THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL

(Coram: Egonda-Ntende, Bamugemereire & Mugenyi, JJA)

CRIMINAL APPEAL NO. 126 OF 2017

1. NGONGO MUSTAFA aka MAWASO
2. WALISA HAMIS ..... APPELLANTS

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda at Kasese (Oyuko Ojok, J) in Criminal Session Case No. 54 of 2015)

JUDGMENT OF THE COURT

A. Introduction

1. This is a first appeal from the decision of the High Court in Masindi (Oyuko Ojok, J) in which Messrs. Mustafa Ngongo aka Mawaso and Hamis Walisa ('the Appellants') were on 10th July 2019 convicted of seven (7) counts of murder contrary to sections 188 and 189 of the Penal Code Act, Cap. 120 and one count of arson contrary to section 327 of the Penal Code Act. They were each sentenced to forty (40) years' imprisonment on all counts of murder and five (5) years imprisonment for arson, which sentences were to run concurrently.

2. The prosecution case as accepted by the trial court is that on 5th July 2014 at about 3.00pm at Bigando village, Kitsamba subcounty, in Kasese district, a group of Bakonzo including the Appellants invaded Basongora living in the area, hacked several of them to death, locked others in a grass-thatched house and set it ablaze. The persons that were murdered in this attack included CPL Grace Nabimanya (40) and his children Joseline Tarindeka (13), Rosette Karikunda (6), Enid Nabagye (5) and Pofia Karungi (3), who were locked up in a house that was then set ablaze, as well as Alice Akankunda and Monica Bariho, who were hacked to death. The attack was attributed to a dispute between the Bakonzo and Basongora communities following the resettlement of the latter at Nsinungi and Bigando villages in Kitswamba subcounty, Kasese district by the Government.

3. Dissatisfied with their conviction and sentence, the Appellants lodged this Appeal in this Court proffering the following grounds of appeal:

    I. *The learned Trial Judge erred in law and fact when he convicted the Appellants of murder and arson without evaluating the evidence in respect of their defence of alibi hence arriving at an erroneous decision.*

    II. *The learned Trial Judge erred in law and fact when he ignored the inconsistencies and contradictions in the evidence of the prosecution witnesses in respect of participation of the Appellants which touched the root of the matter hence arriving at an erroneous decision.*

    III. *The Trial Judge erred in law and fact when he sentenced the Appellants to a harsh and manifestly excessive sentence of 40 years imprisonment for 7 counts of murder and 5 years' imprisonment for arson to run concurrently without considering the mitigating factors.*

4. At the hearing of this Appeal, Mr. Samuel Muhumuza represented the Appellants while the Respondent was represented by Ms. Harriet Adubango, a Chief State Attorney, holding brief for Ms. Immaculate Angutoko.

B. **Parties' Legal Arguments**

5. Under *Ground 1* of the Appeal, the trial judge is faulted for ignoring the Appellants' alibi yet it was neither subjected to cross examination nor otherwise controverted, leaving their participation in the alleged offences in doubt. Counsel relied upon this Court's decision in **Kutegana Stephen vs Uganda Criminal Appeal No. 66 of 1996**, where it was held:

> It is settled law that the burden of proving an alibi does not lie on the prisoner beyond reasonable doubt. **Sekitoleko vs Uganda (1967) EA 531**. It is the duty of the Court to direct its mind properly to any alibi set up by an accused and it is only when the Court comes to the conclusion that the alibi is unsound that it would be entitled to reject it. See **R vs Thomas Finel (1916) 12 Cr. App. Rep. 77**.

6. In his view, the First Appellant attested to having been at home with his father on the date of the attack and his alibi was supported by the testimony of his brother, Wilson Masereka (DW3), who attested to having been at his home with him (the First Appellant), one Grace Kabugo and his children on the date of the murder. Similarly, the Second Appellant's testimony that on the fateful day he was at his home the whole day drying maize that he had bought from the trade centre was opined to have been well corroborated by Abdu Kanyama (DW4), who attested to having been with him at Bigando Trading Centre early in the morning of that day where they had purchased maize, they had lunch together and parted in the evening of the same day.

7. It is thus argued that the Appellants were not placed at the scene of crime, which assertion is purportedly supported by the prosecution evidence that the murders and arson in question had been carried out by more than twenty people. To compound matters, in Counsel's view, Colleb Beinoburyo (PW3) admitted under cross examination that he was outside when the many assailants entered the mud and wattle house of his deceased father (Grace Nabimanya) and hacked him to death, which suggests that he did not witness who actually killed his father. It is

proposed that the same witness conceded to not having seen who killed another of the deceased persons, Monica Bariho. Counsel for the Appellants therefore invites this Court to uphold the Appellants' defence of alibi.

8. In relation to *Ground 2* of the Appeal, it is the Appellants' contention that the prosecution evidence was riddled with material inconsistencies and contradictions that the trial judge neither evaluated nor explained yet they went to the root of the prosecution case.

9. With regard to the Appellants' participation in the offences, Counsel contends that PW3's failure to identify the Second Appellant before the trial court because he had no prior knowledge of him meant that he could not have identified him at the scene of crime. It is argued that although the witness claimed to have been at the scene of crime, he neither saw his father's attackers since he was outside the house at the time nor did he know who killed Ms. Bariho. On the contrary, Richard Natukunda (PW4) attested to Ms. Bariho's dying declaration in which the deceased purportedly identified a different person, one Kisumuruzo, as her assailant.

10. Consequently, it is proposed that since the only witness at the scene could not identify the Second Appellant and Ms. Bariho's dying declaration had identified another person altogether as her attacker, both Appellants should be acquitted. PW4's evidence that he witnessed the Appellants killing Grace Nabimanya, his four children and the other deceased people is discredited for having been contradicted by the same witness' later testimony that at 4.00pm when the murder and arson were committed he was at his home, only arriving at the scene to the burnt bodies of Grace Nabimanya and his children after the assailants had run away. In the supposed absence of forensic evidence that establishes the murder weapon used in the murder of Grace Nabimanya, it is argued that a shadow of doubt is created as to the deceased's participation in his death.

11. In any case, it is argued that there were material contradictions as to when the fatal attack took place, PW3 attesting to it having taken place at 2.00pm while PW4 put it at 4.00pm. Furthermore, whereas PW3 testified that there were no close neighbours near the torched homes, Ronald Mprirwe (PW6) testified that his home was only 100 metres from Nabimanya Grace's home. In addition, PW3's own

evidence is alleged to have been inconsistent as to whether he was present at the scene of crime given his admission that he had told the police that his father left him at one Mugabo's farm on that fateful day.

12. Finally, under *Ground 3* of the Appeal the sentence of 40 years for the offence of murder is opined to be harsh and excessive, defying the need for consistency or uniformity at sentencing. The case of **Kalibobo Jackson vs Uganda, Criminal Appeal No. 45 of 2001** (unreported) is cited, where this Court observed that if the trial judge had considered the need to maintain uniformity of sentence she would not have imposed a seventeen-year sentence for the offence of rape. Further reference is made to **Adiga vs Uganda (2021) UGCA 2** where the Court set aside a life sentence for murder and substituted it with a sentence of 19 years and 3 months imprisonment. Referenece is further made to **John Kasimbazi & Others vs Uganda, Criminal Appeal No. 167 of 2013** where a sentence of life imprisonment for murder was on appeal substituted with a 12-year term sentence.

13. Additionally, the trial court is faulted for failing to consider the mitigating factors in favour of the Appellants, including the fact that they both were first time offenders; the First Appellant was only 30 years old and a father to 5 children, while the Second Appellant was 33 years with children and a sister to look after, as well as the offences for which they were convicted having been committed by a group of people therefore the Appellants should not be made to shoulder the burden of the rest that were still at large.

14. Considering all the foregoing circumstances, it is argued that a custodial sentence of 15 years would be sufficient for the offence of murder, while one of 5 months would suffice for the offence of arson. The remand period would then be deducted from those sentences as by law required. The trial judge is criticised for not ascertaining or crediting to the Appellants the period that they had spent on remand. This is opined to have been two (2) years and seven (7) months and two years (2) and one (1) month for each of them respectively.

15. Conversely, State Counsel contends that the trial judge did evaluate the evidence before him and came to the conclusion that the Appellants had been correctly identified. In response to *Ground 1* of the Appeal, it is argued that the prosecution

discharged its duty of destroying the Appellants' defence of alibi through the evidence of PW3, PW4, PW5 and PW6, all of which placed the Appellants at the scene of the crime and proved their participation.

16. It is argued that PW3, a son to one of the deceased persons testified that while outside on the fateful day he saw about twenty people amongst whom was the First Appellant enter the deceased's house armed with pangas and knives. They found the deceased sleeping and cut him up. PW3 claimed to have heard the deceased making an alarm that they were killing him and witnessed the deceased's attackers thereafter closed the door from outside and set the house on fire with the deceased and his children inside, after which they started chasing him (PW3). The witness is opined to have properly identified the First Appellant through an identification parade and he explained that he was able to identify him as he had seen him at the scene. He maintained under cross-examination that he had seen the First Appellant at the scene of crime participating in the killing of the deceased persons.

17. It is the Respondent's contention that PW3's evidence was corroborated by PW4, who confirmed having seen both Appellants at the scene of crime. The witness maintained under cross examination that they had killed PW3's father, Grace Nabimanya and his children, as well as Monica Bariho. He testified that he saw the Appellants with pangas at the scene but they went into hiding after the incident. Further corroboration of PW3's evidence is opined to be found in the testimonies of PW5 and PW6; PW5 attesting to having found the First Appellant in hiding when he arrested him and PW6 confirming that he had seen him at the scene of crime carrying a panga.

18. In relation to the contested identification under *Ground 2* of the Appeal, it is argued that PW3 only identified the First Appellant and his identification evidence was corroborated by PW4 and PW6; while the Second Appellant was identified by PW4 whose evidence was corroborated by the evidence of the investigating officer PW5 regarding his conduct after the murder.

19. Whereas State Counsel concedes that there were some inconsistencies in this evidence, such as the time the offence was committed and the distance from the neighbours' homes, it is argued that the inconsistencies were minor and do not go

to the root of the case. Relying on **Alfred Tajar vs Uganda vs Uganda (1969) EACA Criminal Appeal No 167 of 1969**, it is argued that major contradictions and inconsistencies will result in the evidence of the witnesses being rejected unless they are satisfactorily explained, while minor ones ought to only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness.

20. In Counsel's view, the prosecution witnesses were truthful, PW3 particularly restricting his identification evidence to the First Appellant and stating honestly that he did not see the Second Appellant at the scene of crime. With regard to the inconsistencies as to the time of the attack, the Court was referred to **Makabugo Christopher vs Uganda, Criminal Appeal No. 348 of 2015**, where this Court observed that whereas the prosecution had failed to include in the indictment the actual date of the offence and none of the witnesses gave a date in their testimonies, it was understandable that neither of the prosecution witness could recall the date as all three testified three years after the event.

21. Under *Ground 3* of the Appeal, in relation to the sentence handed down to the Appellants, Counsel for the Respondent concedes that the trial Judge did not abide the provisions of Article 23(8) of the Constitution and invites this Court to invoke its powers under section 11 of the Judicature Act to deduct the period spent on remand by each of the Appellants.

22. It is nonetheless argued that save for the omission to deduct the remand period, the Appellants' sentences are consistent with existing precedents. Reference in that regard is made to **Bakubuye Muzamiru & Anor vs Uganda, Criminal Appeal No. 56 of 2015,** where the Supreme Court considered a 40-year sentence for the offence of murder to be neither harsh nor excessive, and confirmed it. Relatedly, in **Sebuliba Siraje vs Uganda, Criminal Appeal No. 575 of 2005**, this Court confirmed a life imprisonment sentence handed down to an Appellant that had been convicted on his own plea of guilty for the offence of murder whereby he cut the deceased with a panga. In the same vein, in **Florence Abbo vs Uganda, Criminal Appeal No. 168 of 2013**, this Court upheld a 40-year sentence for the offence of murder, while in **Magero Patrick vs Uganda, Criminal Appeal No. 76 of 2019**, it upheld a 45-year sentence for an Appellant that went on a wanton

shooting spree, killing one person and injuring two others. The Court did also uphold a 50-year sentence for the offence of murder in **Semaganda Sperito & Anor vs Uganda, Criminal Appeal No. 456 of 2016**.

23. On that premise, it is the State Counsel's contention that a 40-year sentence in the circumstances of this case is appropriate, from which the remand period should be deducted.

C. **Determination**

24. I propose to address *Grounds 1* and *2* of the Appeal together insofar as they both relate to the Appellants' conviction, and conclude with the separate determination of *Ground 3* of the Appeal.

25. This being a first appeal, this Court is required to review the evidence and make its own inferences of law and fact. *See Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13 – 10.* It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial Court and, while giving allowance for the fact that it has neither seen nor heard the witnesses, come to its own conclusion on that evidence. In so doing, the first appellate court must consider the evidence in its totality and not any piece thereof in isolation. It is only through such re-evaluation that it can reach its own conclusions, as distinct from merely endorsing the conclusions of the trial court. *See* ***Baguma Fred vs Uganda, Criminal Appeal No. 7 of 2004*** *and* ***Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997*** *(both, Supreme Court).*

26. The crux of the complaint in this case is that the Appellants were convicted on identification evidence that was riddled with inconsistencies and their respective alibis were ignored by the trial court. The trial judge discharged himself as follows:

> *PW3 identified A1 at the scene of crime and also at Police after arrest during an identification parade. PW3 told Court that A1 had a panga during the commission of the offences. A2 was identified by PW4 who saw him among the attackers during the commission of the offences. He also identified A1. PW4's evidence was corroborated by PW5 who told Court that he was called by PW4 who told him about the incident and among the attackers mentioned were A1 and A2. The offence was committed during the day which means that there was enough light to identify the accuse persons, PW3,*

*PW4 and PW6 were all in close proximity to the scene of crime and the accused persons were known to them for some time. PW5 told Court that after the incident A2 went into hiding for 7 months and was arrested February 2015. The circumstances of his arrest also speaks volumes since he wanted to cut with a panga the Arresting officer alleging that he thought that he was being attacked by thugs. Generally the conduct of A2 was not one of an innocent person. (**See: Uganda versus Sam Onen (1991) HCB P.7).** PW3's evidence had minor inconsistencies that did not touch the root of the case. Both accused persons denied all the 8 counts and raised the defence alibi. However, the prosecution through its witnesses managed to sufficiently place the accused persons at the scene of crime because the offences were committed during the day thus, there was sufficient lighting, the accused were known to the witness for some time and there was close proximity.*

27. The legal position on the defence of alibi was restated by the Supreme Court in **Festo Androa Asenua & Another vs Uganda (1998) UGSC 23** as follows:

> It is trite that by setting up an alibi, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. See Ntale vs. Uganda (1968) E.A. 206. In the case of R. vs. Chemulon Were Olancro (1973) 4 E.A.C.A, it was stated:
>
> "The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act." See also Ezekia vs Republic (1972) E.A. 42 at 48 on proof of alibi.

28. The defence of alibi neither negates the burden of proof upon the prosecution to prove its case to the required standard nor does it place a burden upon an accused person to so prove the truth of his/ her alibi. The only duty placed upon an accused person is '**to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act**.' Thus, the accused person must account for his/ her whereabouts during the material time a crime was committed in such a manner so as to render it impossible for him/ her to have participated in its commission. *See **R vs Chemulon Wero Olancro (1937) 4 EACA 46***. Accordingly, the present Appellants would have been under a duty to account for the time during which the present attack ensued.

29. In this case, the First Appellant testified that on 5th July 2014 when the attack happened he was at his home at Bwera, Nyabugando with his father. This alibi was

not corroborated as DW3 attested to having been with the First Appellant at his (brother's) home in a different place, namely, Kibuyiri 2, Kyegegwa ward, Mpondwe trading centre. Furthermore, the First Appellant's evidence is self-contradictory given that whereas at the onset of his testimony he names Kyabahokya village in Kasese district as his place of residence, he subsequently claims to have been at his home in another place – Bwera, Nyabugando on the day of the attack.

30. Insufficient as this evidence might be to account for the First Appellant's whereabouts at the time of the attack, it does not negate the duty upon the prosecution to place the said appellant at the scene of crime and establish his participation in the murder(s) beyond reasonable doubt. It is therefore to the identification evidence that we turn.

31. PW3 testified that he knew the First Appellant before the attack as a resident of his village against whom he bore no grudge, and on the fateful day at about 2.00pm had seen him alongside a group of about twenty people enter a house in which the deceased Grace Nabimanya, his father, slept. It was his evidence that he witnessed the group enter his father's house with pangas and knives; he thereafter heard his father shouting that he was being killed and later saw the attackers shut the door of the house and set the house ablaze. They thereupon went to a second house and killed four children aged between 3 – 8 years, before similarly setting the house ablaze. The witness attested to having thereafter fled the scene as the attackers then sought to attack him as well. He reportedly sought help from a nearby Uganda Wildlife Authority (UWA) office and upon his return to the scene of crime with some UWA Staff, they found dead burnt bodies. In a contradictory piece of evidence, the witness also testified that when his father was being burnt he was busy but later on reported the matter to the police. Be that as it may, the witness further testified that he had observed both appellants cutting a neighbour called Monica, and attested to having identified the First Appellant at a police identification parade as one of the persons that he had seen at the scene of crime.

32. Under cross examination, PW3 testified that he witnessed the attack from about 15 metres away from his father's house and saw the First Appellant cutting his father through large holes in the mud and wattle house. It was his evidence that

he had known the said Appellant for 8 years before the incident and when the attack was taking place he was standing outside with his sister but rather than send her to get help they simply made an alarm. He further testified that the nearest homestead to his father's home was very far away; the time frame between the attack on their father's home and that on their neighbours was about 20 minutes, and during that time he remained standing outside his father's house with his sister. The witness further attested to having observed six people enter the second house in his father's homestead, five of whom cut his sister, before running after him.

33. In an apparent contradiction of his evidence-in-chief, the witness conceded that he did not see who had killed Monica but maintained that the First Appellant killed his father while the other attackers killed the children. In re-examination, the witness clarified that he was able to see the First Appellant cutting his father because he was the only one of the attackers that had a panga while the rest had knives. He further clarified that he was initially with his sisters outside but they later run to the house thinking they would be safer there and left him outside. In addition, it was his evidence that the distance between the two houses was 17 metres and the entire attack took about 1 hour.

34. PW3's evidence is materially corroborated by that of PW6, who testified that he knew both appellants before the attack as they all lived in Bigando village, Kitswamba sub-county, Kasese district, while the deceased Nabimanya lived about 100 metres from his house. On the fateful day, he had seen Nabimanya enter his house at 2.00 pm then at about 2.30pm, he heard the deceased's dogs barking. On checking, PW6 saw about 20 people at the deceased's home, which had been set ablaze. He attested to having identified the First Appellant among the people present at the burning home; saw children running and enter another house and the same group set that house on fire too. He and his wife thereupon run towards a nearby Uganda Wildlife Authority (UWA) camp while making an alarm, found 2 members of staff there and returned with them to the scene of crime. It was on their return that they came face-to-face with the attackers, including the First Appellant. One of the UWA staff fired in the air prompting the attackers to flee, and PW6 then found the burnt bodies of Nabimanya and the children. He confessed no knowledge of the Second Appellant but under cross examination, states that he

had known the First Appellant for 2 years and corroborates the alarm made by PW3 with whom he later run to the UWA office, as well as the latter's evidence that the First Appellant was carrying a panga. In re-examination the witness clarifies that he did see the attackers setting Nabimanya's house on fire. PW6 further attests to having identified the First Appellant vide an identification parade held on 31st October 2014. The identification parade report was admitted in evidence as Exhibit PE1.

35. The test of correct identification in a criminal trial was laid out in the *locus classicus* of **Abdala Nabulere & Another vs Uganda, Criminal Appeal No. 9 of 1978** as follows:

> The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced. The poorer the quality, the greater the danger.

36. In this case, not only did PW3 see the First Appellant cutting his father during broad daylight through large holes (cum windows) in the mud and wattle house, his testimony that he was the only person carrying a panga is corroborated by PW6. Both witnesses had prior knowledge of the said appellant as a village-mate, and PW6 had ample time to recognise him when he came face-to-face with him at the scene of crime, before the First Appellant fled when gun shots were fired in the air. It is plausible that the witness would have been able to identify a village-mate he had known for two years at an identification parade held six months after the attack. We are satisfied, therefore, that the First Appellant was duly placed at the scene of crime and would accordingly reject his alibi.

37. On the other hand, PW4 attested to having seen both appellants killing the deceased but in a clear contradiction goes on to testify that he came to the scene of crime after the attackers had run away from the village, found the bodies of Nabimanya Grace and the children already burnt and discovered a fatally injured Monica Bariho in the maize plantation. Therefore, he did not see the attackers during the murderous attack. Under cross-examination, however, he purports to

have seen the Second Appellant running with the attackers from the deceased Nabimanya's home to the deceased Bariho's home; concedes that he did not see either of the appellants cutting the deceased, but claims to have seen the Second Appellant in the group of people holding pangas that entered the maize plantation where Bariho was discovered. On the other hand, PW5 – the police officer that arrested the Second Appellant, attested to having acted on information from PW4 and in his view, the said appellant's guilt was confirmed by his suspicious conduct after the attack, having found him in hiding when he arrested him.

38. Clearly, PW4 did not see either of the appellants cutting Nabimanya. Proof of the Second Appellant's participation in the attack is compounded by the inconsistencies and contradictions in PW4's evidence. His evidence on whether he had gotten to the scene of crime before or after the attack on Nabimanya and Bariho raises significant doubts as to the credibility of his evidence. He initially attests to having found the deceased persons already dead, then turns around to claim to have seen the Second Appellant running from Nabimanya's home to Bariho's home only to further contradict himself further by saying the attackers run into a maize plantation. These contradictions cannot be classified as minor contradictions touching as they do on whether he did in fact identify the Second Appellant. This contradictory identification was the basis for the Second Appellant's arrest by PW5.

39. To begin with, PW4's incoherent and non-cogent evidence lends credence to the strong alibi presented by the Second Appellant. The Second Appellant testified that on the day of the attack he was at home in Bigando from morning to evening, with Abdu Kanyama (DW4) and one Baluku, drying maize that he had bought from the trading centre. DW4 corroborates this alibi, testifying that on the day of the attack he and the Second Appellant (his childhood friend) had bought maize together, had lunch and parted in the evening. Therefore, the Second Appellant does so account for his time as to render it impossible for him to have participated in the attack.

40. More importantly, as quite correctly proposed by learned State Counsel, in **Alfred Tajar vs Uganda vs Uganda** (supra) it was held that major contradictions and

inconsistencies that are satisfactorily explained would result in the evidence of the witnesses being rejected. Consequently, finding no explanation herein for the major inconsistencies and contradictions identified in that witness' testimony, we do reject PW4's identification evidence. The rejection of PW4's evidence thus leaves the Second Appellant's participation in the attack unproven.

41. Consequently, we find that the First Appellant was properly convicted for the offences of murder and arson, but would acquit the Second Appellant of the offences as charged. It is our finding that PW3 and PW6 did place the First Appellant at the scene of crime for the 5 counts of murder in respect of Corporal Grace Nabimanya, Joseline Tarindeka, Rosette Karikunda, Enid Nabagye and Pofia Karungi; as well as the additional count of arson in respect of the two houses. However, we do not find the evidence on record sufficient to sustain his conviction for the 2 additional counts of murder by hacking in respect of Alice Akankunda and Monica Bariho. He is therefore acquitted of those charges.

42. We now turn to *Ground 3* of the Appeal. The trial court discharged itself as follows at sentencing.

> *The convicts are first offenders and have been on remand for some time. They are family people and this was a group of about 20 people. On counts I - VII, I sentence each of the convicts to 40 years' imprisonment and on count VIII, I sentence each of the convicts to 5 years imprisonment. The sentences will run concurrently.*

43. Having found in our determination of *Grounds 1* and *2* above that the First Appellant was wrongly convicted of the murder of Alice Akankunda and Monica Bariho, we consider it our duty to interfere with the sentence imposed on him on that premise. Furthermore, considering that it has been conceded that the trial judge did not take into account the period that the appellant had spent on remand, it becomes our inescapable duty to resentence the appellant. See **Kamya Johnson Wavamuno vs Uganda, Criminal Appeal No. 16 of 2000**, **Kiwalabye vs Uganda, Criminal Appeal No.143 of 2001** and **Rwabugande Moses vs Uganda, Criminal Appeal No. 25 of 2014**.

44. We do therefore set aside the sentence imposed on the First Appellant and, pursuant to section 11 of the Judicature At, Cap. 13, undertake the re-sentencing of the said appellant.

45. We take cognisance of the argument advanced by State Counsel that murder and arson are rampant within the Fort Portal magisterial jurisdiction and the maximum sentence for murder is death. It is equally acknowledged that at sentencing the First Appellant was a young 30-year old first offender that would have been capable of reform, who was a part of a larger group of attackers and had spent two years and seven months on remand. We are similarly mindful of the need for consistency in sentencing in cases of a similar nature.

46. In **Kamya Abdullah & Others vs Uganda, Criminal Appeal No. 24 of 2015**, the Supreme Court reduced a sentence of 30-year term sentence for murder to 18 years' imprisonment for each Appellant in an appeal that related to mob justice. It was held:

> Without downplaying the seriousness of offences committed by a mob by way of enforcing their misguided form of justice, a wrong practice in our communities which admittedly must be discouraged, we cannot ignore the fact that, in terms of sheer criminality, **such people cannot and should not be put on the same plane in sentencing as those who plan their crimes and execute them in cold blood**. The crowd which assembled at the scene of crime, according to the evidence, consisted of about 50 people. Most of these people participated in beating the deceased to death. Police managed to arrest only a few who included the Appellants as identified by the prosecution witness.' (Our Emphasis)

47. Relatedly, in **Mudwa vs Uganda, Criminal Appeal No. 363 of 2017,** this Court held that it was injudicious to sentence the Appellant as though the offence he had been convicted of had not been committed in circumstances of mob justice involving other offenders. The Court reduced his sentence from 30 years to 20 years, exclusive of the remand period. Furthermore, in **Tumwesigye Rauben vs Uganda, Criminal Appeal No 181 of 2013**, this Court similarly reduced a 30-year custodial sentence to 20 years exclusive of the remand period in respect of an Appellant that had together with others beaten the deceased to death.

48. However, we do not take lightly the fact that an entire family was wiped out by the brazen murder of a father and his young children. A 22-year custodial sentence is therefore considered to be more appropriate for the five counts of murder in this case. With regard to the charge of arson, the 5-year sentence imposed by the trial court is upheld, both sentences to run concurrently. The two years and seven months spent on remand are deducted from that sentence yielding a custodial term sentence of 19 years and 5 months imprisonment from the date of conviction.

D. **Disposition**

49. In the result, this Appeal partially succeeds in the following terms:

I. The First Appellant's conviction for 5 counts of murder and 1 count of arson is upheld, but his conviction for the murder of Alice Atukunda and Monica Bariho is set aside and the sentence therefor quashed.

II. The 40-year custodial sentence imposed on the First Appellant by the trial court for 7 counts of murder is hereby substituted with a sentence of 19 years and 5 months' imprisonment for each of the 5 counts of murder.

III. The 5-year sentence imposed on the First Appellant by the trial court for the offence of arson is upheld.

IV. The sentences are to run concurrently.

V. The Second Appellant's conviction for 7 counts of murder and 1 count of arson is hereby quashed, his sentence therefor is set aside and he is accordingly discharged forthwith unless held on any other lawful charge(s).

It is so ordered.

Dated and delivered at Kampala this ..5th.. day of ..March.., 2024.

Fredrick M. S. Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal