THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 01 OF 2017

(CORAM: KISAAKYE, ARACH-AMOKO,MWANGUSYA, OPIO-AWERI,BUTEERA, J.J.S.C.)

B E T W E E N

SOWEDI SERINYINA :: APPELLANT

A N D

UGANDA :: RESPONDENT

[Appeal from the judgments of the Court of Appeal (Kasule, Bossa,Obura, JJA,) in Criminal Appeal No. 757 of 2014, dated 30th -12-2016 and (Kikonyogo, Twinomujuni ,Byamugisha, JJA,) in Criminal Appeal No. 13 of 2003, dated 15th -12-2009]

JUDGMENT OF THE COURT

The deceased, **Mperinde Kyompaire Scovia** lived with her husband, **Mperinde Ephraim** at Nyanga Cell, Mahyoro Sub-county, Kamwenge District. On the 18th January, 2001 at around 8.00pm, the couple were at home with their children when someone who was armed with a gun and a torch pushed the door open.

The intruder demanded for ten million shillings and threatened the complainant (**Mperinde Ephraim)** that if he did not produce the money he would be killed. The intruder assaulted the complainant who thereupon revealed that he had only two million shillings. After the revelation two other assailants entered the house. The assailants forced the complainant to enter his

bedroom where he got the money which he handed over to one of them. Then the assailants dragged the complainant's wife to the bedroom. She was then brought back to the sitting room and shot in the chest. In the meantime, the complainant ran away raising an alarm which was answered by his neighbors. The assailants left. The complainant's wife told her son **Twinomujuni Abert (PW2**) that she had been shot by "BOSS". Boss is a name by which one Beinobwira Moses**(A2)** was known. The victim (**Mperinde Kyompaire Scovia)** was taken to the hospital but she died on the way. On the victim's revelation about the identity of one of the assailants, the security personnel went to the house of Tumusiime Robert**(A1)** and Beinobwira Moses **(A2)** and arrested them that same night. The two revealed that the gun and army uniform belonged to the appellant who was the Local District Internal Security Organization official. The gun and the uniform were recovered from Beinobwira Moses's home in the presence of the Local Council Chairperson Kagaba Peter (**PW4).**

The appellant was arrested the following morning. The appellant (Sowedi Serinyina) together with Tumusiime Robert(A1) and Beinobwira Moses(A2) were charged and tried for the offences of murder contrary to Sections 188 and 189 and Aggravated Robbery contrary to Sections 272 and 273(2) of the Penal Code Act. On the 17th January 2003, the High Court convicted all the three accused persons on both counts and sentenced each one to suffer the then mandatory death sentence.

The appellant and his co-convicts appealed to the Court of Appeal against both conviction and sentence. On the 15th January 2009, the Court of Appeal dismissed the said appeal and confirmed the conviction but did not pronounce itself on the issue of sentence. The convicts then appealed to this court against conviction through Criminal Appeal No.5 of 2010. Following the case of **Attorney General Vs Susan Kigula & Others (Supreme Court Constitutional Appeal No.3 of 2006)** this court confirmed the Constitutional Court decision that a mandatory death sentence was unconstitutional and ordered that all those sentences passed without mitigation should be remitted to the High Court for mitigation of sentence. This case fell in that category.

On the 23 July, 2014 His Lordship Justice Lameck. N. Mukasa who conducted the mitigation proceedings found that convict Tumusiime Robert (**A1)** was still a minor at the time the offence was committed. He had spent a period of 11 years which was more than the mandatory three years' period of imprisonment under **Section 94 of the Children Act.** Court ordered for his immediate release. The learned Judge further set aside the death sentence and substituted the same with 23 years imprisonment for Beinobwira Moses **(A2)** and 33 years for the appellant. The judge ordered that pursuant to **Section 286(4) of the Penal Code Act** the appellant, Beinobwira Moses and Tumusiime Robert, jointly and severally pay compensation to the deceased's husband, Mperinde Ephraim of Ug.Shs. 2,000,000/= (two million shillings only).

The appellant and Beinobwira Moses being dissatisfied with the decision of the mitigating judge appealed to the Court of Appeal in Criminal Appeal No.757 of 2014 against sentence only. The Court of Appeal dismissed the appeal and confirmed the sentences and orders passed by the mitigating judge.

The appellant has now appealed to this court against both conviction and sentence. The appellant's memorandum of appeal raises two grounds which were amended during hearing and they are that;

1. **The Learned Justice of Appeal erred in law in upholding the appellant's conviction based on illegally (sic) confession extracted of the co-accused.**
2. **The Learned Justice of Appeal erred in law in upholding a harsh, illegal and excessive sentence without due consideration of his mitigating factors**

Representation

The appellant was represented by Counsel Mooli Albert on state brief and Ms. Asiku Mary, Senior State Attorney, represented the respondent.

Submissions of counsel

Both counsel filed written submissions which they adopted at the hearing of the appeal.

On ground one, counsel for the appellant faulted the Court of Appeal for holding that the charge and caution statements were admissible despite the finding that one of the statements was not countersigned and the same police officer had recorded two

statements from the co-accused. He cited the case of **Sewankambo Francis & Others vs. Uganda S.C.C.A No.33 of 2001,** to support his assertion that such a confession was inadmissible. Counsel further submitted that there was no evidence in support of the confession from the co-accused and that the mere fact that the gun belonged to the appellant was not sufficient to prove a case against him. According to counsel the prosecution had failed to produce evidence to support the allegations that the appellant had hired the other convicts to carry out the said robbery. The ownership of the gun and uniform alone did not in any way implicate the appellant in the crime.

Counsel faulted the Court of Appeal for having failed to consider the weight of evidence that ought to be attached to a confession from a co-accused. He submitted that the position of law is that a confession by a co-accused can be taken into account against a fellow accused but that it only constitutes the evidence of the weakest kind and cannot form a basis of a case against a co-accused person. Counsel concluded that there was no independent evidence which the confession of the co-accused would corroborate and that the conviction was based on evidence of the weakest kind.

On ground 2, counsel submitted that the Court of Appeal in upholding the sentence of the sentencing judge did not consider the period the appellant spent serving sentence since his conviction in 2003. Counsel argued that court only mentioned the fact that he had spent two years on remand and also failed to

consider the appellant's mitigating factors. These were that he has family responsibilities, he is a first time offender and that he has since his incarceration attained qualifications as a counselor from MUBS offered in prison, he has apologized to the victim's family which is a sign of remorse and willingness to change to a better citizen in society. Counsel prayed for the appellant to be given a lenient sentence to enable his reintegration into society.

On the other hand, counsel for respondent opposed the appeal. On ground one she submitted that the appellant was properly convicted by the High Court and the Court of Appeal which properly re-evaluated the evidence and correctly applied the law to the facts of the case. She added that the evidence of recovery of the gun and army uniform as a result of the confessions of the two convicts was sufficient to link the appellant with participation in the commission of the two offences. She further submitted that the trial judge conducted a trial within trial and found that the retracted confessions of the two convicts were made voluntarily and were admissible in line with **Section 24 and Section 25 of the Evidence Act.** She submitted that the confessions contained detailed information which was true and sufficient to sustain the conviction of the appellant notwithstanding the fact that one statement was not countersigned and both were recorded by the same police officer which was irregular but not fatal to the case for the prosecution. Counsel cited the case of **Muzaya Thomas & Anor vs Uganda Sc.Cr No.3 of 2006** for the proposition that a confession is not vitiated by the irregularity in its recording.

Counsel submitted that the evidence that led to the recovery of the gun and the army uniform should be taken as independent evidence to corroborate the confession of the two other convicts to the effect that the appellant participated in the commission of the two offences. Counsel contended that the appellant's assertion that his gun and army uniform were stolen at 8.00 pm on the very night the offences were committed was rightly rejected by the two lower courts. Counsel contended that the appellant supplied the gun and army uniform which were used in the robbery. She added that in terms of **Section 20 of the Penal Code Act** this makes him a principal offender.

On ground 2, counsel submitted that the sentencing judge considered the mitigating factors which included the period the appellant had spent on remand, his age, his being a first time offender, his remorse, his education accomplishments while in prison and his family responsibilities. Counsel contended that the sentencing court also considered the aggravating factors such as the nature of the offences which attract maximum sentence of death, loss of life of a mother and money stolen before passing the sentence of 35 years' imprisonment to appellant. Counsel added that the sentence was reduced to 33 years by the Court of Appeal after the court considered the period spent in lawful custody. She added that the sentences were to run concurrently from 17th January, 2003. She pointed out that the Court of Appeal upon re-evaluation found no basis to interfere with the sentence passed by the sentencing judge. Counsel prayed that this court should

not interfere with the concurrent finding of lower courts and that this appeal should be dismissed.

Decision of the Court.

This is a second appeal. This Court does not have the duty to re-evaluate evidence unless it has been shown that the first appellate Court did not re-evaluate the evidence on record. In **Areet Sam Vs Uganda (Criminal Appeal No. 20 of 2005)** this court reiterated the above duty in the following terms:-

"We also agree with Counsel for the respondent that it is trite law that as a second appellate Court we are not expected to re-evaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong on findings of fact, the Court is obliged to do so and to ensure that justice is properly and truly served..."

Secondly we can only interfere with a concurrent finding of the High Court and Court of Appeal where there was no evidence to support the finding because this is a question of law. Inference legitimately drawn from proved facts by the trial and first appellate court must establish the guilt beyond all reasonable doubt. See ***Okeno* vs *Republic (1972) EA 32***, ***Kifamunte Henry* vs *Uganda***, **Criminal Appeal No. 10 of 1997,**

Counsel for the appellant faulted the Court of Appeal for holding that the charge and caution statement were admissible despite the finding that the statement was not countersigned and both

statements were recorded by the same Police officer. As counsel for the respondent righty contended this act, though irregular, was not fatal to the case of the prosecution.

The Court of Appeal found and rightly so in our view that the practice of the same police officer recording the two statements of first appellant and second appellant was irregular. It is not a prudent practice. There is a risk of importing facts from one statement to another or mixing up of facts between the two statements of the accused.

The failure to counter sign the statement is also irregular but as rightly found by the Court of Appeal the irregularity does not go to the root of the prosecution case.

In the case of **Twinomugisha Alex & 2 Others vs Uganda, Criminal Appeal No.35 of 2002,** this court stated that: -

"We agree with the above conclusions and therefore we do not find any merit in the complaint that the charge and caution statement was not voluntary and true. On the complaint that it was not properly recorded, we agree that it was irregular for a police officer to record a charge and caution without countersigning after the signature of the suspect. It was irregular for the second officer to take over from where the first officer stopped without countersigning after he had read over the charge and caution to the suspect. Indeed, it is quite irregular for the two officers to record one statement without satisfactory explanation. However, we think that failure by

the recording officer to countersign after the charge and caution was read over to the suspect was cured by the recording officer's signature at the end of the suspect's statement. We do not think that the omission by the recording officers in this case to sign after charging and cautioning the suspect was fatal to the statement. Further, we agree with the Court of Appeal that there was no evidence to prove that the confession was a forgery." (Underlining for emphasis)

Counsel for appellant submitted that there was no independent evidence to convict the appellant apart from the retracted confessions of the co-accused persons which was the weakest kind of evidence. Counsel for respondent submitted that the confessions led to evidence of recovery of the gun and army uniform which belonged to the appellant and that the confessions further linked him as participant in the commission of the two offences.

The trial judge after evaluation of evidence from both the prosecution and the appellant stated: -

"I have perused the statements by both A1 and A2 and I have found them quite detailed and the facts therein are only peculiar to the participants. They could not have been imagined by any other person. They reveal how they were approached by A3 and how the whole robbery was carried out. They explain how they reacted after shooting the deceased and who actually shot her. In the circumstances of this case I

find that the confessions must be a true account of what each of the accused stated to PW6.

If there is any need for corroboration then the same was provided by their admissions at Mahyoro Police Post which lead to recovery of the gun and army uniforms at the home of A2 where he was staying with A1.

In their confessions not only did the accused implicate themselves but they also implicated A3 as the person who supplied the gun and in fact hatched the whole plan of robbery.

The statement of A1 and A2 amount to confessions within the meaning of Sections 24 and 25 of the Evidence Act because they are sufficient in themselves to justify the conviction of the makers. See Anyungu v. Republic 1967 EA 239. Since the above confessions implicate the 3rd accused they may be taken into account against him. See Section 23 of Evidence Act. This kind of evidence, is said to be of the weakest kind and can only be used as leading assurance to other evidence against the co-accused i.e. A3.

The other evidence against the accused (A3) to which the confession lend assurance is the fact that the gun that was used in the murder and uniform worn by the assailants belonged to A3. These are exhibits which were found in the home of A2 and A3 admitted in his defence that indeed they were his.

However, in his defence A3 alleged that they were stolen from his home when he had gone for a drink. He called his

wife who stated that her husband left the gun and uniform at home and that she did not know that they had disappeared. She tried to impress it on court that they could have been stolen by people who called at their home when she had gone to the trading centre to buy some drugs.

It appears that could have been the only opportunity for the exhibits to have been stolen from their home. But she went to buy drugs at around 8.00pm. It is inconceivable that A1 and A2 and others could have stolen the gun and uniform at that time and hatch a plan to go and rob at home of PW1 at the same time of 8.00pm which is some distance from the home of A3. The story of the theft of the gun and army uniforms is an outright lie. The truth is stated by A1 and A2 in their confessions. I reject A3's defence. It is all which only serves to point to his guilt.

From the evidence on record it is clear that all accused persons had common intention to prosecute an unlawful purpose namely to commit robbery prejudice pw1 whom A3 knew had some money. He gave a gun and army uniform to use in the execution of the robbery and in the process the deceased was killed.

It is immaterial that the initial plan was not to kill the deceased. However, the violence was used in prosecuting a common design which resulted in the death of the deceased. The offence with which they are charged was a probable consequence of the use of that violence, and under Section 22 of the Penal Code Act, A1 and A2 are deemed to have

committed the murder. See Tabulayenka Kire vs R (1943) 10 EACA 51.

A3 aided his co-accused by giving them a gun and army uniform to go and commit robbery which ended up in the death of the deceased and as such under provisions of S.21 of the Penal Code Act he is deemed to have committed the same offence as one of the principal offenders...” (Underlining for emphasis)

We have reproduced the above extract of the judgment of the trial court to show that the trial judge was fully aware that the evidence of confessions of the co-accused persons against the appellant was of the weakest kind but it could be used to lend assurance to other evidence. The Court of Appeal re-evaluated the same evidence.

In the case of **Walusimbi & 3 Others v Uganda, Supreme Court Criminal Appeal No.28 Of 1992,** it was stated:-

“The learned judge emphasized that the confession of the Appellant Twaha implicated Kandole. She directed herself correctly that to be admissible for this purpose Twaha must have exposed himself to the same or even a greater risk than the person implicated. She also acknowledged that it was evidence of the weakest kind. What unfortunately she did not do, was to advise herself on the authorities, that the practical approach to such weak evidence, is to consider whether there is a substantial case for the prosecution already in existence, so that this weak evidence simply adds the final assurance of

the Accused's guilt. **(See Gopa s/o Gidamebanya .v. R. (1953) 20 E.A.C.A. 255). This approach was very necessary in this case."**

We do not agree with the submission of the appellant's counsel that the appellant was convicted only on the retracted confessions of the co-accused and that there was no independent evidence to support his conviction. The confessions of his co-accused led to discovery of the appellant's gun and army uniform which were used in the commission of the offences. The trial judge correctly rejected the evidence of the appellant and his wife alleging that the gun and army uniform were stolen from the appellant when he had gone for a drink and when his wife had gone to buy drugs at a shop.

The Court of Appeal upon re-evaluation of the evidence on record agreed with the finding of the trial judge that it was the appellant who hired the first and second convicts namely Tumusiime Robert and Beinobwira Moses, to carry out the robbery. As pointed out earlier in this judgment, the role of a second appellate court is to find out whether the concurrent findings of the two lower courts can be supported by the evidence on record. We have also shown above that there was overwhelming evidence to support the findings. Ground one fails.

On ground two, which raises the issue of the sentence being harsh, illegal and excessive, counsel for appellant submitted that the Court of Appeal in confirming the sentence of 33 years'

imprisonment given by the sentencing judge erred because both courts did not take into consideration the appellant's mitigating factors and the time already spent serving the sentence. Counsel for the respondent on the other hand submitted that the sentence was lawful and that the two courts did not overlook any material fact which could cause a miscarriage of justice.

In the case of **Mutagubya Godfrey vs Uganda, Supreme Court Criminal Appeal No.8 of 1998**, this court held that:

"A court of justice is under a duty to ensure that people who commit crimes are punished in accordance with the process of the law. This includes proper process of investigation and proof by satisfactory evidence that the suspect is guilty."

There is now a wealth of authorities defining the circumstances under which this court can interfere with the discretion of a sentencing court in arriving at the sentence being appealed against. These authorities are rooted in Section 5(3) of the Judicature Act which provides that in the case of 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. We cite three of these cases to illustrate this principle.

In the case of **Jackson Zita vs Uganda, SCCA No.19 of 1995,** this court held as follows: -

"The last ground is the complaint that the sentence of seven years' imprisonment is excessive and that the order for corporal punishment is illegal. It has been stated time and

again that in order for an appeal against sentence of imprisonment to succeed, the sentence must be illegal or the court must be satisfied that the sentence is manifestly inadequate or manifestly excessive. See the case of R.V Mohammedi Jamal (1948) 15 E.A.C.C 126" (Underlining for emphasis)

In **Kizito Senkula vs Uganda (Supreme Court Criminal Appeal No.24 of 2001)** this court held as follows: -

"As we have already mentioned the appellant appealed against the sentence to the Court of Appeal. In dismissing that appeal, the Court of Appeal, rightly in our view, followed the principle in *Ogalo s/o Owowa - vs- R (1954) 24 EACA 270*, which is that in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in *James -vs- R (1950) 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

In **Ssekitoleko Yudah and Others vs. Uganda, SCCA No. 33 of 2014** this court held as follows: -

"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon

which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive so as to amount to an injustice." See also **Ogalo s/o Owuora v. R (1954) 21 EACA 270** and **R v. Mohamedali Jamal (1948) 15 EACA 126**.

The considerations that can be determined from the above authorities are as follows: -

1. where court passes an illegal sentence.
2. where court passes a manifestly excessive sentence.
3. where court passes a manifestly low or inadequate sentence resulting into a miscarriage of justice.
4. where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence.
5. where the sentence imposed is wrong in principle.

In this appeal none of the above elements exist to warrant interference by this court on the sentence passed by the sentencing Judge and confirmed by the Court of Appeal.

On the failure to take into account the fact that the appellant has family responsibilities, this court in the case of **Magala Ramathan vs Uganda, SCCA No.1of 2014** found that that consideration is irrelevant. It went on to hold as follows: -

"However, after identifying the mitigating and aggravating factors, a judge may come to the conclusion that in the circumstances of the particular case, the aggravating factors outweigh what would have been mitigating factors. This principle was well laid out in the persuasive authority of S vs. Vilakazi 2009 1 SACR 552 (SCA), where the Supreme Court of South Africa held that: *'In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has 2 children or 3 ... are largely immaterial to what that period should be.'* Nevertheless the fact that the judicial officer was alive to what the accused submitted in mitigation must be evident on record. It must therefore be stated by the judicial officer that the sentence was arrived at with both the mitigating and aggravating factors in mind. It is only then that the accused will be sure that the judge addressed his or her mind to the cited mitigating factors but nevertheless came to the conclusion that the aggravating factors outweighed the mitigating ones."

On the post sentencing conduct of the appellant while in prison, this court is of the considered view that, that is also irrelevant because the sentence appealed against is the one that was passed at the time of the trial. The considerations in the cases of **Jackson Zita vs Uganda(supra), Kizito Senkula vs Uganda(supra) and Ssekitoleko Yudah and Others vs.**

Uganda(supra) mentioned earlier in this judgment are therefore inapplicable to the post sentence mitigating factors.

We have perused the judgment of sentencing judge and we find that he considered both the aggravating factors and mitigating factors of the appellant. The judge considered the appellant's role at the time of the commission of the offence as being a GISO in charge of security who was entrusted with a gun to protect the country, people and the property. The judge sentenced the appellant to 35 years. However, he deducted 2 years which the appellant had spent on remand in accordance with Article 23(8) of the Constitution. As result he sentenced him to 33 years' imprisonment starting 17th January, 2003. The judge made an order of compensation of Ug.Shs 2,000,000 to Mperinde Ephraim. The Court of Appeal found no basis to interfere with the above sentence passed by the mitigating judge. We find that both courts evaluated and revaluated the aggravating factors and mitigating factors before reaching the sentence of 33 years' imprisonment and the order for compensation and we find no reason to interfere with it.

In the result, we find no merit in the appeal which we accordingly dismiss. We uphold the appellant's conviction, the sentence of 33 years' imprisonment and the order for compensation.

Dated at Kampala this ....8th.....day of .....May..... 2019

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Hon Justice Dr. Esther Kitimbo Kisaakye

JUSTICE OF THE SUPREME COURT

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Hon Justice Stella Arach-Amoko

JSUTICE OF THE SUPREME COURT

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Hon Justice Eldad Mwangusya

JUSTICE OF THE SUPREME COURT

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Hon Justice Rubby Opio-Aweri

JUSTICE OF THE SUPREME COURT

.....

Hon Justice Richard Buteera

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

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CRIMINAL APPEAL NO. 01 OF 2017

[CORAM: KISAAKYE, ARACH-AMOKO, MWANGUSYA, OPIO-AWERI, BUTEERA, J.J.S.C]

BETWEEN

SOWEDI SERINYINA :: APPELANT

AND

UGANDA :: RESPONDENT

[Appeal from the Judgments of the Court of Appeal (Kasule, Bossa, Obura, JJA,) in Criminal Appeal No. 757 of 2014, dated 30.12.2016 and (Kikonyogo, Twinomujuni, Byamugisha, JJA,) in Criminal Appeal No. 13 of 2003, dated 15th December 2009]

JUDGMENT OF DR. KISAAKYE, JSC (DISSENTING IN PART)

I have had the benefit of reading in draft the Judgment of the Court in this Appeal. I agree with the decision of this Court to dismiss the Appeal and to uphold the appellant's sentence of 33 years with effect from 17th of January 2003, the date he was convicted.

In the same Judgment, this Court has also confirmed the Order for compensation of 2,000,000/= Uganda shillings to Mr. Mperinde, the husband of the deceased.

With due respect to my learned colleagues, I am unable to agree with this order for compensation as framed. This has prompted

me to write this dissent Judgment to address this part of the Judgment.

Before I get into the discussion of the law and my reasons for disagreeing with my colleagues on this point, it is necessary to give a brief background to this appeal.

The appellant (who was A3), together with Tumusiime Robert (A1) and Beinobwira Moses (A2) were charged and convicted of the murder of Scovia Kyompaire Mperinde on 18th January 2001. The late Scovia Kyompaire was the wife of Ephrahim Mperinde. She was shot at her home and died while she was being taken to the hospital.

In the same incident, the Mperindes were also robbed of 2,000,000/= Uganda shillings. As a result, the trio were also charged and convicted of aggravated robbery. They were all sentenced to suffer death for each count and the sentences were to run concurrently.

Following this Court's decision in ***Attorney General v Susan Kigula and Others, Supreme Court Constitutional Appeal No. 3 of 2006,*** the appellant and his co-convicts were respectively re-sentenced. Tumusiime Robert (A1) was found to have been a minor at the time of committing the offences, and to have spent more than the mandatory 3 years period in custody. Relying on the provisions of the Children's Act, the Court ordered that he be immediately released. Beinobwira Moses (A2) was sentenced to 23 years.

On the other hand, the appellant who had been found to have been the master mind behind the crimes, was sentenced to 33 years imprisonment.

The resentencing Judge also made the following Order which is the subject of this Judgment:

> ***"I further order under section 286(4) of the Penal Code Act that the convicts shall jointly and severally pay compensation to the deceased's husband Mperinde Ephrahim in the sum of Uganda Shillings 2,000,000/=."***

The appellant and his co-convict appealed to the Court of Appeal. The learned Justices observed as follows with respect to the above Order:

> ***"The trial Court found as a fact that a sum of Shs. 2,000,000/= had been robbed from Mr. Mperinde Ephraim, the victim of the robbery, and that the same had not been recovered. Hence, the order by the sentencing Judge that the appellants jointly and severally pay compensation to the deceased's husband, Mperinde Ephraim, in the said sum of shs. 2,000,000/= pursuant to section 286(4) of the Penal Code Act.***
>
> ***The appellants raised no specific ground of appeal in their Memorandum of Appeal as regards that part of sentence ordering payment of compensation. They thus do not contest the order."***

The Court of Appeal later dismissed the appeal and ordered as follows:

> ***"Both appellants are to jointly and/or severally pay compensation in the sum of Uganda Shs. 2,000,000/= to Mr. Mperinde Ephraim, as ordered by the trial sentencing Judge on 27th July 2014."***

Being dissatisfied with the decision of the Court of Appeal, the appellant filed his appeal to this Court. As I noted earlier, this Court has dismissed the appellant's appeal. It should be noted the compensation order was not a subject of appeal in this Court. However, this Court, in confirming the appellant's conviction and sentence has also confirmed the compensation order.

I note that in making the compensation order that the resentencing Judge relied on section 286(4) of the Penal Code Act which provides as follows:

> ***"286. Punishment for robbery.***
>
> ***...***
>
> ***(4) Notwithstanding section 126 of the Trial on Indictments Act, where a person is convicted of the felony of robbery the court shall, unless the offender is sentenced to death, order the person convicted to pay such sum by way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the court is just, having regard to the injury or loss suffered by such person, and any such order shall be deemed to be a decree and may be***

executed in the manner provided by the Civil Procedure Act."

Section 126 of the Trial on Indictments Act which is referred to in section 286 of the Penal Code, provides as follows:

"126. Compensation.

(1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable."

A reading of these two sections shows that while section 126 of the Trial on Indictments Act uses the term "may", section 286(4) of the Penal Code Act on the other hand uses the word "shall". This therefore means that while under section 126 of the Trial on Indictments Act, it is discretional for a Judge to award compensation to a person who has either suffered material loss or personal injury, section 286(4) of the Penal Code Act makes it mandatory for the trial Judge to order compensation, except in cases where the offender has been sentenced to death.

The sum of compensation ordered to be paid must be such sum as, in the opinion of court is just, having regard to the injury or

loss suffered by such person "to the prejudice of whom the robbery was committed."

I am aware that unfortunately, the Director of Public Prosecutions did not raise the issue of inadequate compensation on behalf of the victims of these dual crimes, both at the Court of Appeal and in this Court. That notwithstanding, I believe it is not lawful for this Court to ignore errors of law which are apparent on the face of the record, even where the respective parties have not raised or canvassed the issue.

Apart from the provisions of the Penal Code Act and the Trial on Indictments Act, the principle of adequate compensation is also entrenched under Article 126(2)(c) of the Constitution of Uganda, which provides as follows:

"126. Exercise of Judicial power.

...

(2) In adjudicating cases of both Civil and Criminal nature, the Courts shall, subject to the law, apply the following principles-

.....

c) adequate compensation shall be awarded to victims of wrongs."

In the present case, it was clear that the victims of the appellant's crime were not only robbed of a life but also cash amounting to 2,000,000/= in 2001. While the resentencing Judge correctly cited the law and made an order for compensation, the order made was not in any way just or adequate to compensate the

victims. In the terms of the order, the resentencing Judge ordered the two convicts to "jointly and severally" pay compensation to the deceased's husband, Mperinde Ephraim, in the sum of Uganda Shillings 2,000,000/= only!!.

It is not clear from this order whether the Judge intended to order compensation to Mperinde for the loss of his wife or for the pain and suffering he had endured or for the money that had been stolen from him during the armed robbery. Whichever way one looks at this order, it is undisputable that the amount ordered did not meet the criteria laid down by section 286(4) of the Penal Code Act.

While this is so, it is also true that although the appellant has been in custody before and after his conviction, he continued to enjoy and to benefit from the 2,000,000/ shillings he stole from the victims of his crime (the Mperinde family) from the time of the commission of the crime in 2001. The net result of this is that the appellant has benefited and used the stolen money for over 19 years and whatever investments he made have yielded returns. On the other hand, the victims of his crime have been deprived of his money for the same period.

I am of the firm view that the trial Judge erred in law when he failed to fully comply with the dictates of both the Constitution, the Penal Code Act and the Trial on Indictments Act. Similarly, the Court of Appeal erred when it failed to identify and correct this error of law. In the same way, I believe this Court has erred in law when it has simply confirmed the compensation order as

ordered by the resentencing Judge and confirmed by the Court of Appeal.

The question that this Court should have considered in my view is whether it is right for the Supreme Court, which is the last Court in the land, to leave this glaring error of law unreversed by confirming a compensation order that merely refunds the victims of the crime the exact money they were robbed of almost 20 years ago?

In my view, this Court should have invoked the powers vested in it by the Constitution, the Judicature Act, the Penal Code Act, the Trial on Indictments Act and Rule 2(2) of the Judicature (Supreme Court) Rules to order adequate compensation to Mr. Mperinde. The victims of these crimes have waited for 20 years to get Justice. I am aware that it is still open to the victims to seek for full compensation by filing a Civil suit and waiting for many more years to get justice. However, it would be more appropriate if the Courts always endeavoured to give meaning to the purpose and intention that was behind the law when the provisions requiring and empowering Courts to make fair, reasonable and adequate compensation to victims of crime, were enacted.

In conclusion, I wish to note that this being a dissenting judgment, the fate of the Mperinde family has been sealed with the majority Judgment of this Court confirming a compensation order that does not comply with the law under which it was made. While this may be so, it is definitely not too late from other victims of crime who are still awaiting for Justice before

various Courts of law in this country, to benefit from a proper compliance with the cited provisions of the Constitution, the Penal Code and the Trial on Indictments Act with respect to our duty to not only make compensation orders. We should also ensure that the compensation Orders we make are "adequate, just, fair and reasonable." These are the standards clearly set out in our Constitution, the Penal Code and the Trial on Indictments Act respectively. While the question of what is fair, just and reasonable will always be posed in such cases and courts will have to confront this issue in cases before them, I have no doubt in my mind that a compensation order that is "adequate, just, fair and reasonable" should certainly go beyond a refund of what a victim of crime lost at the time the offence was committed and seek to put the victim of crime, in as far as possible, back in the position he or she would have been if the crime had not been committed against them.

A review of the record of appeal shows that the offences the appellant with his co-convicts were convicted of, were committed in the most brutal manner which involved shooting a young wife and mother in the presence of her husband and her young children, of tender age which led to her death, stabbing of the husband in the head three times which led to his hospitalization for a while, among others.

Considering my analysis above, the evidence on record and taking judicial notice of:

(a) the losses in the value of money in this country since 2001 and 2003 (which is 19+ and 17+ years ago) respectively;

(b) the loss of a youthful and productive life of the deceased. Although her age was not recorded on the record, the age of her her husband of 36 years and her young children is indicative of the deceased's youthful age;

(c)the trauma the deceased's husband suffered in the dual tragedy of witnessing the shooting of his wife in his presence and her eventual death in the same night and from the threats on his life he received from the robbers/killers as well as the head injuries he received from panga cuttings he sustained;

(d) The loss of a mother by the couple's young children, three of whom witnessed the robbery and shooting of their mother;

(e) the expenses incurred by the husband/deceased's family in burying his wife;

(f) pain and suffering experienced from bereavement and widowerhood at a youthful age of 36 years only, among others;

I would set aside the compensation order confirmed by the Court of Appeal and would instead substitute it with the following orders with respect to the refund and compensation of the victims of the appellant's crimes.

1. The order of compensation of 2,000,000/= be substituted to an order that the appellant refunds to Mperinde Ephraim 1,000,000/= shillings being one half of the 2,000,000/= that was stolen from him in 2001.
2. That item 1 shall attract interest at the rate of 10% per year with effect from the date of the robbery (18th January 2001).

3. That the appellant pays compensation to Mperinde Ephraim of 35,000,000/= with effect from 17th January 2003, the date of conviction.
4. That item 3 shall attract interest at the rate of 10% per year with effect from the date of conviction (17th January 2003).
5. That Mperinde Ephraim should recover his refund of 1,000,000/= being half of the 2,000,000/= that was stolen from him in 2001 from the appellant's co-convict, as per the order of the Court of Appeal.

These orders would be without prejudice to the right of victims to pursue additional compensation from the appellant in a civil suit.

Dated the.....8th..... day of .....May..... 2020

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JUSTICE DR. ESTHER KISAAKYE

JUSTICE OF THE SUPREME COURT