THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama, JJCA*]

CRIMINAL APPEALS NO. 179 OF 2020 AND 208 OF 2020

(*Arising from High Court Anti-Corruption Division Criminal Session Case No.004 of 2016*)

BETWEEN

Geoffrey Kazinda ==========Appellant

AND

Uganda==========Respondent

(*An appeal from the Judgement of the High Court Anti-Corruption Division [Tibulya, J] delivered on 6th November 2020*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was charged and convicted on 3 counts of illicit enrichment contrary to sections 31(b) and 31(2) of the Anti-Corruption Act.

[2] The particulars in count 1 were that the appellant between 2010 and June 2012, being the Principal Accountant in the Office of the Prime Minister maintained a standard of living above that which was commensurate with his income or past known sources of income or assets whose sum for the duration 2009 to 2012 was established by the Inspectorate of Government to be UGX 83,754,655 when he rented and occupied Suite 105 at Golden Leaves now Constellation suites Nakasero, apartments at Sheraton hotel Kampala for a period of 10 months at a total cost of UGX 210,364,011.

[3] The particulars of the offence in count 2 were that the appellant between 2010 and June 2012, being the Principal Accountant in the Office of the Prime Minister was

in possession and control of property comprised in Volume 2014 Folio 19, plot no. 1904 Bukoto, Kyadondo Mengo; Volume 1956, Folio 11, plot no.264, Bukoto Sabaddu-Kyadondo West Mengo; Volume 213 Folio 21, plot no.2132, Bukoto Mengo whose value was established to be UGX 3,657,747,500.00 which was disproportionate to his income and past known sources of income and assets whose sum for the duration 2009 to 2012 was established by the Inspectorate of Government to be UGX 83,754,655.

[4] The particulars for count 3 were that the appellant between 2010 and June 2012, being the Principal Accountant in the Office of the Prime Minister was in possession and control of four motor vehicles namely: AK 1 BMW, AK 2 Mercedes Benz, UAN 200X Dodge Saloon and UAM 200B Mercedes Benz ML Class which cost UGX 769,473,835 which was disproportionate to his income and past known sources of income and assets whose sum for the duration 2009 to 2012 was established by the Inspectorate of Government to be UGX 83,754,655.

[5] The learned trial judge sentenced the appellant to a term of 5 years' imprisonment on each count to run consecutively. A confiscation order was issued against the appellant for the land and developments in Volume 2014 Folio 19, plot no. 1904 Bukoto, Kyadondo Mengo; Volume 1956, Folio 11, plot no.264, Bukoto Sabaddu-Kyadondo West Mengo and Volume 213 Folio 21, plot no.2132, Bukoto Mengo. A confiscation order was also issued for motor vehicles AK1 BMW, AK2 Mercedes Benz, UAN 200X Dodge, UAM 200B. The appellant was also disqualified from holding public office for a period of 10 years from the date of sentencing.

[6] Dissatisfied with the decision of the trial court, the appellant appealed against the conviction and sentence on the following grounds:

> **'A-APPEAL AGAINST CONVICTION**
>
> 1.The learned trial judge caused a miscarriage of justice to the appellant when, after perusing the appellant's written submissions in support of his acquittal, wherein the appellant urged (*sic argued*) that he was not supposed to be prosecuted by the inspectorate of Government when it is not fully constituted, and that during the trial, his the rights to a fair trial, under **Article 2891) and 44(c)** had been derogated, she declined to acquit the appellant, and advised the appellant to file a constitutional petition in the Constitutional court for such determination, yet the determination by the constitutional court for both issues had already been made and the judgments to that effect were attached to the appellant's submission before here and were still in force.

2. The learned trial judge erred in law and fact when she convicted and sentenced the appellant under a law which is not an offence and for which no punishment is prescribed, hence occasioning a violation of the appellant's rights to a fair trial.

3.The learned trial judge erred in law and fact when she convicted the appellant in a trial which she dropped one of the two remaining assessors for having absented himself, and remained with one assessor to whom she summed up, rendering the trial an illegality

4. The learned trial judge erred in law and fact in not addressing her mind to the fact that by omitting to compute the appellant's income for the fifteen years prior to the year 2009, prosecution did not prove the ingredient of current or past known income embedded within the offence of illicit enrichment thereby convicting the appellant wrongly on all the three counts.

5. The learned trial judge erred in law and fact when she distorted the principles set forth in **B.D Wandera Vs Uganda HCT-00-AC-SC-012 of 2014** and convicted the appellant in counts 2 and 3 without making a finding as to whether the appellant acquired the properties unlawfully.

6.The learned trial judge erred in law and fact in failing to address her mind to the fact that the approach which prosecution adopted to prove the values of the vehicles (UGS 769,472,8350) with which disproportionality the appellant's income was alleged in count 3 is not the approach prescribed in law for proving value of assets, hence wrongly concluding that the appellant was guilty of illicit enrichment in count 3.

7. The learned trial judge erred in law and facts when she relied on the evidence of **PW4, PW5, PW6** and **PW10** to wrongly arrive at the conclusion that the appellant occupied suites 105 at Constellation Suites, Sheraton Hotel, Kampala for a period of six months during which he consumed bills of UGS 210, 364,011 and paid UGS 149, 150,000 whose documentary evidence being photocopies admitted outside the law of admission of such evidence.

8. The learned trial judge erred in law and fact when, without reason, she omitted the evidence of Teopista Nanfuka contained in exhibit **D7**, the evidence of John Mike Musisi in exhibits D8, the evidence in exhibits **D1, D2** and **D3** in the evaluation of who the property in exhibits **P5(a), P5(b)** and **P5(c)** belongs, thus

arriving to a wrong conclusion that the property belonged to the appellant.

B-APPEAL AGAINST CONFISCATION ORDERS

9.The learned trial judge erred in law and fact when she ordered confiscation of properties, in count 2 and 3 yet the conviction from which the orders were issued arose out of a prosecution whose continuation had been prohibited by the orders of the Constitutional Court in Petition No 30 of 2014 (Geoffrey Kazinda v Attorney General), which were still in force at the date of conviction, thereby occasioning a miscarriage of justice.

C-APPEAL AGAINST SENTENCE

10. The learned trial judge erred in law and fact when she relied on non-remorsefulness of the appellant and evidence which was not canvassed on the record to deny the appellant a non-custodial sentence.

11.The learned trial judge erred in law and fact when she did not address her mind to meaning attached to "distinct offences' and 'several punishments" which are embedded in the law of imposition of. Consecutive sentences, thereby sentencing the appellant to 3 five year terms, to run consecutively, which resulted in a fifteen year sentence which is harsh and excessive.

12.The learned trial judge erred in law and fact in not addressing herself to the principles of sentencing when she did not state the final sentence upon which she deducted the five year period which the appellant had spent on remand, thereby imposing an ambiguous and illegal sentence.'

[7] The respondent opposed the appeal.

Submissions of counsel

[8] At the hearing, the appellant represented himself and the respondent was represented by Ms. Sarah Birungi, Director Legal Affairs, Inspectorate of Government. Counsel adopted their written submissions.

[9] It was the appellant's submission on ground 1 that it was erroneous for the learned trial judge to continue with the hearing of the case despite the orders by the Constitutional Court in Geoffrey Kazinda v Attorney General [2020] UGCC 11 barring the continuation of the proceedings against the appellant. He argued that the decision by the trial court to continue with the proceedings was a violation to

his constitutional right to a fair hearing as was found in Geoffrey Kazinda v Attorney General (supra).

[10] The appellant also submitted that the Inspectorate of Government prosecuted his case when it was not fully constituted as mandated by the law. The appellant contended that the fact that Justice Irene Mulyagonja did not resign from her position as judge before taking up the position of Inspector General of Government rendered his prosecution a nullity. He referred to Hon Sam Kuteesa & 2 Ors v Attorney General Constitutional Petition 46 of 2011 & Constitutional Reference 54 of 2011 (unreported) where the constitutional court held that the Inspectorate of Government must be fully constituted so as to prosecute cases involving corruption or abuse of authority or of public office. The appellant further submitted that his prosecution started on 2nd June 2016 after the decision in Hon Sam Kuteesa & 2 Ors v Attorney General (supra) took effect. The appellant further contended that the failure to appoint an Inspector General of Government after Justice Irene Mulyagonja left office and his subsequent prosecution by the Inspectorate of Government in the absence of an Inspector General of Government rendered his prosecution a nullity.

[11] In reply, counsel for the respondent submitted that the Inspectorate of Government was fully constituted before the proceedings against the appellant commenced in 2016 when he was arraigned before the Magistrate's Court in Criminal Case No. 59 of 2016 before being committed to the High Court on the same charges in Criminal Case No. 004 of 2016. Counsel for the respondent submitted that Justice Irene Mulyagonja was appointed as Inspector General of Government in 2012 after resigning her position as a High Court Judge in July 2012. She submitted that Mr. George Bamugemereire and Ms. Mariam Wangadya were appointed as Deputy Inspector Generals of Government in 2013. Counsel also submitted that the declarations in Kazinda v Attorney General (supra) excluded Criminal Case No. 59 of 2016 that was being prosecuted by the Inspectorate of Government against the appellant on charges of illicit enrichment.

[12] With regard to ground 2, the appellant submitted that the learned trial judge erred in law and fact when she sentenced him under a law which is not an offence and for which no punishment is prescribed contrary to Article 28 (12) of Constitution. The appellant submitted that a judge should pass a sentence against a convict in accordance with the law as provided by section 82 (5) of the Trial on Indictments Act. He argued that section 31 (1) (a) and (b) of the Anti-corruption Act, under which he was convicted does not provide for an offence or punishment but rather provides for the powers and the authority of the Inspectorate of Government and

the Director of Public Prosecutions to investigate or cause the investigation of persons suspected of acquiring wealth illicitly.

[13] The appellant submitted that his conviction under a wrong law was a violation of his right to a fair trial. He relied on Opolot and Anor v Uganda [2009] UGSC 4 for this submission. He prayed that this court exercises the powers vested in it under section 34 of the Criminal Procedure Code Act to quash his conviction. The appellant relied on Aniket Patel v Attorney General Constitutional Petition No. 02 of 2019 (unreported), Otema Anthony v Uganda Court of Appeal Criminal Appeal No. 456 of 2015 (unreported) and Albanus Mwasia Mutua v Republic [2006] eKLR for the submission that the trial against him ought to be nullified because non derogable rights were violated.

[14] In reply, counsel for the respondent submitted that the trial judge convicted and sentenced the appellant in accordance with the law. She submitted that the offence of illicit enrichment is described in S.31(1) (a),(b) and created in section 31(2), the latter providing the offence and punishment. It was counsel's submission that the respondent was therefore convicted by the trial judge of an offence that is defined with a penalty set by the law.

[15] For ground 3, the appellant cited section 69 (2) and section 3 of the Trial on Indictments Act and argued that the reasonable construction of section 69 (1) and (2) when read together with section 3 of the Trial on Indictments Act is that irrespective of the number of assessors that absented themselves, continuation of a trial is permissible with at least two or more assessors. He submitted that instead of staying the proceedings when only one assessor remained, the learned trial judge erred in law by summing up to the remaining assessor. He argued that the trial judge did not take steps to satisfy herself that the assessor (Mr. Gabriel Obonyo) was absent for good reasons or could not be found thereby unnecessarily delaying the trial. He relied on Komakech v Uganda [1990] UGSC 10. He further submitted that the remaining assessor did not take an oath as required by section 67 (1) of the Trial on Indictments Act. He relied on Alenyo Marks v Uganda [2019] UGSC 62. The appellant averred that the absence of assessors renders the trial a nullity. He relied on Bongomin Kennedy v Uganda [2020] UGCA 7.

[16] In reply, counsel for the respondent cited Byaruhanga Fodori v Uganda [2002] UGCA 4 where it was held that that a trial can proceed with the assistance of a single assessor if the other assessor fails to turn up during the trial or for any reason absents himself and misses part of the trial. She referred to Komakech v Uganda (supra) were it was stated that a trial in the High Court or the Magistrate's Court

begins when some evidence is led. Counsel for the respondent submitted that summing up to one assessor did not occasion a miscarriage of justice and that there were two assessors throughout the trial. Counsel further argued that the trial court was satisfied that the assessor could not be found without unnecessarily delaying the trial since the appellant had been put to his defence. Counsel for the respondent also relied on Okwonga Anthony v Uganda [2002] UGSC 8.

[17] With regard to ground 4, the appellant faults the learned trial judge for considering 2009 as the starting point for computing his financial profile for purposes of establishing the offence of illicit enrichment. The appellant contended that the learned trial judge did not take into consideration the appellant's past known income contrary to section 31(2) of the Anti-Corruption Act and the decision in Uganda v Wandera [2014] UGHCACD 8 upon which she relied. The appellant argued that his past known income could not have been UGX 83,754,655 because prior to 2009, he had been a government employee in Uganda Airlines, the Office of the Auditor General, Ministry of Finance, Planning and Economic Development, Ministry of Water, Movement Secretariat and the Office of the Prime Minister. The appellant argued that this information was known by the prosecution because it was available in Exhibits P20(a), P 20(b) and P20(c), the appellant's declaration forms. He stated that PW15 admitted that there was income for the appellant acquired before 2009 that was omitted from the evidence.

[18] The appellant further submitted that there are various avenues that the prosecution could have used to attain information regarding his past income namely, his bank opening form, personal employment number 03050K and tax identification number. The appellant was of the view that by omitting to compute the income before 2009, the investigation was not thorough. He submitted that the cases of Uganda v Akankwasa Damian HCT-00-AC-SC-69 of 2010 and Republic v Wesley Mzumara Criminal Case No. 47 of 2010 upon which the trial judge relied emphasised the need establish the known income. The appellant also contended that the declaration of assets required by the law is not cumulative but rather relates to the past two years at the time of declaration on the presumption that the previous years are already with the IGG. Further, the appellant contended that the law places the obligation on the respondent to establish the accused's past income and the burden does not shift to the appellant. The information which the accused can volunteer to provide is income which is unknown to the state. The appellant submitted that there would be evidence expected of the accused as to why he omitted his income if what the appellant declared for the past years was presented which was not the matter in this instant case.

[19] In reply, counsel for the respondent disagreed with the interpretation of section 31 of the Anti-Corruption Act in Uganda v Wandera (supra) that the prosecution must prove both the past and current known income of the accused in a trial for illicit enrichment. Counsel for the respondent submitted that the selection of an appropriate starting point as a baseline for the financial profile depends on the merits of the case as was emphasized Uganda v Wandera (supra). Counsel stated that this view was echoed by Muzila et al, (2012) in their book, On the take: Criminalising illicit enrichment to fight corruption, where it was observed that the demarcation of a period of interest sets a practical starting point in setting a baseline for investigations and that such a period must establish a nexus between the significant increase in wealth by the accused.

[20] It was counsel for the respondent's submission that the evidence on record demonstrated that the appellant had a tremendous increase in acquisition of property and control of pecuniary sources between 2009 and 2012 and that it was important to establish whether the increase resonated with his known current income. Counsel submitted that the evidence led by PW15 established that the appellant from as far back as 2005 could not afford such exorbitant sums of money. Counsel for the respondent contended that all the ingredients of the offence had been proved beyond reasonable doubt.

[21] With regard to ground 5, the appellant contended that the learned trial judge misapplied the principles stated in Uganda v Wandera (supra) by failing to take into consideration that the disproportionality in assets and current or past known income must be a result of the unlawful acts of the accused. The appellant contended that the prosecution did not adduce evidence of the unlawful acts of the appellant and neither did the trial judge make any findings as to the unlawful acts of the appellant from which illicit enrichment could be inferred.

[22] In reply, counsel for the respondent submitted that section 31 of the Anti-Corruption Act only requires the respondent to prove that the properties and pecuniary sources in control of the appellant are disproportionate to the appellant's known income and that the trial judge in Uganda v Wandera (supra) stated that once this is done then an inference is drawn that the accused illicitly enriched himself if no plausible defence is raised. Counsel contended that the appellant did not put up any plausible defence when the trial court found him guilty of the offence of illicit enrichment.

[23] With regard to ground 6 the appellant submitted that before the alternative value was admitted, the amount of UGX 769,472,835 as the total value of the motor vehicles ought to have been computed by a certificate of Government Valuer or someone appointed by the Inspector General of Government in accordance with section 31(4) of the Ant--corruption Act. The appellant contended that there was no documentary evidence concerning the monetary value of the vehicles. In particular, he referred to exhibits P22(c), P22(d) and P22(b). He argued that PW4, Spear Motors, and a licensing officer from the Uganda Revenue Authority are not Government Valuers in as far as section 31(4) is concerned and that neither were they appointed by the Inspectorate of Government as valuation experts. The appellant contended that the prosecution had failed to prove the second ingredient of the offence because the valuation of the said properties was illegal.

[24] In reply, counsel for the respondent submitted that section 31(4) of the Anti-Corruption Act does not restrict proof of facts to the evidence of a Government Valuer or a valuation expert appointed by the Inspector General of Government. Counsel for the respondent contended that the prosecution proved the value of vehicles in control of the appellant to the required legal standard of proof.

[25] With regard to ground 7, the appellant submitted that exhibit P11 and exhibit P12 were wrongly admitted in evidence. It was the appellant's contention that the documents in the exhibits are private documents that had to be proved by primary evidence under section 63 of the Evidence Act. The appellant also argued that it was not sufficiently proved that Suite 105 Constellation Suites remained vacant for some time under the appellant's names and that PW10 closely interacted with the appellant over a long period of time. The appellant further contended that it was not sufficiently proved that he consumed bills worth UGX 210,364,011 while at Constellation Suites. He argued that it was PW11's testimony that he only consumed UGX 3,600,000. The appellant submitted that the cheques in exhibit P.9 did not have particulars, that they were not received by P.7 and that they were outside the indictment period. He further argued that there is no evidence that he ever resided in the apartment from which the cheques were picked.

[26] The appellant also argued that there is no documentary evidence on record to prove that he concealed his identity through Charles Kamunvi. He contended that the bills were in Kamunvi Charles' names and that none of the bills not in his names could be attributed to him. He also contended that there is no evidence that he rented office space at Sheraton office. The appellant argued that the learned trial judge did not exhaust all provisions of the law to ensure that she arrives at the correct decision. The appellant submitted that the learned trial judge ought to have

applied sections 39,76 and 80 of the Trial on Indictments Act, to recall any witness whose evidence was essential or called upon the prosecution to give additional evidence before concluding that his evidence was an afterthought.

[27] In reply, counsel for the respondent submitted that the evidence of PW10 falls within the ambit of section 64 (1) (c) of the Evidence Act which allows proof of private documents by secondary evidence in exceptional circumstances, certified copies inclusive. She contended that the documents in question were rightly admitted into evidence. Counsel for the appellant further contended that the evidence of PW4, PW5, PW6 and PW10 demonstrated that the appellant resided at Constellation Suites, Sheraton and incurred a bill of UGX 210,364,011.

[28] It was the appellant's submission on ground 8 with respect to the land comprised in Volume 2014, Folio 19 plot 1904 Bukoto Kyadondo (Exhibit P5(a)) that the learned trial judge was wrong in coming to the conclusion that PW1 believed that the appellant had donated the said piece of land to the association. He contended that the learned trial judge ignored that PW2 admitted that the properties were transferred to the brothers for purposes of securing loans for the joint project. Counsel also submitted that it was erroneous for the trial judge to change PW2's evidence where he stated that it was PW'2's evidence that the accused acquired the property at UGS 120,00,000. He argued that PW2 only stated that the association never paid money to Dr. Busingye. The appellant argued that PW2 was silent with regard to the demand to return the titles that was in exhibit D2.

[29] The appellant further contended that the learned trial judge omitted the evidence of Teopista Nanfuka contained in her statement (exhibit D7) that shows that she is the owner of the land in question. The appellant also submitted that learned trial judge did not take into consideration the evidence of John Mike Musisi contained in exhibit D8 where he stated that he dealt only with PW2 with regard to the transfer of the land titles and that he withheld the certificate of titles because the association of the Registered Trustees of the Native African brothers of Christian Instruction had not paid him legal fees.

[30] The appellant further submitted that the learned trial judge did not take into consideration the evidence in exhibit D3 that shows that the association opened a joint account with Nanfuka Teopista in Centenary Bank for the joint project called 'The Brothers of Christian Instruction – life insurance'. Equally, the appellant submitted that the learned trial judge did not take into consideration the evidence in exhibit D1 and D2 where Teopista Nanfuka demanded that the Brothers of Christian Instruction refund the money they had withdrawn from the account

without her knowledge and return her certificate of titles due to failure to fulfil their obligations. The appellant also referred to the evidence of PW2 and PW3 that showed that his late father had a long-term relationship with the Brothers of Christian Instruction. He further stated that the evidence of PW2 corroborated the evidence of Nanfuka Teopista on how the properties were transferred to the association after having opened a joint account with Nanfuka Teopista

[31] With regard to land comprised in Volume 213, Folio 2132 Mengo, the appellant reiterated his submission that the learned trial judge did not take into consideration the evidence of Teopista Nanfuka as to how she acquired the property. He submitted that the trial court did not take into consideration that PW7 stated that at times projects are supervised by people who are not owners and that the alleged interaction between PW7 and the appellant took place in 2005 outside the indictment period of December 2009 to June 2012. He argued that the transactions were not hidden because Teopista Nanfuka dealt with PW2 and PW3 for the joint venture project, she exchanged letters such as D2 and D3 with the brothers and that she wrote a letter to the Attorney General demanding the return of the seized documents. The appellant averred that the learned trial judge did not take into consideration the fact that DW4 and PW7 constructed at different times hence the evidence of DW4 could not corroborate the evidence of PW7.

[32] With regard to land comprised in Volume 1936 Folio 11 plot 264 Bukoto Mengo (exhibit p5(c), the appellant submitted that the trial judge ignored Teopista Nanfuka's evidence that she bought the land and that no agreement was presented to show that the appellant bought the land at UGX 350,000,000. He argued that the trial judge did not take into consideration the evidence of PW2 where he stated that exhibit P1 was not applicable to properties acquired in 2010 and 2012. He argued that the trial court did not take into consideration the evidence of PW2 where he stated that he did not disclose the joint venture in the Annual General Meeting because the memorandum had not been completed. He stated that John Mike Musisi in his statement denied dealing with anyone else save for Brother Byaruhanga contrary to the evidence of PW2. He also argued that the association did not own the property in question but was only transferred to it to enable it borrow money for the project. He stated that at all times the property belonged to Nanfuka Teopista. The appellant invited this court to take consideration Abdu Ngobi v Uganda Supreme Court Criminal Appeal No. 10 of 1991 (unreported) where it was held that the evidence of prosecution should be examined and weighed against the evidence of the defence so that a final decision is reached after all the evidence has been considered.

[33] In reply, counsel for the respondent submitted that the trial court considered D8 which PW8 explained in his testimony on page 41, 42, 43 and 44 of the record that he contacted John Mike Musisi on the instruction of the appellant. It was counsel for the respondent's submission that the contents of D1, D3 and of D7 were explained by PW1, PW2 and PW3 on pages 24 to 66 of the record. She contended that the trial court took into consideration all the evidence before arriving at its conclusion.

[34] On ground 9, the appellant contended that it was erroneous for the trial court to continue with the proceedings following the orders in Kazinda v Attorney General [2020] UGCC 11 barring the state from prosecuting the appellant for any similar offence or offences founded on the same facts or in connection with his former employment as Principal Accountant, Office of the Prime Minister. He was of the view that this instant case is one of those cases. The appellant contended that the orders in the decision of the Constitutional Court did not provide for any exception as ruled by the trial court. He argued that the exception only related to one of the issues for determination but was not applicable to the orders. He submitted that the charges of illicit enrichment resulted from investigations regarding his employment as Principal Accountant, Office of the Prime Minister. The appellant cited R v Barrell and Wilson (1979) 69 Cr. App R 620 for consideration in determining offences founded on the same facts. The appellant submitted that a miscarriage of justice was occasioned to him when the trial judge issued the confiscation orders. He referred to Hadkinson v Hadkinson [1952] 2 All ER 567 for the proposition that orders by a competent court have to be obeyed by the person against whom they have been issued unless and until they have been discharged as was his case.

[35] In reply, counsel for the respondent submitted that section 131 of the Trial on Indictments Act allows confiscation of property that is subject to a criminal trial. It was counsel's submission that the decision in Kazinda v Attorney General [2020] UGCC 11 excluded case no. 59 of 2016 for illicit enrichment being prosecuted by the Inspectorate of Government from its declarations therefore the trial court legally continued with the trial of the appellant.

[36] It was the appellant's submission on ground 10 that the imposition of a custodial sentence was not applicable in his case because the trial court misdirected itself on the law regarding non-remorsefulness of a convict as an aggravating factor while sentencing. The appellant referred to Mattaka and Others v Republic [1971] EA 495 and Kizito Senkula v Uganda [2002] UGSC 36. He further stated that the evidence of proceeds of the crime was not established and that there was no

evidence of prevalence of the crime in public or its effect on the economy. The appellant reasoned that section 63 of the Anti-Corruption Act distinguishes between property that is subject of a crime from property that is proceed of a crime. He argued that the properties in question were subject of a crime as opposed to proceeds of a crime as stated by the learned trial judge. The appellant further reasoned that there was no evidence of lost proceeds from government, that he was only found in control or possession of property whose value exceeded his known income. He contended that the UGX 502,527,930 which the court established as his income was a reasonable estimate of his alleged past income which could cover the expenses at Sheraton hotel.

[37] With regard to ground 11, the appellant submitted that the offences for which he was charged and convicted do not fall under section 2(2) of the Trial on Indictments Act. He argued that he was charged in a manner that all the three counts were one offence of illicit enrichment which carries the maximum punishment of 10 years imprisonment. It was the appellant's contention that the offences were not distinct therefore the 5-year sentence that was imposed on each count ought to have run concurrently.

[38] With regard to ground 12, the appellant submitted that the learned trial judge did not take into consideration the period that he had spent on remand. He referred to Rwabugande v Attorney General [2017] UGSC 8 and Magala Ramathan v Uganda [2017] UGSC 34 for the submission that it is mandatory to take into consideration the period the convict has spent on remand while sentencing. He submitted that the trial judge had to indicate the sentence for each of the counts and arrive at the final sentence from which she should have reduced the remand period. He was of the view that the learned trial judge imposed an omnibus sentence by using the phrase 'would be'. He argued that the sentence imposed against him was ambiguous because it is not clear whether the trial court imposed a sentence of 20 years imprisonment from which it subtracted 5 years or 15 years imprisonment from which it subtracted 5 years imprisonment. The appellant also contended that the evidence on record indicates that the appellant spent 4 years and 5 months on remand instead of the 5 years that was attributed to him as the period spent on remand.

[39] In reply to grounds 10,11 and 12 counsel for the respondent submitted that paragraph 6 (g) and (i) of Part three of the Sentencing Guidelines that provides for sentencing principles permits the trial court to consider circumstances prevailing at the time the offence was committed up to the time of the sentencing which the trial court did. Counsel for the respondent argued that a number of illicit

enrichment cases have been brought to court which points to severity of the offence. Counsel further contended that the trial judge considered other factors besides the remorsefulness of the appellant or lack thereof before arriving at the sentence.

[40] Counsel for the respondent submitted that the learned trial judge complied with Article 23(8) of the Constitution that mandates a sentencing court to take into consideration the period the convict has spent on remand before sentencing. Counsel relied on Abelle v Uganda [2001] UGSC 10 for the submission that taking into account the period spent on remand must not necessarily be done in an arithmetical way but rather it must be shown that the period was taken into consideration before arriving at the sentence. Counsel for the respondent further submitted that the maximum sentence for the offence of illicit enrichment under section 31(2) of the Anti-corruption court is 10 years and that sections 22 and 23 of the Trial on Indictments Act show that every count is an offence of its own.

[41] In conclusion, counsel for the respondent was of the view that the learned trial judge complied with the provisions of Article 23 (8) and did not offend the provisions of section 2(2) of the Trial on Indictments Act. Therefore the sentence imposed upon the appellant was neither excessive nor illegal. Counsel for the respondent prayed that this appeal be dismissed.

Analysis

[42] It is our duty as a first appellate court to subject the evidence adduced at trial to a fresh re-appraisal and to draw our own conclusions, bearing in mind however, that we did not have the opportunity to see the witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, Bogere Moses v Uganda [1998] UGSC 22, Kifamunte Henry v Uganda [1998] UGSC 20.

Grounds 1 and 9

[43] Grounds 1 and 9 will be resolved together since they are interrelated. The appellant's first contention in ground 1 is that the learned trial judge ought to have discontinued the trial against him and acquitted him following the decision in Geoffrey Kazinda v Attorney General (supra).

[44] Musota JCC wrote the lead judgment of the Constitutional Court and expressly excluded the proceedings in relation to the charges with illicit wealthy. He stated:

.....

This finding, however, excludes Criminal Case No. 59 of 2016 on charges of illicit wealth, contrary to Section 33(i) and (ii) of the Anti-Corruption Act. Article 28(9) of the Constitution does not affect the charges of illicit wealth, because it is not of the same character as the charges discussed above.

[45] It is clear from the decision of the Constitutional Court that charges of illicit wealth were excluded from the findings of the court. The appellant was first charged with possession of illicit wealth in the Magistrate's Court in Criminal Case No. 59 of 2016 and later indicted in the High Court Anti-Corruption Division under Criminal Case No. 004 of 2016 on the same charges. The appellant's argument that trial court should have discontinued the proceedings against him in High Court Criminal Case No. 004 of 2016 from which this appeal arises is baseless. We therefore find that the decision by the Constitutional Court in Geoffrey Kazinda v Attorney General (supra) is not a bar to the prosecution of the appellant on the current charges in this appeal.

[46] On ground 9, the appellant contended that it was erroneous for the trial court to issue confiscation orders for land comprised in Volume 2014 Folio 19, Plot No. 1904 Bukoto Kyadondo Mengo, Volume 1956, Folio 11, Plot No. 264, Bukoto Sabaddu Kyadondo West ,213 Folio 21, Plot No. 2132 Bukoto Mengo and motor vehicles; AK 1BMW, AK2 Mercedes Benz, UAN 200X Dodge and UAM 200B. His argument was that the Constitutional Court in Kazinda v Attorney General (supra) made orders barring the prosecution of cases resulting from his employment as Principal Accountant in the Office of Prime Minister, this case inclusive. He contended that the orders of the court were silent on the exclusion of Criminal Case No. 59 of 2016.

[47] While granting the orders in Kazinda v Attorney General (supra), Musota JCC stated;

'ORDERS

The petitioner also sought for three orders stated in paragraph 3 (x, xi and xii) of the petition (supra). I grant two of the orders sought namely;

An order sought is to permanently stay proceedings against the petitioner in the pending criminal Cases No. 47 of 2013, No. 62 of 2014, now 101 of 2014 and directing the Anti-corruption Court to immediately discharge the petitioner in the above Cases and any future cases whose offences are founded on the same facts.

> This order will be granted because of the reasons I have given above.
>
> An order to permanently prohibit the State from using any process of any Court so as to initiate and prosecute the petitioner for any offences similar in character or founded on the same facts whatsoever arising out of or in connection with his former employment as Principal Accountant, office of the Prime Minister.
>
> Consequently, this petition succeeds.'

[48] We find the appellant's contentions unfounded as it is clear from the above extract that the orders of the Constitutional Court in Kazinda v Attorney General (supra) did not include Criminal Case No. 59 of 2016 or charges to do with illicit wealth. We find that the learned trial judge rightly issued the confiscation orders.

[49] The appellant also contended that the Inspectorate of Government prosecuted his case when it was not fully constituted thus rendering his trial a nullity. Section 1 of the Inspector of Government Act establishes the Inspectorate of Government. Section 2 lays down the composition of the Inspectorate. It provides that the inspectorate shall consist of the Inspector General of Government and two deputy Inspectors General. In order to prosecute or cause prosecution of cases relating to corruption, abuse of authority or of public office, the Inspectorate must be fully constituted. See Hon Sam Kuteesa & 2 others v Attorney General (supra).

[50] It has been established that a judge appointed to the Inspectorate must first resign his or her position as a judge before taking up the position. See Jim Muhwezi & 3 Ors v Attorney General & Anor [2010] UGCC 3.

[51] There is a letter on record dated 4th July 2012, indicating that Justice Irene Mulyagonja Kakooza retired from public service on 5th July 2012. She was sworn in as the Inspector General of Government on the same day. Mr. George Bamugemereire was sworn in as First Deputy Inspector General of Government on 27th March 2013 according to the Inspectorate of Government website and Mariam Wangadya was sworn in on 2nd August 2013 as second Deputy Inspector General of Government thus rendering the Inspectorate of Government fully constituted. The prosecution of the appellant's case commenced in 2016 when the Inspectorate was fully constituted. We find that the appellant's allegations are unfounded.

[52] It was also the appellant's contention that the Inspectorate was not fully constituted after 5th July 2020 when Justice Irene Mulyagonja's term in office expired. By this date the prosecution had completed presenting its case. What was important, in our view, is that the presentation of the prosecution case was completed while the Office of Inspector General of Government was fully constituted. We would understand the holding of the Constitutional Court in Hon. Sam Kuteesa and others v Attorney General (supra) to be to the effect that before a decision is made to prosecute an individual for the offences under the Anti-Corruption Act, the Inspectorate of Government must be fully constituted to make that decision. The Inspectorate of Government was fully constituted when the prosecution of the case against the appellant was commenced and throughout the period the prosecution presented its case against the appellant.

[53] Following the handover of the former Inspector General of Government, the position remained vacant until 22nd September 2021. By then the case against the appellant had already been decided. The decision had been made on 28th October 2020. By the time the former Inspector General Government handed over, the defence hearing had already begun and the appellant had called witnesses. The conduct of the defence by the appellant was not and could not be affected by the constitution of the Office of the Inspector General of Government.

[54] It would be unreasonable in the circumstances to halt the proceedings and wait until the Inspectorate was re-constituted. Halting proceedings would also be oppressive to an accused answering charges who may already be on his defence. It could not have been the intention of the legislature that this would be the result of lapses in appointment process for the organ of the Inspectorate of Government. The delay in appointing the Inspector General of Government is administrative and did not occasion the appellant a miscarriage of justice. It did not prejudice any of his fundamental rights. The defence hearing had already started.

[55] It is inconceivable to think that every time there is such an administrative lapse all ongoing criminal proceedings being prosecuted by the Inspectorate must be annulled, or halted. This would cause a gross miscarriage of justice. Nonetheless, this court does not condone the laxity that has been demonstrated by the relevant authorities with regard to appointments to the Inspectorate. It is important that the Inspectorate must be fully constituted at all times.

[56] Grounds 1 and 9 are, accordingly, answered in the negative.

Ground 2

[57] We are of the view that this ground offends rule 66 (2) of the Judicature (Court of Appeal Rules) Directions S.1 13-10. Rule 66(2) states:

> (2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, **specifying, in the case of a first appeal, the points of law or fact or mixed law and fact** and, in the case of a second appeal, the points of law, or mixed law and fact, **which are alleged to have been wrongly decided**, and in a third appeal the matters of law of great public or general importance wrongly decided.

[58] Ground 2 states as follows:

> '2. The learned trial judge erred in law and fact when she convicted and sentenced the appellant under a law which is not an offence and for which no punishment is prescribed, hence occasioning a violation of the appellant's rights to a fair trial.'

[59] Rule 66 (2) of the Rules of this Court requires that a memorandum of appeal sets forth concisely and without argument the grounds of objection to the decision appealed against specifically setting out the points of law or mixed law and fact wrongly decided by the trial court. The ground does specify the law that was wrongly applied. We would strike out this ground because it offends rule 66 (2) of the rules of this court.

Ground 3

[60] The appellant contended that it was erroneous for the learned trial judge to continue the trial with only one assessor when one of the remaining two assessors absented himself. Section 3(1) of the Trial on Indictments Act states:

> 'Except as provided by any other written law, all trials before the High Court shall be with the aid of assessors, the number of whom shall be two or more as the court thinks fit.'

[61] Section 69 of the Trial on Indictments Act states:

> '69. Absence of assessor

> (1) If, in the course of a trial before the High Court at any time before the verdict, any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself or herself, and it is not practicable immediately to enforce his or her attendance, the trial shall proceed with the aid of the other assessors.
> (2) If more than one of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of different assessors.'

[62] In this case, 3 assessors were sworn in on 23rd March 2017. From 18th April 2017 the trial continued with two assessors up until 22nd September 2020 when the matter was for summing up to the assessors. The trial court dropped the assessor who was absent and proceeded to sum up to the remaining assessor. The trial from that point continued with one assessor until its conclusion. The appellant sought to rely on Komakech v Uganda (supra) but the facts in that case are distinguishable from this instant case. The trial had commenced with two assessors but along the way it was discovered that one of the assessors had not participated in the trial. The assessor had been sitting with a different judge in a different case while another person who had not been sworn in had taken up the assessor's place in that case.

[63] In Byaruhnga Fodori v Uganda [2002] UGCA 4, this court stated:

> 'Though section three of the Trial on Indictments Decree requires that all criminal trial in the High Court be conducted with at least two assessors, this trial appears to have proceeded with only one assessor and no explanation appears on record as to why another assessor was not obtained. It is now established law that a trial can proceed with the assistance of a single assessor if the other one fails to turn up during the trial or for any reason absents himself and misses part of the trial.'

[64] We are satisfied that the trial court rightly proceeded with one assessor in the circumstances of this case. Ground 3 therefore fails for lack of merit.

Ground 4

[65] The appellant's main contention was that the prosecution failed to establish his known income by not taking into consideration his income before the year 2009. He relied on Uganda v Wandera (supra) for the submission that it is crucial to establish the appellant's past and current known sources of income. In that case, the accused was indicted with the offence of illicit enrichment contrary to section

31(1) (b) and 31(2) of the Anti-Corruption Act,2009. The trial court found that the prosecution had failed to prove the second ingredient of the offence on the basis that it omitted to compute the past known income of the accused that could have been established. The accused had stated in his declaration form that he was able to build his family home from personal savings over a period of ten years. The learned trial judge stated that prosecution ought to have established whether the accused had indeed accumulated the said savings.

[66] In order to establish whether the offence of illicit enrichment has occurred, courts will usually calculate the total amount of wealth that the person has enjoyed over a certain period of time and the total amount of lawful income received by the person over the same period of time. Andrew Dornbierer in his book 'Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth' at page 110 writes:

> **'3.3.2 Defining a 'period of interest' in which to calculate potential illicit enrichment**
> In order to be able to calculate if illicit enrichment has occurred under the above formula, a court will usually be required to set time parameters for its analysis. The period of time between the two set dates is often referred to as a 'period of interest', a 'period of check' or a 'period of reckoning', and is necessary for an accurate calculation and comparison of a person's total wealth and income. If such parameters did not exist, then it would be possible for:
> 1) The targeted person to argue that they paid for certain wealth that they enjoyed during the period of interest using income that they received before or after the period of interest that wasn't actually available to them at the time; or
> 2) The state to argue that a person acquired additional wealth before or after the period of interest that is disproportionate to a certain amount of income received during the period of interest.
> The period of interest does not necessarily refer to the total period of time that someone could be targeted by an illicit enrichment law (for example, the total period of time someone was a public official or the time period that falls within a legislation's limitation period). Instead, it refers to the time period in which the claimed illicit enrichment occurred (for example, one year in which a public official inexplicably acquired a significant amount of wealth).
> For instance, although the Indian illicit enrichment law requires those who illicitly enrich themselves to be public officials, this does not mean that the period of interest used by the court to calculate an alleged disproportion in wealth versus

income needs to span the entire period the person was a public official. As explained in State of Marashtra v Pollonji Darabshaw Daruwalla:

> ...it is not imperative that the period of reckoning be spread-out for the entire stretch of anterior service of the public-servant... However, the period must be such as to enable a true and comprehensive picture of the known sources of income and the pecuniary resources and property in possession of the public-servant either by himself or through any other person on his behalf, which are alleged to be so disproportionate.'

[67] In State of Marashtra v Pollonji Darabshaw Daruwalla, 1988 AIR 88, the Supreme Court of India opined:

> 'We are inclined to agree with the learned counsel on the submission on points (a) and (b). In order to establish that a public-servant is in possession of pecuniary resources and property, disproportionate to his known sources of income, it is not imperative that the period of reckoning be spread-out for the entire stretch of anterior service of the public-servant. There can be no general rule or criterion, valid for all cases, in regard to the choice of the period for which accounts are taken to establish criminal misconduct under Section 5(1)(e) of the 'Act'.
>
> The choice of the period must necessarily be determined by the allegations of fact on which the prosecution is founded and rests. However, the period must be such as to enable a true and comprehensive picture of the known sources of income and the pecuniary resources and property in possession of by the public-servant either by himself or through any other person on his behalf, which are alleged to be so disproportionate. In the facts and circumstances of a case, a ten year period cannot be said to be incapable of yielding such a true and comprehensive picture. The assets spilling-over from the anterior period, if their existence is probablised, would, of course, have to be given credit-to on the income side and would go to reduce the extent and the quantum of the disproportion.

[68] We are persuaded by the above approach. Selecting the period of interest depends on the circumstances of the case. It was not necessary in this case to establish the appellant's past known income from 1999 when he started his employment in public service. The evidence on record shows that the appellant was indebted prior

the period of 2009 to 2012 that was marked by the prosecution as the baseline for its investigation.

[69] Notwithstanding the foregoing, upon perusal of the appellant's declaration forms that were adduced in evidence, it was shown that in 2005, according to exhibit PEX 20(a), the appellant declared UGX6,500,000 as his salary per annum plus a yearly allowance of UGX 2,000,000. By then he was a senior accountant in the Ministry of Finance. He was owed UGX 3,000,000 from loans he had advanced to relatives. He had loans worth UGX 6.100,000 that he had acquired in 2002 and 2004 to offset a loan that he had secured for his wife's business that she started in 2000 that failed to take off. He stated that he spent most of his money on school fees and dependants. So he barely had any money left to start income generating activities. He did not disclose that he owned any assets as of March 2005.

[70] When the appellant declared his financial status again in 2007 (PEX 20(b)), he was a Principal Accountant in the Ministry of Finance. His salary per annum was UGX 9,000,000. He did not declare any allowances. He stated that he had been employed as a senior accountant from January 2000 to January 2006. He had loans worth UGX 2,200,000 secured on his payroll. The loans were obtained to pay school fees for his children. He stated that after giving tithe, he used the remaining salary to support his children and dependants.

[71] In 2009 (PEX 20(c)), the appellant declared that he was earning UGX 11,000,000 per annum plus a yearly allowance of UGX 6,000,000. He had acquired a loan of 2,500,000 for purposes of paying school fees. He stated that after paying tithe, he used his money to renovate his widowed mother's home and to look after his dependants and brothers who are jobless. In 2011 (PEX 20(d)), he declared his yearly salary as UGX 11,372,863 and annual allowances of UGX 4,320,000. He indicated that he had acquired a lease at UGX 15,000,000 at land comprised in Kitala, Busiro Plot 76, Block 422 from his savings for two years. He acquired a car worth UGX 4,000,000. He stated that he acquired this vehicle following a disagreement between Patrick Mirembe and his nephew. He paid up the money in arbitration and got the car in place. He had no liabilities by the time he made the declaration.

[72] By 2005, the appellant was indebted. He stated that he barely had any money left after supporting his family. He declared liabilities in forms of loans in the declaration forms that he presented. He did not have any assets prior to 2005. The appellant did not declare any savings or other forms of income to justify the sudden

increase of wealth between 2009 to 2012. At that point, investigation into the appellant's income prior to 2009 was not relevant in this case.

[73] Further, it was not enough for the appellant to state that he had other employment prior to the period of interest marked by the prosecution. Once the prosecution had established that the appellant maintained a standard of living above that which is commensurate with his or her current or past known sources of income or assets and that the accused was in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or asset, it is upon the appellant to justify or explain the significant rise in income in his defence. Such information would only be within his knowledge. The appellant failed to do so in his evidence.

[74] Ground 4 accordingly fails.

Ground 5

[75] Under this ground it is the contention of the appellant that it was the duty of the trial court to first find that the appellant had acquired the properties in question unlawfully before a conviction could be made on count 2 following the decision of the High Court of Uganda in B.D. Wandera v Uganda [2014] UGHCACD 8. We shall set out the provisions of section 31 below.

> **'31. Illicit enrichment**
>
> (1) The Inspector General of Government or the Director of Public Prosecutions or an authorised officer, may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person—
>
> a) maintains a standard of living above that which is commensurate with his or her current or past known sources of income or assets; or
>
> (b) is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or assets.
>
> (2) A person found in possession of illicitly acquired pecuniary resources or property commits an offence and is liable on conviction to a term of imprisonment not exceeding ten years or a fine not exceeding two hundred and forty currency points or both.

(3) Where a court is satisfied in any proceedings for an offence under subsection (2) that having regard to the closeness of his or her relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such resources or property as gift or loan without adequate consideration, from the accused, those resources or property shall, until the contrary is proved, be deemed to have been under the control or in possession of the accused.

(4) In any prosecution for corruption or proceedings under this Act, a certificate of a Government Valuer or a valuation expert appointed by the Inspector General of Government or the Director of Public Prosecutions as to the value of the asset or benefit or source of income or benefit is admissible and is proof of the value, unless the contrary is proved.'

[76] Before we consider the provisions of the said section we must point out that the learned trial judge was not bound to follow Wandera v Uganda (supra). She was free to depart from the same though of course she would have to provide reasons for doing so. Wandera v Uganda (supra) was a decision of the High Court of Uganda. We have read the same. It was a ruling on whether a prima facie case had been established to require the accused to be put on his defence. Wandera v Uganda (supra) initially set out the ingredients of the offence under section 31 of the Anti-Corruption Act. There were 2 ingredients. In our view the 2 ingredients were correct. However, the learned judge went on to add later on his ruling that, '..... ***the prosecution must also be able to infer that the disproportion originates from the unlawful acts of the accused.***'

[77] We are unable to agree. This third ingredient has no basis in the provisions of section 31 or any other part of the Act.

[78] Section 31 of the Anti-Corruption Act does not require the prosecution to prove that the accused acquired the pecuniary resources or the properties through unlawful means as the appellant contended. All the prosecution had to do was to prove beyond reasonable doubt that the accused maintained a standard of living above that which is commensurate with his or her current or past known sources of income and assets and that the accused was in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources

of income or assets. What is criminalised is the control or possession of resources or property disproportionate to one's known past and current sources of income and assets. This is what makes such resources or property illicitly acquired or enjoyed.

[79] The word 'illicit' must not be equated to unlawful though it may include the unlawful. It must be read in terms or context of the provisions of section 31 (1) and (2) of the Anti-Corruption Act. It is much wider than unlawful. In the instant case it includes all resources and assets which are enjoyed or acquired beyond or in excess of past and current known income and assets of a person charged with the offence. And there is persuasive authority as set out below to support this approach.

[80] Muzila et al in their book titled 'On the Take: Criminalizing Illicit Enrichment to Fight Corruption (2012)' at page 47 state:

> 'Because illicit enrichment criminalizes merely the existence of a significant increase in a public official's assets without a viable explanation, the prosecution therefore does not have to demonstrate or link the assets to any underlying criminal act. This is the major advantage of the criminalization of illicit enrichment from a prosecutorial perspective'

[81] Andrew Dornbierer (2021) in his book titled Illicit 'Enrichment : A Guide To Laws Targeting Unexplained Wealth' at page 29 states;

> 'Illicit enrichment laws do not require the state to demonstrate that a person has already been convicted of a criminal offence, that any underlying or separate criminal activity has even taken place, or that any wealth was provably derived from crime. Instead, under an illicit enrichment law, a civil or criminal sanction may be imposed by a court solely on the basis that the acquisition, receipt or use of a certain amount of wealth by a person cannot be, or has not been, justified through reference to their lawful income. This characteristic specifically distinguishes illicit enrichment laws from similar categories of asset recovery laws, such as extended confiscation laws, NCB confiscation laws or even money laundering-based legislation. Unlike illicit enrichment laws, these laws generally require the state to either achieve a previous criminal conviction, or to prove the existence of underlying or separate criminal activity and/or the criminal origin of assets, to a requisite court standard.'

[82] We are satisfied that ground 5 has no merit.

Ground 6

[83] Section 31(4) of the Anti-Corruption Act states as follows:

> '(4) In any prosecution for corruption or proceedings under this Act, a certificate of a Government Valuer or a valuation expert appointed by the Inspector General of Government or the Director of Public Prosecutions as to the value of the asset or benefit or source of income or benefit is admissible and is proof of the value, unless the contrary is proved.'

[84] The foregoing provision provides 2 possible scenarios. Firstly, the prosecution could prove the value of assets or benefit or source of income by valuation by a Government Valuer. Secondly valuation may be proved by a valuation expert appointed by the Inspector General of Government or the Director of Public Prosecutions. Nevertheless, those are not the only means by which valuation of assets and income in question may be done.

[85] Section 31(4) of the Act does not limit proof of value of assets to the evidence of a Government Valuer or a valuation expert appointed by the Inspector General of Government as the appellant contended. Other forms of evidence can be adduced as proof of value of assets. Ordinary testimony of witnesses as to the consideration for the purchase of property or sale of property, if credible, is admissible to prove the value of the property in question. We are of the view that the prosecution proved the value of the motor vehicles in question by such evidence.

[86] PW4, Kamunvi Charles stated that the appellant through his agents (Mirembe and Faisal) bought motor vehicle AK1 at approximately UGX 18,000,000. The money was paid in cash. He stated that it was Mirembe who paid him the money claiming that he was purchasing the car for the appellant. For motor vehicle AK2 Mercedes Benz, PW4 stated that he did not know about the first payment but was only involved at the point of paying taxes. He paid UGX 120,000,000 as part of the taxes on an understanding that the appellant would refund him which he never did. He was dealing with Faisal, who was an agent of the appellant. The tax invoices from Spear Motors Ltd show that the car was imported at 544,594,287. For motor vehicle no. UAN 200x Dodge, PW4 stated that Faial approached him and instructed him to order the vehicle for the appellant. He stated that the vehicle cost UGX 92,489,460 including commission of UGX 5,000,000. PW4 started that he

acquired motor vehicle UAM 200B Mercedes Benz ML for the appellant through Faisal at cost USD 20,000 including a commission of UGX 5,000,000. He presented to court a copy of the bank transfer.

[87] PW4's evidence remained unchallenged because the defence opted not to cross-examine him. His evidence was supported by the evidence of PW15 Amons Acidri, the investigation officer.

[88] We find ground 6 to be without merit.

Ground 7

[89] The essence of the appellant's submissions on this ground is that the prosecution failed to prove that he resided at Constellation Suites, Sheraton Hotel and incurred expenses worth UGX 210,364,011 which is disproportionate to his current or past known income. To prove the allegation, the prosecution relied on the evidence of PW4, PW5, PW6, PW10 and PW11.

[90] The evidence of PW4 is to the effect that it was not him but rather the appellant who paid for the services at the hotel. He denied making any of the payments in the invoices and receipts that were in his names. PW4 denied consuming the services. It was PW4's testimony that the appellant used him on various occasions to procure services. He stated that at one occasion the family of the appellant had a party at Sheraton Hotel and requested him to pay bills worth UGX 60,0000 for which he would be refunded.

[91] PW6, Stella Maris Alobo was a resident supervisor at Constellation Suites at Sheraton Hotel from 2007. Her evidence was to the effect that the appellant occupied room 120 and later shifted to room 105, Constellation Suites for the years 2011 and 2012. He used the room as office space. She stated that at some time she saw a small boy with a girl who she thought was either a maid or a relative staying at suite 105 and that the appellant would occasionally check on them during his lunch breaks.

[92] PW5, Richard Odwong who used to work at Sheraton Hotel as a credit manager testified that the appellant opened a credit facility in his names at the hotel in 2011 but a year later, he made a verbal request to change the name of the account to Charles Kamuvi which was approved by the credit committee. He stated that despite the name of the account having changed, the business remained the same.

The appellant remained receiving the same services of restaurant and laundry from the hotel, he would sign bills and an invoice would be presented to him.

[93] PW5 also stated that the appellant rented office space at the hotel. He explained how the appellant came to rent the office for 'wheels on hire''. It was his testimony that the appellant entered into a tenancy agreement with the hotel to rent office space for the first quarter of the year 2009. The agreement was signed by the general manager and the director finance of the hotel on behalf of the hotel. This agreement was not produced in court as evidence. He stated that the hotel wanted to start a business of hiring taxis under the business name 'wheels on hire' which business was to occupy the office that was rented to the appellant. PW5 stated that the hotel had already put up the sign post of 'wheels on hire' on the office and that the appellant requested them not to remove it. PW5 also testified that the appellant stayed at Constellation suites for about six months and that he made most of his payments in cash. The appellant would at times pay at the reception or a gentleman named Faisal would assist him. He testified that he would at times get the money from the appellant from his office at Sheraton or at his office at the Office of the Prime Minister. PW5 testified that initially the receipts were issued in his names but later they were issued in the names of Charles Kamuvi when the account name was changed. The witness was able to identify the receipts that he had issued worth UGX 80,000,000 and USD 3000 for the period of September 2011 to April 2012. He also identified invoices for 2011 that the appellant had signed because he was familiar with his signature. PW5 also identified three post-dated cheques worth UGX 10,000,000 each that the appellant gave him after signing to settle his bill at Sheraton. All the cheques bounced.

[94] PW10, Oswold Lwanga stated that he met the appellant while he was in prison. By then he had taken up the position of credit manager at the hotel from PW5. He testified that he had gone to meet the appellant in prison to talk about the appellant's outstanding bill with the hotel and to find means of paying the bill. It was his testimony that the appellant had an outstanding bill of UGX 61,214,011. A statement of the outstanding bill for the account in the names of Charles Kamuvi together with supporting bills was tendered into court as exhibit P.11.He stated that the appellant attempted to pay the outstanding bill in three cheques but thy all bounced. The debt had been accumulated from restaurant bills, laundry bills and services from apartment hire. PW10 testified that PW5 handed over to him the appellant's file when he became the credit manager. The witness also tendered into evidence paid up receipts worth UGX 149,150,000 that were admitted into evidence as exhibit P.12. The prosecution also tendered into evidence a breakdown of the paid bill consisting of receipts, invoices and bills. It was marked exhibit P13.

It was PW10's testimony that upon compilation that the appellant incurred bills worth UGX 149,150,000 from restaurant services, laundry services and the business centre. The appellant had an outstanding bill worth UGX 61,214,011.

[95] It was the appellant's contention that the invoices in exhibit P11 and the payments in exhibits P12 were wrongly admitted into evidence given their nature. He contended that the documents are private hence they had to be proved by primary evidence. The appellant contended that the circumstances of the case did not fall under section 64 of the Evidence Act to warrant production of certified copies.

[96] The general rule as stated in section 63 of the Evidence Act is that documents must be proved by primary evidence. Primary evidence is defined in section 61 of the Act as:

> 'Primary evidence means the document itself produced for the inspection of the court.'

[97] However, section 63 leaves room for secondary evidence to be adduced in court in special circumstances as laid out in section 64 of the Act. Counsel for the respondent contended that the evidence of PW10 falls within the ambit of section 64(1)(c) of the Evidence Act. Section 64(1)(c) of the Evidence Act states as follows:

> '(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—
> (c) when the original has been destroyed or lost, or is in the possession or power of any person not legally bound to produce it, and who refuses to or does not produce it after reasonable notice, or when the party offering evidence of its contents cannot, for any other reason not arising from his or her own default or neglect, produce it in reasonable time;'

[98] The trial court while dealing with this issue during hearing ruled:

> 'Court: It is true that pw5 (Richard Odwong) testified about how he generated the documents and at the time the documents were disallowed because he was not the one in custody of them. At this stage we have the evidence of the person who generated the documents on record, and we have that of the one in custody of them and who certified them. The Evidence Act allows a custodian of documents to certify them. The circumstances of this case are that the chain of movement of the documents is complete.'

[99] We find no reason to interfere with the finding of the trial judge. PW10 testified that he was in custody of the documents from 2014 when PW5 handed over the office of Credit Manager Sheraton hotel to him. He stated that it was PW5 who handed to him the file belonging to the appellant containing a compilation of paid and outstanding bills. The bills were in the names of Kamunvi Charles. It has been established that the said Kamunvi Charles was an agent of the appellant. PW15 testified that he could not keep the original copies of the documents because at that time in 2016 Sheraton Hotel wanted to use the documents in a civil suit against the appellant to recover the amount of UGX 61,000,000 that he owed the hotel.

[100] In light of the above, the appellant's allegation that PW11's evidence, the handwriting expert showed that he only consumed bills worth UGX 3,600,000 is baseless. PW6 saw the appellant occupy room 120 and later 105 Constellation Suites, Sheraton Hotel. It was the evidence of PW5 that he received 3 cheques worth UGX 30,000,000 that bounced from the appellant. This evidence was corroborated by the testimony of PW15 who stated that he went to Bank of Africa, Equatorial branch and confirmed that the appellant had an account with the bank and that the said cheques had indeed bounced. He got a bank statement (exhibit P.17) which reflected the transaction. It was PW5's testimony that the request to allow the appellant to change his credit account to the names of Kamunvi Charles was verbal. The appellant had told him that he needed to change the account names because it would not be good for him as a public servant if it was discovered that he was spending such sums of many at the hotel. It is no wonder that most of the transactions he made at the hotel were not made in his names. It is clear that the appellant had the intention of concealing his identity.

[101] In light of the above, we find that the learned trial judge properly found that the appellant had rented and occupied Suite No 105 Constellation Suites for six months at a total cost of UGX 210,364,011.

[102] Ground 7 is without merit.

Ground 8

[103] While determining whether the appellant was in control and possession of land comprised in Volume 2014 Folio 19 Plot 1904 Bukoto, the learned trial judge stated:

> 'Pw2 (**Brother Gerald Byaruhanga Edward Kahwa**) testified that the transferor of the land in **Volume 2014 Folio 19 Plot 1904 Bukoto**

was **Dr. Busingye Bazare Robert** who **PW2** has never met. **Mr. Kazinda** informed him that he had donated the property to the society, which information he passed onto **Pw3 (Br. Gerald Mwebe)**. **Pw2 (Br. Gerald Byaruhanga**) and **Pw3 (Br. Gerald Mwebe)** were signatories on the transfer documents though the Annual General Meeting didn't instruct them to sign the documents on behalf of the society. The transfer forms **(which they received from the accused)** reflect a transaction amount of 120,000,000/= purportedly paid to **Dr. Busingye Bazare Robert** by **Gerald Byaruhanga** and **Gerald Mwebe**, but they did not pay the 120m/= to **Dr. Busingye**. To **Pw2**'s knowledge their society has never paid the 120m/- to **Dr. Busingye.**

The accused denied that he bought the land in issue, and pointed out that **Dr Busingye** in his statement did not say that he sold the land to him.

The court recalls that **Pw2 (Brother Gerald Byaruhanga)'s** evidence that the accused made him and Brother Mwebe sign transfer documents for the land, and that he told him that he had donated the land to the society was never challenged by the accused. The court notes that **Pw2** is the accused's family friend, who was even entrusted with the accused's Fathers Will, and would have no reason for falsely testifying that:

- The accused acquired the property at 120m/=
- The accused gave him 70m\= and directed him to have the property transferred in the names of Registered Trustees of Brothers of Christian Instruction.
- He (Br. Byaruhanga) took the documents to a lawyer (John Mike Musisi) to process the transfer, which was done on 29/3/2010,
- He approached Brother Mwebe (PW3) for a copy of the Constitution and the seal of the Trustees to help in the transfer process,
- He gave Brother Mwebe Gerald the transfer forms for his signature since they were anticipating the property as a gift from Kazinda, but the gift never materialised,
- He handed over the documents to Mr. Kazinda
- By 20/3/2014 he had never seen the documents back to the trustees,
- the property is not in the records of the Trustees as their property.

The accused's argument that Dr. Busingye who was not called as a witness, never said that he (accused) paid him for the land is without merit. In the first place, the accused did not challenge Pw2's evidence in its entirety. For him to raise these issues at the time of his defence is not helpful to him. Once Pw2's evidence was not challenged it was not necessary for the prosecution to adduce further evidence to prove

the uncontested issues. The court believes Pw2's evidence and finds that the accused bought and owned **Land in Vol. 2014 Folio 19 Plot 1904 Bukoto at 120,000,000m/=.'**

[104] Upon review of the evidence on record, we find that the trial judge rightly found that the land in question was in control and possession of the appellant. Teopista Nanfuka and John Mike Musisi were not called as witnesses in the matter. Therefore their statements cannot be relied upon as evidence since they were not cross examined on them. The evidence of an intended joint project between Nanfuka Teopista and the association has no bearing as to the ownership of the property in question. PW2's evidence with regard to the purchase price of the land was not challenged. PW2 stated that he saw the amount that was stated on the transfer form. He signed the forms and he dealt with the appellant at all times. PW2 agreed to sign and transfer the property into the names of the association on an understanding that the property was being gifted to the association.

[105] The appellant in his evidence gave a background relating to the acquisition and transfer of Land comprised in Volume 213 plot 2132 Mengo (exhibit P5(b) which is similar to what is contained in the statement of Nanfuka Teopista. The appellant in his defence stated that all the property belonged to Nanfuka Teopista, his mother and that he did not deal with either PW2 or PW3. Besides land comprised in Vol. 213 Folio 21 Plot 2132 Bukoto Mengo, the other two properties had been registered under other people's names prior to being transferred to the association. The learned trial judge while rejecting the evidence of the accused that the land in question belonged to Teopista Nanfuka stated:

> **'Land in Vol. 213 Folio 21 Plot 2132 Bukoto Mengo.**
> Pw2 testified that this land was never discussed in the Annual General Meeting of the society and it is not documented in the report of the Chairman of the Board of Registered Trustees **(exhibit P. 3)** and in all their records. It was registered in the society names with effect from 16.11.2012.The previous owner (28.11.2007) was the accused's mother **(Teopista Nanfuka)**
>
> According to **Pw2** he got the transfer forms from the accused when the part which was supposed to be signed by the transferor had not been signed. Pw2 signed the form in his capacity as the executive secretary of the Association, as the purchaser on the accused's instructions. This was on the understanding that the accused had donated the land to them, but he didn't purchase the land. He returned the forms to I the accused.

He later got the forms from the accused and on his instructions took them to **counsel John Mike Musisi**. Although the property is registered in the association names, it does not belong to them and they don't have the title in their possession. The members of the association were not aware that Teopista Nanfuka was donating land to the Association.

The accused explained to the court that the land at **Plot 2132 Bukoto** belonged to his late father, on whose instructions it was transferred to his mother **(Teopista Nanfuka**). In his **Will**, his father instructed his mother to enter into an understanding with the Brothers of Christian Instruction under which there was to be an investment, and half of the proceeds from that investment would go to the up keep of old and aged Brothers, half to grandchildren and to the accused's father. The proceeds to the Brothers were a gift for the long relationship his father had with them.

The court recalls **Pw2(Gerald Byaruhanga)'s** testimony that in October 2009 the Brothers held a meeting and passed a resolution to open an account relating to Life Insurance for upkeep of infirm and old Brothers, a joint effort with Teopista Nanfuka. This evidence corroborates the accused's evidence about the existence of the joint venture. 2

The fact however that the Land in issue was at one time registered in **Nanfuka Teaopista's** names, and that at some stage she had a joint effort with the Brothers is not corroborative of the accused's assertion that it ever belonged to his father.

The court finds it strange for example, that even when **Pw2** testified that the accused's father entrusted him with his **Will** and the accused testified that Pw2 actually read it to the family, he (the accused) did not specifically examine him about the fact that his father bequeathed Plot 2132 Bukoto to his mother with instructions to enter an investment agreement with the Brothers of Christian Instruction. Not a single question was put to Pw2 about that critical issue. That he did not find it important to examine him on such a crucial aspect of his defence creates doubt about its veracity.

The court also notes that had the land been bequeathed to Teopista Nanfunka by her husband and had there been nothing to hide, there would be reason for transferring it to the society through Pw2 (Bro Byaruhanga Gerald) who signed the documents as its buyer whereas he was not. Pw2 testified that he got the transfer documents from the accused when the part to be filled by the transferor had not been signed, and he signed as the purchaser on the accused's instructions, on the understanding that the accused had donated the land to them. Donating and a purchasing are two distinct transactions. There were obvious attempts at concealing

of the correct ownership of this land in a manner only consistent with the accused's mode of ownership of property. '

[106] We have reviewed the evidence on record and find no reason for interfering with the trial court's findings. PW2 gave detailed explanations of how the land in question came to be registered in the association's names. At all times he was dealing with the appellant and working under an understanding that the land in issue was being gifted to the association which never happened. The defence did not cross examine the witness with regard to the transfer of the property in the association's names. With regard to land comprised in Volume 1956 Folio 11 Plot 264 Bukoto, the appellant's contention that no agreement was adduced to prove that the payment of the purchase price was in instalments was baseless. PW2 gave evidence that he paid the first instalment of UGX 130,000,000 and final instalment UGX 120,000,000 as part of the purchase price of UGX 350,000,000. He testified that he got this money from the appellant. The appellant never challenged this evidence.

[107] Ground 8 has no merit.

Grounds 10,11 and 12

[108] It is now a well-settled position in law, that this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with a sentence, where the trial Court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstance. See Bashir Ssali v Uganda [2005] UGSC 21, Ninsiima Gilbert v Uganda [2014] UGCA 65, Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Livingstone Kakooza v Uganda [1994] UGSC 17

[109] The relevant part of the sentencing order states as follows:

'I considered all the factors brought to my attention by both the prosecution and the defence in so far as they are relevant to the issue in hand. The value of the subject matter is over **4b/=.** The offences for which the accused has been convicted are grave and involve moral turpitude. I have been taken aback by the fact that he is passionate about retaining properties which have been found to have been illicitly obtained.

In a case where the subject matter is money and assets, the clearest sign of remorse is the willingness to forego those assets and

money. In this case I don't see any sign of remorse from the accused, since he is clearly passionate about retaining the property in issue. The Court must not allow convicts to enjoy the fruits of their criminal conduct. That would turn criminal prosecutions into money laundering conduits, and a slap in the face of justice.

The argument that confiscation orders should not be issued because the accused's dismissal from public service was sufficient punishment shows a failure to distinguish between administrative and criminal sanctions. It is understandable that the accused who was living a life of a king for years would not want to let go of all those benefits, but allowing him to retain proceeds of crime would render the Governments efforts in fighting crime a mockery.

That the accused could illicitly own luxury cars, high value land and spend over **210m/=** illicit money in ten months in a luxury hotel in a country which still struggling to provide basic services to its citizens in the zenith of selfishness and reckless wickedness.

The gravity and nature of the offences with which he has been convicted, their prevalence in public life and their effect on national economy persuade me that a custodial sentence for the accused is inevitable.

Each of the offences the accused has been convicted of attracts a maximum 10 year's imprisonment. In mitigation of sentence I have considered that the accused is a first offender, and that he has been on remand for about five years.

'All relevant factors considered, and after reducing the **5 years** which the convict has been on remand from the would be sentence, I sentence him as follows;

- he will serve 5 years' imprisonment on count 1,
- he will serve 5 years' imprisonment on each of counts 2 and 3,

The imprisonment terms shall be served consecutively, meaning that he will serve a total of 15 years' imprisonment.'

[110] The appellant contends that the learned trial judge did not take into account the period he spent on remand. Article 23(8) of the Constitution states:

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

[111] In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. The period

to be taken into account is that period which an accused person spends in lawful custody before completion of the trial. This period should be taken into account before the court pronounces the term to be served. It must be considered and that consideration must be reflected in the decision of the sentencing court. See Abelle Asuman v Uganda [2018] UGSC 10.

[112] In Abelle Asuman v Uganda [2018] UGSC 10 the Supreme Court while interpreting its decision in Rwabugande Moses vs Uganda (supra) where it had held that taking into account of the remand period while determining the appropriate sentence should be an arithmetic exercise, the Supreme Court stated:

> 'What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.
>
> Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.'

[113] We are satisfied that on the face of the judges' order the learned trial judge took into account the period the appellant spent on remand as required by the law. Courts can either apply the non-arithmetical formula or apply the arithmetical formula in accordance to Rwabugande Moses vs Uganda (supra)as long as it is shown that this period has been specifically credited to the convict in the sentencing process. We are of the view that the learned trial judge took into consideration the period that the appellant spent on remand before imposing the sentence against him.

[114] The appellant also contended that the trial court erroneously imposed a custodial sentence on the appellant after misapplying the law regarding non-remorsefulness of a convict as an aggravating factor while imposing a custodial sentence.

[115] In Mattaka and others v Republic [1971] EA 495 at page 512, the Court of Appeal at Dar es Salaam stated:

> ... A person who has pleaded not guilty and has maintained his innocence throughout and who intends to appeal cannot be expected to express repentance, which would amount to a confession of guilt. A person who has been found guilty may believe himself innocent , as a matter of fact or law, and that belief may be upheld by an appellate court. If, however, lack of repentance could be treated as an aggravating factor, the right of appeal would be fettered, because the convicted person would, in effect, be put to a choice, whether to risk a heavier sentence by maintaining his innocence or to abandon his right of appeal in the hope of leniency.
>
> The position is analogous to that when a person is pleading to a charge. It is well established law that a plea of guilty springing from genuine repentance may be treated as a factor in mitigation. It is equally well established that the fact that a person has pleaded not guilty may not be treated as an aggravating factor, because that would derogate from the right of every accused person to be tried on the charge laid against him.

[116] While agreeing with the decision in Mattaka and others v Republic (supra), the Supreme Court in Kizito Senkula v Uganda [2002] UGSC 36 stated:

> 'In the instant case, it is clearly our view that it was a misdirection in law for the learned trial judge to have regarded appellant's absence of repentance as an aggravating factor in sentencing him. Equally, with respect, the learned Justices of Appeal failed to direct themselves on the matter. We agree with the view of the law as stated in the decision in Mattaka's case (supra). Absence of repentance by an accused person should never be an aggravating factor in considering what sentence the trial court should impose. However, we are of the view that in the instant case, the misdirection by the trial court and the failure of the learned Justices of Appeal to direct themselves on the matter, did not cause a failure of justice. There were legitimate aggravating factors which the learned trial judge took into account, namely, that what the appellant did to the victim was treacherous; and that he spoilt her when he introduced her to sex at such a young age of 11 years.
>
> We note that the learned trial judge also took into account certain factors in favour of the appellant.

In this regard, the Court of Appeal referred to Ogalo s/o Owowa (supra) and concluded:

> **"In the instant case, the trial Judge considered the appellant's own personal responsibility, the period he spent on remand against the gravity of the offence and within his discretion chose a sentence of 15 years imprisonment. In our view, he did not act on a wrong principle in assessing the sentence and the sentence he imposed is not manifestly excessive. We thus find no Justification to interfere with the sentence."'**

[117] In light of the above decisions, we find that the learned trial judge misdirected herself in law by taking into consideration the appellant's lack of remorse as an aggravating factor when sentencing him.

[118] Secondly the maximum sentence for each of the offences that the appellant was convicted of is 10 years' imprisonment. The learned judge in her sentencing order claimed she took into account a period of 5 years that the appellant had spent in pre-trial custody and then sentenced the appellant to 5 years' imprisonment on each count he was convicted of. In effect this meant that the appropriate sentence in the mind of the learned trial judge was 10 years' imprisonment, the maximum punishment. Much as the learned trial judge claimed that she had taken into account the fact that the appellant was a first offender clearly it carried no credit to the appellant as he was handed the maximum punishment, ordinarily spared first time offenders.

[119] The appellant contended that the sentence of 5 years' imprisonment on each count should have run concurrently because he was charged with one offence of illicit enrichment and not distinct offences. We find the appellant's argument baseless because he was charged with three distinct offences of illicit enrichment, not arising from one transaction or one set of facts. Section 23 of the Trial on Indictments Act provides for joinder of counts. It provides:

> '23. Joinder of counts
> (1) Any offences, whether felonies or misdemeanours, may be charged together in the same indictment if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character.
> (2) Where more than one offence is charged in an indictment, a description of each offence so charged shall be set out in a separate paragraph of the indictment called a count.'

[120] Each count is a separate offence that carries a separate punishment. It is upon the discretion of the sentencing judge to determine whether the sentences imposed against the convict in the various counts are to run consecutively or concurrently. The general rule is that the High court will impose a consecutive sentence in case of distinct offences.

[121] In Magala Ramathan v Uganda [2017] UGSC 34, the Supreme Court stated:

> 'In answering the question whether the order that the sentences run consecutively was an error in law, we must again emphasize that sentencing is a matter in which a judge exercises discretion and furthermore that judicial discretion should be exercised judicially.
> More specifically, Judicial Officers have the discretion to decide the manner in which the sentences given will be served – whether concurrently or consecutively. **Section 2 (2) of the Trial on Indictments Act provides:**
>
> **When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the court may direct, unless the court directs that the punishments shall run concurrently**. (Emphasis of Court)
>
> We agree with the Court of Appeal's interpretation of Section 2 (supra) that the general rule is for the High court to impose a consecutive sentence and a convict will only concurrently serve sentences arising out of distinct offences if the court so directs.
>
> We however must underscore the need for an accused to know why a judge arrived at a particular decision. In the persuasive authority of **Ndwandwe vs. Rex [2012] SZSC 39**, the Supreme Court of Swaziland considered what judicious exercise of the sentencing discretion entails as follows:
>
> **The exercise of sentencing discretion must be a rational process in the sense that it must be based on the facts before the court and must show the purpose the sentence is meant to achieve. The Court must be conscious and deliberate in its**

choice of punishment and the records of the court must show the legal reasoning behind the sentence. The legal reasoning will reflect the application of particular principles and the result it is expected to achieve. The choice of applicable principles and the sentence will depend on the peculiar facts and needs of each case. The choice will involve a consideration of the nature and circumstances of the crime, the interest of the society and the personal circumstances of the accused other mitigating factors and often times a selection between or application of conflicting objectives or principles of punishment. (Our emphasis)

It is therefore expected that whether a judge opts for a consecutive or a concurrent running of sentences, her reasoning should be on record. Be that as it may, it is a trite principle of law that in ordering a consecutive sentence, the total sentence must be proportionate to the
offence and the circumstances surrounding each case.

The above principle is reflected in **Section 8** of the **Sentencing guidelines** which provide that

(1) Where the court imposes consecutive sentences, the court shall first identify the material part of the conduct giving rise to the commission of the offence and determine the total sentence to be imposed.

(2) The total sum of the cumulative sentence shall be proportionate to the culpability of the offender.

In pronouncing the number of prison years for each count and that the sentences would run consecutively, the trial judge mentioned the justification for the sentence - punitive on the one hand and deterrent on the other.

We therefore find that the trial judge judicially exercised his judicial discretion.'

[122] It was within the discretion of the learned trial judge to impose consecutive rather than concurrent sentences, if she deemed it appropriate and provided reasons for doing so. We would not fault the learned trial judge on this point.

[123] However, as noted above, the learned judge took into account matters that ought not to have been taken into account and ignored mitigating factors in light of the

length of sentence imposed on each count. We shall have to interfere with the sentences.

[124] Taking into account both the mitigating and aggravating factors in this case the appropriate sentence would be 3 years on count 1; 5 years' imprisonment on count 2 and 4 years' imprisonment on count 3 to be served consecutively, one after the other. However, we must deduct from the aggregate total of years to be served the time of 4 years and 5 months that the appellant spent in pre-trial custody, in compliance with article 23 (8) of the Constitution. And the balance thereof, 7 years and 7 months, shall be served from the 6th day of November 2020, the date of his conviction,

[125] In light of the above the appeal against sentence succeeds to the extent indicated herein above.

Miscellaneous Application No. 55 of 2021

[126] The appellant filed Miscellaneous Application No.55 of 2021, an application for stay of execution of the confiscation orders that were issued by the Anti-Corruption Court in criminal session No. 004 of 2016, the case from which this appeal arises.

[127] Since the appellant's appeal has been heard and determined, Miscellaneous Application No.55 of 2021is overtaken by events.

Decision

[128] For the foregoing reasons, the appeal against conviction fails and is dismissed. The appeal against sentence is allowed in part.

[129] Court of Appeal Miscellaneous Application No. 55 of 2021 is hereby dismissed.

Dated, signed and delivered at Kampala this 24th day of March 2022.

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal