THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 155 OF 2009

1. **OPOLOT JUSTINE**
2. **AGAMET RICHARD alias ACMENT RICHARD..APPELLANTS**

VERSUS

UGANDA……..RESPONDENT

(Appeal from conviction, sentence and order of High Court of Uganda holden at Kumi by The Honourable Mr. Justice Musota Steven delivered on 28/07/2009).

CORAM: HON. JUSTICE A.S. NSHIMYE, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGEMENT OF THE COURT

This is an appeal from conviction, sentence and order at the High Court of Uganda holden at Kumi by the Honourable Mr. Justice Musota Steven dated 28th July 2009 in which the appellants were convicted of murder on two counts and attempted murder on the 3rd Count and sentenced to life imprisonment on both counts 1 and 2 and 15 years imprisonment each on count three.

The appellants being aggrieved and dissatisfied appealed to this court on the following grounds;-

1. *The trial judge erred in law and fact when he failed to properly*
   evaluate the evidence hence coming to a wrong conclusion which led to a miscarriage of justice.

2. *The learned trial judge erred in law and fact when he held that the appellants had been properly identified and placed at the scene of crime.*

3. *The trial judge erred in law and fact when he relied on evidence of children of tender years without corroboration and this led to a miscarriage of justice.*

4. *The learned trial magistrate erred in law and fact when exercise of his judicial discretion imposed harsh and excessive sentences.*

It appears that reference to trial Magistrate on ground 4 above was a clerical error and we shall substitute it with trial Judge.

At the hearing of this appeal learned counsel **Mr. Chris Bakiza** appeared for both applicants. **Ms. Vickie Nalusenke** appeared for the respondent.

Mr. Bakiza adopted the facts of the case as set out by the learned trial Judge in his Judgment. The brief facts as set out by the trial Judge are as follows;-

"The case for the prosecution is that on 28th January 2007 at Kabwalin village in Kachumbala sub-county, Bukedea District, Kulume Janet Amit the deceased in count 1 was sleeping in her house with her four children. She heard noise outside and something being poured on the roof of her house which she suspected to be petrol.

She woke up her children and lit a candle. When her door was kicked in order to force it open she made an alarm and together with her children took refuge in her bedroom.

The door was forced open and the assailants gained entry in welding pangas. Two assailants are said to have entered and one straight away hacked Kulume Janet to death. They turned to one of the children called Amos Orieno who was also hacked to death. They tried to hack third child called Anguria Bosco but left him for the dead. Prosecution alleges that as all this was happening the remaining two children to wit Alupo and Olebo were in hiding and watching what was going on. One child, Alupo Janet the eldest aged about 17 years hid under her parent's matrimonial bed and Olebo Naphtali then aged 15 years hid behind maize sacks kept in
the bedroom. Another child Anguria Bosco the subject of count 3 didnot hide and was hacked during the incident and he survived with grave cut wounds.

According to the prosecution the three surviving children managed to identify the assailants as the two accused persons with the aid of the candle light in the room. And as the attack was going on, Olebo Naphtali managed to escape while making an alarm and informed their uncle Odong James about what happened.

They came back to the scene and found the two dead bodies and a badly cut child. The assailants had left.

Post mortems were conducted on the deceased indicating that they died of haemorrhagic shock due to the multiple cut wounds and over bleeding. Prosecution contends that the accused persons had a common intention to commit the alleged offence and were properly identified.

Mr. Bakiza submitted that the appellants do not contest the findings of the trial in respect of the ingredients of the offences but only contest the participation of the appellants.

In this appeal it is contended that the appellants were not the persons responsible for the commission of the offences of murder and attempted murder and they set up the defence of *alibi*.

Mr. Bakiza urged grounds 1, 2 and 3 of the appeal together and ground 4 separately.

He submitted on ground one that the learned trial Judge erred when he considered the evidence of the prosecution in isolation

of that of the defence. He submitted further that the evidence of the prosecution must also disapprove the evidence of the defence, before it can be taken that the case has been proved beyond reasonable doubt.

Learned counsel submitted that the second appellant had testified that at the time the offences were committed Kabwalin village, in Kachumbala sub-county in Bukedea District he was away in Kampala several miles away.

He submitted that, the *alibi* set up by the appellant was never disapproved by the defence. He submitted that having set up the defence of *alibi* it was up to the prosecution to disapprove it, but it failed to do so.

He submitted that the learned trial Judge erred when he relied on evidence of a child of tender years PW3 who was 16 years old at the time the offence was committed.

He submitted that this witness' testimony should not have been relied upon by the learned trial Judge, as it was not possible that this witness could recall an incident that had taken peace two years before she gave testimony in court. He submitted that no Police statement had been recorded from PW3 at the time the offence was committed. Learned counsel submitted that this witness is more likely to have been motivated to testify against the appellant because of an existing family dispute between the appellant and the family of the witness.

Learned counsel submitted further that PW3 was simply repeating what other witnesses had stated and her evidence therefore should never have been relied upon by the learned trial Judge. He submitted further that the evidence of PW3 required corroboration and that there was no such corroboration.

Learned counsel submitted that the sentence imposed was illegal as the period the appellant has spent on remand was not deducted or taken into consideration by the learned trial Judge while sentencing the appellants. That the above notwithstanding the sentences imposed upon the appellants were harsh and excessive in the circumstances.

Ms. Nalusenke for the respondent opposed the appeal and called upon this court to uphold both the conviction and sentence.

She submitted that the appellants were well known to the witnesses. PW3 clearly stated that the 1st appellant is her brother while the 2nd appellant is her uncle. That the witnesses clearly and positively identified the appellant as the assailants.

That she saw the 1st appellant cut her mother on the head and on the breast. This is consistent with the postmortem report. She submitted further that the learned trial Judge accepted the evidence of the prosecution and believed the witnesses. That the attack lasted a long period of about one hour. That the PW3 was able to see what was happening from a short distance under the

bed. That there was enough light to enable the witness identity the appellants who were very well know to her.

That the evidence which required corroboration was that of PW5 and that corroboration was provided by the evidence of the PW3 and PW5. That the evidence of all the witnesses was consistent.

She submitted that the learned Judge correctly rejected the defence of *alibi* having accepted the prosecution case. Learned counsel prayed for the appeal to be dismissed.

In reply Mr. Bakiza contended that the evidence of the prosecution witnesses appear consistent because it was rehearsed.

He retaliated his earlier submissions that the conditions at the time were not favaourable for correct identification. He cited the case of ***Bogere Moses versus Uganda Supreme Court (Criminal Appeal No. 1 of 1997).***

This court as a first appellate court has a duty to re-evaluate the whole evidence before the trial court and come to its own conclusion.

In the case of ***Kifamunte Henry vs Uganda (Criminal Appeal No 10 of 1997)*** the Supreme Court observed as follows:-

> ***"We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of***

the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire ys Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5."

The duty to reappraise the evidence as a first appellant court is also set out in Rule 30 of the Rules of this Court which provides as follows:-

Rule 30

“Power to reappraise evidence and to take additional evidence.

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-

(a) reappraise the evidence and draw inferences of fact.”

We shall accordingly proceed to re-evaluate the evidence as whole as the law requires.

Mr. Bakiza learned counsel for the appellants argued grounds 1, 2, and 3 of appeal together.

Ground one of appeal is set out as follows.

“The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence hence coming to a wrong conclusion which led to miscarriage of justice.”

This ground is too general and does not specify in what way and in which specific areas the learned trial Judge failed to evaluate the evidence. It does not set out the wrong conclusion arrived at by the learned trial Judge.

This ground offends the provision of Rule 86(1) of the Rules of this Court which provides as follows:-

“86(1) . Contents of *memorandum* ***of appeal.***

(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make.

The requirement of **Rule 86 (1)** is in our view mandatory and not regulatory. It is intended to ensure that the court adjudicates on specific issues complained of in the appeal and to prevent abuse of court process. The flaunting of this rule allows the appellant to ambush the respondent with issues he or she would not have contemplated on account of the general nature of such grounds of appeal.

We accordingly strike it out.

The stricking out of this ground has no bearing on this appeal as we have already noted earlier in this Judgment that this court as a first appellant court is required to reevaluate the whole evidence and come to its own conclusion.

It was contended by the appellant in ground two of appeal that: - **“the learned trial Judge erred in law and fact when he held that the appellants had been properly identified and placed at the scene of crime”.**

The appellants’ case revolved around the issue of identification. Both appellants set out a defence of *alibi*. The learned trial Judge

rejected that defence and held that it could not stand in view of the fact that both appellants had been properly identified and placed at the scene of crime by the witnesses.

On the issue of *alibi,* the Supreme Court in the case of ***Bogere Moses, Kamba Robert versus Uganda Supreme Curt (Criminal Appeal No. 1 of 1997***) held as follows;-

> ***"The need for care stressed in the above passage is not required in respect of a single eye witness only but is necessary even where there are more than one witness where the basic issue is that of identification. This point was stressed in- Abdala Nablllere & Another Vs Uganda Cr. App. No. 9 of l978. (1979) HCB 77 in the following passage in the Judgment.***
>
> ***Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All the factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is***

reduced but the poorer the quality the greater the danger……..

When the quality is good, as for example, when the identification is made after a long person of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provide the court adequately warns itself of the special need of caution.(emphasis added)

In Moses Kasana vs Ugnada Cr. App. No. 12 of 1981 (1992-93) HCB 47 this court which cited the two foregoing decisions with approval, underlined the need for supportive evidence where the condition favaouring correct identification are difficult
It said P.48

> ***"Where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased , naming of the assailant to those who answered the alarm, and of fabricated alibi"***

We have to point out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence of for proving sexual offences. (See George William Kalvesubula vs Uganda (Supra). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an

eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose."

In this particular case there were more than one identifying witnesses. Three witnesses testified to have identified both appellants as the assailants who attacked their home in the early hour of 20th January 2007. PW5 Anguria Bosco was 11 years old when he testified two years after the incident. The issue in this particular case therefore is not that of a single identifying witness but rather it is about correctness of the identifications.

In his evaluation the learned trial Judge at pages 13-25 of his Judgment observed and concluded as follows:-

"After a careful consideration of the above evidence I must state that I was struck by the consistence and demeanour PW3. I observed this girl testify and I was persuaded to believe her story. She was truthful and withstood cross-examination Her testimony was remotely corroborated by the evidence of her younger brother Olebo Naphtali, PW4 that their mother woke them up when assailants attacked them home. When the door to their house was forced open, A 1 Agamet Richard entered first and hacked 'their mother to death. PW4 observed this when he was hidden behind sacks of maize in his mother's bedroom. PW3 and PW4 observed for a long time what was going on and saw A2 Opolot come in after being called by A 1. When Opolot came in he cut Orieno to death and gravely cut

Anguria Bosco. I also believed Anguria Bosco's revelation of how the accused, Opolot handed to him his hat and told him that he tells his father that he from Kampala is the one who had killed the mother and him. Opolot then mercilessly hacked the young boy and left him for the dead. These children knew both accused very well and since the incident took almost one hour. According to PW3, and the bedroom where all the children took refuge with their mother was lit with a candle, and the accused did not see. PW3 hidden under her mother's bed and PW4behind the sacks of maize, yet PW5 was encountered by A2 Opolot, I am satisfied that PW3, PW4 and PW5 were able to identify their assailants.

This is not a case of a single identifying witness. The three witnesses who were victims of the accused persons properly identified them. According to Mr. Isodo for the accused persons, conditions were not favourable for correct identification given that all prosecution eye witnesses were young and were trying to hide from the mess. That prosecution evidence of identification should therefore be treated with caution. That his clients raised a strong defence of alibi that they were in Kampala at the time. Mr. Okello the Learned Resident State Attorney submitted to the contrary. He said his consistent evidence showed a positive identification of the

two accused persons. The witnesses narrated what took place and what each accused did during the attack. That the witnesses were aided by a candle light and the attack did not happen in a flash.

On the appellants defence of alibi the learned trial Judge observed and concluded as follows at page 17 of his Judgment

"***The respective defences of alibi put forth by each accused did not in any way dissuade me from maintaining my belief in the strong prosecution evidence which squarely placed the two accused persons at the scene of crime. The accused persons were not strangers to the eye witnesses. The attack of the victims took a long time. PW3 and PW4 hid in vantage positions and saw the accused persons properly. PW5 was confronted by A2 Opolot. He revealed the words he told him before he hacked him. PW3 heard these very words from under the bed where she had hidden herself. This strong prosecution evidence waters down the defences of alibi. The defence evidence appeared concocted and an afterthought. I did not believe it both A 1 and A2 that they were on normal duty in Kampala because there was no basis to do so.***

PW3 was 18 years old when she testified in court in June 2009. She was therefore 16 years old when incident took place in January 2007. She testified in examination in chief as follows:-

> ***"After, they kicked the door and entered the house. The door was forced open. Then Agamet Richard came and cut my mother with a panga. I recognized Agamet because there was light. At that time I had hidden under the bed. He cut the right of the head, on the breasts and on the head. The other child was pg20 mother. He was also killed. Naphtali Olemo ran. As Agamet finished killing, he called uncle you also come. He called Opolot who began cutting my brother Orieno Amos. After, Opolot cut Anguria Bosco. He told Bosco that "I, the dad from Kampala is the one who came to kill the mother and you also." After they moved outside. The whole attack took like one hour."***

In cross examination she testified as follows;-

> ***"I was scared but I identified them. The space was there and the light was there. I identified them and the way they were dressed. Agment had a black over coat and black trousers and black shoes. He was all black. Opolot had a black***

cap like the one of Museveni. He was also black even his over coat. I looked and saw them cut the people."

In his Judgment already referred to above, the learned Judge states that he was struck by the consistence and demeanor of this witness. He found her to be truthful and that she had withstood cross examination.

PW4 16 years old in 2009 when he testified in court he was therefore 14 years old when the incident took place in 2009. He stated as follows in examination in chief.

"We made an alarm and they cut the door and forced it open. Agment came in and straight away cut mother. There was light. I had hidden near the sacks of maize and I saw what was happening. This was in the bedroom. The Opolot Justice also entered and started cutting my other brother called Orieno Amos. When I saw Opolot I managed to sneak out and ran away"

In cross examination the witness stated that he was scared at that time, but did not cover his face. That he had watched as they killed his mother.

PW5 was 11 years in 2009 when he testified and was only 9 years when the incident occurred. He testified in examination in chief as follows:-

> ***"They kicked the door. We run to mother's bedroom. The Richard came and cut mother using a panga. Then "father" Opolot cut me and he gave me his hat. He told me to tell, the father from Kampala that it is Opolot who came to kill us. The mother's room had light so I saw them. Opolot cut me three times. After cutting me they left.***

In cross examination this witness sated that the PW3 was under the bed. That the 1st appellant Oploto is the one who cut Orieno Amos and is the same person who cut the witness also.

In this particular case we find that there were factors and conditions unfavourable to correct identification. The attack took place at night. Although all the witnesses say the room was lit, by a candle it still appears it was not well lit. The witnesses were all very young. They must have been extremely scared on account of the brutality of the attack on their mother and brothers.

However, there are also factors favouring correct identification. The attackers were very well known to witnesses. They were very close relatives. They were identified by each witness immediately they entered the house. The witnesses were all in the house, the distance between the witness and the attackers was very short.

The witnesses were able to identify the second appellant by voice when he called out the 1st appellant. This evidence was never challenged.

In cross examination PW3 stated as follows:-

> "***The lamp was a local lamp 'Todooba'….. We were all in one room. I was scared. My mum lit the candle in her bed room and left it lighting in her room."***

Although the witnesses describes the light as emanating from "a lamp, a candle, a *"tadooba".* It appears that their mother lit a wick lamp. A wick lamp is known as a *"tadooba".* It is not a candle although it is sometimes referred to as such. It is a Kerosene lamp that burns a cotton or other fiber wick and produces more light then a wax candle. We have no doubt therefore that the room was lit well enough to enable the witnesses identify correctly their assailants who were very well known to them.

The evidence of PW3 is to the effect that the attack took about one hour. It could probably have been less. But this was never challenged. A period on one hour or even half an hour is very long period, sufficient enough for one to identify an assailant who is well known to him or her.

The learned trial Judge found the witnesses credible and believed them. We have found no reason to fault the finding of the trial Judge in his regard. We accordingly uphold them.

Both appellants raised a defence of *alibi*. The learned trial Judge rejected their defences. At pages 16 of his Judgment the learned trial Judge states as follows;-

> "***"This conclusion leads me to consideration of the defences of alibi put forward by each of the accused persons. Having believed the prosecution evidence that the eye witnesses positively identified A 1 and A2 the assailants. I am unable to believe the defence stones that they were in Kampala at the time of offence. It is trite that once an accused person puts in place a defence of alibi he has no duty to prove it. The duty to disprove the defence of alibi lies on the prosecution."***

We agree with the learned trial Judge's evaluation of evidence as set out above. We also agree with his conclusion. A person cannot be in two places at the same time. The learned Judge having believed the prosecution witnesses and having found that

the appellants had both been placed at the scene of crime the Judge had no option but to reject the appellants *alibi.*

It is not necessary for the prosecution to adduce any further evidence to disapprove the *alibi* having placed the appellants on the scene of the crime.

Be that as it may, the defence of *alibi* set out by the appellants does not appear to have been credible. The first appellant stated in his testimony in court that he was on duty as a security guard on the night of 28/01/2007.

That he was guarding Madidas Hotel in Kampala and has signed for a gun the evening before and signed out the next morning at 6 am. However, no other evidence was brought to prove this, in view of the strong prosecution evidence putting him on the scene of crime.

He stated that he had traveled for Kampala to Kachumbala for burial of the deceased person on a motorcycle and the journey took 4 hours. The second appellant put the time a 5 hours. It is possible that the appellants could have traveled from Kampala to the scene of crime and the back within a period of 8- 10 hours.

Similarly we do not find the 2nd appellant's *alibi* to have been credible at all for the same reasons.

In any event, the defence in this particular case set up the defence of the *alibi* after the closure of the prosecution case. It would not therefore have been possible for the prosecution to produce other evidence disapprove the *alibi* at this late stage of the trial.

The defence of *alibi* to be credible ought to be set out at the earliest stage of investigations. In ***R vs Sukha Singh S/o Waziri Singh & other [1939] 6 EACA 145.*** It was observed as follows:-

> ***"If a person is accused of anything and his defence is a alibi, he should bring formed that alibi as soon as he can because, firstly if he does not bring it forward until months afterwards there is natural doubt as to whether he has not been preparing it in the interval, and secondly if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***

We reiterate the observation made by the Supreme Court in ***Festo Androa Asenua and Kakooza Joseph Denis vs Uganda Supreme Court (Criminal Application No.1 of 1998)*** in which the court first observed that law in respect of the defence of *alibi* was challenged in the United Kingdom, Under the Criminal Justice Act of 1967.

That Act requires an accused person who intends to put up a defence of *alibi* to do so within a prescribed period of time. The Supreme Court then went on to observe as follows:-

> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the***
> ***prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late.***
>
> ***Although for the time being there is no Statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the U.K. Statute cited above, such belated disclosure must go to the credibility of the defence. We would therefore, strongly recommend that a Statutory Provision of similar effect to Section 11 of the United Kingdom Act ought to be made part of our Criminal Justice."***

We agree with above observations made by the Supreme Court.

We also note that the appellants did not formulate any ground of appeal in respect of the defence of *alibi*. Nonetheless we have considered it as it was conversed by both parties in this court.

We therefore, find no merit in the second ground of appeal and we dismiss it accordingly.

The third ground of appeal is set out in the memorandum of appeal as follows;-

> "***The trial judge erred in law and fact when he relied on evidence of children of tender years without corroboration and this led to a miscarriage of justice."***

Section 40(3) of the Trial On Indictments Act Cap 23 provides as follows:-

> ***40(3)***
> ***"Where in any proceedings any child of tender years***
> ***called as a witness does not, in the opinion of the court, understand the nature of an oath, his or her evidence may be received, though not given upon oath, if, in the opinion of the court, he or she is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; but where evidence admitted by virtue of this subsection is given on behalf of the prosecution, the accused shall not be liable to be convicted unless the evidence is corroborated by some other material evidence in support thereof implicating him or her."***

Although the Act does not define the expression *'a child of tender years'* a number of decisions of this court and the Supreme Court have defined the expression to mean a child of any age or apparent age under 14 years in absence of any special

circumstances. See ***Nyondo Mohamed vs Uganda Court of Appeal (Criminal Appeal No. 198 of 2004), Mukasa versus Uganda Supreme Court (Criminal Appeal 21 of 1993)***

In this particular case PW3 was 18 years old when she testified and PW4 was 16 years old when she testified. The evidence of both witnesses was sufficient to sustain a conviction against both appellants.

Be that as it may, evidence of PW5 did corroborate the evidence of PW3 and PW4, even if that evidence could not stand un corroborated. See ***Patrick Akol versus Uganda Criminal Appeal No. 23 of 1992 and Nyondo Mohamed vs Uganda*** (Supra).

We find no merit whatsoever in this ground of appeal and it is accordingly dismissed.

In the result this ground of appeal also fails.

The forth and the last ground of appeal relates to sentence. It was contended by the appellants that sentence imposed by the learned trial Judge was illegal as it contravened Article 23 (8) of the Constitution. That the period the appellants had spent on remand was not taken into account by the learned trial Judge when he imposed a sentence of imprisonment upon the appellants.

Article 23 (8) of the Constitution provides as follows;-

> ***"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."***

Before passing sentence the learned trial Judge noted as follows:

> ***"Sentence and Reasons therefore:***
>
> ***While sentencing each of the convicts, I will consider the respective submission by the learned Resident State Attorney for the maximum sentence and that of Mr. Isodo learned Counsel for the convicts for a lenient sentence. I will consider the time each of the convicts has spent on remand. I note that the convicts committed grave double murder and attempted to kill one of their victims in count 3. The circumstances under which the offences were committed were exceptionally grave. The mode of execution of the offences showed no serious provocation. The actions of the convicts were callous, premeditated and inexcusable."***

We find that the learned trial Judge took into consideration the 2 year period the appellants has spent on remand.

In **Bukenya Joseph v Uganda Supreme Court Criminal Appeal No 17 of 2010**, the Supreme Court held as follows:-

> ***"It does not mean that taking the remand period into account <u>should be done mathematically such as subtracting that period from the sentence that Court would give</u>. But it must be considered and that consideration must be noted in the judgment."(Emphasis ours).***

The Supreme Court also held in **Kizito Senkula v Uganda Supreme Court Criminal Appeal No 24 of 2001** that :-

> ***"taking into account does not mean an arithmetic exercise"***

We are satisfied that the learned trial Judge complied with the standard set by the Supreme Court in the **Bukenya** and **Kizito Senkula** cases (supra) in the Constitution. He clearly took into account the period that the appellant had spent on remand during sentencing.

We however, note that the Judgment of the High Court was delivered on 27th July 2009. This was before the Supreme Court

pronounced itself in the case of ***Tigo Stephen vs Uganda, Supreme Court (Criminal Appeal No. 8 of 2009)*** (unreported) on 10th May 2011. Before then, the thinking and belief was that imprisonment for life or life imprisonment meant 20 years in prison.

It is our view that when the learned trial Judge was sentencing the appellants in 2009, he was of the view and belief that imprisonment for life meant that the appellants would spend 20 years in prison and not the rest of their lives.

In **Tigo's case** (Supra) the Supreme Court observed as follows:-

> ***"We are satisfied that the trial Judge intended to impose a sentence of imprisonment for twenty years… We uphold a sentence of twenty years imprisonment."***

This particular issue was not addressed by either counsel when this appeal came up for hearing. However, being an issue of law this court has power and a duty to raise it on its own motion and dispose of it.

Accordingly we hereby set aside the sentence of life imprisonment imposed upon each of the appellants in count 1 and count 2.

We hereby substitute the said sentences with a sentence of 20 years imprisonment.

The 1st appellant shall therefore serve a sentence of 20 years imprisonment on count 1 and also on count 2.

The 2nd respondent shall also serve a sentence of 20 years imprisonment on count 1 and also on count 2.

The sentence of 15 years imprisonment imposed upon each of the appellants on count 3 of 15 years imprisonment is hereby confirmed.

We also order that the sentences shall run consecutively.

We so order.

Dated at **Kampala** this **1st** of **July** 2014.

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HON. JUSTICE A.S. NSHIMYE

JUSTICE OF APPEAL

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HON. MR. JUSTICE RICHARD BUTEERA

JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL