

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 235 OF 2021**

[CORAM: R. Buteera, DCJ; F. M. S. Egonda- Ntende & M. K. Mugenyi, JJA]

- 5      1. ARYAMPA JACKSON  
         2. KIIZA VICENT  
         3. SABIITI JACKSON      }  
         4. ARIHO JUSTUS  
         5. BYAMUKAMA SAM      } : APPELLANTS

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## VERSUS

*(Appeal from the decision of the High Court of Uganda sitting at Masindi,  
(Byaruhanga Jesse Rugyema, J,) dated 15<sup>th</sup> September 2021, in Criminal  
Case No. 166/ 2012)*

15

## JUDGMENT OF THE COURT

## Introduction

The appellants were convicted of aggravated robbery c/ss 285 and 286 (1); arson c/s 327 (a); malicious damage to property c/s 335 (1), and criminal trespass c/s 302 (a), all of the Penal Code Act, Cap 120. They were sentenced to 16 years' imprisonment for aggravated robbery and arson, a caution for malicious damage to property and criminal trespass, compensation of Ugx 77, 112, 700 to be paid jointly by the appellants to the complainant. The appellants were placed under police supervision for two years immediately after serving their detention periods.

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## **Background**

The facts as gathered from the prosecution case are that on the 1<sup>st</sup> day of April 2012 at Katikara Trading Centre in Kibaale District, the appellants and others still at large, stole 20 old iron sheets, 40 bags of dry cassava, 5 10 bags of Sorghum, 40 bags of maize, 35 bags of beans, 30 sauce pans, 20 metallic plates, 20 plastic plates, 150theer plates, 12 cups, 18 hoes, 9 jerry cans, 4 spraying pumps, 3 jerry cans of agricultural chemicals, 2 bicycles, 2 beds, 2 mattresses, blankets, clothes and 4tables among other household items all valued at UGX 50,000,000 (Fifty Million Shillings 10 Only), the property of Reverend Rwamaraki Elisa. That at the time of or immediately before or immediately after the said robbery, used a deadly weapon, to wit: a panga, which they used to cause Grievous Bodily Harm on one person. That they also descended on the complainant's Kibanja which was about 35-40 acres and razed down his crops which included 15 bananas, oranges, pineapples, cassava, etc, to pave way for the market. The appellants were tried, convicted and sentenced. Dissatisfied with the decision of the trial court, they filed this appeal.

## **Grounds of Appeal**

1. That the learned trial judge erred in law and fact when he failed 20 to properly evaluate the evidence on record thereby erroneously convicting the Appellants, and thus occasioning a miscarriage of justice.
2. That the learned trial judge erred in law and fact when he relied 25 on unsatisfactory, inconsistent and contradicting evidence to convict the appellants thereby occasioning a miscarriage of justice.



3. That the learned trial judge erred in law and fact by disregarding the defense of bonafide claim of right set up by the appellants thereby wrongfully convicting them, and occasioning a miscarriage of justice.
- 5 4. That the learned trial judge erred in law and fact by passing a sentence against the appellants which was illegal and harsh.

### **Representation**

At the hearing of the Appeal, the appellants were represented by Mr. Kumbuga Richard, together with Mr. Idambi Paul, holding brief for Mr. 10 Ronald Tusiime, on private brief. The respondent was represented by Mr. Sam Oola, Senior Assistant Director of Public Prosecutions, in the Office of the Director of Public Prosecutions.

Counsel for the appellants moved under Section 11 of the Judicature Act, Cap 13, and Rules 2 (2), 5, 43 (3) and 67 of the Judicature (Court of Appeal 15 Rules) Directions, S.I.13-10, to seek leave of court to amend the Memorandum of Appeal. There being no objection from the respondent, leave was granted and the Amended Memorandum of Appeal was adopted.

Both counsel applied to Court to rely on the written submissions filed in Court. The Application was granted. Court shall rely on the written 20 submissions and the authorities supplied by Counsel together with other relevant authorities to resolve this Appeal.

### **Case for the appellant**

Counsel made reference to **Kifamunte Henry vs Uganda; S.C. Criminal Appeal No. 10 of 1997** and **Bogere Moses & Anor vs Uganda; S.C. 25 Criminal Appeal No. 01 of 1997**, on the duty of the first appellate court and proceeded to submit on each of the grounds.

## **Ground 1**

**That the learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record thereby erroneously convicting the Appellants, and thus occasioning a miscarriage of justice.**

Counsel for the appellant cited the case of **Woolmington V DPP**, on the assertion that the burden of proof in criminal cases lies upon the prosecution to prove the allegations beyond reasonable doubt. He submitted that the element of theft was not made out. He stated that  
5 neither PW1 nor PW2 mentioned that they saw any of the appellants take away anything from the scene of crime. PW3 testified that he arrived at the scene and stayed there for some time. He stated that he took photos but he did not exhibit any photo in court. PW4 stated that property was loaded on a waiting truck. He also stated that he was at the scene for over 4 hours,  
10 yet could not describe with particularity which vehicle ferried the items away from the scene. Further, that PW5 in her evidence, only stated that she saw the appellants ferry packed sacks from the complainant's house. She did not point out what exactly she saw being stolen from the scene.

The learned trial judge found that the evidence of PW1 and PW2 was that  
20 when they appeared at the scene, they were confronted by the appellants and group. That the appellants grabbed and threw them down with threats of harming and or killing them. PW2 was hacked with a panga and as a result, she lost a finger, she was tied with ropes as she was undressed with threats to rape her. There was violence during and after the theft.

25 Counsel argued that PW1 told court that the people who grabbed him came from behind and he could not tell what each of the appellants did as he was thrown down. To counsel, that meant he did not identify anyone albeit

the appellants as those who threw him down. That PW2 did not state that she was thrown down but rather manhandled, undressed with threats of rape and had her finger cut off.

Counsel further submitted that the possession of a deadly weapon was in dispute. Whereas it was claimed that some of the appellants were in possession of pangas, spears and other items that are classified as deadly weapons and that prosecution intended to tender these items as evidence in court, they were neither tendered nor was there evidence that they had been recovered by the investigators. It was counsel's view that that raised doubts as to the appellants' participation in the commission of the alleged crime.

On the offence of arson, counsel for the appellants submitted that PW1 stated that when he came back, he found that one of the grass thatched houses was burnt. It was counsel's contention that it meant that PW1 never witnessed anyone burn the house. Further, that PW2 also stated that one grass thatched house was burnt but did not state who exactly burnt it.

Counsel thus prayed that this Court finds that the learned trial Judge had wrongly found that the appellants committed the alleged offences, and thereby allows the appeal.

## **Ground 2**

**Whether the learned trial judge erroneously convicted the appellants relying on unsatisfactory, inconsistent and contradicting evidence.**

Counsel cited the case of **Candiga V Uganda; Court of Appeal Criminal Appeal No.23 of 2012** in which the Lordships agreed with the submissions of the appellant that the trial judge did not address himself

to the contradictions in the prosecution case. Counsel submitted that there was a contradiction when PW1 stated that, 'people who grabbed me came from behind', and yet on page 39 of the record, he stated that, 'it was Aryampa, Kiiza, Sabiiti Jackson who attacked me, plus Justus'. To 5 counsel, that contradicted what PW4 stated that, 'I did not see anyone assault Reverand Rwamaraki'. That furthermore, PW1 stated that, 'I cannot tell court the time I took at the scene before I escaped.' And the trial judge noted that the witness stopped answering questions and would take long pauses.

10 Counsel also cited PW2 who introduced the presence of her Aunt. She stated thus: 'My father found when the accused persons had left and scattered around. My aunt untied me, wrapped me with a piece of cloth with the assistance of another man called Julius'. Counsel observed that, however, PW1 stated that since it was a group of many people, he could 15 not identify 'who grabbed my daughter... Thereafter I returned to find out what had happened to my daughter. I found my daughter covering herself with a *lesu*'. In counsel's view, that contradicted the statement by PW1's daughter.

It was counsel's contention that the contradictions from the prosecution 20 witnesses were lies, which meant that on the said land in dispute, there were no houses belonging to PW1, since the appellants were consistent in their evidence that PW1 owned only two houses which were not established on the land that was in dispute where they were allocating market stalls.

25 Counsel submitted that the contradictions and inconsistencies in the prosecution case were not minor but rather deliberate lies intended to

mislead court and the learned trial judge would ordinarily be expected to have found so. Counsel prayed that this ground succeeds.

### **Ground 3**

5      **Whether the learned trial judge erroneously disregarded the defence of bonafide claim of right set up by the appellants thereby wrongfully convicting them.**

Counsel for the appellant **cited Section 7 of the Penal Code Act Cap 120** which grants exemption of criminal liability to any person in a property related offence who can prove to court that he or she had a 10 bonafide, genuine or faithful claim of right over such property.

Counsel stated that according to the evidence of DW2 (page 61 of the record), Kasapuli Denis, former L.C.III Chairperson of Katikara, he stated that he was the one using his powers as L.C.III Chairperson to allocate the said land to the market vendors. Counsel submitted that it was 15 unjustifiable for the trial judge to have found the appellants criminally liable yet they had a genuine claim over the said land where by there was a pending main Civil Suit which had not yet been determined and a temporary injunction order arising from Civil Miscellaneous Application No.002 of 2014 by the Honorable Justice Byabakama Simon Mugenyi, 20 the Resident Judge at the time. Counsel thus prayed that this ground equally succeeds.

### **Ground 4**

**That the learned trial judge erred in law and fact by passing a sentence against the appellants which was illegal and harsh.**

25      Counsel for the appellant cited the case of **Aharikundira Yustina V Uganda; Supreme Court Criminal Appeal No. 27/2005**, where it was

- held that consistency is a vital principle of a sentencing regime. That it is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation. Counsel submitted that the appellants were sentenced to 16 years' imprisonment on the charges
- 5 of aggravated robbery and arson and malicious damage to property as well as criminal trespass. Counsel argued that the appellants were mere innocent bystanders as everything went on, and played a very negligible, if not non-existent role, in any transgressions against the complainant and his daughter, if any.
- 10 Counsel also submitted that the compensatory award of 77,112,700/=, was merely capricious, guessed, arbitrary, illegal and ill-intentioned, and the same should not be left by this court to stand. Counsel prayed that this honorable court be pleased to consider the sentence passed against the appellants harsh, illegal and excessive and substitute it with a fairer
- 15 and more deserving one of a caution for the counts of aggravated robbery and arson.

### **Case for the respondent**

#### **Ground 1**

Counsel for the respondent challenged ground 1 basing on the evidence of

20 PW1, PW2, PW4 and PW5 which clearly proved that several properties belonging to PW1 were stolen. That the evidence of PW2 corroborated that of PW1 that one grass thatched house was burnt, two other houses were demolished, 40 bags of cassava, 10 bags of sorghum, saucepans, 18 hoes and 20 iron sheets taken. That PW4 and PW5, who were eye witnesses,

25 testified as to how the properties were taken by the appellants.



Furthermore, that there was evidence that a panga was used by the 5<sup>th</sup> appellant to cut off one of the right fingers of Rwamaraki Ruth, (PW2), thereby causing her grievous harm as prosecution exhibit P. Exh.1 showed. It was counsel's submission that the trial Judge analyzed the 5 evidence on this ingredient in his judgment at page 139 of the record and correctly found that the appellants were in possession of deadly weapons which were used before, during and after theft of PW1's property and resulted in grievous harm being occasioned on PW2.

On the appellants' contention that the trial judge's finding that it was the 10 appellants who burnt PW1's house was based on mere speculation or prejudice because there was no direct evidence to that effect, counsel for the respondent cited the case of **James Swoabiri and another Vs. Uganda; Supreme Court Criminal Appeal No.5 of 1990**, wherein it was held that an omission or neglect to challenge the evidence in chief on a 15 material or essential point by cross- examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue.

He contended that the appellants were acting in concert as a group and none of them disassociated themselves from the unlawful acts. That as 20 such, each of them was thus liable under Section 22 of the Penal Code Act. That it was immaterial that PW4 did not see the particular person among the group who set the house on fire. The trial judge rightly found that the appellants acted with common intention. Counsel also referred to **Ismail Kisegerwa and another Vs. Uganda; Court of Appeal Criminal 25 Appeal No.6 of 1978**, on the application of the doctrine of common intention to the instant case.



Counsel noted that there was evidence from PW3, the District Police Commander, who responded to the scene at about 10.00am on the instructions of the Regional Police Commander. That he was able to take photographs of the scene which were collectively admitted in evidence as 5 P. Exh.12. That the evidence of PW3 clearly showed that the offences the appellants were convicted of were committed. Counsel thus submitted that ground one of the appeal is devoid of merit and should fail.

## **Ground 2**

Counsel for the respondent disagreed that the trial Judge relied on 10 unsatisfactory, inconsistent and contradicting evidence to convict the appellants. That PW1's testimony that the people who grabbed him came from behind did not contradict his evidence that he was attacked by A1, A2, A3 and one Justus. Further that it did not contradict PW4's evidence that he did not see any one assault PW1 and P2, since they were not at 15 the same point at the same time.

On the alleged contradictions between the evidence of PW1 and PW2 as to whether the first and third appellants were armed with pangas, counsel submitted that PW1 and PW2 saw the appellants at different points and situations during the incident. Each of them testified as to what they saw 20 from the situation in which they were. That when PW1 was attacked and thrown down, he escaped from the scene and left PW2 behind. If she saw the appellants armed with pangas at that point, it cannot be said to be a contradiction of PW1's evidence.

Counsel noted that it was contended for the appellants that the defense 25 evidence was non contradictory and consistent, which meant that the prosecution failed to prove its case. He responded that the trial judge analyzed the defense evidence vis-à-vis the prosecution evidence at length

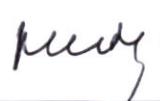
in his judgement from pages 139 to 142 while dealing with the issue of the participation of the appellants in the commission of the offence of aggravated robbery. He contended that the contradictions or inconsistencies had no bearing whatsoever on the prosecution case and 5 should be disregarded as inconsequential. He prayed that ground two of the appeal should also fail.

### **Ground 3**

Counsel for the respondent stated that the trial judge was alive to Section 7 of the Penal Code Act which provides for the defense of honest claim of 10 right and that the appellants had raised that defense over the crime scene portion of land. He submitted that the trial Judge considered exhibit D. Exh.1, Min 11/KSC/3/2012, in which it was indicated that the Sub County Chairperson explained that he had been reliably informed that there was enough Sub County land below the market in Katikara which 15 would cater for all the needs and that for clarity, there was need to form a Committee to identify the land in question and make sure that all people got stalls.

Further, that the evidence on record showed that PW1 was in possession 20 of the land, had houses and plantations of crops and trees thereon. In cross examination, the first appellant admitted thus; 'The sub county did not have any documentary proof of ownership of this portion of land where the market was constructed'.

To counsel, the trial Judge was right to hold that the defense of honest 25 claim of right was not available to the appellants, with the result that it was proved that they acted willfully and unlawfully in setting ablaze PW1's house, maliciously damaging it and the crops and entering upon land in



the possession of PW1 with intent to commit, and did commit, offences thereon. Counsel prayed that this ground should also be dismissed.

#### **Ground 4**

Counsel for the respondent cited the case **of Rwabugande Moses Vs Uganda; Supreme Court Criminal Appeal No.25 of 2014**, where the court reviewed several authorities in this regard, namely **Kyalimpa Edward Vs Uganda; Supreme Court Criminal Appeal No.10 of 1995; Kamya Johnson Wavamuno Vs Uganda, Supreme Court Criminal Appeal No.16 of 2000 and Kiwalabye Vs Uganda, Supreme Court Criminal Appeal No.143 of 2001**, and gave the position and circumstances under which an appellate court may interfere with the sentence passed by trial court.

From the above authorities, counsel submitted that an appropriate sentence was a matter for the discretion of the trial Judge and this court as an appellate court could only interfere if the said circumstances exist.

For the offence of aggravated robbery, he noted that the 1<sup>st</sup> and 4<sup>th</sup> appellants were sentenced to 14 years' imprisonment after the period of 2 years they had spent on remand was deducted. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> appellants were sentenced to 15 years and 3 months' imprisonment after the period of 9 months they had spent on remand was deducted. For the offence of arson, the 1<sup>st</sup> and the 4<sup>th</sup> appellants were sentenced to 14 years' imprisonment while the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> appellants were sentenced to 14 years' imprisonment.

Counsel cited **Naturinda Tamson Vs Uganda, Supreme Court Criminal Appeal No. 024 of 2015**, and submitted that the appellant in that case was tried and convicted of aggravated robbery, among other offences. That

thugs had broken into the home of the complainant with an iron bar and demanded for money from her. One of them was identified as the appellant. After the complainant failing to produce the money, the appellant and his colleagues robbed her of UGX. 100,000/- and other 5 items. The appellant and his co-accused were sentenced to 18 years' imprisonment. On appeal to the Court of Appeal, the sentence was reduced to 16 years' imprisonment.

Counsel submitted that the sentence passed against each of the appellants herein for aggravated robbery was appropriate and the sentence against 10 the appellants for the offence of arson was equally appropriate. He thus prayed that this Court be pleased to find that the appeal lacked merit and dismiss it accordingly.

### **Court's consideration**

This is an appeal against conviction and sentence. In resolving the appeal, 15 we are alive to our duty as the first appellate court to re-appraise the evidence at the trial court and come to our own conclusion. See **Rule 30 (1) (a) of the Judicature (Court of Appeal) Rules**. In doing that, however, we bear in mind that we did not have the opportunity to see and hear the witnesses as they testified. See **Selle and Another v Associated Motor 20 Boat Co; [1968] EA 123, Pandya v R; [1957] EA 336 and Kifamunte Henry v Uganda; Criminal Appeal No. 10 of 1997 (SC)**.

### **Ground 1**

Ground 1 of this appeal reads:

*That the learned trial judge erred in law and fact when he failed 25 to properly evaluate the evidence on record thereby erroneously*

*convicting the Appellants, and thus occasioning a miscarriage of justice.*

A quick look at that ground shows that the appellants do not specify what error the trial Judge made and what miscarriage of justice was occasioned.

- 5 Whereas counsel goes into details of what they dispute about the trial judge's decision in their written submissions. It is worth emphasizing that this Court is guided by Rules and those Rules should be strictly complied with. Relevant at this point is Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions S.I. 13-10. It provides:

10           **"(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."**

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The manner in which grounds of appeal are framed has been addressed  
20 by this Court. In **Muhereza Bosco & Katureebe Boaz v Uganda; C.A.C.A No. 066 of 2011**, this Court found the second ground of appeal too general. It observed as follows:

25           **"In any event it is superfluous as this court has a duty to re- evaluate the evidence as a first appellate court. We would strike it out as it offends Rule 66 (2) of the Rules of this Court which requires that a memorandum of appeal sets forth concisely and without argument the grounds of**



**objection to the decision appealed against specifically the points of law or mixed fact and law which are alleged to have been wrongly decided.”** (Emphasis added)

Poor framing of grounds and/ or issues poses a challenge not only for the  
5 Court that is required to resolve the alleged error but also makes it difficult for the other party to appropriately respond and/ or defend or oppose an appeal or suit. This goes to the heart of the principles of natural justice since one cannot defend what they do not understand.

Nonetheless, since both counsel made substantive submissions on the  
10 said ground, we shall proceed to resolve it, in the interest of justice.

Counsel for the appellants contends that the learned trial Judge relied upon evidence that was insufficient to convict the appellants. Counsel stated the reasons in their submissions. We shall tackle each aspect distinctly. On the issue of theft, it is contended that the stolen items were  
15 not identified since PW2, PW4 and PW5 testified that they saw the appellants carry sacks of items out of PW1’s house. To answer this contention, we look at Section 254(1) of the Penal Code Act that defines ‘theft’ as follows:

**“Definition of theft.**

20 **(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.”**

25 In this case, PW2, PW4 and PW5 testified that they saw the appellants ferrying sacks of items out of PW1’s house and loading these sacks onto a

waiting vehicle. PW1 informed Court that they stole his 40 bags of cassava, 10 bags of sorghum, saucepans, 18 hoes and 20 iron sheets. From that evidence, we note that the appellants entered into PW1's house and took out his property and loaded it on a vehicle that was later driven away. That  
5 property was never returned. The evidence adduced by the witnesses proved that the appellants stole PW1's property. And as such, the learned trial Judge rightly found that theft had been proved.

Regarding use of deadly weapons, counsel for the appellants contended that the said weapons were never tendered in court as prosecution  
10 evidence. However, we note that PW2 testified that her finger was cut off by one of the appellants. This was corroborated by the testimony of PW3, PW4 and PW5 who actually saw her bleeding fingers. This was further corroborated by the medical evidence that was admitted in evidence. PW1 informed court that all the appellants had pangas. This was confirmed by  
15 PW4 who testified that when he arrived at the home of PW1, the scene of the crime, he found very many people at the two houses of PW1. That were armed with pangas, hoes, spears, and that he found those people removing properties from PW1's house.

From the above evidence, we note that although the pangas were never  
20 exhibited in court, it is our view that a non- dangerous weapon cannot cause the kind of injury that PW2 suffered. The evidence on the trial Court record was sufficient to prove that deadly weapons had been used in the commission of the offences. More so, there was malicious damage of PW1's property as evidence by the photos that were equally taken by PW3 and  
25 admitted in evidence. We find no merit in the contentions on that point.

Regarding arson, counsel for the appellants contended that prosecution had not furnished evidence to show who exactly burnt PW1's houses and

how many of his houses were burnt. PW3 testified that on the fateful day of 1/4/2012, he received a call from RPC at 8:30am who told him to rush to Katikara and find out what had happened to the family of Rev. Rwamaraki, (PW1). He told court that he found many people, including A1.

5 That A1 was allocating plots of land to people. That one house was burnt and another house put down. The iron sheets were removed. Fresh cassava, bananas and other crops were cut. The group was very violent. And he took photos and reported to RPC. From that evidence, we note that PW3 was a police officer who visited the scene of crime and witnessed for

10 himself what was on ground. He saw a burnt house and saw that the appellants were still at the crime scene. We find the above to be sufficient evidence to prove that it was the appellants who burnt down the houses. As such, we find no merit in the ground and accordingly reject it.

## **Ground 2**

15 Counsel for the appellants faulted the learned trial judge for relying on unsatisfactory, inconsistent and contradicting evidence to convict the appellants thereby occasioning a miscarriage of justice. Counsel particularly cited the evidence of PW1, PW2, PW3, and PW5, arguing that their testimonies contradicted each other in as far as they did not tell court

20 what exactly was being ferried from the complainants' house, and that they contradicted themselves regarding who attacked PW1 and PW2 and who burnt down the complainant's house.

We have carefully studied the record of appeal and noted that the learned trial judge, in reaching his decision, was alive to the fact that the incident

25 occurred during broad day light. That is particularly important because it helps with identification of the perpetrators of an offence. In this case, the appellants raised an alibi claiming that they were not at the scene of the

crime. However, PW1, PW2, PW3, PW4 and PW5 confirmed that indeed the appellants were among the people that destroyed PW1's property and that one of them cut off PW2's fingers using a panga. Thus far, the defence of alibi cannot stand since the appellants were squarely placed at the scene

5 of the crime.

Regarding the alleged claim that the learned trial judge relied on contradictory and unsatisfactory evidence to convict the appellants and that PW1 contradicted himself when he testified that some people grabbed him from behind and then also stated that it was the appellants who

10 grabbed him and beat him, we note that the incident occurred at about 8:30am, during broad day light. This gave the prosecution witnesses ample time to identify the appellants as the persons who caused mayhem in the community. Specifically, PW4 and PW5 who informed court that they had the opportunity to see and talk to the appellants. For PW4, when the 1<sup>st</sup>

15 appellant was informing him to warn PW2 against disturbing them. And for PW5 when she informed Court that she witnessed the appellants destroy the complainant's property, including crops, and then saw them carry items out of PW1's house and load them onto a waiting vehicle. And that as she run to Police with PW2's phone that PW2 had been using to

20 record the events before she was injured, one Gubaza pursued her, squeezed her neck and grabbed the phone from her.

The sum total of the above evidence, in our view, is satisfactory proof that the prosecution witnesses had ample time to observe and ably identify the persons who were engaged in the destruction of the property as well as

25 injuring PW2. They saw that the appellants were armed with pangas and other weapons which they used to destroy the complainant's property and

to injure PW2. Thus far, we find no merit in this ground and hereby dismiss it accordingly.

### **Ground 3**

This ground revolves around the defense of lawful claim of right as provided for under Section 7 of the Penal Code Act, Cap 120. In raising it, the appellants claimed that the land they were dealing with belonged to Kakikara Town Council and as such, the complainant could not stop them from distributing it to the market vendors. Section 7 provides:

**“A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim or right or without intention to defraud.”**

In the case of **Muhwezi Jackson v Uganda; Criminal Appeal No. 149 of 2008**, the Court of Appeal, while addressing the above legal provision, held as follows:

**“In court’s opinion, the above law does not apply where property in question is the subject of multiple interests. In the instant case, we have seen that much as the appellant had a registered interest in the land in question, Nakiberu too had a legitimate interest on that land as a kibanja holder. Therefore, the appellant ought to have respected Nakiberu’s said interest.”**

Court further observed that there was an element of fraud. It stated:

**“Secondly Mr Byansi was absolutely right in saying that the evidence on record of the lower court reveals fraud on**

the appellant's part in that he threw Nakiberu out of her kibanja without compensating her. The Administrator General's file, which is part of the lower court's record as (exhibit P2) is clear.

5 It shows that the Administrator General's office warned the appellant against evicting her. However, the appellant did not heed that warning! He went ahead to evict Nakiberu without compensating her... according to section 7 of the Penal Code Act (Cap120) the presence of fraud would deny a person protection despite a claim of right he or she might have in a given property."

10

In the instant case, the appellants were fully aware that the land in question was the subject of a court case. More so, according to PW3, meetings had been held to try and resolve the tension between the  
15 appellants and the complainant and the Police had warned the appellants against doing anything that was against the due process of the law. The appellants went ahead to attack the complainant, destroy his property and even injure his daughter, PW2. In the circumstances, they cannot seek to hide under the cover of 'claim of right'. The defense under Section 7 of the  
20 Penal Code Act was not designed or intended to foster and cover- up for criminal and/or reckless acts. There may have been a land dispute between the appellants and the complainant, however, the stealing of properties and using pangas to injure people are offences that cannot be covered by a defense of claim of right over the disputed land. The burning  
25 of houses and stealing of properties from the house, could not be said to be in enforcement of a claim of right to the properties. PW2 was cut with a panga and injured. This was not under the defense of a claim of right to

property. This was violence perpetrated in the commission of the offences. This Court should not be seen to endorse such criminal conduct under the defense of a claim of right.

As a result, we find that the defense of a claim of right was not available 5 to the appellants as the learned trial Judge rightly found. This ground fails for lack of merit.

#### **Ground 4**

The law as to when an appellate court may interfere with the sentence imposed by a lower court is well settled. In **Kyalimpa Edward v Uganda;** 10 **Supreme Court Criminal Appeal No. 10 of 1995**, the Court considered the principles upon which an appellate court should interfere with a sentence. It referred to **R v Haviland (1983) 5 Cr. App. R (s) 109**, and held that:

15       **“An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice. Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1984) 15 E.A.C.A. 126. (Emphasis ours)”**

20       In **Kamya Johnson v Uganda; SCCA No. 16 of 2000**, the Supreme Court held that:

5            “It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently. (Emphasis ours)”.

10          In the case of **Ogalo s/o Owoura v R Criminal Appeal No. 175 of 1954**,  
the Court of Appeal for Eastern Africa held as follows:

15          “The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in **James v. R. (1950) 18 E.A.C.A. 147**, “it is evident that the Judge has acted upon some wrong principle or overlooked some material factor”. To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: **R. V. Shershewsky, (1912) C.C.A. 28 T.L.R. 364**.

20          In the instant case, counsel for the appellant claimed that the sentences meted against the appellants were illegal on the basis of inconsistency. He cited **Naturinda Tamson** (supra) where the trial court’s sentence was reduced by this Court from 18 years to 16 years’ imprisonment. What

counsel did not state, however, is the reason for the interference with the sentence by this court. A study of that authority shows that court was dealing with the constitutional requirement under Article 23 (8) of the Constitution. In deciding to interfere with the trial court's sentencing discretion, the court stated thus:

10           **"Where a court determines that a sentence of imprisonment is the appropriate sentence the trial court is required to take the period spent on remand in account in determining the sentence. Much as the learned trial judge stated that he is taking into account the long period spent on remand he left it to those who would administer the sentence to deduct the period spent on remand from the sentence he had imposed. This was a misdirection. This duty belonged to the trial judge and not to the prison authorities. This misdirection rendered the sentence a nullity.**

15           **We take it that the learned trial judge had in mind a sentence of 18 years on each count less the 2 years spent on remand which would set the actual sentence in this case to 16 years' imprisonment on each count rather than the stated 18 years."**

In this case, the learned trial Judge was not only alive to the requirements under Article 23 (8) of the Constitution, he went ahead to do an arithmetical deduction of the remand period as is directed by the current 20 legal regime. (See **Moses Rwabugande v Uganda; Criminal Appeal No. 25 of 2014 (2017) UGSC 8**, and **Asuman Abelle v Uganda; S.C. Criminal Appeal No. 66 of 2016**).

Counsel for the appellants argued that the sentence passed against the appellants was inconsistent. He fell short of showing what the sentence was inconsistent with. We wish to reiterate here that consistency is not synonymous with uniformity. In **Aharikundira Yustina v Uganda; SCCA No. 27 of 2015**, the Supreme Court held:

“There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is “manifestly excessive”. An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation.” (Emphasis ours)

15 Further still in **Kaddu Kavulu Lawrence v Uganda; S.C. Criminal Appeal No. 72 of 2018**, the Supreme Court held as follows:

“Counsel for the appellant presented to court related cases where the appellants were sentenced to lesser prison terms and in his view the Court of Appeal ought to have taken those cases into consideration and given the appellant a somewhat similar sentence. It is our view that an appropriate sentence is a matter for the discretion of the sentencing court. Each case presents its own facts upon which a court exercises its discretion. The offence of murder attracts a maximum sentence of death and the appellant was given a sentence of life imprisonment which

**is a legal sentence. We find no reason to disturb the sentence and uphold the same."**

In this case, save for submitting that the sentence passed was inconsistent or different from sentences passed in other similar cases, counsel for the 5 appellant did not point out any illegality that marred the sentence. Neither did he demonstrate that the learned trial Judge had not considered some material factor. We have carefully studied the record of appeal and observed that in passing the sentence he did, the learned trial Judge considered that the appellants were first time offenders and being 47 10 years, 50 years, 46 years, and 56 years respectively, they were moving towards advanced age, and that some of them were already suffering from certain ailments such as diabetes, and neck problems. He noted that all that went to the mitigation of the sentence in favor of the appellants. The learned trial Judge was equally alive to the fact that the maximum 15 penalty for aggravated robbery, one of the offenses with which the appellants were convicted, is death penalty.

On aggravating factors, the learned Judge considered that the appellants who were local leaders who committed the offences under detestable circumstances. That there was loss of lots of lots of property, loss of a 20 home and one of the victims, PW2, lost a finger, which is a permanent disfigurement on her at a youthful age. He also noted that the offences were committed as part of a premediated, planned or concerted and the fact that the offences were also rampant in this era of land grabbing. Putting all those factors together, the learned trial Judge them deducted 25 the period that the appellants had spent on remand and finally sentenced them to 16 years' imprisonment on aggravated robbery and arson, and a caution on malicious damage, as well as making an order for

compensation when they left prison upon serving the term of imprisonment.

In light of the above, the question begs, whether the sentence meted was way out of range as to be deemed manifestly harsh and excessive. We cite 5 a few authorities. In **Ojangole Peter v Uganda; SCCA No. 34 of 2017**, the Supreme Court found a sentence of 32 years' imprisonment imposed by the Court of Appeal on a convict of aggravated robbery as legal and appropriate. In **Guloba Rogers v Uganda; CACA No. 57 of 2013**, this Honourable Court considered a sentence of 35 years on a count of 10 aggravated robbery as appropriate from which it deducted 1 year and 5 months spent on remand thus arriving at a sentence of 33 years and 7 months' imprisonment. In **Basikule Abdu v Uganda; CACA No. 516 of 2017**; the trial Court meted out a sentence of 20 years' imprisonment in a case of aggravated robbery in which the victim was robbed of Shs. 200, 15 000/ and his clothes. This Honourable Court, while upholding the sentence of 20 years' imprisonment, found it not to be harsh as contended by the appellant.

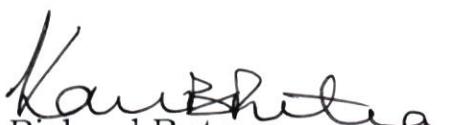
In light of the above authorities, and considering that the appellants wrecked massive havoc, both on the property and the physical life of the 20 complainants, we find that the sentence passed by the learned trial Judge was in fact very lenient. We are augmented in this finding by the fact that the appellants had been warned by the police and the local leaders not to do anything unlawful but they instead went ahead to take the law into their own hands by attacking the complainants and destroying plus looting 25 their property.

In the result, we find that the sentence is neither illegal, nor is it founded upon a wrong principle of the law. There is neither a failure to consider a

material factor nor or is it harsh and manifestly excessive in the circumstances. Therefore, in the absence of justifiable reason to interfere with the trial court's sentence, we hereby uphold it. Having found as we have on the other grounds, we find the appeal devoid of merit and hereby 5 dismiss it accordingly. The appellants shall continue to serve their sentences. We equally find no reason to set aside any other orders that were made by the trial court.

Dated at Kampala this .....17 Day of .....September 2023

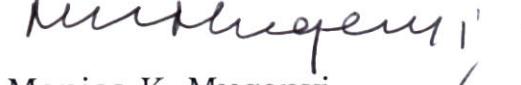
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Richard Buteera  
**Deputy Chief Justice**

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F.M.S. Egonda- Ntende  
**Justice of Appeal**

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Monica K. Mugenyi  
**Justice of Appeal**