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**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 776 OF 2014**

*(CORAM: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi JJA)*

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- 1. **KAKAIRE YAKOUB**
- 2. **SENYONJO DOUGLAS**
- 3. **KYALIMPA GIDEON**
- 4. **JINGO EDWARD**
- 5. **LUBEGA EDWARD**.....: **APPELLANTS**

15

**VERSUS**

**UGANDA**.....: **RESPONDENT**

*(An appeal from the decision of the High Court at Kampala before Her Lordship Hon. Lady Justice Elizabeth Jane Alivdza, J dated 30<sup>th</sup> July, 2014 in Mitigation Criminal Session Case No. 0143 of 2014)*

**JUDGMENT OF THE COURT**

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**Introduction**

The appellants herein were indicted with the offences of aggravated robbery and murder contrary to sections 285, 188 & 189 respectively of the Penal Code Act. They were tried and convicted by Katutsi, J in High Court Criminal Session Case No. 013 of 2002 and were sentenced to death which was a mandatory penalty for murder at the time.

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Following the Supreme Court decision in **Attorney General vs Susan Kigula and 417 others, Constitutional Application No. 03 of 2006**, which abolished the mandatory death sentence, the case file was remitted to the High Court for mitigation hearing and re-sentencing before Hon. Lady Justice Elizabeth Jane Alivdza, J. Having heard the submissions of both counsel, the learned re-sentencing Judge sentenced the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> appellants to 21

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years and 7 months imprisonment, whereas the 4<sup>th</sup> appellant was sentenced to 27 years



5 imprisonment. The 4<sup>th</sup> appellant being dissatisfied with the decision of the re-sentencing Judge, appealed to this Court against sentence only on one ground that:

*"The learned trial Judge erred in law and fact when she based her sentence on the appellant's behavior in prison."*

10 The facts giving rise to this appeal as far as we have ascertained from the court record are that on 03/02/2001 the appellants robbed Lt. Makoko Umaru (the deceased) of household items including a TV set, radio cassette, clothes, brief case, degree gown and a coat and that prior to the commission of the offence, fired shots at him which eventually led to his death. The appellants were arrested and taken to the Central Police Station and were charged with murder and robbery.

15 At the hearing of this appeal, Mr. Andrew Ssebugwawo represented the 4<sup>th</sup> appellant on State Brief while Ms. Jacqueline Okui Senior State Attorney from the office of the Director Public Prosecutions represented the respondent.

20 At the commencement of the hearing counsel for the 4<sup>th</sup> appellant informed court that the appellants were supposed to be 5, however, according to the return of the Prisons Authority filed in this Court, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> appellants served their sentences and were released. He prayed that the appeal against the 4 appellants be dismissed under rule 73 (6) of the Rules of this Court. Counsel also sought for leave to appeal against sentence which was granted.

25 Counsel submitted that the sentencing Judge erred by relying on the evidence of the appellant's misconduct in prison and imposed on him a harsher sentence than that imposed on his co-convicts. He prayed that the appeal be allowed, sentence set aside and an appropriate sentence be imposed so that the appellant is also released. He prayed for uniformity of sentence with the co-convicts.

5 Conversely, counsel for the respondent conceded that the re-sentencing Judge erred by considering the appellant's post-conviction conduct during sentencing. He added it was also irregular for her to take into account the post-conviction period spent in prison while sentencing the appellant. She referred to the case of ***Bandebeho vs Uganda, CACA No. 319/2014*** and submitted that the sentence was illegal and should therefore be set aside and  
10 a fresh sentence imposed. She prayed that the appellant be sentenced to 35 years imprisonment on each count less the period of 1 year and 6 months he spent on remand.

### **Court's consideration**

We are aware that as the first appellate Court, under ***Rule 30 of the Judicature (Court of Appeal Rules) Directions***, we have a duty to re-appraise the evidence and draw  
15 inferences of fact and the circumstances of the case even as we consider an appeal against sentence only. Also see: ***Baguma Fred vs Uganda, SCCA No. 7 of 2004***.

The appellate court in exercising its power to review sentences is guided by the principle stated in ***Kizito Senkula vs Uganda, SCCA No. 24 of 2001*** that;

20 " ...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  
25 that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

5 Counsel for the appellant submitted that the sentencing Judge during sentencing imposed a harsher sentence on the appellant than his co-convicts which was conceded to by counsel for the respondent.

We note at page 86 of the court record that the sentencing Judge in arriving at the sentence of 27 years, stated as follows:

10 *“The convict is aged 35 years and is youthful offender. His prison report shows poor judgment and conduct. I sentence him to 40 years imprisonment taking into consideration his bad behavior in prison. Since he has been in custody for 13 years and 5 months. He will serve 27 years imprisonment sentence to run concurrently on both counts. It is hoped that with good behavior, he will qualify for remission of*  
15 *sentence.”*

We note from the court record that each of the appellant’s co-convicts were sentenced to 35 years imprisonment whereas the appellant was sentenced to 40 years imprisonment. The reason the sentencing Judge gave is that the appellant’s report shows *“poor judgment and conduct”* and as such he deserved 40 years for his *“bad behavior in prison”*. In our considered  
20 view this was wrong in principle and it indeed occasioned a miscarriage of justice to the appellant as he was given a harsher sentence than those of his co-convict. We therefore find it necessary to interfere with the discretion of the sentencing Judge.

We also accept the submission of counsel for the appellant, which was conceded to by counsel for the respondent, that the sentence of 40 years imposed upon the appellant was  
25 harsh and manifestly excessive in the circumstances.

Counsel for the respondent also pointed out that it was irregular for the sentencing Judge to consider the post-conviction period spent in prison while sentencing the appellant. We note that the sentencing Judge considered a period of 13 years and 5 months as the period the



5 appellant had been in custody and that is the period she took into account while imposing a sentence of 27 years imprisonment on the appellant. However, according to the court record, the appellant was arrested on 6/2/2001 and convicted on 13/2/2003 which means he spent 2 years and 7 days on remand.

10 Pursuant to Article 23 (8) of the Constitution which enjoins court while passing sentence to take into account the period a convict spent in lawful custody prior to completion of his or her trial, that is the period which ought to have been taken into account while sentencing the appellant. It was therefore irregular to add the post-conviction period to that period as the sentence would run from the date of conviction.

15 For the above reasons, we set aside the sentence of 27 years imprisonment and invoke section 11 of the Judicature Act which gives this Court the powers, authority and jurisdiction as that of the trial Court to impose an appropriate sentence of its own. In so doing, we shall take into account the range of sentences for similar offences as well as the aggravating factors and the mitigating factors.

20 The mitigating factors presented were that the appellant was a first time offender of youthful age; he has taken character rehabilitation courses in prison; he is remorseful and was a family man with 2 children and siblings. If given a second chance, he will be able to go back and impact the society positively. On the aggravating side, it was submitted that the facts show that the crime was meticulously premeditated and executed; the crime was committed in furtherance of a common purpose or conspiracy which was to rob the house of the deceased; 25 both offences of murder and robbery were committed in the presence of the deceased's spouse, Kibirimu Annet; the children lost their dad and the wife lost her husband and property. Further, that the manner in which the crime was committed left a very deep scar not only on the family but the community as well; the weapon used in the execution was a gun which was



5 recovered from the convict's place of abode; the crime of murder and aggravated robbery are rampant and there is a high degree of impunity. Counsel prayed for a deterrent sentence.

As regards range of sentences in similar offences, in ***Abaasa Johnson and anor vs Uganda, CACA No. 33 of 2010***, the appellants were convicted of both murder and aggravated robbery and sentenced to life imprisonment for murder and 15 years on each of the 3 counts of  
10 aggravated robbery. On appeal, this Court set aside the sentence of life imprisonment and sentenced the appellants to 35 years imprisonment for the offence of murder but confirmed the sentence of 15 years imprisonment on each of the 3 counts of aggravated robbery.

In ***Tumusiime Obed and anor vs Uganda, CACA No. 149 of 2010***, both appellants were convicted of murder and aggravated robbery and were sentenced to 16 years and 14 years  
15 imprisonment respectively on each count. On appeal, this Court observed that the sentences were inordinately too low and amounted to a miscarriage of justice since the murder was premeditated and was compounded with aggravated robbery. Court further observed that had the issue of severity of sentence been raised by either party, it would have been inclined to enhance the sentence in respect of murder to at least 35 years imprisonment.

20 Considering the sentencing range for both murder and aggravated robbery in the above decided cases, we are of the view that, a sentence of 23 years imprisonment on each count will meet the ends of justice. However, we are enjoined under Article 23 (8) of the Constitution to deduct the period of 2 years and 7 days the appellant spent on remand.

In the premises, we sentence the appellant to 20 years, 11 months and 3 weeks imprisonment  
25 on each count of murder and robbery to be served from the date of his conviction, that is, 13/02/2003. The sentences are to run concurrently.

We so order.



5 Dated at **Kampala** this 2<sup>nd</sup> day of July 2019

Elizabeth Musoke  
**JUSTICE OF APPEAL**

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Hellen Obura  
**JUSTICE OF APPEAL**

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Ezekiel Muhanguzi  
**JUSTICE OF APPEAL**

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27/19

Appellants asked Seny 4<sup>th</sup> appeal.  
Mrs. NOKESA Diana holding brief of  
counsel for Seny of the appellants.  
Mr. Seny: dea.

CPA: document delivered in open court in the  
presence of the adm.  
The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> appellants or Seny  
have denied the 4<sup>th</sup> Seny.