THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 31 OF 2014.

[CORAM: ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; MWONDHA; TIBATEMWA-EKIRIKUBINZA, JJSC.]

BETWEEN

1.OPOLOT JUSTINE

2.AGAMET RICHARD :::::::::::::::::::::::::: APPELLANTS

AND

UGANDA :: RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala before Nshimye, Buteera, and Kakuru, JJA, Criminal Appeal No. 155 of 2009 dated 1st July, 2014.]

Representation

Both appellants were represented by Mr. Muwonge Emmanuel on State Brief while the respondent was represented by Mr. Damurani David Ateenyi- Senior Assistant Director of Public Prosecutions.

JUDGMENT OF THE COURT

Introduction:

This is a second appeal from the judgment of the High Court (Kumi) delivered by Justice Stephen Musota on 28th July 2009.

Background

The background facts to this appeal as indicated on the record are that, on 28th January 2007, Opolot Justine and Agamet Richard (appellants) murdered Janet Amit (deceased) and Orieno Amos (Amit's child) at Kabwalin village in Bukedea District. The appellants also attempted to murder Anguria Bosco. The offences were committed at night and were witnessed by three of Amit's surviving children. These are the children who testified during the High Court trial.

The appellants denied committing the offences. However, the trial Judge found the appellants guilty on all the 3 counts; the first 2 counts being murder and the third being attempted murder. Consequently, each of the appellants was sentenced to life imprisonment on the first 2 counts. The appellants were also sentenced to 15 years imprisonment each on the third count. The said sentences were to be served concurrently.

The appellants appealed to the Court of Appeal contesting their participation in the commission of the offences. The learned

Justices of Appeal confirmed the conviction of the appellants and the 15 years imprisonment sentence. However, the learned Justices of Appeal substituted the sentences of life imprisonment on each of the first 2 counts with prison sentences of 20 years imprisonment. The learned Justices were of the view that life imprisonment meant 20 years imprisonment before the Supreme Court decision of **Tigo Stephen vs. Uganda SCCA No. 8 of 2009** was delivered. The view was based on the fact that before the **Tigo decision**, the Supreme Court in **Livingstone Kakooza vs. Uganda SCCA No.17 OF 1993** held that the term 'life imprisonment' meant 20 years imprisonment. In addition, the learned Justices of Appeal ordered the sentences to be served consecutively and not concurrently as ordered by the trial judge.

Dissatisfied with the Court of Appeal decision, the appellants appealed to this Court on the following two grounds:

1. That the Learned Justices of Appeal erred in law and fact in failing to re-evaluate the evidence of the appellants and as a result came to a wrong conclusion.

2. The Learned Justices of Appeal erred in law and fact in imposing an illegal, harsh and excessive sentence.

Appellants' Submissions

Ground 1

The essence of the appellants' submission was that the learned Justices of Appeal failed in their duty of re-evaluating the evidence

presented before the High Court and consequently upheld the conviction of the trial court and enhanced the sentence. That, in upholding the conviction, the learned Justices of Appeal misinterpreted **Rule 86(1) of Court of Appeal Rules** which requires a Memorandum of Appeal to set forth concisely and under distinct heads the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided .

That basing on the said rule, the learned Justices of the Court of Appeal struck out Ground 1 of the Appellants' Memorandum of Appeal without considering the gist of the ground. The Appellants argued that this led to a miscarriage of justice.

We will deal with this preliminary issue first. We here below reproduce the ground as presented at the Court of Appeal:

> *The trial Judge erred in law and fact when he failed to properly evaluate the evidence hence coming to a wrong conclusion which led to a miscarriage of justice.*

We find that indeed the ground did not specify the points which were not correctly evaluated. In such circumstances, the Court of Appeal was right to strike out the ground for offending **Rule 86 (1) (supra).**

We also observe that just as it was at the Court of Appeal, counsel for the appellant presented Ground 1 of the Memorandum of Appeal in this Court in a general manner. The ground states as follows:

"The Learned Justices of Appeal erred in law and fact in failing to re-evaluate the evidence of the appellants and as a result came to a wrong conclusion".

This contravened **Rule 82 (1) of the Rules of this Court** which provides as follows:

> **A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make.** (Emphasis of Court)

We would like to emphasize the need for counsel to follow the prerequisites of **Rule 82 (1) of the Rules of this Court** when drafting Grounds of Appeal. A properly drafted ground would for instance read as follows:

> *The Learned Justices of Appeal erred in law and fact in failing to re-evaluate the evidence on identification of the appellants at the scene of crime and as a result came to a wrong conclusion.*

Be that as it may, the record indicates that even though the learned Justices of the Court of Appeal struck out the offensive ground, they went ahead and discussed the issues surrounding the identification of the appellants. The central issue in the struck out

ground was the wrong identification of the appellants at the scene of crime.

It is on this basis that we shall proceed to determine whether or not the Court of Appeal rightly carried out its duty of re-evaluating the evidence relevant to identification.

It was submitted for the appellants that they were not positively identified at the scene of crime. That the identification was made by children of tender years aged (7,11 and 18 years) by use of a wick lamp and who had been woken up from sleep by their frightened mother. The Appellants contended that these factors did not favour correct identification and therefore the learned Justices of the Court of Appeal ought to have warned themselves before believing the prosecution evidence.

Furthermore, the Appellants contend that the Justices of Appeal did not consider their defence of Alibi. The appellants stated that the when the crime happened, they were at their work places in Kampala and travelled a day after the incident for burial.

Ground 2

The appellants submitted that the Court of Appeal imposed a sentence of 20 years imprisonment on counts 1 & 2 and 15 years imprisonment on count 3 without considering the 2 years the appellants spent on remand. That this was contrary to **Article 28 (3)** of the **Constitution** which mandates courts to take into account the period spent on remand during sentencing. In addition, the appellants submitted that the mitigating factors presented were not

taken into consideration before imposing a harsh and excessive sentence.

In specific reference to the 15 years imprisonment sentence on count 3, the appellants faulted the learned Justices of Appeal for wrongly exercising their discretion to impose an additional sentence.

The appellants prayed that this Court quashes the conviction and sets aside the harsh sentences.

Respondent's submissions

The respondent on the other hand contended that the learned Justices of Appeal correctly re-evaluated the evidence and arrived at their own conclusion before confirmation of the conviction.

In reference to the identification of the appellants at the scene of crime, counsel submitted that the evidence given by the children who witnessed the incident corroborated one another. Counsel referred to the analysis of each of the children's testimonies made by the learned Justices of Appeal. The learned Justices stated that, although there were circumstances that hindered correct identification, the attackers (appellants) were known to the witnesses and were identified by each witness immediately they entered the house.

Similarly, counsel for the respondent referred to the analysis made by the learned Justices of Appeal concerning the alibi. The learned Justices stated that, the learned trial Judge having believed the

prosecution witnesses and having found that both the appellants had been placed at the scene of crime, had no option but to reject the appellants' alibi. In disregarding the alibi, the learned Justices observed that the defence of alibi was set up after the prosecution had closed its case.

Ground 2

The argument of the respondent was that the varying of the sentence from life imprisonment to 20 years imprisonment was premised on the learned Justices of Appeal interpretation of the meaning of life imprisonment before the Supreme Court decision of **Tigo Stephen vs. Uganda (supra).**

The respondent contended that the sentence which was the subject of present appeal was imposed on 1st July 2014 after the **Tigo** decision. That however the Justices went ahead to equate life imprisonment to 20 years imprisonment. That it could not therefore be argued by the appellants that the sentence of the learned Justices of Appeal was harsh and excessive. The respondent prayed that the appeal be dismissed.

Analysis of court

Ground I

The essence of the arguments under this ground relate to the identification of the appellants as perpetrators of the crimes which were committed. Whereas the appellants argued that the conditions

favouring correct identification were absent, the respondent argued that factors favouring positive identification of the appellants as the assailants were present. Respondent's counsel contended that the particular factor favouring positive identification was the fact that the assailants were known relations to the children who testified in court.

Both counsel correctly cited the leading authorities of **Bogere Moses vs. Uganda SCCA No.1 of 1997** and **Abdalla Nabulere & ano vs. Uganda Criminal Appeal No.9 of 1978** on identification in criminal cases. The Court of Appeal referred to these authorities and stated the law on identification as follows:

> *Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identifications ... The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light the familiarity of the witness with the accused ... When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support*

the identification evidence, provided the court adequately warnus itself of the special needs of caution.

Having cited the law on identification, the Court of Appeal went on to evaluate the evidence and found as follows:

We find that there were factors and conditions unfavorable to correct identification. The attack took place at night. Although all the witnesses say the room was lit by a candle, it still appears it was not well lit.

The witnesses were all very young. They must have been extremely scared on account of the brutality of the attack on their mother and brothers. However, there are also factors favoring correct identification. The attackers were very well known to witness. They were very close relatives. They were identified by each other witness immediately they entered the house.

The witnesses were all in the house, the distance between the witness and attackers was very short. The witnesses were able to identify the second appellant by voice when he called out the 1st appellant. This evidence was however challenged.

The evidence of PW3 is to the effect that the attack took about one hour. It could probably have been less. However, this was never challenged. A period of one hour or even half an hour is a

very long period sufficient enough for one to identify an assailant who is well known to him/ her.

We find that the Court of Appeal correctly applied the law on identification. The Court of Appeal highlighted and weighed the factors that favoured correct identification against the factors that disfavoured correct identification. The court then came to the conclusion that there was correct identification.

We find no reason to depart from the findings of the Court of Appeal. We maintain that the appellants were correctly identified at the scene of crime.

In regard to the alibi, the Court of Appeal rejected the defence. In addition, the alibi was destroyed by witnesses who had squarely placed the appellants at the scene of crime.

The principles of law on the defence of alibi were articulated in **Bogere Moses & Ano V Uganda (supra)**. In that case this Court *inter alia* stated:

> **Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is**

accepted. It is a misdirection to accept the one version and then hold that because of the acceptance per se, the other version is unsustainable.

In the appeal before us, PW3 stated that the crime happened on 28th January, 2007 at night. The appellants broke into the deceased's home, brutally murdered the deceased and one of her children with a panga.

On the other hand, the second appellant stated that on the night of 28th January 2007, he was working as a security guard at Madidas hotel in Kampala. On 29th January, he was informed by one of his relations (an Uncle) of the death of the deceased. That on 30th January, he travelled with the 1st appellant for the burial.

The 2nd appellant stated that on 28th January, 2007 he was at his Kiosk in Kampala. That he was only informed of the death of the deceased by his uncle on 29th January, 2007 at 6:00 am.

The Court of Appeal in evaluating the alibi held as follows:

> *We agree with the learned trial Judge's evaluation of evidence as set out. We also agree with his conclusion that a person cannot be in two places at the same time. The learned Judge having believed the prosecution witnesses and having found that the appellants had been placed at the scene of crime, the judge had no option but to reject the appellants alibi.*

It is not necessary for the prosecution to adduce any further evidence to disapprove the alibi having placed the appellants on the scene of crime.

Be that as it may, the defence of alibi set out by the appellants does not appear to have been credible [as] person cannot be in two places at the same time. In any event, the defence in this particular case set up the defence of the alibi after the closure of the prosecution case. It would not therefore have been possible for the prosecution to produce other evidence [to] disapprove the alibi at this stage of the trial. The defence of alibi to be credible ought to be set out at the earliest stage of investigations (R vs. Sukha Singh s/o Waziri Singh & Ors [1939] 6 EACA 145). (Emphasis of Court)

In the case of **Kazarwa vs. Uganda SCCA No.17 of 2015 (dissenting)**, the Judge in dealing with the issue of the alibi stated:

An alibi can be destroyed either by prosecution evidence which squarely places an accused at the scene of crime or by prosecution evidence which directly negates or counteracts the accused's testimony that he was in a particular place other than at the scene of crime. The latter can be by the prosecution presenting witnesses to testify that they were at the particular place where the

accused says he was but he was not present in the said place.

The alibi can also be discredited when witnesses who testify in support of the accused having been in a place other than the scene of crime are rendered untruthful.

(Emphasis of Court)

We find the above postulation a correct position. We note that both the trial Judge and the Court of Appeal made a finding that the appellants were squarely placed at the scene of crime. This in essence discredited the defence of alibi raised by the appellants. We are therefore satisfied that the appellants were correctly identified as the perpetrators of the crimes.

As a result, Ground 1 fails.

Ground 2

The arguments raised by counsel under this ground call for a resolution of what the impact of the Tigo decision is on convicts who were sentenced by the High Court to life imprisonment prior to the Tigo decision but whose appeals were heard after Tigo. In essence we must decide whether the Tigo decision has a retrospective or prospective application.

The Tigo decision interpreted the sentence of life imprisonment to mean the whole natural life of the convict. However, the appellant

argued that life imprisonment means 20 years imprisonment according to the authorities before the **Tigo Stephen** decision. On the other hand, the respondent argued that the sentence of life imprisonment confirmed by the Court of Appeal meant the natural life of the prisoner. Furthermore, the respondent contended that since the Court of Appeal judgment (which is the subject of the present appeal) was delivered in 2014 after the 2011 Tigo decision, the proper meaning of life imprisonment given to the appellants was that they would be in prison throughout their natural life.

In considering the Tigo decision, the Court of Appeal held as follows:

> *We ... note that the judgment of the High Court was delivered on 27th July, 2009. This was before the Supreme Court pronounced itself in the case of Tigo Stephen vs. Uganda, SCCA No.8 of 2009 on 10th May 2011. Before then, the thinking and belief was that imprisonment for life or life imprisonment meant 20 years in prison. It is our view that when the learned trial Judge was sentencing the appellants in 2009, he was of the view and belief that imprisonment for life meant that the appellants would spend 20 years in prison and not the rest of their lives. In Tigo's case (supra) the Supreme Court observed as follows:- "We are satisfied that the trial Judge intended to impose a sentence of imprisonment for twenty years ... We uphold a sentence of twenty years imprisonment.*

We respectfully disagree with the above interpretation of the Tigo decision. In **Tigo Stephen vs. Uganda (supra)**, the Supreme Court held that, "*life imprisonment means imprisonment for the natural life [whole life] term of a convict, though actual period of imprisonment may stand reduced on account of remission earned*". (Emphasis of Court)

The Supreme Court further stated as follows:

> *In the present case, the trial Judge imposed a sentence of imprisonment for life yet she qualified the sentence by limiting it to twenty years. In our view, the sentence was vague. The Court of Appeal confirmed the sentence of life imprisonment without clearing the vagueness. However, we think that this error did not make the sentence illegal. We are satisfied that the trial Judge intended to impose a sentence of imprisonment for twenty years.* (Emphasis of Court).

A clear understanding of the **Tigo decision** leads to the conclusion that this Court upheld the twenty years imprisonment as a result of the qualification of the sentence made by the trial judge after sentencing the accused to life imprisonment. The trial judge ordered the sentence as follows:

> *" ... I take into account the fact that he has been on remand for 2 years, so taking that into account, he is sentenced to life imprisonment (20 Years), so that the rest who intend to do the same can stand warned."* (Emphasis added).

The decision of the Supreme Court was premised on the peculiar circumstances (the qualification of 20 years) of that case. We therefore find that the substitution of life imprisonment with 20 years' imprisonment by the Court of Appeal in the present matter was premised on a wrong interpretation of the **Tigo decision**.

What then is the impact of the Tigo decision on convicts who were sentenced by the High Court to life imprisonment prior to the Tigo decision but whose appeals were heard after Tigo?

In answering the above question of law, we are persuaded by the proposition of Allen W. Stephen in his article entitled: *Toward a Unified Theory of Retroactivity*[1] that if a judicial decision interprets a law, then it does no more than declare what the law has always been and that the Court's declaration of what the law is must have a retrospective effect. This view has been adopted by this Court in **Ssekawoya Blasio vs. Uganda SCCA No.24 of 2014** wherein it was held that:

> **The sentence of life imprisonment has always been in our Penal Code Act, Cap 120 Laws of Uganda. Tigo simply clarified what the sentence of life imprisonment meant under our statutory laws.**

We also note that at the time when the Penal Code Act prescribed the mandatory death penalty for capital offences, it also prescribed

[1] New York Law School Law Review, Vol 54/2009,10.

sentences of life imprisonment as a maximum sentence for offences below the capital offences. Such offences include manslaughter.

After this Court's decision in **AG vs. Susan Kigula & 417 Ors Constitutional Appeal No. 03 of 2006** which declared the mandatory death sentence as unconstitutional, courts now have discretion in sentencing a person convicted of a capital offence. When a court exercises that discretion and sentences a convict to life imprisonment, that cannot be the life imprisonment which is prescribed in the Penal Code for convictions of lesser offences and interpreted by the Prisons Act as 20 years, albeit for the purposes of remission.

We therefore come to the conclusion that in the present matter, the appellants were each sentenced to prison for their natural life on count 1 and 2.

We note that the appellants also argued that the sentence of 15 years imprisonment on the third count confirmed by the Court of Appeal made the sentence harsh and excessive. **Section 5(3) of the Judicature Act** precludes this Court from hearing appeals against the severity of a sentence. The Section provides as follows:

In the case of an appeal against sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of sentence.

However, in **Kiwalabye Bernard vs. Uganda, Criminal Appeal No. 143 of 2001,** this Court held that,

> **The appellate court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice.**

In criminal trials, each offence is distinct and attracts an individual penalty. In the present appeal, two individuals were killed. Both appellants were convicted of murder for each of the individuals whose life was lost. This attracted two separate penalties of life imprisonment. For the offence of attempted murder, a penalty of 15 years imprisonment was given to each appellant.

In the instant appeal, the Court of Appeal substituted the sentence of life imprisonment [natural life] given by the trial Judge with one of 20 years imprisonment. This we have found was erroneous. Furthermore, the Court of Appeal also ordered that the sentences be served consecutively instead of concurrently as ordered by the trial Judge.

Given the fact that the maximum penalty of death for the offences of murder was not given, it could not be said that the sentences

were harsh and excessive. As such, we are unable to interfere with the sentence imposed by the trial Judge.

Regarding the failure to consider the period spent on remand, this Court in **Rwabugande vs. Uganda SCCA No.25 of 2014** held that *"a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision."*

Be that as it may, the Constitutional provision which obliges a sentencing court to consider the period spent by a convict on remand does not apply to a sentence of life imprisonment (for capital offences as in this appeal). Indeed this Court has stated so in an earlier decision, **Magezi Gad vs. Uganda SCCA No. 17 of 2014,** wherein it was held that:

> **We are of the considered view that like a sentence for murder, life imprisonment is not amenable to Article 23 (8) of the Constitution. The above Article applies only where sentence is for a term of imprisonment i.e a quantified period of time which is deductible. This is not the case with life or death sentences.**

Arising from the above analysis, we find that Ground 2 fails.

Conclusion and orders of Court

Having found that all the grounds of appeal have no merit, the appeal is hereby dismissed. We accordingly uphold the conviction of the appellants.

For the reasons given above, we hereby set aside the sentences of the Court of Appeal and reinstate the sentences given by the trial Judge as follows:

For the murder of Janet Amit, the first and second appellants are each sentenced to life imprisonment (natural life).

For the murder of Orieno Amos, the first and second appellants are each sentenced to life imprisonment (natural life).

For the attempted murder of Anguria Bosco, the first and second appellants are each sentenced to 15 years imprisonment.

The sentences will be served concurrently.

We so order.

Dated at Kampala this 24th day of January 2019.

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STELLA ARACH-AMOKO,

JUSTICE OF THE SUPREME COURT.

.....

RUBBY OPIO-AWERI,

JUSTICE OF THE SUPREME COURT.

.....

PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA,

JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.31 OF 2014

CORAM: ARACH AMOKO, MWANGUSYA, OPIO AWERI, MWONDHA, TIBATEMWA EKIRIKUBINZA JJSC

BETWEEN

1. OPOLOT JUSTIN
2. AGAMEL RICHARD .....APPELLANTS

VERSUS

UGANDA.....RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala before Nshimye, Buteera, Kakuru JJA in Criminal Appeal No.155 of 2009)

JUDGMENT OF MWONDHA JSC

I have had the benefit of reading in draft the judgment of Court. I do agree that ground one of the appeal fails but I do not agree that ground two fails also. In particular, I do not agree with the conclusion that like a sentence for murder, life imprisonment is not amenable to Article 23(8) of the Constitution. That the above article applies where sentence is for a term of imprisonment i.e. a quantified period of time which is deductible. And that this is not the case with life imprisonment. **See Magezi Gad Vs Uganda SCCA No.17 of 2014.** I was on the Magezi Gad case but having carefully reconsidered and re-examined my mind, I am convinced that I can no longer hold that view for reasons stated herein.

As far as the background of the appeal is concerned, it was well laid out in the draft judgment and I do not need to labour reproducing it here.

The conclusion above was derived from **Magezi Gad case (supra)** which was relied on as authority by this Court in the instant appeal while resolving ground 5 of the Appeal. The court reproduced Article 23(8) of the Constitution.

"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 completion of his or her trial shall be taken into account in imposing the term of imprisonment."

I am of a well considered view that the penalty of death for the offence of murder cannot be likened to a sentence of life imprisonment even if one thinks that it is for the rest of natural life of a convict.

Death is the maximum penalty which after all due process has been taken and or considered, it is imposed in the rarest of the rare cases. In the circumstances, it has to be born in mind that the right to life is protected under Article 22 and there are exceptions provided in which a person/convict is deprived of his or her right to life.

Article 22(1) provides:-

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the Laws of Uganda.

The death penalty therefore cannot be the same as life imprisonment which is not defined by neither the Constitution nor any other legislation.

It is clear in my mind that there is neither direct nor implied expression or intention of indefinite deprivation of personal liberty which is mandatory. Article 23(1)(a)(b)(c)(d)(e)(f)(g) and (h) provides for cases under which a person can be deprived of personal liberty and my understanding is that, they all imply limited period. They provide as follows:

23. Protection of personal liberty.

(1) No person shall be deprived of personal liberty except in any of the following cases—

(a) in execution of the sentence or order of a court, whether established for Uganda or another country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted, or of an order of a court punishing the person for contempt of court; (emphasis added)

(b) in execution of the order of a court made to secure the fulfilment of any obligation imposed on that person by law;

(c) for the purpose of bringing that person before a court in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda;

(d) for the purpose of preventing the spread of an infectious or contagious disease;

(e) in the case of a person who has not attained the age of eighteen years, for the purpose of the education or welfare of that person;

(f) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of the care or treatment of that person or the protection of the community;

(g) for the purpose of preventing the unlawful entry of that person into Uganda, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Uganda or for the purpose of restricting that person while being conveyed through Uganda in the course of the extradition or removal of that person as a convicted prisoner from one country to another; or

(h) as may be authorised by law, in any other circumstances similar to any of the cases specified in paragraphs (a) to (g) of this clause.

So in the absence of legislation enacted by Parliament to guide courts in light of the **Attorney General Vs Susan Kigula and 412 others decision (Constitutional Appeal No.03 of 2006)**, the Sentencing Guidelines for the Courts of Judicature are our only resort where long imprisonment sentences can be imposed.

Article 23(8) of the Constitution (supra) provides interalia, the words a term of imprisonment. That provision does not provide "**where a person is convicted and sentenced to a quantified term of imprisonment**"!

That is an import of court. I am of a well considered view that if the drafters of the Constitution had the intention of having quantified or specific term of imprisonment in that provision, they would have stated so, or they would have stated unquantified term of imprisonment as an exception. This obviously was not the case.

It is a principle of Constitutional interpretation, that **a constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their social economic and political cultural values so as to extend the benefit of the same to the maximum possible** (See Okello Okello John Livingstone and 6 others Vs Attorney General Constitutional Petition No.1 of 2005)

Another principle is that, **where the language of the Constitution or statute sought to be interpreted is imprecise or ambiguous; a liberal, generous or purposeful interpretation should be given to it.** (See Major

General David Tinyefuza Vs Attorney General Constitutional Petition No.1 of 1997 SC)

The words, "term of imprisonment" should be given a dynamic, progressive, liberal and flexible interpretation to uphold the convict's rights of taking into account the period spent on remand before conviction.

According to the Legal English Dictionary (https://www.translegal.com), term of imprisonment means the length of time that a person has to spend in prison either for the rest of their natural life or until paroled. Unfortunately, in this country because of lack of legislation even parole cannot apply.

I am persuaded by the decision of the **Indiana Supreme Court No.53 S01-1209 CR 526, Joey Dennings Vs State of Indiana**, where the Supreme Court heard a reference to determine the question for statutory interpretation; **Does the phrase term of imprisonment as it is used in the Indiana Misdemeanour Statute include the time spent on suspended sentence?**

The Court held; **term of imprisonment means the total amount of time that a person is incarcerated.**

It is a well accepted rule of statutory interpretation that a period of imprisonment prescribed for a particular crime reflects the maximum penalty available to the sentence.

Suffice it to say that in Uganda there is no Penal law which prescribes what imprisonment for the rest of natural life means unlike other jurisdictions. In India, they have the Code of Criminal Procedure where a convict sentenced to indeterminate period of incarceration, a specific order under S.423 of CPC has to be passed by an appropriate government. The reduced period cannot be less than 14 years and also the remissions earned or awarded to such life convict are notional.

"In sentencing, both crime and the criminal are equally important. We have not taken the sentencing process as seriously as it should be with the result that in capital offences it has become judge centric sentencing rather than the principles of sentencing"(Bench of Justices K.S Radhakrishnen and Madan B. Supreme Court of India)

For that reason, my view is that it is incumbent upon Court to comply with the mandatory provisions of Article 23(8) of the Constitution and handle the case as per the sentencing guidelines as life imprisonment is not mandatory. And when Article 23(8) is considered then any specified period of imprisonment can be imposed. It is only by doing so that the approach of

aggravating and mitigating circumstances can be satisfactorily met in the interest of Justice.

In **Attorney General Vs Suzan Kigula (supra)**, it was submitted by counsel for the appellant and I agree with the submission that fair trial as envisaged by Article 22(1) included conviction and sentencing.....mitigation was part of fair trial in all other non mandatory sentences. The fact that mitigation was not expressly mentioned as a right in the Constitution does not deprive it, of its essence as a right because rights are not exhaustive.

Indeed this Court in my view in the Suzan Kigula case accepted the above submission when it stated:

The process of sentencing is part of fair trial and the trial does not stop at convicting a person. This is because the Court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence...

Article 28(12) of the Constitution provides:

Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.

Since there is no legislation which defines life imprisonment, the proposition that Article 23(8) only applies where a sentence is for a quantified period of time which is deductible amounts to ousting the supremacy of the constitution in as far as that provision is concerned.

We cannot be at the forefront of sowing a seed of non-compliance with the mandatory provisions of the Constitution being the apex court in the land. In Gad Magezi Vs Uganda case (supra) which was relied on the in the instant case, the sentencing Judge failed to demonstrate that he had considered and or taken into account the provisions of Article 23(8) of the Constitution for example the period the convict has spent on remand.

All the trial Judge said was as hereunder:-

Reasons for sentence

"The prosecution has called for the maximum while the defence asks for lenience that the convict happened to move with a murderer and did not participate physically in killing the accused. Of course, the convict in law is a principal offender although his role was to divert attention of the family members to allow his companion to finish the job. During the trial, it was revealed that his companion died in Mbarara Hospital...

I agree with the defence that the maximum sentence should not be imposed for the role that the convict played and I sentence the convict to life imprisonment."

We were giving sentencing Judges a blanket cheque not to comply with Article 23(8) of the Constitution.

Article 2(1) of the Constitution provides:

This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail and that other law or custom shall to the extent of its inconsistency be void.

Not taking into account the period the convict has spent on remand before conviction when passing a sentence of life imprisonment becomes unconstitutional and or illegal.

In the result, ground 2 which is, the learned Justices of appeal erred in law and fact in imposing an illegal, harsh and excessive sentence succeeds. The appeal therefore partially succeeds.

Dated at Kampala this 24th day of January 2019

MWONDHA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CRIMINAL COURT NO. 31 OF 2014

Coram: (Arach-Amoko, Mwangusya, Opio Aweri, Mwodha, Tibatemwa-Ekirikubinza JJSC)

Between

1. Opolot Justine
2. Agamet Richard ..... Appellants

And

Uganda ..... Respondent

[Appeal from the decisions of the Court of Appeal at Kampala before Nshimye, Buteera, and Kakuru, JJA Criminal Appeal No. 155 of 2009 date 1st July, 2014]

JUDGMENT OF MWANGUSYA, JSC (DISSENTING)

I have had the opportunity of reading the judgment of the Court and I do not agree that the Conviction of the appellants by the High Court which was upheld by the Court of Appeal is sustainable by the evidence adduced by the prosecution. I find that the evidence relied upon by both Courts falls short of proving the case beyond any reasonable doubt as required by the law.

The background of the case and the circumstances leading to this appeal are well laid out in the judgment of the Court and I need not repeat them except in so far as they are relevant to this judgment. The evidence adduced by the prosecution shows that at the time the assailants allegedly attacked the home of the

deceased persons there were five occupants. These were Kulume Janet, (deceased) and mother of Oricno Amos (also deceased), Alupi Janet (PW3), Olobo Naphtali (PW4) and Andrew Bosco (PW5). PW5 was also a victim of the murderous assault but he miraculously survived the serious injuries he sustained during the attack. The prosecution relied on the surviving occupants of the home all of whom claimed to have identified the two appellants as the persons who killed the deceased persons and badly injured PW5.

According to all the three witnesses, they were in their room when they were alerted to the attack on their home by their mother. They all gathered in their mother's room where she had lit a lamp (tadoba). PW3 hid under a bed while PW4 hid among sacks of maize. The two claimed to have recognised the assailants whom they knew very well with the aid of the tadoba. The two witnesses claimed that the attack took about an hour. I think this is an exaggeration because from the description of events, the assault on the victims could not have taken that long. The evidence showing that there was light, that the two appellants were well known to the witnesses and the duration the incidence took led to the conclusion by the two Courts below that the prevailing conditions enabled the three witnesses to identify the two appellants and there was no possibility of error. I do not share this view. On the contrary I do not believe that PW3 who testified that he was hiding under a bed, PW4 who hid among the sacks of maize and PW5 who was seriously injured during the

attack had an opportunity to clearly recognise the appellants as claimed.

According to the case of **Moses Bogere and Another vs Uganda (SCCA No. 1 of 1997)** which was cited by both Court, this Courts has laid down three material considerations when faced with case which is mainly dependant on visual identification(s). These are:-

1. Whether there were factors or circumstances which at the material time rendered identification of the attackers difficult notwithstanding that there were those which could facilitate identification.

2. Whether the absence of evidence of arrest and/or police investigation had any or no adverse effect on the cogency of the prosecution case

3. Whether the appellant's defences of alibi were given due consideration.

In respect of the first issue the Supreme Court gave the following guidelines:-

"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in criminal cases. The starting point is that a Court ought to satisfy itself from the evidence whether the conditions under which identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The Court should then proceed to evaluate the evidence cautiously so

that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult.

It is trite law that no piece of evidence should be weighed except in relation to the rest of the evidence. (See Suleman Katushabe Vs Uganda S. C. Cr. App. No 7 k of 1991) unreported" (underlining provided)

The finding of the trial judge on the circumstances under which the identifications of the appellants were made was that he did not wish to dismiss the submissions that the conditions were difficult to favour correct identification. He hastened to add that the difficult conditions were upset by the consistent and corroborating evidence of the PW3, PW4, and PW5 who was according to the judge observed the assailants for the long time.

In the first place while I agree that there was light in the room where the attack took place and the witnesses were relatives of the assailants I do not share the view that the three eyewitnesses had an opportunity to clearly observe the assailants for Court to come to the conclusion that the difficult conditions were 'clearly upset' by their evidence. I do not comprehend how from their hiding places PW3 and PW4 would be able to identify the assailants. This leaves only PW5 who was himself a victim of the assault in the difficult conditions acknowledged by the trial Judge.

Secondly in view of the finding by the trial judge that the conditions favouring correct identification were difficult what was required was 'other' evidence to support the evidence of visual identification. The Supreme Court in the case **Moses Bogere and Another vs Uganda** (Supra) held as follows:-

"In Moses Kasana Vs Uganda Cr. App. No 12 1981 (1992-93) HCB 47 this Court which cited the two foregoing decisions with approval, underlined the need for supportive evidence where conditions favouring correct identification are difficult. It is said at P. 48 "where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial Court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming the assailant to those who answered the alarm, and of a fabricated alibi."

There was no other available evidence that Court would rely on to support the evidence of identification in the difficult conditions acknowledged by the Court.

On the second consideration the Police bungled some evidence that would have lent credence to the evidence of identification in difficult conditions.

The first of such evidence was a hat which according to PW5 the first appellant left at the scene. The scene was visited by ASP Mwanga Baker who, at the time of the incident was O.C. Kachumbala Police Post. He testified as follows:-

"I made an investigation at the scene and was able to recover a few exhibits. After recovering the exhibits I arrested the accused from the scene. One was arrested at the scene when the burial was taking place by I/C CID I arrested one on the day of the post-mortem i.e. Agamet Richard. I sent the two to Bukedea where they were charged."

This witness did not specify any of the exhibits he recovered from the scene. He did not tender any exhibit during the trial. Specifically he did not mention that he had recovered any hat which was identified by any of the witnesses as belonging to any of the appellants thus rendering the evidence of the hat worthless.

The other evidence that was rendered worthless was evidence by PW4 that he had ran to his uncle, Odong James whom he informed that thieves had entered their house wanting to kill them. He never named any of the thieves and by the time of the trial James Odong had a mental problem and could not testify. The significance of the evidence of the persons in authority to whom an immediate report is made was discussed in the case of **Lt. Jonas Ainomugisha Vs Uganda (SCCA) No 19 19 of 2015)** where this Court stated as follows:-

"The desirability of the evidence of the persons in authority to whom an immediate report is made was stressed in the case of Kebla and Another V. Republic [1967] EA 809 where the former Court of Appeal for East Africa cited with approval the following passage from Shabani Bin Ronald V. R. (1940 EACO 60.

"We desire to add that in cases like this and indeed in almost every case in which an immediate report has been made to someone who is called as a witness evidence of details of such report (save such portions of it as may be inadmissible as being given at trial. Such evidence frequently proves most valuable, sometimes as corroboration of the evidence of the witness under Section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is purporting to identify a person whom he really did not recognise at the time, or an article which is not really his at all."

That which applies to the Police in his regard also applies to the Chiefs. Another case **Tekerali s/o Korongozi and others vs Reg (19520 19 EACA 259** emphasises the same point at P. 260 in the following terms:-

"Their important can scarcely be exaggerated for they often provide a good test by which the accuracy of the later statements can be judged, this providing a safeguard against later establishments or the deliberately made up case. Truth with often came out in a statement taken from the witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

There were three witnesses who claim to have identified the two appellants. There is no evidence that the identities of the appellants were mentioned to anybody let alone the Police. The Police officer who visited the scene immediately after the incident

should have investigated more on this point and his failure weakens the evidence of identification.

The other piece of evidence that would have been explored further by the prosecution was the suggestion that A.1 was identified by his voice. The Court can only rely on identification by voice where there was evidence on record that the witnesses were familiar with the appellant's voice.

In case of **Sabwe Abdu vs Uganda (SCCA No 19 of 2007)** it was established that the witnesses were familiar with the appellant because he lived a quarter of a mile from their home, they always passed by his home as they went to school and they used to hear him speak to other people. The appellant used to come to their home where they would hear him speak to their father.

While I acknowledge that the first appellant was an uncle to the witnesses, it does not follow that they knew his voice. The prosecution should have established how they knew he appellant's voice.

On the defence of alibi both appellants stated that they were in Kampala and only travelled to the village to attend the burial of the deceased persons.

The first appellant who was a security guard stated that he was on night duty between 6.00p.m. and 6.00a.m. while the second appellant who used to run a Kiosk stated that on 28.1.2007 he run his business as usual and only to be told on 29.01.2007 at 6.00 a.m. as to what happened in the village.

The two appellants called a witness, Oriono Lazarus (DW3) who testified that he is the one who had called the first appellant to inform him of what had happened. A prosecution witness, Alupi Janet FLA (PW3) also testified that the two appellants were arrested when they came for burial from Kampala.

There are two well established principles in regard to the defence of alibi. The first one which both Courts correctly stated is that an accused person who raised the defence of alibi does not assume the burden of proving it. The burden to disprove it remains with the prosecution. The case of **Moses Bogere and Anor Vs. Uganda** (Supra) has given guidelines as to how a defence of alibi should be handled. The Court stated as follows:-

"The passage cited earlier in this judgment shows that the learned trial judge held the defences to be unsustainable because "through the evidence of the four (4) eyewitnesses the accused has been put at the scene of crime" "what they amounts to putting an accused at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof had been achieved, the Court must not base itself on the isolate evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the evidence showing that the accused was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judiciary

and give reasons why one and no other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version unsustainable." (Underlining provided

In his consideration of the defence of alibi this what the trial judge concluded:-

"This conclusion leads me to consideration of the defences of alibi put forwarded by each of the accused persons. Having believed the prosecution evidence that the eyewitnesses positively identified A1 and A2 the assailants. I am unable to believe the defence story that they were in Kampala at the time of offence. It is the trite that once an accused person puts in place a defence of alibi he has not duty to prove it. The duty to disprove the defence of alibi lies on the prosecution." (underlining provided)

Then the Court of appeal made the following conclusions:-

"We also agree with the learned trial Judge's evaluation of evidence as set out above. We also agree with his conclusion. A person cannot be in two places at the same time. The learned Judge having believed the prosecution witness and having found that the appellants had both been placed at the scene of crime the Judge had no option but to reject the appellants alibi."

It is not necessary for the prosecution to adduce any further evidence to disprove the alibi have placed the appellants on the scene of crime.

Be that as it may, defence of alibi set out by the appellants does not appear to have been credible. The first appellant stated in his testimony in Court that he was on duty as a security guard on the night of 28/01/2007.

That he was guarding Mididas Hotel in Kampala and has signed for a gun the evening before and signed out the next morning at a.m. <u>However, no other evidence was brought to prove this, in view of the strong prosecution evidence putting him on the scene of crime</u>.

He stated that he had travelled from Kampala to Kachumbala for burial of the deceased person on a motor cycle and the journey took 4 hours. The second appellant put the time at 5 hours. It is possible that the appellants could have travelled from Kampala to the scene of crime and then back within a period of 8 – 10 hours.

Similarly we do not find the 2 appellants alibi to have been credible at all for the same reasons.

In any event, the defence in this particular case set up the defence alibi after the closure of the prosecution case. It would not therefore have been possible for the prosecution to produce other evidence to disprove the alibi at this stage of the trial."" (underlining provided)

Quite clearly the trial judge fell into the error of first believing the prosecution case before rejecting the alibi and so did the Court of Appeal. The Court of Appeal went even further and shifted the burden of proof when they stated that no other evidence was

brought to prove that the appellant had been on duty as he claimed. The appellant did not assume such a burden.

According to the prosecution the offence was committed between 3 and 4 a.m. DW3 who testified that he is the one who informed the first appellant of the murder stated that he rang him on 29/.01.2007 at 6:00 a.m.

In my view it was speculative of the Court of Appeal to find that the appellants travelled to Kachumbala, committed the murder and travelled back Kampala. Yet the alibi of A.1 was that he was on duty throughout the night and nobody can tell where he was when DW2 rang him.

The other well established principle is that an accused person who wishes to rely on the defence of alibi must raise it as the earliest opportunity The Court of Appeal cited with approval the case of **R vs Sukha Singh S/O Walir Singh & Another [1939] 6 EACA 145** where it was observed as follows:-

"if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly if he does not bring forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest moment it will give prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuiness proceedings will be stopped."

The two appellants were arrested by two different Police Officers. According to ASP Mwanga Baker (PW6) he is the one who

arrested the second appellant while the first appellant was arrested by incharge CID. The In Charge CID did not testify at the trial. It was not established from PW6 if the second appellant said anything at the time of his arrest. During the trial the 1st appellant was cross examined on a charge and caution statement which the state Counsel sought to tender as an exhibit but the trial judge declined in the following ruling.

"This statement cannot be allowed in now because rules are clear on admitted charge and caution statements".

The trial judge did not indicate under what rule the statement was disallowed because a statement that sought to show discrepancies between the appellant's evidence in Court and his previous statement is admissible so long as it is not incriminating as to the amount to a confession. It was from this statement that Court would have established whether or not the first appellant disclosed his alibi at the first opportunity and there was no basis for the finding by the Court of Appeal that the appellant first disclosed his alibi when the prosecution had closed its case and the Police had opportunity to investigate its genuineness.

The Police officer who arrested him did not testify at the trial so it is difficult to tell as to whether or not the appellant did not disclose his alibi either at the time of arrest or when the made his charge and caution statement. It was an easy alibi to investigate and the failure to do so leaves doubt as to the whereabouts of the appellant at the time of crime was committed.

In conclusion, the Court has established principles of law to be followed when faced with a case dependant on identification in

difficult conditions and burden of proof in cases where alibi is raised as a defence. I have illustrated that instead of following the principles the two Courts below disregarded them. In the case of alibi the Court of Appeal shifted the burden of proof as I have demonstrated.

In the circumstances the judgment of the Court of Appeal from which this appeal arises should not allowed to stand. I would therefore allow this appeal, quash the conviction and set aside the sentence.

Dated this 24th Day of January 2019

Mwangusya Eldad,

JUSTICE OF THE SUPREME COURT