THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Kakuru, Mutangula Kibeedi & Mulyagonja, JJA

CRIMINAL APPEAL NO. 228 OF 2017

1. SSEMAKULA MUHAMMED
2. SUUNA JOSEPH
3. JURUA FAITH
4. MUGERWA FAROUK
5. NAMUTEBI IRENE
6. NASANGA ZAINABU — **APPELLANTS**
7. LUBEGA DONOZIO
8. ALI KASULE KIRUMIRA
9. MUWONGE JULIUS
10. KASULE JOHN VIANNEY JOMBWE

VERSUS

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

[Appeal from the decision of Hon. Justice Dr. Joseph Murangira, J., dated 5th October, 2012 in Kampala Criminal Session Case No. 138/2016]

JUDGEMENT OF THE COURT

Introduction

This is an appeal from the decision of the High Court of Uganda sitting at Entebbe, in which the trial judge convicted the appellants on one count of murder and 16 counts of aggravated robbery, on the 5th October 2012. He sentenced all of them to 35 years' imprisonment for murder and 35 years' imprisonment for aggravated robbery, both sentences to run concurrently.

The facts that were accepted by the trial judge were that, on 21st August, 2014, the appellants and others still at large, armed with sticks, *pangas*,

iron bars, hammers and other weapons broke into several homes at Bwebajja Village in Wakiso District. They stole money, telephones and other electronic items from the occupants and before, during and after the thefts, they assaulted and injured the victims.

The trial judge also found that the appellants in the course of the robberies, caused the death of Sekitto Lawrence, by strangulation. The robberies were reported to the Police which arrived at the scene of the crimes soon after the robbers departed.

The injured victims were taken to various hospitals and treated for their injuries. However, some of them sustained long term injuries from the assaults, while others were forced to leave the area in fear of the robbers.

Investigations by tracking communications on one of the telephones stolen led to the arrest of the appellants, first through the person who had the telephone and later, an associate of the same person. The appellants were arrested, indicted and prosecuted for the offences.

The appellants each denied the charges. But the trial judge found that there was sufficient evidence and so convicted all of them for aggravated robbery and murder and sentenced them each to 35 years imprisonment for each of the offences. Being dissatisfied with both conviction and sentence, they appealed to this court on the grounds stated in their supplementary memorandum of appeal filed on 24th March 2021, which were as follows:

1. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on admission of a charge and caution statement thereby arriving at a wrong conclusion.
2. The learned trial judge erred in law and fact in sentencing A9 without holding a trial within a trial to determine whether he was a juvenile at the time of the commission of the offence which occasioned a miscarriage of justice to him.

3. The learned trial judge erred in law and fact when he sentenced the appellants to harsh and excessive sentences.

Representation

At the hearing of the appeal, the appellants were represented by Mr. Kafuko Ntuyo, learned counsel on State Brief. The respondent was represented by Ms. Sherifah Nalwanga, Chief State Attorney. The accused persons were not present in court due to Covid-19 control procedures. However, they followed the proceedings in court via video link to Luzira Prison.

Before the hearing of the appeal, counsel were instructed to file written arguments which they did. The appellants' counsel filed his submissions on 24th March 2021, to which the respondent's counsel filed a reply on the 28th March 2021. The appeal was disposed of on the basis of written arguments only.

Consideration of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules (SI 13-10). It is to reappraise the whole of the evidence before the trial court and draw its own inferences of fact. The court then comes to its own decision on the facts and the law, but must be cautious of the fact that it did not observe and hear the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**).

That being the duty of this court, we shall now proceed to re-appraise the whole of the evidence on record with regard to the grievances that the appellant set out in their memorandum of appeal. We considered the submissions filed by counsel, the authorities that they cited and others not cited that were relevant to the case. We disposed of the grounds in the order that they were set out in the memorandum of

appeal. We summarised the submissions of counsel on each ground of appeal immediately before disposing of the particular ground of appeal.

Ground 1

This was the complaint that the trial judge did not properly evaluate the evidence on record when he admitted a charge and caution statement, and that as a result, he came to wrong conclusions.

Submissions of counsel

In that regard, Mr Kafuko Ntuyo submitted that during his cross-examination, Mugerwa Farouk, the 4th appellant, stated that CID wrote his statement and told him to append his signature on it. That as a result, he just wrote his name. Further that Lubega Donozio, the 7th appellant denied knowledge of the police statement, and stated that he told the police officer that he knew nothing about the incident in Bwebajja. Counsel then submitted that the testimonies of the two appellants cast doubt on the fact that the charge and caution statements were made voluntarily. That as a result, there was need for a trial within a trial before the statements could be admitted in evidence.

Counsel referred us to the decision in **Mumbere Julius v Uganda, Supreme Court Criminal Appeal No. 15 of 2014,** in which the court relied on the decision in **Amos Binuge v Uganda, Criminal Appeal No. 23 of 1989**, for the dicta that when the admissibility of an extra judicial statement is challenged, the accused must be given a chance to establish his grounds of rejection through a trial within a trial.

The appellants' counsel further referred us to the decisions in **Beigana Kanoni Willy v Uganda, Supreme Court Criminal Appeal No. 26 of 2009** were it was held, relying on **Kawoya Joseph v Uganda, Supreme Court Criminal Appeal No 50 of 1999** and **Omaria Chandia v Uganda, Supreme Court Criminal Appeal No. 23 of 2001**, that the trial court must take caution before admitting a confession in evidence where the

accused person denies the charge. Further that when the accused's counsel does not object to such a confession, it is proper for the judge to ascertain from the accused person whether the confession was made voluntarily.

Counsel then submitted that in the case now before us, despite the fact that the appellants denied the charges, their advocate did not object to tendering the charge and caution statement in evidence. Further that the trial judge did not ask them whether they consented to the admission of the same in evidence. That as a result, for Lubega Farouk and Mugerwa Donozio, this procedural irregularity went to the root of the case and therefore this appeal should be decided in their favour.

In reply, counsel for the respondent conceded that the learned trial Judge erred in law and fact when he admitted the charge and caution statement. That however, it did not occasion a miscarriage of justice. She submitted that the learned trial Judge evaluated the evidence on identification that placed the appellants at the scene of crime.

Counsel referred us to the part of the judgment where the trial judge considered the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW9, before he made his finding that the appellants were placed at the scene of the crime. The respondent's counsel demonstrated this with specific reference to the testimonies of the witnesses and the means by which they identified their assailants. She then asserted that the evidence adduced by the prosecution against the appellants placed them at the scene of crime and accordingly destroyed their *alibis*. Further, that the learned trial judge would have still found the appellants guilty in the absence of the impugned charge and caution statements.

Counsel finally submitted that the evidence of the witnesses was corroborated by that of **PW10**, who tracked the stolen mobile phones. She singled out the tracking of the cell phone stolen from Lumu David

which was tracked to one Kavuma Asumani (**PW12**), who led the police to the appellants. She referred us to the decision in **Bogere Moses v Uganda Criminal Appeal No. 1 of 1997** to support her argument.

Resolution of Ground 1

In order to resolve this ground of appeal, it is important that we first establish whether the trial judge admitted the contested charge and caution statements in evidence during the trial.

In his testimony, **PW10**, Bazibu John stated that Kavuma Asuman **(PW12)** said to be the man friend of Mumbejja Silva Rose who was found with David Lumu's stolen telephone, confessed that he was a robber and a man fried to Mumbejja Silva Rose. David Lumu was **PW3** at the trial. That Kavuma led them to Zainabu Nasanga who admitted that she knew Mumbejja. Further that when they arrested Semakula Muhammed, the 1st appellant, he confessed he was a robber and had spent many years as one. That the 1st appellant also confessed he knew Kavuma and other groups they worked with and that he (Semakula) participated in the robbery in Bwebajja.

PW10 further testified that he went to Naguru Remand Home because he was informed that Nsubuga Ivan, a juvenile, was also involved in the robbery. That on interrogating him, Nsubuga confessed that he was a robber and used to stay at the 6th appellant, Nasanga Zainabu's place in Ndeeba. That Nasanga confirmed that she knows Nsubuga, *alias* Asante, as a boy who used to stay at her place.

In cross examination, **PW10** stated that the charge and caution statements of the appellants were recorded by *"many officers at Katwe"* and they were placed on the police file. In re-examination, he stated that the appellants made confessions to him and he led them to another

officer who recorded their charge and caution statements. That he read through them and filed them on the police file.

The prosecution called D/AIP Byamugisha Fulgence as **PW11**. He stated that he recorded the charge and caution statement of one Kavuma Asuman. But that at the time he was meant to testify, Kavuma was not in court. Court adjourned for Kavuma Asuman to be summoned for it was known to the prosecution that he was on remand at Kigo Prison.

Kavuma Asuman was **PW12**. However, when he attended court on 7th June 2017, it appears Byamugisha Fulgence was not in court to testify about the charge and caution statement that he recorded from him. Kavuma therefore testified that he was arrested because police were tracking him for using a stolen telephone. Further that he informed the police that the telephone belonged to his girlfriend Mumbejja. He explained that the phone was sold to Mumbejja by Gibbeon (Gibson) and Seremba. Further that a statement was recorded from him under torture while at Katwe Police Station.

In cross examination he stated that while at the police, he called his girlfriend Mumbejja and she told him she bought the phone from Gibson and Seremba. Further that the two persons were arrested. He asserted that he was tortured by the *"Firing Squad"* people as they were interrogating him about Mumbejja and the stolen phone. That he had scars from the torture and the statements he admitted, or to which he confessed were the result of torture by the police. In re-examination, he emphasised that he was tortured again when he was re-arrested and they used to treat his injuries at the surgery of the Police Surgeon.

It was therefore established that Byamugisha Fulgence (**PW11**) did not produce Kavuma's charge and caution statement. Neither was any other police officer called to produce any other charge and caution statements

of the appellants. After the testimony of Kavuma Asuman, the prosecution closed its case. We therefore concluded that the trial judge could not have relied on any confessions in charge and caution statements, because he did not admit any such documents in evidence

As to whether he relied upon other confessions in the statements recorded by the appellants Mugerwa Farouk and Lubega Donozio to convict the rest of appellants, we observed that the trial judge evaluated the evidence about the participation of the appellants in the murder (Count 1) and the 16 counts of aggravated robbery together. Before he came to his conclusion on this very important ingredient for both offences, the trial judge, at pages 27 and 28 of his judgment stated thus:

> *"The defence counsel in his submissions stated that the accused persons were not identified and that the accused persons were not arrested during the course of the robbery. Many of the accused persons were put at the scene of the crime by PW1, PW2, PW3, PW4, PW5, PW6, PW8 and PW9 in their respective evidence. Factors for proper identification did exist at the time. See the case of* ***Bogere Moses & Anor. V Uganda, SCCA No.1 of 1997.***
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> *There is also circumstantial evidence adduced by PW10 the investigator. PW10's evidence was never challenged by the Defence. In Defence, none of the accused persons attacked his evidence.*
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> *All the accused persons were arrested by PW10 with the help of PW11 (Kavuma Asuman). Although PW11 never pointed at any accused person as the people he knows, the demeanour of Kavuma Asuman, when asked questions in examination in chief by the prosecution he could take some time before answering a simple question paused (sic) to him by the prosecutor. His demeanour while giving evidence portrayed him to be a liar.*
>
> *Something to bear in mind is how the accused persons were traced, identified by police if it was not for Kavuma Asuman who told police the names of each accused person and where they were located. Even the doubt about identification was cleared by the* ***admissions*** *by A4 (Mugerwa Farouk) and A7 (Lubega Donozio) in their respective police statements (Exh. P25 and Exh.P26)."*

We observed that Mugerwa's statement was admitted in evidence during cross-examination because he stated in his sworn testimony that he was not told why he was arrested. That a policeman called Akim, who was known to him before he was arrested, led men with pistols to his home to arrest him. That following his arrest, the said Akim called him while he was at the police station and asked him for money; but he had no money. That as a result, the police recorded a statement from him.

In cross examination, Kavuma stated that the statement that he recorded was drafted by police and he was just asked to sign. That he then wrote his name on it. Further that he did not find the persons then in the dock at the police; he first met them at May Fair Clinic. He admitted that the plain statement was read back to him before he wrote his name on it. He also admitted that his residence was as stated in that statement.

The importance of the statement seems to be that in it, Mugerwa stated that he was once a thief. That he knew Avata, Nsubuga Ivan, the minor. That Nsubuga informed him that he participated in a robbery in Bwebajja with Julius, Shaban, Gibson, Lubega and Jimmy Fupi. And that Nsubuga was arrested but when he was arrested, Gibson sent money to Mumbejja to rescue him. Further that he knew that Mumbejja resided at Nasanga's place and it was Nasanga who knew where Mumbejja was.

In his testimony, Donozio Lubega stated that he was arrested with a group of people and taken to Kibuye Police Station where he was beaten up. That he denied knowledge of what the police were interrogating him about. In cross examination he stated that he knew nothing about the robbery in Bwebajja. But he admitted that he signed a statement that was recorded by the police.

In the statement dated 14th October 2014, admitted as **PEX26**, Lubega stated that he participated in breaking into people's homes and stealing televisions, telephones, radios and other portable items but he did not state where this happened. That he also knew other people who broke into homes. He named Nsubuga (Avata) and others known to him *"by face"* as having been involved in the robberies at Bwebajja, where victims were injured by cutting them.

It is important to note that the appellants Mugerwa and Lubega did not implicate themselves as participants in the robberies at Bwebajja. They only pointed fingers at Nsubuga Ivan, a juvenile. The statements therefore cannot be called confessions by Mugerwa and Lubega to the crimes for which they were convicted and sentenced.

We

further observed that in both statements, the appellants Mugerwa and Lubega stated that Nsubuga informed them that he participated in the robberies at Bwebajja. If they did not participate in the crimes with Nsubuga, as they wanted the police to believe, the information given to them by Nsubuga and reported to the police in his plain statement can only be classified as hearsay evidence. This is because section 59 (a) of the Evidence Act provides that oral evidence must, in all cases whatever, be direct; if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. Mugerwa and Lubega *did not state* that they saw Nsubuga participate in any offence, since they claimed not to be joint participants with him.

We also observed that while Mugerwa's plain statement was clearly voluntarily made, there is some doubt that Lubega's statement was. However, the trial judge admitted both in evidence, as plain statements and relied upon them as corroborating the testimony of **PW10**, with

regard to the participation of all the appellants in the crimes for which they were tried and convicted.

But before he did so, the trial judge referred to section 2 (1) (d) of the Evidence Act, which defines evidence to mean:

> **"... the means by which any alleged matter or fact, the truth of which is submitted to investigation is proved or disproved and includes statements of accused persons, admissions, judicial notice, presumptions of law and ocular observation by the court in its judicial capacity."**

While this was a correct statement of the law with regard to admitting plain statements of accused persons, the Evidence Act also provides for rules for admissibility and relevance of evidence. With regard to confessions, section 23 (1) of the Evidence Act provides that:

> **"(1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of—**
>
> **(a) a police officer of or above the rank of assistant inspector; or**
>
> **(b) a magistrate, but no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b), unless the confession is corroborated by other material evidence in support of the confession implicating that person."**

The police did not record charge and caution statements from Mugerwa and Lubega about the matters stated in their plain statements. They therefore could not be admitted in evidence as confessions. The trial judge therefore misdirected himself and erred when he relied upon the statements to convict the appellants on the 17 counts of the two offences for which they were indicted.

It must now be determined whether the trial judge arrived at wrong conclusions in his judgment, with regard to the participation of the appellants in the 17 counts with which they were charged.

In his conclusion before convicting the appellants, the trial judge held as follows:

> *"On closing and in consideration of the entire evidence on court record, the submissions by both counsel for the parties, sections 19 and 20 of the Penal Code Act (supra) the authorities cited in this judgments, my evaluation and analysis of the entire evidence of the parties (Prosecution and the Defence), I hold that the Prosecution proved its case against each accused person. Each accused person is found guilty of murder contrary to sections 188 and 189 of the Penal Code Act, and Aggravated Robbery contrary to section 285 and 286 of the Penal Code Act (supra) on each count. Accordingly, therefore, the accused person is (sic) convicted on each count, of the said charged offences."*

We shall first consider whether the conclusion that all the 11 appellants participated in the murder of Sekitto Lawrence was correct.

But before we do so, it is important to point out that although he appeared on the list of accused persons in the heading to the record of proceedings, Nsubuga Ivan (alias) Avata was not tried with the rest of the appellants. He does not appear in the lists of the appellants as they took their pleas, in which they all denied participation in all the 17 counts for which they were indicted.

We also observed that the said Avata was referred to by most of the witnesses as *"the boy"* or *"the young child."* His age was stated to be between 11 and 14 years, by most of the witnesses that referred to him.

The prosecution did not report to court what happened to "Avata" between his arrest and the trial. We assume that he could have been tried separately as a juvenile. The judgment of the High Court therefore listed 10 persons as the accused tried in that court. Much as he was not tried, witnesses referred to him as a participant. We shall therefore accept the evidence about his participation as a joint offender acting in concert with the appellant, but shall not make any conclusions about his guilt.

Going back to the evidence in respect of Count 1, we observed that the only evidence on the record with regard to participation of the appellants in the murder of the deceased was in the testimony of **PW10**, D/IP Bazibu John. He testified in chief, in one sentence, that one victim was killed in the attack and others sustained serious injuries. On being cross examined he stated as follows:

> *"Suuna has a scar above his left eye even I can see it now. The dead person was killed by all the accused before – (sic) by circumstantial evidence they are the ones who killed the deceased. I recorded statements from the relatives of the deceased; the wife was with the deceased. The wife said that she was kicked, fell down and could not identify any person. Identification parade was conducted when witnesses clearly identify the assailants (sic)."*

PW10 did not name the wife of the deceased. Neither did he produce the report from the Identification Parade referred to. The prosecution did not call any witness to specifically state that the Police carried out the parade at which appellants were identified by the wife as the assailants.

There is no doubt at all in our minds that the deceased, Sekitto Lawrence died. The prosecution produced a post-mortem report dated 22nd August 2102, which was admitted in evidence as **PEX5**, by consent of counsel for the appellants. The injuries inflicted on his head were a depressed skull. There were other internal injuries on the skull, liver and heart.

However, there was not a scintilla of evidence adduced to prove the person or persons that inflicted the injuries upon him. It is clear that the prosecution did not labour to prove this fact or facts to the trial court. In the circumstances, we find that the participation of the all the appellants in the death of the deceased was not proved at all. The trial judge therefore erred when he convicted and sentences all of the appellants on Count I of the indictment.

In conclusion, unfortunately, we have no alternative but to set aside the convictions and sentences imposed upon all of the appellants for the murder of Sekitto Lawrence.

We shall next consider the decision that all the appellants participated in all the 16 counts of aggravated robbery for which they were indicted. Apart from Counts 9, 16 and 17 in respect of which it seems the alleged offences took place in the same house, we shall consider each count separately, for they were all committed against different persons specified in the each count of the indictment.

Count 2

In Count 2, all the appellants were indicted for aggravated robbery using sticks, metal bars, hammers and *pangas* and beating up Masawu Sarah. And that thereafter they stole her Nokia phone valued at Ushs 70,000, a bag worth Ushs 30,000 (thirty thousand shillings) and cash in the sum of Ushs 400,000/= (four hundred thousand shillings).

Similar indictments to the one above were preferred against all the appellants in respect of the following victims in the different counts as indicated below:

Count 3: Aggravated robbery of one Techno cell phone and Ushs 150,000/= against Jjuko Simon;

Count 5: Aggravated robbery of Ushs 10,000/= and a Techno phone valued at Ushs 70,000/= against Bruno David;

Count 7: Aggravated robbery of Ushs 720,000/= and a mobile phone valued at Ushs 120,000/= against Kyokunda Scovia;

Count 8: Aggravated robbery of Ushs 51,000/= against Mutesasira Alan;

Count 10: Aggravated robbery of Ushs 30,000/= against Nagayi Grace;

Count 11: Aggravate robbery of a DVD player and flat iron, against Ayokera Ruth;

Court 12: Aggravated robbery of an unspecified amount of money and phones against Kasumba Rashid;

Count 13: Aggravated robbery of a mobile phone and Ushs 200,000/= cash, against Mutangira Joshua;

All of the appellants denied that they committed the offences stated in the counts above and the others to be considered later. We observed that each appellant made an unsworn statement or testified on oath in their defence. In view of the multiplicity of counts against them, we deemed it useful to consider their defences at the onset, before we determine whether the trial judge was correct when he convicted and sentenced all of them for aggravated robbery.

Muhammed Semakula, the 1st appellant, a Muslim, did not affirm before his defence. He stated that he was a *boda boda* rider. Further that he was arrested on the 27th September 2014 by 3 men in civilian clothing and taken to Kibuye Police Station. That one Jamil, a person he did not know, told him that he was taking him to jail. That he spent 6 days at the Police Station and that is where the other appellants joined him on the same file. In effect, he did not know why he was arrested.

Suuna Joseph, Appellant No 2, also made no affirmation before he made his statement. He stated that he was a hawker who dealt in cosmetics and school bags before he was arrested and that he resided in Wakulukuku. He stated that on the 27th September 2014, he met a policeman as he was going back to his home. That the policeman arrested him, bound him with ropes and put him in a taxi (*Kamunye*)

on account of being idle, and took him to Kajjansi Police Station. That Count 1 about robbery was there read to him and the CID brought some of the bags that he was selling in his business and claimed they were exhibits from the robbery.

Jurua Faith, the 3rd appellant, made an unsworn statement. She stated that she was a prostitute at Ndeeba, a suburb in Kampala. That on 29th September 2014, at 1.30 am, policemen found her negotiating with a customer. That they arrested her and 9 other people and took them to Kibuye Police Station for being idle and disorderly and carrying no identity cards. Further that at the police station, policemen told each person to pay them Ushs 200,000/=. That the others paid but she did not have the money so she was detained. That she found Irene Namutebi and Zainabu Nassanga in the cell where she was detained but she did not know them. Finally, that on the 3rd October 2014, they were all taken to Kajjansi Court where the charges of murder in Bwebajja and Salaama were read to them.

Mugerwa Farouk, the 4th appellant made his statement after affirming his faith as a Muslim. He testified that in the night of 21st August 2014, he was at his home in Ndeeba. That he was arrested by a policeman from *"Wembule"* called Akim at 10.30 pm at night. Further that Akim and 4 others policemen took him to Kibuye Police Post but he was not told why he was arrested. That Akim asked him for money, which he did not have. That because of this, he was asked to record a statement. He asserted that he knew nothing about all the charges brought against him.

Namutebi Irene, the 5th appellant, made an unsworn statement. She stated that she knew nothing about all the allegations against her and that they were untrue. Further that Zainabu, the 6th appellant, was her close friend and she had gone to Zainabu's place on the day that she was arrested. That policemen armed with guns arrived, arrested her and

took her to Katwe Police Station where she found Zainabu. That she made a statement at the police in which she admitted that she knew Nassanga Zainabu and that at times, she used to go to her home. That police then informed her about the charges against her, which she denied. But on the 3rd October she was taken to court for the same charges.

Nassanga Zainabu, the 6th appellant opted not to affirm before making her statement. She stated that she used to baby sit for working mothers, preparing food and feeding their children. That on 23rd August 2014 she returned from work at midnight and retired to her room. At 2.00 am policemen from *Wembley* went to her house and arrested her. They took her to Katwe Police Station, where they locked her up in a cell. That she was tortured and beaten up while they asked her about the cases in Bwebajja, but she knew nothing about them.

Lubega Donozio, the 7th appellant, stated on oath that he was arrested from his home, with a group of other people, by armed men in civilian clothes. That he was beaten up at Kibuye Police Station and made to sign 4 statements, involuntarily. He denied that he knew Sauda Nanyonjo (PW4). He also denied knowledge of the robberies that took place in Bwebajja on 21st August 2014.

Kasule Ali Kirumira, the 8th appellant did not affirm his faith before making his statement. He said that he was arrested by a policeman with three stars and taken to Ndeeba Police. That police asked for Ushs 40,000/= from each of the people they had arrested, but he did not have it. That he was then taken to a room where he was bound with ropes and questioned about the robberies in Bwebajja and informed that there were people who had implicated him. That he did not know any of the charges that were read to him at Kajansi Court on 2nd March 2015 or any of the appellants.

Mugerwa Farouk, the 4th appellant did not make a statement or testify. He called one witness, his wife Nabaka Prossy (**DW10**). She stated that on the night of 21st August 2014, Mugerwa was at home. That he did not work at night but sold leather sandals during the day in Kikuubo, downtown Kampala. That though she did not recall the date on which he was arrested, the arrest took place while he was at home. That the people who arrested him beat him up during the process.

Kasule John Vianney Jombo, Appellant No. 10, made no statement. He opted to keep silent.

Having taken note of the defences of the appellants in respect of all the charges, we observed that in respect of Counts 2, 3, 5, 7, 8, 10, 11, 12 and 13, the prosecution did not call any of the victims of any of the alleged offences to testify; neither were witnesses called to testify on their behalf.

We therefore find that the prosecution failed to prove all the ingredients of the offence of aggravated robbery against any of the appellants in Counts 2, 3, 5, 7, 8, 10, 11, 12 and 13. The learned trial judge therefore erred when he convicted and sentenced all the 10 appellants of the offences alleged against them in the 9 counts specified above.

Consequently, the convictions in respect of Counts 2, 3, 5, 7, 8, 10, 11, 12 and 13 and the omnibus sentence of 35 years imprisonment that was imposed on all of the appellants for aggravated robbery in respect of those 9 counts are hereby set aside.

We shall next consider the evidence on record to establish whether the prosecution proved the participation of all the appellants in the offences of aggravated robbery alleged to have been committed against the victims named in Counts 4, 6, 9, 14, 15, 16 and 17 of the Indictment.

In view of the fact that the attack took place at night, we take cognizance of the principles that were set out in **Abdala Nabulere & Another v Uganda, Criminal Appeal No 09 of 1978**, as they were restated in **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No 01 of 1997**, as follows:

> *"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.*
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> *All these 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. ...*
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> *When the quality is good, as for example, when the identification is made after a long period 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, provided the court adequately warns itself of the special need for caution."*

We were guided by these principles in ascertaining whether the appellants were positively identified during the robberies. We also cautioned ourselves about the possibility that the victims may have made mistakes while identifying their assailants, in view of the fact that the attacks on them took place in the dead of the night and in circumstances that could have made identification difficult.

Count 4

In Count 4, all of the appellants were indicted with aggravated robbery against Namanda Juliet, who it was alleged they descended upon with pieces of timber, sticks, metal bars, hammers and *pangas* and stole Ushs 90,000/= from her.

In this regard Namanda testified as **PW6**. She stated that in the night of the 21st August 2014, at about 1.00 am, she was asleep in her house when some people opened the locks and entered the house. That the door was metallic but they broke in and entered and demanded for money and phones. Asked whether she knew any of the appellants in the dock, she said: *"I first saw A5 Namutebi, A8 Kasule Ali Kirumura and I last saw A9 Muwonge."*

The witness further testified that after the attack she again saw her assailants when they were taken to Kitende Court. When asked to tell court how she identified the assailants in the dark she stated thus:

> *"My Lord, the lady was with the torch and I was at the side. I was able to see the two. And others were following from behind and I told them where the money was and the phone. They told me to bring more money and I directed them where the bag was and they removed it."*

She clarified that the assailants took a total of Ushs 110,000/= from her during the incident. That they first took 30,000/= which was on the bed and 80,000/= which was in the bag. Further that she handed her Techno make phone over to them.

Namanda further testified that she relinquished her property to the assailants because they threatened her and hit her with iron bars. And that in the process of gaining access to the bag which had more money, one of the assailants almost trampled upon her child who was asleep on the bed with her before they broke into her house. That when she asked him not to trample upon the sleeping child, he pierced the side of her mouth with a knife. That in addition, one of the assailants had a hammer which he used to hit her on the head. After this last assault, she stated that she lost control and ran out of the house, dazed. She further testified that when the Police patrol car later came to the scene of the crimes, her uncle and police searched for her and found her. They took her to Namulanda Health Centre.

PW6 further emphasised that she sustained injuries on the head and face, which were swollen on arrival at the Health Centre. That she had also lost her sight and spent two weeks at the Health Centre on treatment for her injuries and that these affected her health even after she recovered from the wounds. The prosecution did not produce evidence of a medical examination form to prove the injuries. But the witness testified that she had records of the treatment she received at Namulanda Health Centre. She also showed her injury on the cheek to court in the form of a scar.

In cross examination **PW6** stated that she was able to see Muwonge clearly because after the assailants left, they returned to the house because they had forgotten their hammer. That she was able to see Muwonge, clearly when the assailants returned to collect it becuse the woman flashed the torch. That she talked to him and showed him where he left the hammer. He then took it and hit her on the head. Further that Muwonge, also had a light which he used to see. She stated that she was also aided by the same light to see him clearly.

Counsel for the appellants challenged her about the effect of the injuries on her memory; he intimated that she may have forgotten those who attacked her on the night of the robbery. She insisted that she could very well recall the people she saw that night. That she was also able to identify them at Kitende Court. Further that this was not long after the incident because when they brought the appellants to Kitende Court, she still had a shaven head following treatment she received due to the injuries that she sustained on her head.

We find that although she was not examined on Police Form 3, as is usually the case, her testimony that the assailants had weapons which they used against her resulting in injuries to her body is credible. She also could not have made up the story about the assailants returning to collect one of their weapons and the fact that during the attack, one

of them almost trampled on her sleeping child. The time that they spent in her house also appears to have been long enough for her to identify the appellants with the aid of the torch and the other light that they carried during the robbery. That Muwonge and Nanteza came back to the house to collect the hammer, in the process of which Muwonge hit her with the hammer on the head, makes her identification of the assailants more credible.

With regard to Count 4 therefore, we find that the prosecution proved that Irene Namutebi (Appellant No.5), Ali Kasule Kirumira (Appellant No. 8) and Muwonge Julius (Appellant No. 9) did set upon Juliet Namanda with deadly weapons. They inflicted multiple injuries upon her and stole her Techno cell phone and Ushs 110,000/=. They are therefore guilty of aggravated robbery as indicted.

We find that the trial judge erred when he convicted and sentenced all of the appellants for the offence in this count. The convictions and sentences against the appellants No 1, 2, 3, 6, and 8 in respect of Count 4 are therefore hereby set aside.

Count 6

In Count 6 of the indictment, all of the appellants were indicted for aggravated robbery against Nanyonjjo Sauda, in which they set upon her with sticks, metal bars, hammers and *pangas*, beat her up and robbed her of Ushs 100,000/= and a mobile phone valued at Ushs 200,000/=.

Nanyonjo Sauda testified as **PW4**. She stated that on the 21st August, she was asleep in her house which she rented from Mr Busagwa at Bwebajja. That it was at around 1.00 am when she heard noises from her neighbour's house where people were hitting widows and someone shouting, *"Afande! Afande! Leave him; don't beat him, don't kill him."*

That she thought they were arresting a thief so she got up and opened the door to see what was happening. At that point, someone outside came to her door and locked it from the outside. That she then retraced her steps and sat down in a chair. And that then she heard her neighbour, one Allan, wailing and people demanding for money and a phone from him.

The robbery against Allan Mutesassira was included in the indictment in Count 8. It was stated that all the appellants attacked him in the same night and robbed him of Ushs 51,000/=. However, he was not called by the prosecution, or he chose not to pursue the matter in court.

PW4 further testified that when the assailants left her neighbour's place they proceeded to her house where they kicked her wooden door open. They entered and started to search the drawer while she observed them, since she was now quietly sitting in a chair.

At the beginning of her testimony **PW4** identified A3 (Jurua Faith), A4 (Mugerwa Farouk) and A7 (Lubega Donozio) as persons that she had seen before. Further in her testimony she explained as follows:

> *"My Lord one of them A3 was holding a torch and she was standing behind the others. The little boy who was in front of her hit me.*
> ...
> *The child was about 14 years old. He hit me on the head twice and ordered me not to look at them.*
> ...
> *My Lord when they entered A3 flashed a torch and they went straight to the cupboard and they pulled a drawer when I was seeing them before they saw me; then the other went to the bed and I was not there.*
> ...
> *My Lord when they checked in the drawers there was no money. The boy checked on the bed when he didn't see me there (sic) he came back and saw me in the chair where I was sitted (sic) and he ordered me not to look at them. They then ordered me to give them phone and money (sic).*
> ...
> *I gave them the phone and the ...*
> ...

It was a touch screen phone of posh make."

Nanyonjo further testified that after she handed over the phone to the boy, the others asked whether she had refused to give him money, and if so, whether they should come back. Further that when they came back to the house for money, they threatened that if she did not give it to them, they would make her *"lose her head."* She further testified that when she was threatened, she handed over her savings box. The witness could not tell how much money there was in the savings box, but she said it contained all her savings for a full year. That after she handed the box to the assailants, they left. And that a little later she heard them as they were cutting the box open outside her house.

PW4 also testified that a few days later she saw Lubega Donozio pass by her home. But since there were only ladies around at the time, they could not arrest him. As to whether the assailants injured her, she said that she suffered injuries on the back and the head but they did not hurt.

Police Form 3 dated 27th August 2014, which was admitted in evidence by consent of counsel for the appellants as **PEX3,** showed the Sauda Nanyonjo was examined at Mulago Hospital as a victim of aggravated robbery. That she alleged that she was beaten up and her cell phone and money stolen from her. The injuries found on her body were a bruise on the right forehead, an abrasion on the right forehead, above the bruise, and another bruise on the right forearm, all classified as *"harm."*

In cross examination, Nanyonjo stated that the landlord's wife was called Nassanga Josephine. Nassanga testified as **PW5**. She testified about the attack upon her neighbours that night and her testimony corroborated that of **PW4** in that regard.

The appellant's counsel tried to challenge Nanyonjo's testimony about the circumstances in which she identified her assailants. The witness reiterated that Jurua Faith had a torch and she was flashing it. She explained that though the torch was directed at the backs of the other assailants, she was seated at the side. She could therefore see their faces.

Nanyonjo did not specify the weapons that were used to assault her during the robbery. However, section 285 of the Penal Code Act (PCA) provides for robbery as follows:

> **"Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery."**

Section 286 of the same Act provides for the punishment for robbery, and creates the offence of aggravated robbery in subsection (2) which provides that,

> **"Notwithstanding subsection (1) (b), where at the time of or immediately after the time of the robbery, an offender is in possession of a deadly weapon or causes death or grievous harm to any person, the offender or any other person jointly concerned in committing the robbery shall on conviction by the High Court, be liable to suffer death."**

According to subsection (3) of the section 286, *"deadly weapon"* for purposes of subsection (2) includes any instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument.

In respect of Court 6, the victim did not state the weapons but mentioned that they threated to make her *"lose her head."* She did not say she saw any weapon that they could have used to achieve that purpose. The doctor who examined her, according to **PEX3**, reported

that the injuries were caused by a *blunt object* and classified them as *"harm."*

In view of the evidence on record, it was established beyond reasonable doubt that Jurua Faith (Appellant No. 3), Mugerwa Farouk (Appellant No 4) and Lubega Donozio (Appellant No. 7) did in the night of 21st August 2014 commit a robbery against Sauda Nanyonjo, at Bwebajja. Lubega used an object that the victim did not identify to inflict injuries upon her. Since the injuries were classified as harm they do not fall within the ambit of those specified in section 286 (2) of the Penal Code Act.

We therefore find that the trial judge came to the wrong conclusion when he convicted all the appellants now before court of aggravated robbery under Count 6. As a result, the convictions and sentences against all the appellants for aggravated robbery in Count 6 are hereby set aside. The appellants Jurua Faith, Mugerwa Farouk and Lubega Donozio are hereby convicted of the lesser offence of robbery, contrary to section 285 of the Penal Code Act.

Count 14

In this Count, all the appellants were indicted with aggravated robbery, and it was alleged that they set upon Nassanga Josephine with pieces of timber, sticks, metal bars, hammers and *pangas*, beat and cut her and in the process stole from her Ushs 20,000/=.

The evidence on record shows that Nassanga Josephine testified as **PW5**. Among the persons in the dock, she identified Suuna Joseph (Appellant No. 2), Jurua Faith (Appellant No 3), Mugwerwa Farouk (Appellant No 4) and Namutebi Irene (Appellant No. 5) as people she has seen before.

Nassanga testified that in the night of 21st August 2014, she woke up and went to the toilet, which was within the house. And that after she returned, she heard people knocking at her neighbour Nakku's house. Further that after they banged at the door of neighbour's house, she heard them at her door which was wooden and weak. The assailants then kicked the door in and entered her house.

Nassanga further testified that Jurua Faith, the 3rd appellant, had a torch in her hand. And that Suuna had a stick which he used to hit her on the back; Mugerwa stood by, he did not do anything to her. That the 4 appellants then demanded for money and they got it from her. Further that the money they found and stole, Ushs 650,000/= was in a book on a table. That they searched for money until they found some in the book and took it.

Regarding the weapons that the assailants had, Nassanga testified that they also had *pangas*. But they did not inflict any injuries upon her other than hit with a stick in the back. That she eventually got the courage to get out of the house when her neighbours also got out of their dwellings, gathered outside and started talking. **PW5** further testified that she next saw her assailants at Kitende Court.

In cross examination, Nassanga confirmed that Nanyonjo Sauda (**PW4**) was her neighbour. And that while she lived in the main house, **PW4** lived in the servants' quarters. She reiterated that she was able to identify her assailants by the light from the torch held by Appellant No 3, Jurua Faith. That she was able to identify them because they were in front of her getting the money from the table. And that though the torch was not flashed onto the face of Jurua who was holding it, Jurua stood next to her during the search for the money by the other assailants. She clarified that the policeman who told them that the appellants would be at Kajjansi/Kitende Court did not help her to identify the assailants.

Nassanga's testimony was not assailed in cross-examination. Neither did counsel for the appellants challenge her about the amount money that was stolen during the attack because though the indictment stated that only Ushs 20,000/= was stolen from her, she stated that the actual amount stolen was Ushs 650,000/=. Due to the fact that she was the landlady, it is believable that she had Ushs 650,000/= in the house on that fateful day.

By the testimony of Nassanga Josephine therefore, we find that the prosecution proved beyond reasonable, that Suuna Joseph (appellant No 2) Jura Faith (appellant No 3), Mugerwa Farouk (appellant No 4) and Irene Namutebi (appellant No 5), did in the night of the 21st August 2014 commit a robbery with aggravation against her, in which they stole Ushs 650,000/= from her.

We therefore find that the trial judge did not evaluate the evidence correctly and came to the wrong conclusion when he convicted and sentenced all the appellants for aggravated robbery under Count 14. The convictions and sentences against the appellants No 1, 6, 7, 8, 9, 10 and 11, in respect of Count 14 of the indictment are therefore hereby set aside.

Count 15

In this Count, all the appellants were indicted for aggravated robbery and it was alleged that they all set upon Ssebagala Jimmy, while armed with pieces of timber, sticks, metal bars, hammers and *pangas*, beat up and cut him and robbed him of his money.

Sebbagala Jimmy testified as **PW7**. He identified the persons in the dock that he had seen before as Namutebi Irene, Jurua Faith and Muwonge Julius. He then testified that sometime in August, in a year he did not remember, he was in a house in Bwebajja with his brother Mutesasira

Andrew. It was at about 2.00 am when he heard people outside telling someone, *"Afande don't shoot him!"* Further that there were many people and after a while, they kicked the door to the house open and entered it.

PW7 further testified that when the assailants entered the house, they demanded for phones and money. That all three assailants were holding torches which they flashed around, including on each other as they were searching for items in the house. Further that the assailants beat him up but he did not know which of them hit him. He explained that they did so with sticks and his left arm was injured. That they went on to hit him on the head and he lost his consciousness. He explained that he got internal bleeding in the head and he did not know how long he spent in Namulanda Hospital where he was taken for treatment.

PW7 also testified that he next saw his assailants when they were taken to the court at Kitende. He asserted that the appellants he identified in his testimony were indeed present at Kitende Court. He went on to state that as a result of the injuries inflicted upon him by the assailants he continued to suffer from body weakness and headaches all the time.

The appellant's counsel did not challenge the testimony of **PW7**, save for intimating to him that he was not able to remember because he sometimes forgets due to the injuries he sustained on the head. He inquired whether it was he that led the police to arrest the appellants he identified, which he denied.

The court sought further details from **PW7** about his injuries. He stated that his left arm still felt weak. That he was a mechanic before the incident but he left his job because of the weakness due to the injuries.

The prosecution did not produce a medical report in respect of Jimmy Ssebagala's injuries. However the description of his injuries led the trial

judge to seek further inquiry about them, to which the witness explained that he could not work as a mechanic because he continued to suffer from the effects of the injuries. This further testimony was not assailed by counsel for the appellants.

Further to that, **PW7** was the brother to Nakku Harriet (**PW2**). Her testimony corroborated that of **PW7** in that she testified that she was in the same house as her brother Ssebagala Jimmy when they were attacked in the night of 21st August 2014. That their assailants hit Ssebagala on the head with a stick and as a result he suffered a serious injury which led him to develop a problem with his brain. That his mental faculties were affected by this blow on the head and he *"does not understand properly."*

In **DPP v Smith [1961] AC 290**, the court defined *"grievous bodily harm"* at common law as having the same meaning as *"really serious harm."* In view of the testimony that the assailants hit **PW7** with sticks including on his head, till he lost his consciousness, and that to the day he testified in court he still suffered from the effects of the assault and could no longer carry out his vocation to earn a living, we are persuaded that the appellants inflicted grievous bodily harm to Ssebagala Jimmy. We are of the strong opinion that the offence that was committed falls within the ambit of section 286 (2) of the Penal Code Act.

As a result, we find that the trial judge came to a wrong conclusion when he convicted all of the appellants for aggravated robbery under Count 15. We instead find that Namutebi Irene (Appellant No 5), Jurua Faith (Appellant No 3) and Muwonge Julius (Appellant No 9) did steal a telephone and money from Ssebagala Jimmy and immediately before or after the theft hit him with sticks, including on the head and caused him to suffer grievous harm. The prosecution therefore proved the offence of aggravated robbery in Count 15 against these three appellants beyond reasonable doubt.

In conclusion, the convictions and sentences against the appellants No 1, 2, 4, 6, 7, 8, and 10 in respect of Count 15 are hereby set aside.

Counts 9, 16 & 17

Count 9 was an indictment against all the appellants for aggravated robbery of Ushs 50,000/=, a mobile phone, a flat iron, DVD player, wallet and blender valued at Ushs 500,000/=, the property of Kintu Fred. In Count 16 all of them were indicted for aggravated robbery in which it was alleged that armed with pieces of timber, sticks, metal bars, hammers and *pangas* they all attacked Nakku Harriet, beat and cut her and stole her phone. In Count 17, all appellants were indicted for aggravated robbery against Nanteza Immaculate using the same weapons, and similar assaults against her as were stated in Count 16, and stealing Ushs 450,000/= from her.

Kintu Fred, the victim in Count 9 was not called to testify. No reason was assigned for not calling him as a witness, but Nakku Harriet, his wife, testified as **PW2**. She identified her assailants in the dock as Semakula Mohammed (A1) Namutebi Irene (A5), Ali Kasule Kirumira (A9) and Lubega Donozio. She stated that these were the people who attacked her at her home in Bwebajja on the 21st August 2014 at 2.00 am, soon after she finished saying her prayers and retired to bed.

PW2 explained that she was in the house with her husband Kintu Fred, her sister Nanteza Immaculate, her brother Sebaggala Jimmy and her two children. That a group of about 7 people broke into their house. That the assailants entered and switched on the light and demanded that she gives them money and a phone. That she directed them to where the money was and to the phone which she had connected to a power source to charge. That the assailant took her HTC phone and Ushs 300,000/=, which she said was in a safe on the dressing mirror (sic).

PW2 explained that she was compelled to tell them where these items were because they were armed with sticks and *pangas*, and they hit her with a stick. She stated that it was some young person of about 13 years who hit her first on the head, but that person was not in the dock at the time she testified. She further explained that when the assailants entered the house, they were led by the same young person, followed by Namutebi. And that it was Namutebi who ordered her to give them money.

PW2 further explained that the other two assailants were also holding sticks and *pangas* and they too ordered her to bring money and the phone. That the young person hit her with a stick on the back. Following that they cut her with a *panga* on the forehead and the head. The witness showed scars in the position of the injuries to court but she could not identify which of the assailants cut her. She further stated that after the assailant cut her, she bled so much that she lost her consciousness. That she regained it when she was in Mulago Hospital under resuscitation with oxygen.

Court inquired about the other people that were in the house with her and what happened to them during the attack. **PW2** explained that the assailants beat up her husband, Kintu Fred, and pierced him with a knife. That this assault caused him to lose a tooth. That Ssebagala Jimmy was hit with a stick on the head and at the time of her testimony he had a problem with his brain and was incapable of *"understanding properly."* And that Nanteza Immaculate, her sister was also assaulted which caused her to break her arm. But her children were not assaulted.

Although **PW2** testified about the vicious attack against her husband, Kintu Fred, the subject of the aggravated robbery under Count 9, she said nothing about the property alleged to have been stolen by their assailants in Count 9. By its description, most of the property was

household property: a DVD player, flat iron and a blender, but she made no mention of its loss. Regarding her husband's wallet and Ushs 50,000/= alleged to have been stolen in Count 9, again **PW2** said nothing.

The witness explained that she made a statement to the police after she was discharged from Mulago Hospital. That she next saw her assailants in court at Kajansi when the police informed them that they were to be taken to court and she saw all the persons she identified in court. She further explained that at the time of her testimony, she still suffered from the effects of the injuries sustained in the attack.

In cross-examination, **PW2** was asked to explain the location of the various people that were attacked in her home that night. She stated that their home was comprised of two big rooms; one served as a sitting room while the other served as a bedroom. That the assailants found her in the bedroom, while her sister and brother were in the sitting room. That she was lying on the bed and that is where the young person found her and hit her. Further that she remained on the bed because she was surprised and terrified when the assailants entered the bedroom and switched on the light.

Asked how she was able to identify the four assailants she said that they found her still awake and when they entered the room they switched on the light. About their distinguishing features, she said that Namutebi was dressed in black trousers and a brownish top. That she could not recall how the men were dressed but she was able to identify them by their faces; that she could not forget their faces because they were holding sticks and a *panga.*

Regarding the effect of the injuries on her brain, she asserted that she still had a good memory, though she sometimes suffered from dizziness. She explained that she still needed medication, because she did not

complete the treatment before she was discharged from hospital. Due to the fact that several members of her family were injured, her father had to pay their bills for the treatment. He was unable to pay for all of them resulting in her missing some of the treatment.

We observed that Nakku's brother Ssebagala (**PW7**) identified the assailants as Namutebi Irene (Appellant No 5), Jurua Faith (Appellant No 3) and Muwonge Julius (Appellant No 9). **PW2** on the other hand identified the assailants as Semakula Mohammed (Appellant No 1)) Namutebi Irene (Appellant No 5), Ali Kasule Kirumira (Appellant No 9) and Lubega Donozio (Appellant No 7). Nanteza Immaculate only identified Jurua Faith and Irene Namutebi.

We find that this is a minor inconsistency that can be resolved by the fact that the three witnesses, though found in the same house, were in different rooms. It leads us to the conclusion that not all of the appellants entered the bedroom in which Nakku, her husband and children were attacked; some stayed in the sitting room terrorizing Sebaggala and Nanteza. In the fray and the fear of violence, it was very natural for the victims to make mistakes about the number of persons that assailed them that night.

Although **PW7** stated that the lights were off when the assailants entered the house, and that all of them had torches which they flashed around, the trend in the testimonies before was that the two women, Jurua Faith and Namutebi Irene both held and flashed torches during the raid on the various homes and persons. Mutawe Sharif (**PW1**), Nanyonjo Suada (**PW4**), Nassanga Josephine (**PW5**) all said Jurua Faith carried a torch which she flashed around. Namanda Juliet (**PW6**) stated that Irene Namutebi (appellant No 5) flashed a torch and by its light she was able to identify Muwonge Julius. In this particular home, it seems they used the flash lights in the sitting room but when the assailants entered Nakku's bedroom, they switched on the electric light as well.

Regarding the nature of weapons that the assailants carried when they attacked Nakku Harriet, with the consent of counsel for the appellant, the prosecution produced a medical examination report (**PEX2**). The report had the results of the examination of Nakku at Mulago Hospital on 10th October 2014. It was recorded that she sustained injuries which left a scar on the forehead and 2 scars on the frontal parietal scalp. A brain CT scan showed that she had brain oedema. The injuries were described as *"grievous harm"* which resulted from considerable blunt force trauma.

On her part, Nanteza Immaculate (**PW9**) stated that during the attack on 21st August 2014, she was asleep but heard people at the door. They forced the lock open and entered the house. She identified the assailants as already stated above. She further stated that Jurua had a big flashing torch when she entered the house. That when the appellants entered, they also switched on the light.

PW9 further testified that it was Jurua Faith who demanded that they give money and phones to them. And that before she could get her bag to give them the money, they got it from the sideboard and removed her phone, a Sonny and Ushs 150,000/= and took them. She also stated that the appellants had short sticks and *pangas*. That she recognised the assailants who were near her. And thereafter, they proceeded to her sister's bedroom, but not before hitting her on the head and the left arm whose bone broke as a result of the blows.

Nanteza further stated that the assailants pierced her cheek with a knife and cut her head which bled. She explained that it was Muwonge Julius (Appellant No 9) that cut her. That as a result of the injuries, she was taken to Mulago Hospital, from whence she was transferred to Bombo Military Hospital where she spent weeks. That she was unconscious when she was transferred to Bombo. Further that as a result of the injuries, she suffered headaches and her arm remained weak; she could

not lift heavy objects because she did not fully recover from the injuries. She confirmed that she was sure that the appellants she identified in the dock were the very people she saw in their home on the night of the robbery.

Nanteza further confirmed that her sister, Nakku Harriet and her husband were also badly beaten up by the assailants. That Nakku sustained cuts on the head. However, she too said nothing about the property alleged to have been stolen from Kintu Fred during the robbery. She concluded her testimony by stating that she next saw the appellants that she identified before the trial court at Kitende Court to which the police first took them.

In cross examination, Nanteza stated that she had medical reports and x-rays, though she did not bring them to court. She too stated that Namutebi was dressed in trousers and a top. That the phones that were stolen were never recovered. And that the *"accused's pictures were still stuck on her brain."* That although she saw many people who entered their house, she only recognised the three that she mentioned in her testimony.

In order to prove the offence of aggravated robbery under section 285 and 286 of the Penal Code, it must be proved that property was stolen with violence or threats of use of a deadly weapon. With regard to Count 9, **PW2** and **PW9** stated that Kintu Fred was beaten up and sustained serious injuries during the attack. However, it was not proved that the property listed in Count 9 was stolen. One of the ingredients of the offence was therefore not proved beyond reasonable doubt. We therefore find that the trial judge came to a wrong conclusion when he convicted and sentenced all the appellants for aggravated robbery against Kintu Fred.

The convictions and sentences against all of the appellants in respect of aggravated robbery in Count 9 are therefore hereby set aside.

With respect to Counts 16 and 17, the participation of some of the appellants in stealing property belonging to Nakku Harriet and Nanteza Immaculate was proved by the testimonies of the victims. However, although **PW2** referred to a young boy, most probably Nsubuga Ivan alias Avata who was not tried with the rest, we find that she positively identified their assailants. And that the testimonies of **PW2** and **PW9** were not assailed in cross examination. We also find that the appellants offered no valid defences with regard to the offences under the two counts.

There is no doubt in our minds that the two victims were found in the same house and that all the appellants that they each identified entered the house at the same time. In respect of Counts 16 and 17 therefore, the prosecution proved, beyond reasonable doubt that Semakula Mohammed (1st appellant), Jurua Faith (3rd appellant), Namutebi Irene (5th appellant), Ali Kasule Kirumira (8th appellant), Lubega Donozio (7th appellant) and Muwonge Julius (9th appellant) participated in and are guilty of aggravated robbery against Nakku Harriet and Nanteza Immaculate.

We therefore find that the trial judge came to a wrong conclusion when he held that all of the appellants were guilty of the offences in Counts 16 and 17. As a consequence of these findings the convictions and sentences against the rest of the appellants, No. 2, 4, 6, and 10, in respect of Counts 16 and 17, are hereby set aside.

Offences proved by Prosecution but not included in Indictment

Before we take leave of the re-appraisal of the evidence in respect of Ground 1, it is pertinent for us to point out that we observed that there

were victims that testified about the heinous crimes committed against them by some of the appellants in this case in respect of which no charges placed in the Indictment. The 3 victims were Mutawe Sharif (**PW1**), David Lumu (**PW3**) and Moses Musherure (**PW8**). These 3 persons not only lost property but they were beaten up by different assailants, whom they ably identified in court, and they sustained injuries in the process.

We found it useful to single out the aggravated robbery that was committed against David Lumu. He too was a tenant of Mohammed Busagwa as was Nanyonjo Sauda (**PW4**). Lumu was attacked and assaulted and his phone was stolen. His injuries were described in the medical report which was admitted in evidence with consent of counsel for the appellants as **PEX4.** It showed that he sustained an injury on his hand because one of his fingers was literally cut off, but it was joined back on in surgery. Clearly the assailants had a deadly weapon during the attack on him.

He clearly identified his assailants in court as the young boy (Avata) and the juvenile Muwonge Julius, the 9th appellant, who had a knife. As he struggled with him to defend himself from injury, the knife cut Lumu's finger and it almost fell off. There is no doubt that this happened during the attack in which his cell phone was stolen.

The phone was recovered by police during the investigation of the robberies. In his testimony of **PW10**, D/IP Bazibu John, narrated how he arrested a good number of the appellants. He stated that he was fortunate to find that one of the cell phones that was stolen was still in use. That he tracked it through a telecommunications company, which released a statement in respect of David Lumu's telephone number and phone. That he found out that the phone was in the hands of one Mumbejja Silva Rose.

PW10 further stated that in pursuit of Mumbejja, he was instead led to Kavuma Asumani by informers in Ndeeba. That when he found Kavuma and put him to task to lead investigators to Mumbejja Silva Rose, Kavuma instead tipped her off and she fled to Kalangala Island. But he told investigators that Mumbejja was at the 6th appellant, Zainabu Nasanga's place in Ndebba. He led them to Nasanga's place but Mumbejja was not there. They instead arrested Nasanga who admitted that she knew Mumbejja but did not know where she was at the time.

PW10 further testified that the arrest of Kavuma led investigators to arrest Jurua Faith, the 3rd appellant. That the chain of connectedness then led to the arrest of the 2nd appellant, Suuna Joseph, the 1st appellant Semakula Muhammed, the 5th appellant Namutebi Irene, and Nsubuga Ivan (Avata) the juvenile who was not prosecuted with the rest of the appellants.

Nonetherless, we are aware of the provisions of section 22 of the TIA which provides for the contents of the indictment as follows:

> **"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

Since the indictment did not contain counts on the specific offences committed by some of the appellants against Mutawe Sharif (**PW1**), David Lumu (**PW3**) and Moses Musherure (**PW8**), we are unable to make any findings about the offences that were committed against them by some of the appellants in this case. The reason for this decision is to be found in Article 28 (3) (b) of the Constitution from which section 22 of the TIA flows.

The officers from the office of the Director of Public Prosecutions that drafted the Indictment in this case were not only careless but also

negligent in the performance of their duties. Having realised that the indictment did not contain counts relating to evidence that they were to present to the court, they ought to have applied to amend the indictment at the beginning of the trial, as is required by section 50 of the TIA.

In addition, the trial judge ought to have observed that very important evidence was led by the prosecution through David Lumu who testified on the first day of the trial. And that though he testified as a victim there was no Count in the indictment relating to the offences committed against him. He ought to have invoked the provisions of section 50 (2) of the TIA which provides that,

> **"(2) Where before a trial upon indictment or at any stage of the trial it is made to appear to the High Court that the indictment is defective or otherwise requires amendment, the court may make such an order for the alteration of the indictment (by way of its amendment or by substitution or addition of a new count) as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required alterations cannot be made without injustice; except that no alteration to an indictment shall be permitted by the court to charge the accused person with an offence which, in the opinion of the court, is not disclosed by the evidence set out in the summary of evidence prepared under section 168 of the Magistrates Courts Act."**

The grounds for a count in relation to the offence against David Lumu had already been laid down in the Summary of the Case in paragraphs 5, 6, 7 and 8 thereof. No action was taken by both the court and the prosecution to cure this material defect in the indictment. We condemn this lapse on the part of the prosecution in the strongest terms. We urge the Director of Public Prosecutions to always ensure that the indictments and evidence presented to the court are consistent with each other in order to avoid miscarriages of justice such as happened in this case.

Furthermore, we find that though the failure of the trial judge to properly evaluate the evidence was not solely occasioned by wrongly admitting charge and caution statements, as the appellants complained, he clearly did not evaluate the evidence on the record correctly. He arrived at wrong conclusions and convicted all of the appellant for murder without any evidence to sustain the charge. He also convicted some of the appellants for aggravated robbery on all 16 counts without any evidence against them. We single out Nasanga Zainabu, Appellant No 6 and Kasule John Vianney, Appellant No. 11.

The only evidence on record with regard to the participation of Nasanga Zainabu was in the testimony of **DW10**, Bazibu John who arrested her and Irene Namutebi, who stated that she was her friend. In his examination in chief **PW10** said that Nasanga's house was a permanent single room in Ndeeba divided by curtains. He asserted that Nassanga's house was used to harbour criminals. That Jurua Faith and other people who had no employment at times stayed at Nassanga's house. Further that Nsubuga Ivan (Avata) informed him that he stayed at Nassanga's house. And that according to Avata, the leader of the gang was Ssemakula, the 1st appellant. And that the preparation for the robberies was carried out at Nassanga's place.

Namutebi Irene, the 6th appellant stated that at the time of her arrest she resided in Ndejje, off Namasuba Road. That on the day she was arrested, she was at her brother Lugayizi Ssemuddu's place. That she was informed that Nassanga was arrested. She explained that Zainabu Nassanga was her close friend, as well as a family friend whose home village was the same as hers. That she was also there to give the children food because Nasanga had been arrested. And that while she was there she too was arrested. Namutebi's statement was not on oath. She was therefore not cross-examined about her residence at the time she was arrested.

PW10 also testified that he carried out a search of Nassanga's house. That he recovered a bow and 4 arrows from the sitting room, a Nokia phone with original serial No. 35383501274720 which had been changed to 351530044871235. These items were produced and admitted in evidence.

In cross-examination, **PW10** said he recovered an Itel phone from Nassangs's house. That none of the victims showed up to claim any of the phones that were recovered in the search. Further that he was informed that all the other stolen property was loaded onto a motor vehicle by one Ronnie and taken away. However, no direct evidence was led to prove these allegation by **PW10**. There were other electrical items listed in the search certificate that were recovered from Nassanga's house. However, they too were not linked to any of the victims in the robberies; the victims did not identify them as their property.

Although **PW10** said Nassanga's house was used for harbouring criminals there was insufficient proof of the allegation. And though Mugerwa Farouk, in his plain statement (**PEX25**) stated that Mumbejja, the woman who had Lumu's stolen phone resided at Nassanga's, when investigators went to arrest her, they did not find her there. In addition, **PW10** said Nsubuga informed him that he used to stay at Nasanga's. However, **PW10** did not follow up this information to establish whether it was correct. In her statement, Nassanga said nothing about Nsubuga Ivan. We therefore find that this was hearsay evidence that cannot be used against Nassanga.

In the circumstances, the prosecution did not produce concrete evidence to prove that Nassanga Zainabu was one of the robbers, or that she harboured criminals or received and retained stolen property. We therefore doubt that she participated in the crimes that took place at Bwebajja in the night of 21st August 2024. This doubt should, and is hereby resolved in her favour.

On careful perusal of the record, we also established that there was not an iota of evidence produced against Kasule John Vianney Jombwe, the 10th appellant. It is even not clear to us why and when he was arrested and indicted for the offences in this case. It is therefore not surprising that he opted to keep quite when he was put on his defence.

We therefore find that the trial judge came to a wrong conclusion and misdirected himself when he decided to put him on his defence. He ought to have acquitted him at that stage of the trial for he clearly had no case to answer.

In conclusion, the convictions and the sentences that were imposed upon Nassanga Zainabu and Kasule John Vianney Jombwe on all 16 counts of aggravated robbery are hereby set aside.

Ground 1 of the appeal therefore partially succeeds.

Ground 2

The grievance in ground 2 was that the trial judge erred in law and fact when he sentenced the 9th appellant without holding a trial within a trial to determine whether he was a juvenile at the time that the offence was committed. That as a result, he occasioned a miscarriage of justice.

Submissions of Counsel

In this regard, the appellants' counsel referred us to Police Form 24, **PEX13,** in which it was stated, on the first page, that Muwonge Julius was of the approximate age of 18 years. But on the following page of the same document it was shown that he was 17 years of age.

The appellants' counsel then referred us to section 2 of the Children Act which defines a child as a person below the age of 18 years. He further submitted that section 107 of the Children Act, as amended by the Children (Amendment) Act, No 9 of 2016, requires the trial Court to

ascertain the age of the accused person where he appears to be under the age of 18. Further that Section 108 (2) of the same Act provides that the certification by a medical officer that a person is under the age of 18 years shall be the evidence of the age of that person. Counsel went on to refer to section 94(1) (g) of the same Act which provides that a child offender can only be in detention for a maximum of three years. He then prayed that Muwonge Julius be released from prison because he had already served a term of imprisonment of more than three years.

Without much ado, counsel for the respondent conceded to this ground of appeal. However, for completeness, it is necessary to determine whether the correct procedure to be adopted by the trial court in such a case is to hold a trial within a trial to ascertain the age of the offender said to be below the age of 18 years.

Resolution of Ground 2

It is true that on the first page, the medical examination form (**PEX 13**), upon which Muwonge Julius was examined at Mayfair Clinic on the 20th October 2014 the police officer who requested the exam stated that he was approximately 18 years old. But on the reverse side of the same form, the Medical Officer wrote that he was of the *apparent age of 17 years*.

In his unsworn statement Muwonge stated that he was born on the 11th April 1997. It was not challenged, and the trial judge made no inquiry at all about his age. Counsel for the appellant did not draw it to the attention of the judge that the person under trial was below the age of 18 years; he also consented to the admission of the medical examination form without drawing it to the attention of the trial judge that Muwonge was below the age of 18 years when he was arrested and charged for the offences in this case.

However, in mitigation of sentence, counsel for the appellant drew it to the attention of the trial judge that Muwonge was a juvenile at the time

the offence was committed. As a result, while considering the sentence to impose upon Muwonge Julius, the trial judge noted and held that,

> *"Counsel for the defence on A9 (Muwonge Julius) submitted that on the date the offences were committed, he was just aged 16 years. Counsel for the defence present A9's medical card from Murchison Bay Hospital dated 01/01/2015. The card does not bear a stamp of the hospital. I have to urge (sic) at that card, in my own observation in my capacity as a judge that card must have been obtained under the influence of A9's agents. The words in the form are false.*
>
> *According to F24 in respect of Muwonge Julius (Exh.P13) was admitted in evidence for the prosecution in agreement with A9 and his counsel pursuant to section 66 (1) of the Trial on Indictments Act, Cap 23 Laws of Uganda, the convict was by 20th October , 2014 aged 18 (eighteen) years. Thus the submission by counsel for the defence that Muwonge Julius, was a juvenile at the time is a lie. Exhibit 13, is the authentic certificate as to the age of Muwonge Julius (is) pursuant to section 108 of the Children Act, Cap 59 Laws of Uganda as amended."*

Counsel for the appellants referred us to an amendment of section 107 of the Children Act and submitted that the provision requires the court to make an inquiry as to the age of a person that appears to be below the age of 18 years. However, we find that the correct provision that ought to have been cited in that regard was section 88 of the Children Act, as amended by section 18 of the Children (Amendment) Act of 2016, by inserting new subsections, including the following:

> **"(2) In determining the criminal responsibility or an order for a child offender, the police, prosecutor or a person presiding over the matter shall consider the age of the person at the time the offence was allegedly committed;**
>
> **(3) Subject to subsection (2), court shall determine the age based on a full assessment of all available information, giving due consideration to official documentation including a birth certificate, school records, health records, statements certifying age from the parent of the child, or medical evidence."**

It is our view that the interpretation of section 88 (3) does not infer that there ought to be a trial within a trial to determine the age of an offender

said to be below the age of 18 years. In **Lim Seng Chuan v Public Prosecutor, [1977] MLJ 171**, regarding the status and nature of a trial within a trial, the Court of Appeal of Malaysia held that,

> *"It seems to us that fairness to the accused, which is a fundamental principle of the administration of criminal justice requires that a trial within a trial ought to be considered a separate and collateral proceeding"*

We associate ourselves with the observations above. However, we note that in Uganda, there is no provision under the law that guides the courts in Uganda on the procedure or necessity of holding a trial within a trial. This leads many judges to omit this process and has occasioned injustice in some trials.

We observed that in some jurisdictions, there are specific provisions under the written law that require trial courts to hold a trial within a trial where a cautioned statement is contested by the defence. For example, the Evidence Act of Nigeria (2011) provides in section 29 (2) that:

> **"(2) If in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant it is represented to the court that the confession was or may have been obtained –**
>
> **(a) by oppression of the person who made it, or**
>
> **(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence,**
>
> **the court shall not allow the confession to be given in evidence against him except in so far as the *prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section."*** [Emphasis supplied]

It is the requirement to *"prove beyond reasonable"* doubt that the confession is true that necessitates a trial within the trial, a separate or mini trial within the main trial.

The concept of a trial within a trial evolved from the common law. In **Anupchand Meghji Rupa Shah & Vijay Kumar Meghji v Republic [1984] eKLR**, the Court of Appeal of Kenya observed that,

> *"The purpose of a trial within a trial has been stated again and again in England and in the various countries which apply the common law. It is to determine the voluntariness of the statement tendered for the prosecution, because it is axiomatic, in all those systems of law, that a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. If it is not voluntary it is unlikely to have been true."*

In the same case, the court further held that during the trial within a trial, assessors must leave court, lest they mistake the evidence given in this separate trial to be part of the main trial.

In view of the definitions and purposes of a trial within a trial given above, we find that there was no need for the trial court in this case to hold a separate trial to prove the age of an offender whose defence against trial as an adult was in contest. All that the court had to do was carry out a full assessment of all available information, giving due consideration to official documentation including a birth certificate, school records, health records, statements certifying age from the parent of the child, or medical evidence, within the terms of section 88 (3) of the Children Act as amended.

The fact that it is the duty of the court to carry out an assessment and establish the age of the offender makes the process in section 88 (3) of the Children Act clearly different from the process in a trial within a trial. This is because, in a trial within a trial, the onus is upon the prosecution to prove that a confession has been voluntarily made and not obtained by improper or unlawful questioning or other improper methods, and that any inducement to make the same had ceased to operate on the mind of the maker at the time of making. (See **Njuguna s/o Kimani & 3 Others v R (1954) 21 EACA 316**)

We therefore find that counsel for the appellants misdirected court when he complained in ground 2 of the appeal that there ought to have been a *"trial within a trial"* to ascertain the age of Muwonge Julius before he was sentenced by the trial court.

Having made the observations above, we find that in the case before us, the trial judge had access to 2 pieces of evidence required by section 88 (3) of the Children Act: **PF24**, the report of a medical examination of a person accused of a serious crime, dated 20th October 2014 (**PEX13**) and medical records that were produced by counsel for the appellant from Murchison Bay Hospital, but which were not brought before us on appeal.

PEX13 showed that on examination of Muwonge Julius, the Medical Officer at Mayfair Clinic found that he was of the apparent age of 17 years. We find that the apparent age of 17 years assessed by the medical office was conclusive evidence of Muwonge's age at the time that he committed the offences for which he was indicted, pursuant to section 108 (2) of the Children Act. Section 108 (2) provides that *"A certificate signed by a medical officer as to the age of a person under eighteen years of age shall be evidence of that age."*

We also observed that the age assessed by the medical officer on 20th October 2014 was consistent with what Muwonge stated to be his date of birth during the trial, the 11th April 1997. This meant that on the 20th October 2014 when he was examined after the offences were committed he was 17 years and 6 months old. There could have been no fabrication of evidence by agents of the appellant, as the trial judge assumed and concluded.

In conclusion, the trial judge clearly misdirected himself when he considered the approximate age of the appellant in **PEX13**, instead of the apparent age certified by the medical officer in the same document. He also came to a wrong conclusion when he allowed the medical

records produced by counsel for the appellant during the trial to divert him from the concrete evidence that was already before him.

Ground 2 of the appeal therefore succeeds. We shall consider Muwonge's age at the time of committing the offences as 17 years for purposes of reviewing the sentences imposed by the trial judge, which is the subject of the next ground of this appeal.

Ground 3

In ground 3, the appellants complained that the trial judge erred in law when he sentenced them to a *"harsh and excessive sentence."* We note that the complaint ought to have been against sentences that were *"harsh and **manifestly** excessive in the circumstances,"* not merely harsh and excessive sentences.

Submissions of counsel

In this regard, counsel for the appellants submitted that the trial Judge ought to have laid out the mitigating factors, as he did the aggravating factors, before sentencing the appellants. Further that the failure to do so rendered the sentence irregular. He referred us to the decision in **Korobe Joseph v Uganda, Criminal Appeal No. 243 of 2013,** in which, he stated, that this court set aside the sentence imposed because the trial judge did not set out the mitigating factors in detail.

Counsel further argued that the learned trial Judge did not consider the principle of uniformity of sentences because he sentenced each of the appellants to 35 years' imprisonment for each of the offences, that is, murder and 16 counts of aggravated robbery. He referred us to guideline 6 (c) of the Sentencing Guidelines which provides that while sentencing offenders, courts should take into account the need for consistency with appropriate sentencing levels and others means of dealing with offenders in respect of similar offences committed during similar circumstances. He referred us to the decision in **Twinomujuni Baala v**

Uganda, Criminal Appeal No. 024 of 2011, where the range of sentences in cases of aggravated robbery was stated to be between 10 and 20 years' imprisonment. He pointed out that this court in that case laid out cases in which that principle was upheld.

Counsel then prayed that the appellants' sentence of imprisonment for 35 years be substituted with 10 years for the various counts of aggravated robbery, and 20 years for murder, with all of the sentences running concurrently.

We have not considered the submissions on sentence for murder because we already set aside the conviction and sentence for that offence due to the failure by the prosecution to adduce sufficient evidence to prove it to the requisite standard.

In reply to the submissions on ground 3, counsel for the respondent conceded that the learned trial Judge did not state the mitigating factors before sentencing the appellants. She prayed that the appellants' sentences be reduced to 15 years' imprisonment for aggravated robbery.

She referred us to the decision in **Abaasa & Another v Uganda, Court of Appeal Criminal Appeal No. 33 of 2010,** in which this court sentenced the appellants to 15 years' imprisonment for aggravated robbery. She prayed that the court follows that decision in sentencing the appellants in this case.

Resolution of Ground 3

The principles upon which an appellate court may interfere with the discretion of the trial court in sentencing were set out in **Ogalo son of Owoura v Republic [1954] 21 EACA 270**, as follows:

> *"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised*

by a trial judge unless, as was said in James v R., (1950) 18 EACA 147, "it is evident the Judge has acted upon some wrong principle or overlooked some material factor." To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: R. v. Shershewsky, (1912) C.A.A, 28 T.L.R. 364."

We addressed our minds to the principles above as a guide to the decisions made about the appellant's complaints in this appeal.

We observed that indeed the trial judge did not lay down the mitigating factors in as much detail as he did the aggravating factors for the offences committed by the appellants. However, we cannot fault him for not doing so because there was very little said by counsel for the appellants in mitigation of sentence, in respect of specific offenders. It will be useful for us to quote what he stated as mitigating factors for all of the 11 appellants, verbatim:

> *"1) They are all first offenders.*
> *2) All the convicts have been on remand for a period of 3½ years which should be deducted.*
> *3) As per sentencing guidelines part 8, the level of participation be considered. A8 - was juvenile at the time he committed the offence.*
> *4) I pray that the convicts are given 10 years imprisonment.*
> *5) There are 17 counts, I pray that whichever sentence the court gives on each count – such sentences be served concurrently.*
> *6) A6 is 50 years – she is in advanced years. A very long sentence could endanger her life."*

It is therefore clear from the submissions of counsel before the trial court that the court had limited information to go by while assessing the sentences to hand down to the appellants. Moreover, the appellants were not given an opportunity to say anything in mitigation before they were sentenced.

In cases such as this one where there are many offenders before court, the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, specifically sets down a principle for

sentencing co-accused person or multiple offenders. Paragraph 7 thereof provides that:

> **"The court shall consider the specific circumstances of each offender before sentencing co-accused persons or multiple offenders."**

Further, according to paragraph 60 of the Sentencing Guidelines, it is the duty of defence counsel to inform the court about the offender's social background and status; details about the offenders family, including dependants, if any; any responsibilities of the offender, including whether the offender is a primary care-giver; the offender's sources of income and financial status; the likelihood of the offender to reform; remorsefulness of the offender; or any other mitigating factors that may be relevant to the case.

In this case, counsel for the appellant at the trial singled out only two of the offenders in respect of whom he gave some details in mitigation of their sentences. The rest were treated in an omnibus manner. Having been given limited information, the trial judge was inclined to lean on the information given by the prosecution about the appropriate sentence. That is not to say that the prosecution did better at supplying information about the offenders. Prosecuting counsel also did not give specific information about each of the offenders as is required by paragraph 55 of the Sentencing Guidelines.

We therefore cannot fault the trial judge for not laying down all the information that was provided in mitigation, because insufficient information was given anyway. However, we are of the view that the trial judge ought to called counsel for the appellants to order and made him comply with the provisions in paragraph 60 of the Sentencing Guidelines. But he did not do so. As a result, he erred when he did not consider the specific circumstances of each offender before sentencing

the co-accused persons or multiple offenders, contrary to paragraph 7 of the Sentencing Guidelines.

We also accept the argument of counsel for the appellants that the trial judge ought to have had regard to the principles of consistency and appropriate sentencing levels while sentencing the appellants for aggravated robbery. He ought to have considered the sentencing range for similar offences imposed in other cases by other courts. Instead, the trial judge simply considered the sentences proposed by the prosecution and the defence and arrived at sentences of 35 years each in respect of both categories of offences, and therefore the numerous counts in the indictment.

We have already set aside the sentences that were imposed upon all of the appellants by the trial court. We shall now invoke the powers of this court, under section 11 of the Judicature Act, to impose appropriate sentences upon the appellants whose convictions have been confirmed, in respect of specific counts in the indictment.

Counsel for the appellants advanced the argument that the sentencing range for aggravated robbery stated in a recent decision of this court, **Twinomujuni Baala v Uganda** (supra) is 10 to 15 years imprisonment. We accept his submission as a true representation of that decision, but would also point out that this court has the power to augment sentences in different cases depending on the circumstances in the particular case. We say so because the maximum sentence for aggravated robbery is death.

Nonetheless, on the basis of the decision of this court in **Twinomujuni's** case (supra), counsel for the appellants proposed that this court sentences the appellants to 10 years' imprisonment for aggravated robbery. He did not specify the basis of his proposal apart from the sentencing range drawn from **Twinomujuni's** case.

It is pertinent to point out that while exercising its discretion to sentence convicts, the court also considers other factors such as the gravity of the offence, including the culpability of the offender and the information provided to the court concerning the effect of the offence on the victim(s) or the community. The age of the offender also has to be considered, among other things. (See **Bikangaga Daniel v Uganda, Court of Appeal Criminal Appeal No 38 of 2000**). We shall proceed to impose sentences on the basis of the various principles identified above, for each count in respect of which convictions were confirmed.

With regard to Count 4, we confirmed the conviction of Irene Namutebi (Appellant No.5), Ali Kasule Kirumira (Appellant No. 8) and Muwonge Julius (Appellant No. 9). They set upon Juliet Namanda with iron bars, a knife and hammer and stole a mobile phone from her worth UGX 110,000. One of the assailants hit her with a hammer on the head. She sustained serious injuries, some of which left scars that were still evident at the trial. We note that the attack upon the victim was vicious. She was lucky to survive death from the blow of a hammer on her head.

We noted from their statements and testimonies before the trial court that Irene Namutebi was 23 years old, Kasule Kirumira was 30 years; while Julius Muwonge was 17 years old, at the time they committed this offence.

We take cognizance of the fact that Namutebi and Kasule were still young and capable of reforming and going back into their communities to serve their families and the nation. In addition, the victim survived the ordeal. We also take into consideration that the appellants had been in lawful custody for 3 years before they were convicted by the trial court. In the circumstances, we are of the view that a sentence of 10 years' imprisonment would meet the ends of justice in respect of Count 4. We sentence them accordingly.

However, with regard to Julius Muwonge, section 94(1) (g) of the Children (Amendment) Act provides that a child offender can only be in detention for a maximum of three years. Since he was 17 years of age when he committed the offences in this case he fell within the ambit of section 94 (1) (g) of the Children Act.

Muwonge was sentenced to a term of 35 years imprisonment on 30th June, 2017. He has now served a term of imprisonment of 4 years, which is higher than is permitted by law. He therefore ought to be set free in respect of this and other convictions that have been upheld against him in this case.

With regard to Count 6, it was established beyond reasonable doubt that Jurua Faith (Appellant No. 3), Mugerwa Farouk (Appellant No 4) and Lubega Donozio (Appellant No. 7) did in the night of 21st August 2014 commit a robbery against Sauda Nanyonjo, at Bwebajja. Lubega used an object that the victim did not identify to inflict injuries upon her classified as *"harm."* We therefore found that they committed robbery contrary to section 285 of the PCA.

According to section 286 PCA, the maximum punishment for robbery where an offender is convicted by the High Court is imprisonment for life. For offences other than murder, imprisonment for life does not mean imprisonment for the rest of the life of the offender. The court can exercise its discretion to impose a lesser sentence.

The injuries sustained by Sauda Nanyonjo, the victim, were not serious. She did not specify the amount of money that was stolen from her but the assailants also stole her cell phone of an unspecified value. At the time they committed the offence, Jurua Faith was 24 years old, while Mugerwa and Lubega were 27 years and 28 years old, respectively.

We considered the aggravating and mitigating factors that were presented to the trial court. The offences committed by the appellant caused fear to the residents of the area and some of them had to leave and find accommodation elsewhere.

However, the appellants were all still young people at the time they committed the offence and capable of reforming. A long custodial sentence is not necessary to enable them to reform. We have also taken into account that the appellants were in lawful custody for 3 years before they were convicted. We are therefore of the view that a term of imprisonment of 5 years for each of the 3 appellants shall be sufficient to meet the ends of justice for this offence and we sentence them accordingly.

In respect of Count 14, it was established that Suuna Joseph (appellant No 2) Jura Faith (appellant No 3), Mugerwa Farouk (appellant No 4) and Irene Namutebi (appellant No 5), did in the night of the 21st August 2014 commit a robbery with aggravation against Nassanga Josephine, in which they stole Ushs 650,000/= from her. Although they carried *pangas* and sticks, they did not use the *pangas* against her but hit her with the stick. She was frightened into letting them steal her money but sustained no injuries.

We considered all the aggravating and mitigating factors that were presented to the trial court. We have already established that Jurua Faith was still a young adult at the age 23 years. Namutebi was 24 years old, Mugerwa Farouk was 27 years old, while Suuna Joseph was 28 years old. We are of the view that the appellants are still capable of contributing to the nation in useful work. A long custodial sentence will not be necessary to help them reform.

We are cognisant of the fact that the maximum sentence for aggravated robbery is death. However, we have taken into consideration the

circumstances in which this crime was committed and its effect on the victim. We have also considered the fact that the appellants were in lawful custody for 3 years before they were convicted and taken it into account before sentence. We are of the view that a sentence of 8 years in prison for each of the 4 appellants convicted under this count will be sufficient to meet the ends of justice. We therefore sentence them accordingly.

In respect of Count 15, Namutebi Irene (Appellant No 5), Jurua Faith (Appellant No 3) and Muwonge Julius (Appellant No 9) did steal a telephone and money from Ssebagala Jimmy and immediately before or after the theft hit him with sticks, including on the head and caused him to suffer grievous harm. We therefore convicted them of aggravated robbery for which the maximum sentence is death.

We have considered the aggravating factors in this offence. The victim was injured and sustained permanent injuries which led to loss of ability to practice his vocation as a mechanic; his mental faculties were also affected. He could have died from the blow on the head but he survived to remain a dependant on others because he can no longer work to earn a living. The impact of the offence was therefore grave though the amount of money and the value of the phone that the appellants stole were not established by evidence on the record. Regardless of that, the appellants deserve a serious deterrent sentence for this offence.

In mitigation, we have already considered the fact that the appellants were still young people and capable of reforming and contributing to the nation in useful work, and to the sustenance of their families. With regard to Muwonge Julius, we have already held that he has served more years in prison than is permissible for a person that was under the age 18 years at the time the offence was committed and set him free.

We continue to observe that the appellants that are liable to be sentenced under this count had all been in lawful custody for 3 years prior to their conviction. Having taken that into account, we are of the view that a term of imprisonment of 12 years shall be sufficient to meet the ends of justice; we sentence them accordingly.

Counts 9, 16 and 17 related to crimes committed in the same house. However, the victim in count 9 did not testify and no one did so on his behalf. There being no evidence, we set aside the conviction against all of the appellants now before court.

But in respect of Counts 16 and 17, it was proved beyond reasonable doubt that Semakula Mohammed (1st appellant), Jurua Faith (3rd appellant), Namutebi Irene (5th appellant), Ali Kasule Kirumira (8th appellant), Lubega Donozio (7th appellant) and Muwonge Julius (9th appellant) participated in and are guilty of aggravated robbery against Nakku Harriet and Nanteza Immaculate.

The aggravating factors in respect of this count were that the appellants carried sticks and *pangas* during the robbery. They hit Nakku Harriet with a stick and cut her with a *panga* on the head. She recovered but the scars on the forehead and scalp remained and she continued to suffer from dizziness. The attack on her sister Nantenza led to a broken arm which remained weak even after treatment. She also retained scars on the head and cheek where she was cut with a knife. The total amount of money stolen from both victims amounted to 450,000/=. Several members of this family were injured so Nakku did not receive the full course of treatment due to financial constraints; she continued to suffer frequent spells of dizziness.

We considered that Semakula Muhammed was 38 years old. **PW10** testified that he had information that Semakula was the leader of this group of robbers. We have already observed that the rest of the

appellants were young people, though adults. Ali Kasule Kirumira was 30 years old at the time the offences were committed and so relatively older.

We have taken into account that the appellants had all been in lawful custody for 3 years before conviction. Further that Jurua Faith, Irene Namutebi and Lubega Donozio were relatively younger; shorter sentences should be imposed on them to enable them to return to and serve their communities and families.

However, given the impact of these crimes on the community and the injuries to the victims, we consider that a term of imprisonment of 15 years imposed on Semakula Mohammed and Ali Kasule Kirumira shall meet the ends of justice because at their age, they ought to have known better. They ought to have influenced the younger people against committing such heinous offences on a whole community; instead they appear to have led them to do so.

We also considered that given that they were still young and could reform, a term of imprisonment of 10 years on Jurua Faith, Irene Namutebi and Lubega Donozio would be appropriate in the circumstances. We hereby sentence the 4 appellants accordingly. We pronounce no sentence in respect of Julius Muwonge for reasons that we have already stated above.

Ground 3 of the appeal therefore substantially succeeds.

In conclusion, this appeal partially succeeds and we make the following orders:

1. The convictions and sentences against all of the appellants for murder are hereby set aside;
2. The convictions and sentences for aggravated robbery on all 16 counts against Zainabu Nasanga and Kasule John Vianney Jombwe

are hereby set aside. They shall be released from prison forthwith, unless they are held on other lawful charges.

3. The joint conviction of the rest of the appellants on the 16 counts of aggravated robbery and the sentences of 35 years against each of them are hereby set aside. They are substituted with convictions and sentences for each of the appellants as follows:

a) Ssemakula Mohammed for aggravated robbery under Counts 16 and 17 – sentence of 15 years for both counts;
b) Suuna Joseph for aggravated robbery under Count 14 – to serve a sentence of 8 years' imprisonment;
c) Jurua Faith: i) aggravated robbery under Counts 14 and 15, – to serve sentences of 8 years and 12 years, respectively. Under Counts 16 and 17 – to serve a sentence of 10 years' imprisonment for both Counts ii) robbery under Count 6 – to serve a sentence of 5 years imprisonment;
d) Mugerwa Farouk: robbery under Count 6 and aggravated robbery under Count 14 – to serve sentences of 5 years and 8 years imprisonment, respectively;
e) Namutebi Irene: aggravated robbery under Counts 4, 14 and 15 – to serve sentences of 10 years, 8 years and 12 years, respectively. Under Counts 16 and 17 – to serve a sentence of 10 years' imprisonment for both Counts
f) Lubega Donozio: i) aggravated robbery under Counts 16 and 17 – to serve a sentence of 10 years' imprisoment for both Counts; ii) robbery under Count 6 – to serve a sentence of 5 years' imprisonment;
g) Ali Kasule Kirumira: i) aggravated robbery under Count 4 – to serve sentences of 10 years and, under 16 and 17 – to serve a sentence of 15 years imprisonment for both counts; ii) robbery under Count 6 – to serve a sentence of 5 years' imprisonment;
h) Muwonge Julius: aggravated robbery under Counts 4, 15, 16 and 17 – no sentences imposed for he had stayed in prison longer than the 3 years permitted by law for a person under 18 years. He shall be set free forthwith, unless he is held on other lawful charges.
i) The sentences imposed against the appellants for the multiple convictions shall commence on the date of conviction and shall all run concurrently.

It is so ordered

Dated at Kampala this 26th Day of August 2021.

Kenneth Kakuru

JUSTICE OF APPEAL

Muzamiru Mutangula Kibeedi

JUSTICE OF APPEAL

Irene Mulyagonja

JUSTICE OF APPEAL