

REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT FORT PORTAL
CRIMINAL APPEAL NO. 136 OF
2009

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Kajura Kiiza
Mugabe
EdwardAppellants
Museveni George

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Versus

UgandaRespondent

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Coram: Hon. Mr. Justice Remmy Kasule, JA
Hon. Mr. Justice Eldad Mwangusya, JA
Hon. Mr. Justice F.M.S. Egonda-Ntende, JA

JUDGEMENT

20 The appellants were indicted for the offence of Aggravated Robbery **C/S 285 and 286 (2)** of the Penal Code Act. The particulars were that KAJURA KIIZA, MUGABE EDWARD, CHANCE

EDWARD (deceased) and MUSEVENI GEORGE on the 27th day of December 2003 at Mbaale village, Mbale Parish, Bufunjo Sub-County in Kyenjojo District robbed RWAMAYAGA WYCLIFF of cash shs. 250,000= and a motor cycle Reg. No. UAG 225G worth shs. 1,500,000= all valued at approximately shillings 1,750,000=, and at or immediately before or immediately after the said robbery, used a deadly weapon, to wit pangas on the said Rwamayaga Wycliff and caused Grievous Harm to him.

They were tried by the High Court sitting at Fort Portal and at the conclusion of the trial they were convicted as indicted and each sentenced to 10 (ten years) imprisonment.

They appealed against their conviction and sentence. They set forth the following grounds in the memorandum of appeal.

1. The learned trial Judge erred in law and fact when he failed to evaluate properly the evidence of a single identifying witness and thereby made an erroneous and wrong inference that the appellants were properly identified;

2. That the trial Judge erred in law and fact when he rejected the appellants' defence of alibi;

3. That the trial Judge erred in law and fact in passing a harsh and excessive sentence on each of the appellants which occasioned a miscarriage of justice to the appellants.

When the appeal was called for hearing on 30.10.2014, Mr. Cosma Kateeba Counsel for the appellants, informed Court that he had received instructions from the appellants not to oppose the conviction and applied to abandon the grounds relating to the conviction of the appellants. He sought leave of Court, which was granted, to argue the ground on sentence only. All

the appellants in support of their Counsel stated that they had no problem with the conviction and that they had instructed their Counsel to argue the ground of appeal on sentence only. The specific complaint was that the trial Judge in passing the sentence did not take into account the period they had spent on remand.

Mr. Emmanuel Muwonge Counsel for the respondent did not have any objection to the withdrawal of the Appeal against conviction and he applied for its dismissal. Court ordered dismissal of the Appeal against conviction and proceeded to hear the appeal against sentence.

Mr. Cosma Kateeba, rightly in our view, faulted the trial Judge for sentencing the appellants without taking into consideration the period the appellants had spent on remand. Mr. Muwonge conceded the fact that the trial Judge did not take the remand period in consideration but hastened to add that taking into consideration the injuries that the victim of the Robbery sustained during the Robbery, the sentence of 10 years was not harsh and excessive.

Article 23 Clause 8 of the Constitution states as follows:

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

Counsel for the appellants provided two cases in which the Supreme Court has discussed the application of the above constitutional provision. In the case of **KATENDE AHAMAD VERSUS UGANDA Supreme Court Criminal Appeal No. 6 of 2004** the Court went as far as giving a format as to what a trial Judge or Magistrate should say while sentencing a convict for the convict to understand that the Constitutional

requirement has been complied with. The Court stated as follows:

“When sentencing a person to imprisonment a trial Judge or Magistrate should say-

5 ***“Taking into account the period of years (months or weeks whichever is applicable) which the accused has already spent on remand, I now sentence the accused to a term ofyears (months or weeks, as the case may be).***

10 In a later decision of the same Court **Bukenya Joseph versus Uganda (Supreme Court Criminal Appeal No. 17 of 2010)** the Court had this to say:-

15 ***“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the Court pronounces the term to be***

20 ***served. The three decisions which we have just cited are among many similar decisions of this Court in which we emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that***

25 ***period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgment”.*** (emphasis added).

30 It is quite clear to us that unless a sentencing Court complies with the provision of **Article 23 (8)** of the Constitution the sentence is illegal. Secondly under **Section 98** of the Trial on Indictments Act Court is given power to make such inquiries as are necessary to enable it to determine the sentence to be

imposed on the accused. The trial Judge in this case attempted an inquiry in which the Prosecuting Counsel made the following representation:-

5 ***“Kizito: Aggravated Robbery is rampant in the district. They inflicted harm on him. The convicts are young and ought to have struggled to earn a living. Need for stiff penalty”.***

On the other hand Counsel for the appellants made the following representation:-

10 ***“Nyamutale” A.1 (convict) is a first offender, remorseful, is 40 years. Has been on remand for 5 years. Has three children, wife is lame as a result of snake bite. Mother is blind. A4 orphans under his care.***

15 ***A.2 (convict) first offender remorseful, 25 years old was student S.3 at Katooke Modern S.S.S. on remand for 5 years. Has 3 siblings to look after. Mother and father died.***

20 ***A.3 (convict) first offender aged 22 years been on remand for five years. Looking after his father of 75 years. Brother Chance died in Prison, left three children”.***

Then the Court proceeded to determine the sentence thus:

25 ***“Court: Court takes notice of the rampancy of aggravated robbery in the district. There is need for deterrence.***

I sentence each of the convicts to 10 years in jail. Right of Appeal explained”

There are three matters that arise out of the sentencing process as set out above.

The first is that the trial Judge did not take into account the period of more than five years that the appellants had spent on remand. This, as already stated, is a constitutional requirement.

5 Secondly, the trial Judge took into consideration the rampancy of Aggravated Robbery in the District when there was no evidence adduced to prove the fact. The prosecuting Counsel merely mentioned that Aggravated Robbery was rampant in the District without any indicators to prove it.

10 Thirdly, A.3 who stated on oath that he was aged 22 years at the time of his trial was wrongly sentenced as an adult when at the time of the commission of the offence he could have been below eighteen years. His age should have been ascertained.

15 All the above matters call for intervention of this Court to review the sentence. Court will take into account not only the remand period but also the aggravating and mitigating factors. One of the most aggravating factors was that the victim of the robbery was seriously injured during the Robbery and was hospitalised after the attack.

20 In mitigation all the appellants were stated to be first offenders with family obligations. As already stated they had spent more than five years on remand.

The considerations for an appellate Court to alter a sentence imposed by the trial Court was stated in the case **of Ogalo S/O Owoura V. R (1954) 21 EACA 270** as follows:-

25 ***“The Principles upon which an Appellate Court will act in exercising its jurisdiction to renew 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***
30 ***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) EACA 147, it is evident the Judge has acted upon some wrong principle or overlooked some material factor". To this we would add a third discretion, namely, that the sentence is manifestly excessive in view of the circumstances of the case....."

After finding that the trial Judge violated the Constitution and put into consideration a factor not proved by evidence, this Court will go ahead to reconsider the sentence relying on the aggravating and mitigating factors already stated. In so doing we take into account the gravity of the offence so that whatever sentence is passed is proportionate with the offence. In this respect it is observed that the offence of Aggravated Robbery carries a maximum death penalty and the victim was brutally assaulted during the robbery. We accordingly consider a term of ten years on top of the five years that the appellant had spent on remand to be commensurate with the gravity of the offence.

In conclusion Court gives the following orders:-

1. The appeal against conviction is dismissed by reason of its having been abandoned by the appellants with no objection from Counsel for the Respondent.
2. The appeal against sentence by A.1 KAJURA KIIZA and A.2 MUGABE EDWARD, is to the extent that the trial Judge did not put into consideration the period they had spent on remand, allowed. In consideration of both the aggravating and mitigating factors and the period they have spent on remand we impose a term of imprisonment of ten years to run from the time of their conviction.
3. The appeal against sentence by A. MUSEVENI GEORGE is allowed by reason of its having been passed on him by the High Court instead of the Family and children Court in

accordance with **S. 104** of the Children Act. In view of the fact that this appellant, Museveni George, has spent a long period in prison, Court orders for his immediate release instead of forwarding him for sentence by the Family and Children Court.

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We so order.

Dated at Fort Portal this 20th day of November 2014.

Hon. Justice Remmy Kasule
Justice of Appeal

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Hon. Justice Eldad Mwangusya
Justice of Appeal

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

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