THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MBARARA

CRIMINAL APPEAL N0. 090 OF 2009

Arising from Criminal Session Case No. 112 of 2006 before Hon. Justice Lawrence Gidudu at Mbarara dated 31-3-2009.

1. AHIMBISIBWE NDAKURA RODGERS
2. TWESIGYE STANLEY ::::::::::::APPELLANTS

VS

UGANDA::**RESPONDENT**

Coram: **Hon. Mr. Justice Kenneth Kakuru, JA**
Hon. Mr. Justice Byabakama Mugenyi Simon, JA
Hon. Mr. Justice Alfonse C. Owiny-Dollo, JA

JUDGMENT OF THE COURT

This is an appeal against the conviction and sentence by Hon. Justice Gidudu on 31-3-2009, whereby he convicted both appellants of murder contrary to **Sections 188 and 189 of the Penal Code Act** in Count I and aggravated robbery contrary to **Sections 285 and 286 (2)** of the same Act in count II. They were respectively sentenced to life imprisonment on each count and the sentences were to run concurrently.

The background facts to this appeal, as set out and accepted by the trial Judge were that, the deceased Turyakira Wenesirasi owned a motorcycle registration No. UDD 382G that he operated to carry passengers (boda-boda) for a fee. On the 20th day of January 2005 the appellants contrived a plot with one Rogers to steal the motorcycle. The appellants hired the deceased to take them from Kamubeizi stage to Kabuyanda. When they arrived at a certain spot where Rogers was lying in wait, the deceased was directed to stop and ordered to surrender the motorcycle. Rogers cut the deceased several times with a panga inflicting severe injuries resulting into death. The appellants then took away the motorcycle, removed the number plate and rode it to Kabuyanda. Both the motorcycle and its number plate were subsequently recovered and traced to the appellants. The appellants were arrested, tried, and convicted as indicated above.

Being dissatisfied with the conviction and sentence, they filed this appeal on the following grounds.

1. ***The learned trial Judge erred both in law and fact when he convicted the appellants without properly considering the evidence of the appellant's participation thereby arriving at a wrong conclusion.***
2. ***The learned trial Judge erred both in law and fact when he did not consider the mitigating factors of the appellant's age thereby arriving at a wrong decision.***

3. *That the sentence of life imprisonment was harsh and manifestly excessive in the circumstances of the case.*

At the hearing, the appellants were represented by learned
65 counsel James Bwatota on state brief while Karugyishuri Anthony, learned State Attorney, appeared for the respondent.

Mr. Bwatota argued ground 1 separately while grounds 2 and
70 3 were argued together. On ground 1, he submitted that the learned trial Judge erred when he found that the appellants had participated in the commission of the offences without considering their respective defences of *alibi*. He contended that the appellants were arrested from different places and
75 there was no evidence placing them on the scene of crime. Counsel further argued that the confession statement of the 2nd appellant Twesigye Stanley was irregularly admitted in evidence without conducting a trial within a trial. In the absence of direct evidence, counsel submitted, the
80 prosecution evidence, seeking to link the appellants to the crime, was weak and incapable of discharging the burden imposed upon the prosecution, to prove the case beyond reasonable doubt. Counsel prayed Court to quash the conviction.

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Arguing grounds 2 and 3 in the alternative, learned Counsel submitted that the sentences imposed by the Trial Judge were illegal considering that the appellants were minors at

the time of commission of the offences. Although this fact was
90 brought to the attention of the trial Judge at the time of sentencing, counsel argued, the trial Judge did not address himself to the matter but rather concluded that the appellants were adults in dock. In counsel's view, the sentencing of the appellants was subject to the provisions of
95 **the Children Act, Cap 59.**

On severity of sentence, Counsel argued that if this Court finds that the appellants were adults at the time of commission of the offences, the sentence of life imprisonment
100 should be considered as harsh and manifestly excessive in the circumstances of this case. He pointed out that the trial Judge did not consider the mitigating factors which were that; the appellants were first offenders, they were still young and capable of reform and, had spent a considerable period
105 on remand. Counsel submitted that the failure to take into account the remand period rendered the sentences illegal. He implored Court to set aside the same.

Counsel for the respondent opposed the appeal and supported both conviction and sentence. On ground 1, he
110 submitted that there was ample circumstantial evidence that pointed to the guilt of the appellants. The said evidence was premised on the deceased's stolen motorcycle that was found to have been in the possession of the appellants immediately after the deceased had been killed. There is also
115 evidence that it was the 2nd appellant who led the police,

upon his arrest to the recovery of the number plate of the motorcycle. Counsel contended that these two factors irresistibly pointed to the appellants as having participated in the murder of the deceased and robbery of his motorcycle.
120 He prayed Court to uphold the conviction of both appellants.

On the alternative ground of sentence, counsel submitted that there was direct evidence regarding the age of each appellant at the time the offences were committed and
125 there was ample material from which the trial Judge rightly concluded the appellants were adults. These included the police charge sheet as well as the medical examination report (PF 24) in respect of the 1st appellant, where the examining doctor described him as an adult.

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On severity of sentence, counsel submitted that the trial Judge took into consideration all the mitigating and aggravating factors before arriving at the sentences. Considering that the appellants were convicted of murder
135 and aggravated robbery which carry the maximum sentence of death upon conviction, the sentence of life imprisonment was not harsh or manifestly excessive in the circumstances of this case. He implored Court not to interfere with the sentence and cited the decision of this Court in **Budebo Kasito Vs**
140 **Uganda, Criminal Appeal No. 94 of 2009**, where the Court confirmed a sentence of life imprisonment for the appellant

who had been convicted of murder and aggravated robbery.

145 Counsel prayed Court to dismiss the appeal, uphold the conviction and confirm the sentences.

We have carefully considered the submissions of both Counsel and the evidence on record. This is a first appeal and 150 as such this Court is required under **Rule 30(1) of the Rules of this Court** to re-appraise the evidence and make its inferences on issues of law and fact-: see also **Pandya Vs R [1957] EA 336**; **Bogere Moses and another Vs Uganda, Criminal Appeal No. 1 of 1997 (SC); Kifamunte Vs Uganda, 155 Criminal Appeal 10 of 1997(SC).**

We shall, in accordance with the above authorities, proceed to re-appraise the evidence and to make our own inferences on both issues of law and fact.

160 The gist of the submmions of the appellant's counsel on ground 1 is that the circumstantial evidence was weak and incapable of proving beyond reasonable doubt that the appellants had participated in the murder of the deceased and robbery of the motorcycle.

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We note that the conviction of the appellants was hinged mainly on the deceased's motorcycle and its number plate which were recovered from different places. The trial Judge

considered the evidence that linked the appellants to the
170 movement of the motorcycle from the scene of crime to the two locations where the motorcycle and number plate were found. The trial Judge carefully considered the doctrine of recent possession and came to the conclusion the appellants could not have been mere receivers of the motorcycle but
175 were participants in the robbery and murder of the deceased.

The testimony of Birwomuhangi Narris (PW3) was to the effect he last saw the deceased, his young brother, on 20-1-2015. At about 6:00pm the deceased left home for Kamubeize Trading
180 Centre on his motorcycle, registration No. UDD 382G Town Mate Shafta make. He did not return and PW3 only saw his body lying by the roadside, some eight miles away in another sub-county, on 21.1.2005. The motorcycle was missing.

Kangye Chris (PW2) testified that on 21.1.2005, at about
185 2:30am, he was at home when a boda boda cyclist reported that he had come across a body of a person lying in a pool of blood on the road. The body was subsequently identified by PW3 as that of Turyakira.

190 The testimony of Asingwire Peter (PW4) was that on the 21-1-2005, the appellants and a certain girl came to their home on a numberless motorcycle. Ahimbisibwe (1st appellant) explained that the number plate had fallen off and they left it at Kabuyanda. The following day, the 1st appellant borrowed

shs, 37,000/- from PW4 for purposes of servicing and fuelling the motorcycle. One of the tyres had a puncture and the appellants left the motorcycle in the hands of PW4, promising to come back for the same. They never returned till he handed it over to the police. The evidence of PW4 was corroborated by that of Kamukama (PW7).

The testimony of D/CPL Mugarura (PW5) was to the effect that on the 22.1.2005, Tumwesigye (2nd appellant) revealed that the motorcycle was in Andrew's village, Mbarara Town. He led the Police to a certain room but there was no motorcycle. Instead the 2nd appellant pulled out a number plate, No. UDD 382G, that was under the bed. The number plate was for the deceased's motorcycle.

Upon our evaluation of evidence, we are satisfied that the appellants were in possession of the motorcycle immediately after the deceased was killed. They spent the night at the home of PW4 and PW7 where they abandoned the motorcycle.

Where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eyewitness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently

verifiable, while the latter solely depends on the credibility of the eyewitness. See **Bogere Moses and another Vs Uganda, Cr. Appeal No. 1 of 1997 (Supra)**.

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In the instant case, both appellants denied any connection with the motorcycle in their respective defences. They therefore offered no explanation for its possession as overwhelmingly told by PW4 and PW7. Given the short 230 duration between the time the deceased was last seen alive with the motorcycle and the time the appellants were seen in possession of the same, coupled with the absence of an explanation regarding its possession, the possibility that the appellants were mere receivers of stolen property is strongly 235 ruled out. Rather, the incontrovertible evidence of possession of the motorcycle constituted strong circumstantial evidence that irresistibly pointed to the appellants as having participated in killing of the deceased and theft of his motorcycle. The said evidence clearly destroyed their 240 defence of *alibi*.

Counsel for the appellant also raised the issue of the confession statement of the 2nd appellant which was admitted in evidence without conducting a trial-within-a trial, following a no objection by counsel for the appellant. The 245 question whether such confession can be used to convict an accused person has been considered by the Supreme Court in several cases. In **Omaria Chandia, Vs Uganda, Criminal Appeal No. 23 of 2001 (SCU)** a confession statement allegedly

made by the appellant was admitted in evidence without objection from counsel for the appellant. The Supreme Court had this to say:

> ***"..................an unchallenged admission of such a statement is bound to be prejudicial to the accused and to put the plea of not guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that counsel for the accused person has not challenged or has conceded to its admissibility. Unless the trial Court ascertains from the accused person that he or she admits having made the confession statement voluntarily, the Court ought to hold a trial-within a trial to determine its admissibility. See; Kawoya Joseph Vs Uganda, Criminal Appeal No. 50 of 1999 (SCU) (unreported); Edward Kawoya Vs Uganda. Criminal Appeal N0. 4 of 1999 (SCU) (unreported) and Kwoba Vs Uganda, Criminal Appeal N0. 2 of 2000 (CU) unreported.***
>
> ***Therefore, and with respect, we think that it was not proper for the learned trial Judge to admit in evidence the confession statement (exh. P3) of the accused on the basis that his counsel did not object***".

In view of the above decision, we find that it was improper for the learned trial Judge to admit in evidence the confession statement of the 2nd appellant on the basis of no objection by his counsel.

275 We, however, note that the trial Judge appeared to have distanced himself from putting any reliance on the said confession when he stated in the judgment that:

> ***" I would approach the confession tendered by PW8 with even more caution because I did not subject it to a trial***
> 280 ***within-a trial, the defence having failed to challenge it before it was tendered........***
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> ***The confession was not worth the effort to tender it because the circumstantial evidence on the record does not leave room to doubt if the two accused were at the***
> 285 ***scene and participated in the prosecution of an unlawful purpose".***

The confession therefore was not a basis for the trial Judge's decision. We find that even without the confession statement, the circumstantial evidence we have highlighted above was
290 sufficient to sustain the convictions against both appellants.

On the evidence before us, we are satisfied the appellants shared a common intention in the commission of the two offences and that they were rightly convicted by the trial
295 Court. We accordingly find no merit in ground 1 and it fails.

Ground 2 and 3 are concerned with the sentences imposed by the trial Court.

It is now a well settled principle of law that an appellate Court
300 can only interfere with a sentence imposed by the trial Court

where, in the exercise of its discretion, the resultant sentence was manifestly excessive or so low as to amount to a miscarriage of justice, or where a trial Court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle-: see; **James S/o Yoram Vs Rex [1950] 18 EACA 149; Wailagala Mohammed Puni Vs Uganda, Court of Appeal Criminal Appeal No. 133 of 2005**; **Kiwalabye Vs Uganda, Criminal Appeal No. 143 of 2001**.

In the matter before us, the main bone of contention on sentence is whether the appellants were minors or adults at the time of commission of the offences.

Section 2 of the Children Act defines a child as a person below the age 18 years. **Section 104(2) of the Act** provides that where a child is convicted of an offence by the High Court, the child shall be remitted to the Family and Children Court for an appropriate order.

The record in the instant case reveals that the 1st appellant was medically examined on PF 24 (Exh. PE2) on 21-11-2007 but the examining officer did not state or specify his apparent age and merely described him as "adult". This implies he was 18 or above. In his defence given on oath on 29-1-2009, the 1st appellant stated that he was aged 17 years.

The 2nd appellant stated under affirmation that he was aged 20 years on 29.1.2009. No PF 24 was tendered in evidence
330 with regard to his medical examination, if at all he was examined.

The police charge sheet, dated 24-11-2007, reveals that both appellants were aged 18 years respectively at the time it was
335 prepared. Considering all these aspects, it is evident the appellants were below 18 years when the offences were committed (2005).

The burden lay on the prosecution to prove each of the appellants was 18 years or above at the time. The failure on
340 the part of the prosecution to adduce incontrovertible evidence to show the appellants were adults in 2005 left unchallenged the irresistible inference to the effect that they were minors in 2005.

345 While sentencing the appellant, the trial Judge considered the issue of age as follows;

> ***" There is a dispute as to how old they were when the offence was committed. All disputed the medical examination report on PF 24 about their***
> 350 ***age while A1 stated he was 20 years during his testimony.............***
>
> ***In Court A2 stated he was 17 years while at the Police in 2007, he was said to be 18 years and***

medical evidence "P2" put his age at 18 in 2007 according to the Police and Dr. Sendi referred to A2 as an adult. Both are however adults in the dock."

With due respect to the learned trial Judge, having realised that there was doubt regarding the age of the appellants at the time of commission of the offences, he should have resolved the said doubt in favour of the appellants. Besides, there was sufficient material, as we have pointed out, that could lead to the finding that they were below 18 years. Being minors, the Court had no jurisdiction to pass sentence on them and should have referred them to the Family and Children Court as provided for under **S. 104 (2) of the Children Act**. The sentence of 20 years imprisonment was therefore illegal and we set it aside.

The appellants have been in custody on the illegal sentence since 31-3-2009, a period of 7 years and 8 months. The maximum sentence the Family and Children Court can impose on a child convicted of an offence punishable by death is three years imprisonment –: see; **Section 94 (1) (g) of the Act**. Since the period the appellants have spent in custody far exceeds the lawful sentence, it would not serve the ends of justice if this Court were to refer the matter to the Family and Children Court.

380 In the circumstances of this case, the only plausible order we are inclined to make is that the appellants be released from custody and set free forthwith.

We therefore allow this appeal in part. The appeal against 385 conviction is hereby dismissed and the appeal against sentence is allowed in the above stated terms.

We so order.

390 **DATED AT MBARARA THIS...6th...DAY OF DECEMBER 2016.**

HON. JUSTICE KENNETH KAKURU,
395 **JUSTICE OF APPEAL**

HON. JUSTICE BYABAKAMA MUGENYI SIMON,
400 **JUSTICE OF APPEAL**

HON. JUSTICE ALFONSE C. OWINY-DOLLO
405 **JUSTICE OF APPEAL**

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