissed.

23. In response to *Ground 2*, State Counsel concedes that the trial judge's failure to consider the mitigating factors, as well as deduct the period spent on remand did, on the authority of **Rwabugande vs Uganda** (supra), render the sentence imposed on the Third Appellant irregular. She invites this Court to re-sentence the Third Appellant on the basis of past precedent as follows. In **Bahemuka William & Another vs Uganda (2010) UGCA 51**, this Court was of the view that the grisly and barbaric manner in which the deceased had been murdered deserved a deterrent sentence and therefore declined to interfere with the death sentence that had been handed down by the trial judge. Similarly in **Bidong Zenone & Others vs Uganda (2023) UGCA 113**, despite a plea of guilty, this Court upheld a death sentence and in **Ssemaganda Sperito & Another vs Uganda (2023) UGCA 200** it upheld a 50-year sentence that had been imposed on appellants who hacked their relative to death. Reference was further made to **Opolot Justine & Another vs Uganda (2019) UGSC 4**, where the Supreme Court reinstated a sentence of life imprisonment for murder that had been reduced to 20 years' imprisonment by this Court (albeit on the mistaken construction of **Tigo Stephen vs Uganda (2011) UGSC 7**); as well as **Kaddu Kavulu Lawrence vs Uganda (2019) UGSC 19**, where the court upheld this Court's substitution of a death sentence with a sentence of life imprisonment.

C. **Determination**

24. This being a first appeal from a decision of the High Court, this Court is required to review the evidence and make its own inferences of law and fact. *See Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13 – 10.* It is trite law

that the duty of a first appellate court is to reconsider all material evidence that was before the trial Court and, while giving allowance for the fact that it has neither seen nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusions, as distinct from merely endorsing the conclusions of the trial court. *See* ***Baguma Fred vs Uganda, Criminal Appeal No. 7 of 2004*** *and* ***Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997*** *(both, Supreme Court).*

25. The crux of the complaint in this case is that the circumstantial evidence of PW1, PW2 and PW3 was insufficient to establish the Third Appellant's participation in the deceased's murder. The charge and caution statements that were adjudged to have corroborated this evidence are, in turn, contested for having been illegally procured and therefore wrongfully admitted in evidence. Given the interconnectedness of the foregoing issues, we propose to consider *Grounds 1, 2, 3* and *4* together. The impugned evidence is summed up below.

26. PW1, the deceased's son-in-law, attested to a land wrangle between the deceased and the Third Appellant, and death threats that the deceased had received from the said appellant following the death of her husband. The witness also testified that following the deceased's death, the First Appellant used to call one of his wives on the deceased's missing phone, mocking them for the delay in burying '*the person he had killed.*' He further testified that upon tracing the user of the deceased's phone, it was discovered that the Second Appellant had frequently called the First Appellant before and after the murder, hence his arrest. The witness maintained the gist of his testimony under cross examination. It was his evidence that the Third Appellant was arrested because of her call history with the First Appellant, as well as her death threats to the deceased.

27. PW2, the deceased's second wife, also attested to the death threats from the Third Appellant that her deceased spouse had told her about; as well as phone calls from his missing phone that her co-wife received and were later traced to the First Appellant with the help of the police and the communications company. The witness attested to the deceased having sold the Third Appellant's husband a piece

of land at Shs. 30,000,000/=, Shs. 20,000,000/= of which was paid but the balance had never been honoured and was the reason for the wrangle between the deceased and the Third Appellant. Under cross examination she clarified that the Third Appellant and her husband were the only enemies that her husband had told her about.

28. Meanwhile, PC Kamadi tracked and arrested the Second Appellant using his and the deceased's call history and GPS, and testified that the deceased had responded to a call immediately before he was shot and upon inquiry from MTN it transpired that the call was from the phone number of an associate to the Second Appellant. The witness attested to having found the Second Appellant limping when he arrested him, amid allegations from the public of his (the appellant) having participated in a robbery the previous day. Under cross examination, he clarified that the phone number that had called the deceased immediately before he was killed was registered in the names of one Lydia Nabasumba. Under cross examination, PW3 testified that the First Appellant led the arresting team to the Third Appellant's home and, upon her arrest, she was identified to him by the Second Appellant.

29. On its part, the trial court found that the prosecution had satisfactorily proved the Third Appellant's participation in the murder. it rendered itself as follows:

> *Given all the prosecution evidence adduced in court and after considering the minor inconsistencies and contradictions that did not go to the root of this case, I did not find the unsworn testimony of A3 believable in the least. All the evidence adduced by the prosecution shows the accused participated in the murder of Kamusiime David: she is the person referred to as woman/ Mama Viola alias Nalongo/ Alexia Karara; she had a motive for killing the deceased; she was the mastermind of his murder and hired the two convicts who she knew very well to carry out the murder and she paid them for their role in carrying out the murder. This ingredient was therefore proved.*

30. Although there was no eye witness account of the deceased's murder, PW1, PW2 and PW3 did adduce circumstantial evidence that raised the inference of the Third Appellant's complicity in the murder. As was observed by this Court in **Siraje Tumusiime & Others vs Uganda, Criminal Appeal No. 205 & 433 of 2015** (Unreported), where the article *Mayanja, Sowed Juma, Circumstantial Evidence*

and Its Admissibility in Criminal Proceedings: A Comparative Analysis of the Common Law and Islamic Law Systems', Journal of Law, policy and Globalisation, Vol. 67, 2017, p. 27 was cited with approval, '**examples of circumstantial evidence (though by no means exhaustive) would include motive or plan, knowledge, capacity, opportunity, suspicious behaviour, lies, preparatory acts, previous conduct, possession of incriminating articles, absence of explanation, failure to give evidence or call a witness, finger prints, bodily samples, DNA tests and tracker dogs**.'

31. In this case, PW1 and PW2 attested to the Third Appellant's death threats to the deceased. PW2 specifically grounded them in a land wrangle between the deceased and the Third Appellant's deceased spouse whereby her spouse had declined to complete payment for a piece of land he had purchased from the deceased. The outstanding money due from the Third Appellant to the deceased was the subject of a civil suit between the two now deceased men. PW2 attributed the Third Appellant's refusal to pay the outstanding monies on the land sale to her suspicion that the deceased was responsible for her spouse's death. That evidence is supported by PW3's testimony that the Third Appellant had in the course of her interrogation upon arrest asserted that the deceased was responsible for the death of her spouse. When this assertion is considered together with PW2's contestations of the Third Appellant's death threats to the deceased on the same premise; it raises the inference that her suspicion that the deceased was responsible for her deceased spouse's death was the Third Appellant's motivation for his elimination.

32. PW1 and PW2 further attested to the receipt of calls from the First Appellant after the murder, in which he mocked the deceased's relatives for the delay in burying '*the person he had killed.*' The two witnesses' evidence that the tracked phone calls led to the Appellants' arrest is corroborated by the independent evidence of PC Kamadi (PW4), the police ICT expert who actually tracked the calls and participated in the arrest. PW4 testified that he had traced the Second Appellant's phone number as one of the lines that was called by a caller on 0779528181, who had called the deceased's phone number shortly before he was murdered. It was his evidence that the Second Appellant led him and his arresting colleagues to the

home of the First Appellant's girlfriend, who cooperated with the police and led to his arrest. He further attested to having used a call data log to confirm that the First and Second Appellants were indeed in touch with the Third Appellant between January 2016 to the fateful date of the deceased's murder.

33. PW4's sworn testimony remained uncontroverted under cross examination. It establishes the contact between the three appellants before, during and after the murder; as well as their roles in the murder and the circumstances leading to their respective arrests. It is further corroborated by the evidence of PW3, which underscores the First and Second Appellants' intricate knowledge of the Third Appellant, including her place of residence that they had reportedly been to as they concluded their murderous plans. Thus, it was PW3's evidence under cross examination that the First Appellant led the arresting team to the Third Appellant's home and, upon her arrest, she was identified to him by the Second Appellant. The totality of that evidence links the Third Appellant to the murder that was executed by the First Appellant.

34. It is trite law that where the prosecution case depends solely on circumstantial evidence the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co-existing circumstances that would weaken or destroy the inference of guilt. *See* ***Byaruhanga Fodori vs Uganda*** *(supra).*

35. In this case, the Third Appellant gave unsworn evidence in which she denied any responsibility for the deceased's death, asserting on the contrary that she had on numerous occasions sought to settle the land dispute between them out of court but the deceased frustrated her overtures. Faced with the cogent prosecution evidence that is particularly based on uncontroverted scientific, call data results, we find the testimony of the Third Appellant unbelievable.

36. Consequently, we find that the circumstantial evidence did satisfactorily establish the Third Appellant's participation in the deceased's murder and the said Appellant was properly convicted of the offence of murder as charged. We would accordingly dismiss *Grounds 1, 2, 3* and *4* of this Appeal.

37. Turning to *Ground 5* of the Appeal, it is well recognised that an appropriate sentence is a matter for the discretion of the sentencing judge, which discretion is premised on the intrinsic circumstances of each case. Consequently, it is fairly well established judicial practice that an appellate court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or the appellate court is satisfied that the sentence imposed by the trial judge was so manifestly excessive as to perpetuate an injustice. *See* ***Karisa Moses vs Uganda, Criminal Appeal No. 23 of 2016***, ***Kiwalabye Bernard vs Uganda, Criminal Appeal No. 143 of 2001*** *and* ***Kyalimpa Edward vs Uganda, Criminal Appeal No 10 of 1995*** *(all, SC).*

38. Equally pertinent to re-sentencing by appellate courts are the observations made by the Supreme Court in **Wamutabanewe Jamiru vs Uganda (2018) UGSC 8** where it was held:

> The Appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion, unless the exercise of the discretion is such that it results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle. See **Kamya Johnson Wavamunno vs Uganda, Criminal Appeal No. 16 of 2000.**

39. In the matter before us it has been conceded that the trial judge neither considered the applicable mitigating factors nor deducted the period spent on remand. *Ground 5* therefore succeeds.

40. It thus becomes our inescapable duty to re-sentence the Third Appellant. The record of appeal reflects the Third Appellant as a first offender and sole surviving parent of her orphaned children, which would be mitigating factors of which we take cognizance. However, the Third Appellant was convicted of a heinous murder that was premeditated, planned and executed very cold-bloodedly. As the mastermind of the entire operation, the Third Appellant played no peripheral role in the deceased's murder. We take into account both sets of circumstances as we consider an appropriate sentence.

41. The cases to which we were referred by State Counsel present justification under certain circumstances for deterrent sentences. Hence in **Bahemuka William & Another vs Uganda** (supra), the horrendous manner in which a murder was executed was adjudged by this Court to justify the death sentence; while in **Bidong Zenone & Others vs Uganda** (supra) the Court upheld a death sentence on account of the brazenly inhuman manner in which the murder had been executed by the deceased's close relatives. Similar circumstances obtained in **Ssemaganda Sperito & Another vs Uganda** (supra), where the hacking of a relative to death was considered by this Court to warrant the 50-year sentence that had been imposed on the appellants. Indeed, in **Kariisa Moses vs Uganda, Criminal Appeal No. 23 of 2016** the Supreme Court upheld a life imprisonment sentence for the murder of a grandfather by his grandson.

42. Nonetheless, in this case where the Third Appellant and the deceased were not relatives, we are disinclined to abide the sentences imposed in those cases. In **Aharikundira Yustina vs Uganda (2018) UGSC 49**, the Supreme Court substituted a death sentence for the offence of murder with a 30-year term sentence; while in **Ndyomugyenyi vs Uganda (2018) UGSC 20** and **Mpagi Godfrey vs Uganda (2017) UGSC 36**, the apex court confirmed sentences of 32 years and 34 years respectively. Given that sentencing range, we find a custodial sentence of 30 years more appropriate to the circumstances of this Appeal. We do take the period spent on remand into account and deduct the 3 years and 4 months spent on remand to yield a sentence of 24 years and 8 months.

D. **Conclusion**

43. In the result, this Appeal partially succeeds with the following orders:

    I. The First and Second Appellants' sentences are hereby quashed and substituted with sentences of 26 years and 9 months on each count, the sentences to run concurrently.

    II. The Third Appellant's conviction is hereby upheld.

III. The sentence of 50 years' imprisonment handed down to the Third Appellant is hereby substituted with a sentence of 24 years and 8 months to run from the date of conviction.

44. It is so ordered.

Dated and delivered at Kampala this ..... day of ....., 2024

Frederick M. S. Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal