



they abandoned the appeal against conviction; and, with leave of Court, they have appealed against sentence only. The grounds of appeal, as are contained in the amended memorandum of appeal, are that: -

1. *The learned trial judge erred, both in law and fact, when he sentenced the appellants without considering the mitigating factors.*
2. *The sentence of life imprisonment was harsh and manifestly excessive in the circumstances of the case."*

Learned Counsel James Bwatota, who argued the appeal for the appellants, submitted that in the exercise of his sentencing discretion, the learned trial judge failed to take into account the mitigating factors such as the age of the appellants, and the fact that the 1<sup>st</sup> appellant was a first offender. He contended that life imprisonment for the offence of murder was, in the circumstance of the case, harsh and manifestly excessive. He urged us to reduce the sentence for murder to 12 years for the 1<sup>st</sup> appellant who was a first offender; and 25 years for the 2<sup>nd</sup> appellant who had a previous record of conviction. He also prayed for reduction of the sentences in the conviction for robbery.

Senior State Attorney Adrine Asingwire, learned Counsel for the respondent, however supported the sentences as being appropriate in the circumstances of the case owing to the

aggravated nature of the offences committed; in that in the process of committing the armed robbery, the appellants had also committed murder. She also pointed out that the learned trial judge fully justified the imposition of the life sentences, as well as that for the aggravated robbery. Counsel contended that there is no reason for us to interfere with the sentences imposed by the learned trial judge; and therefore, she urged us to uphold and confirm them.

The facts of the case are that on the 4<sup>th</sup> day of November 2004, at Kayanja along Rushere Kashonyi road, Nyabushozi County, then in Mbarara District, the appellants, and others who did not face trial, murdered Private Akoragye Arthur a soldier attached to the Presidential Guard Brigade. They also robbed the soldier and some other persons of valuable items, including a gun. At the *allocutus*, conducted after the conviction, the State Prosecutor informed Court that the 1<sup>st</sup> appellant was a first offender; while the 2<sup>nd</sup> appellant had earlier served sentence for unlawful possession of a firearm. Counsel for the 2<sup>nd</sup> appellant pointed out that the convicts had both been on remand for five years before conviction.

For their part, the 1<sup>st</sup> appellant informed Court that he had three children of his own and others he was looking after. He therefore pleaded with court to exercise leniency in sentencing him. The 2<sup>nd</sup> appellant also told Court that he had five children and elderly parents who were dependent on

him; so he prayed for leniency from Court to enable him look after them. The trial judge however sentenced both of them to life imprisonment for the murder they were each convicted of; and then to 15 (fifteen) years in prison in each of the three counts of armed robbery, for which they had each been convicted. Each of the appellants has appealed against these sentences.

It is now a well-settled position in law, that this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with sentence, where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstance - (*see James vs R. (1950) 18 E.A.C.A. 147, Ogalo s/o Owoura vs R. (1954) 24 E.A.C.A. 270, Kizito Senkula vs Uganda - S.C. Crim. Appeal No. 24 of 2001, Bashir Ssali vs Uganda - S.C. Crim. Appeal No. 40 of 2003, and Ninsiima Gilbert vs Uganda - C.A. Crim. Appeal No. 180 of 2010*).

This Court will however not interfere with sentence imposed by a trial Court, on the ground that it would have imposed a different sentence. While it restated, in the case of *Kyalimpa Edward vs Uganda - S.C. Crim. Appeal No. 10 of 1995*, that the primary responsibility for sentencing is on the trial Court, the Supreme Court made further clarification on the

principles governing interference by the appellate Court on sentencing, 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 court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270, R. vs Mohamedali Jamal (1948) 15 E.A.C.A. 126."*

The Supreme Court expanded these principles further in *Livingstone Kakooza vs Uganda - S.C. Crim. Appeal No. 17 of 1993*, by adding that an appellate Court will also interfere with sentence where the trial Court has '*overlooked some material factor*'. It also advised that '*sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 270.*' In the case of *Kiwalabye Bernard vs Uganda - S.C. Crim. Appeal No. 143 of 2001*, the Court clarified further on the principles governing intervention with sentence; by stating as follows: -

*"The appellate Court is not to interfere with the sentence imposed by the 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, or where a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle."*

Further to this, in the exercise of its sentencing discretion, although Court should be mindful that cases are not committed under the same circumstance, it must maintain consistency or uniformity in sentencing; see *Kalibobo Jackson vs Uganda - C.A. Crim. Appeal No. 45 of 2001*, *Naturinda Tamson vs Uganda - C.A. Crim. Appeal No. 13 of 2011*, *Kyalimpa Edward vs U. (supra)*, and *Livingstone Kakooza vs Uganda (supra)*. The Supreme Court also emphasised this point in *Mbunya Godfrey vs Uganda - S.C. Crim. Appeal No. 4 of 2011*, where it stated that:

*"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."*

Therefore, for the determination of appropriate sentences for the offences in the case before us, we need to seek guidance from sentences handed down for offences whose commission bear similarity with it. In *Attorney General vs Susan Kigula & Others - S.C. Const. Appeal No. 1 of 2005*, the

Court pointed out that murders are not committed under the same circumstance; and that murderers vary in character, as some are first offenders, and some are remorseful. Court should consider these factors while exercising its sentencing discretion. We wish to add here that this observation by the Supreme Court is relevant to any other crime.

In *Mbunya Godfrey vs Uganda* case (supra), on the ground that the appellant therein was a first offender, the Supreme Court set aside the sentence of death and substituted therefor '*a long term of imprisonment*', which was 25 (twenty five) years on the Appellant for murdering his own wife, as the appropriate sentence in the circumstance of the case. It took into account the need to afford the appellant, a first offender, the opportunity to reform and reconcile with the community where he had committed the offence. The Court cited the *Akbar Hussein Godi vs Uganda - S.C. Crim. Appeal No. 3 of 2013*, and the *Attorney General vs Susan Kigula & Others* case (supra), each of which was a case involving murder of a spouse; and the appellants were sentenced to twenty five and twenty years respectively.

Court therefore urged, in the *Mbunya Godfrey vs Uganda* case (supra), that Courts should '*try as much as possible to have consistency in sentencing*'. In *Kyaterekera George William vs Uganda - C.A. Crim. Appeal No. 113 of 2010*, the

Appellant had stabbed the deceased on the chest to death. This Court confirmed the sentence of 30 (thirty) years in prison, imposed by the trial Court. In *Kisitu Majaidin alias Mpata vs Uganda - C.A. Crim. Appeal No. 28 of 2007*, the trial Court had imposed sentence of 30 (thirty) years on the Appellant who had murdered his own mother. This Court confirmed the sentence.

In *Uwihayimana Molly vs Uganda - C.A. Crim. Appeal No. 103 of 2009*, the trial Court had handed down a death sentence on the appellant for murdering her husband. However, this Court reduced the sentence to 30 (thirty) years in prison. In *Ayikanying Charles vs Uganda - C.A. Crim. Appeal No. 8 of 2012*, the trial Court had imposed a sentence of 25 (twenty-five) years on the Appellant for stabbing the victim to death over a land dispute. This Court confirmed the sentence. In *Atuku Margaret Opii vs U. - C.A. Crim. Appeal No. 123 of 2008*, the appellant, a single mother of 8 (eight) children, who had drowned an infant whose body was never recovered, had been sentenced to death by the trial Court. This Court reduced the sentence to 20 (twenty) years in prison.

In like manner, in <sup>Korobel</sup> ~~Koreta~~ *Joseph vs Uganda - C.A. Crim. Appeal No. 243 of 2013*, the appellant had been sentenced to 25 (twenty-five) years imprisonment for murder. However, this Court reduced the sentence to 14 (fourteen) years; for the reason that the Appellant was advanced in age, and had



shown remorse. A clear range of sentencing is thus discernible, which can guide Courts in the exercise of their sentencing discretion in the circumstance of each case.

In the *Ninsiima Gilbert vs Uganda* case (supra), this Court distinguished the case of *Bukenya Joseph vs Uganda - C.A. Crim. Appeal No. 222 of 2003*, where it had confirmed a sentence of life imprisonment. It noted that the case was decided when life sentence was 20 years under the Prisons Act. In effect, the convict in that case had been sentenced to 20 (twenty) years; which justified this Court's confirmation of the life sentence then. In the *Bashir Ssali vs Uganda* case (supra), the Supreme Court itself raised and addressed the issue of legality of the sentence imposed on the Appellant.

This was because the trial Court had not complied with *Article 23 (8) of the Constitution*, which enjoins Courts, during sentencing, to take into account the period a convict has spent in lawful custody. The Court then took into account the period the Appellant had spent on remand by the time of his conviction, and, accordingly, reduced the sentence. In like manner, in the case of *Kizito Senkula vs Uganda - S.C. Crim. Appeal No. 24 Of 2001*, although the Supreme Court found the sentence of 15 (fifteen) years in prison for defilement to be appropriate in the circumstance, it reduced the sentence to 13 (thirteen) years, for the reason that it was not clear

whether the trial Court had taken into account the 2 (two) years the Appellant had been on remand.

In the instant case before us, in sentencing the appellants to life imprisonment, the trial judge did not comply with the provision of clause (8) of Article 23 of the Constitution, to take into account the period the appellants had taken in lawful custody before conviction. We believe the learned trial judge was right in doing so. He had already decided to sentence the appellants to life imprisonment; hence, it would be to no avail to take into account whatever period they had spent on remand, since it would not affect the life sentence anyway. We must nonetheless determine whether the trial judge was justified in handing down a sentence of life imprisonment on the appellants for the murder.

In his sentencing ruling, the learned trial judge had this to say: -

*"Court stands surprised that both convicts are concerned about looking after their own children. They have forgotten that the child of Arthur Akoragye who was born a day or so after Akoragye's death never saw his father, nor obtained any support from him. Court believes that these convicts are very dangerous convicts for if they can go as far as killing a guard at Rwakitura, they can, sure enough, place their fingers into the mouth of the lion. They deserve being put away for a very long time.*

*The evidence shows that both did not devote their efforts and concentration upon nation building or leaving others to do so. Their hobby was to stage robbing sprees in various parts of the country. No one will miss them. Court sentences them to life imprisonment in respect of the offence of murder in count No.1. court also sentences each of them to imprisonment for 15 years in respect of each of the 3 counts of robbery contrary to sections 285 and 286 (2) of the Penal Code Act .... The sentences of imprisonment for 15 years ... to run concurrently."*

Two things stand out from this sentence ruling. First, is that the statement by the learned trial judge that the appellants murdered the late Akoragye at Rwakitura, and therefore they were dangerously daring enough to insert their hands in the mouth of the lion, is not borne out by the evidence adduced in Court. True, on the evidence, the late Akoragye was a guard at the President's home at Rwakitura; but he was not killed while on duty at Rwakitura. He was killed while he was in a public transport; and, on the evidence, it is apparent that the appellants never knew that he was a soldier.

Second, is the statement that the appellants' hobby was to stage robbing sprees all over the country. This was also not borne out by the evidence on record. The evidence on record is that the appellants were involved in one robbery only. As the old English adage goes, *'one swallow does not make a*

*summer.*' However, what is noteworthy in the two observations by the learned trial judge is that they evidently influenced him to impose the life sentence on the appellants for the murder of Akoragye, and the 15 years for each of the ~~there~~ <sup>three</sup> counts of robbery. However, we find that life sentence is harsh and manifestly excessive in the circumstance of the murder herein; so we set the sentences aside.

We believe that a lesser but long custodial sentence, commensurate with the gravity of the offence, will serve as deterrence for those who would want to engage in the vile enterprise of wanton taking of human life. After giving allowance for the five years the appellants had spent on remand at the time of their conviction, we reduce each of their sentences for the murder they were convicted of, to 35 (thirty five) years in prison. This sentence runs from the date of their conviction. However, for the sentences of 15 years in jail, for the appellants' convictions in the three counts of armed robbery, the learned trial judge was under duty to comply with clause (8) of Article 23 of the Constitution.

His failure to do so rendered the sentences in this regard illegal; and for which we hereby set them aside and substitute our own sentences therefor. There are a host of decisions on aggravated robbery, to guide us and enable us reach an appropriate sentence in the instant case before us. *In Kutegana Steven vs Uganda - S.C. Crim. Appeal No. 53 of 2000,*

the Supreme Court upheld a death sentence for aggravated robbery. However, this appears to be an isolated and rare case. The bulk of the authorities on the matter point to a different trend in Court decisions in similar matters. In *Ouke Sam vs Uganda - C.A. Crim. Appeal No. 251 of 2002*, this Court confirmed a sentence of 9 years imposed on the appellant for aggravated robbery.

In *Adama Jino vs Uganda - C.A. Crim. Appeal No. 50 of 2006*, the appellant had been sentenced to life imprisonment for aggravated robbery. This Court reduced the sentence to 15 years. In *Kusemererwa & Anor vs Uganda - C.A. Crim. Appeal No. 83 of 2010*, the appellants had been sentenced to 20 years for aggravated robbery where shs. 2,000,000/= (Two million) was stolen and not recovered. This Court however reduced the sentence to 13 years. In *Rutabingwa James vs Uganda - C.A. Crim. Appeal No. 57 of 2011*, this Court confirmed a sentence of 18 years for aggravated robbery. In doing so, it took into account the fact that the appellant had spent up to five years on remand before conviction.

In the instant case before us, the appellants did not only threaten to, but actually used a deadly weapon in the robbery; with fatal consequences. We find that after giving allowance for the five years they had spent on remand before conviction, a sentence of 15 (fifteen) years imprisonment on each of the three counts of armed robbery

for which they were convicted, is appropriate punishment in the circumstances of this case. Accordingly then, as stated above, the appellants shall serve 35 years in prison for the murder conviction, and 15 years for the triple convictions for aggravated robbery. The sentences shall all run concurrently from the date of conviction by the trial Court.

Dated at Mbarara; this 7<sup>th</sup> day of December 2016



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1. HON. MR. JUSTICE KENNETH KAKURU, J.A.



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2. HON. MR. JUSTICE SIMON MUGENYI BYABAKAMA, J.A.



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3. HON. MR. JUSTICE ALFONSE C. OWINY - DOLLO, J.A.