THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Kasule, Mwangusya & Egonda-Ntende, JJA*]

Criminal Appeal No. 83 of 2010

Pte Kusemererwa==========Appellant No.1

Tusiime Moses==========Appellant No.2

Versus

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

[*An appeal from a judgment of the High Court of Uganda sitting at Fort Portal (Akiiki-Kiiza, J.), in FPT-00-CR-AA-27 of 2005, delivered on the 14 May 2010*]

Judgment of the Court

Introduction

1. The appellants were convicted of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. The trial court found that the appellants had on the 17 February 2005 robbed one Gakyaro Omuhereza of Shs2,000,000.00 and had used a deadly weapon in the process of the robbery upon the said Gakyaro. He sentenced each of them to 20 years imprisonment. The appellants now appeal against sentence only contending that it was harsh and excessive in the circumstances of this case. The appellants with the permission of this court proceeded with the appeal against sentence only.

2. The facts of this case are that on the day in question Gakyaro was at home when two men appeared dressed in military uniform and armed. One of them fired into the ground. They demanded money. The witness's wife brought out in a box Shs.600,000.00 which they took in her handbag. It was mainly in coins. They demanded for more money. The witness took them to his maize mill that was about a half a mile away. He gave them Shs.1,600,000.00 that had been kept there. They took the same

and escorted him back home. They ordered him into his house and they left.

3. The following day he reported the robbery to the local council chairman. On 12 March 2005 the local council chairman went to the room that the appellants occupied and arrested them. A1 was found with a gun and A2 was sleeping in the same room. The chairman arrested both of them and handed them over to the police. A trial was subsequently held by the High Court, sitting at Fort Portal and found both appellants guilty of robbery, a conviction they do not contest.

Submissions of Counsel

4. Mr Cosma Kateeba, learned counsel for the appellants, submitted that the appellants were convicted of aggravated robbery and sentenced to 20 years imprisonment each. Given the circumstances of this case the sentence of 20 years was harsh and excessive. Though the offence they were convicted of is a serious one there are mitigating circumstances that could have led to a lesser period of imprisonment. Although a gun was used none of the victims was injured, no loss of life was occasioned. Both appellants are family men with families to look after. There are relatively young men, A1 was 27; A2 was 30. A sentence of 20 years imprisonment was quite harsh, incomparable to other cases. He referred to the case of Adama Jino v Uganda Criminal Appeal No. 50 of 2006 [unreported]; a decision of the Court of Appeal sitting at Gulu. In that case sentence was reduced from death to 15 years imprisonment. The appellant had been convicted of 3 counts of aggravated robbery.

5. In the present case, Mr Kateeba submitted, the appellants were first offenders and not habitual offenders. They are relatively young and ought not to have got a long custodial sentence. Mr Kateeba further submitted that a sentence of 10 years would have been appropriate. The appellants had already been on remand for 5 years. A long sentence is not likely to lead to the rehabilitation of the appellants. He prayed that this sentence should be set aside and substituted with a lesser sentence.

6. Ms Rose Tumuheise, the learned Principal State Attorney, for the respondent opposed the appeal. She submitted that the sentence of 20 years was not harsh. The trial judge took account of the mitigating circumstances and came to the conclusion that a sentence of 20 years was the right sentence. A2 was a soldier who should have protected the people. But he turned his gun upon an old man. The sentence was not harsh. She prayed that this court should not interfere with the sentence.

Analysis

7. The principles to be applied in cases of this nature have been set out in numerous cases both by the Supreme Court and the predecessor Court of Appeal for East Africa and have been summarised as follows, in Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993 [unreported];

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.C.A. 270.'

8. Counsel for the appellants did not contend that the trial court erred in relation to the accepted principles of sentencing. However, he submitted that the sentence was manifestly harsh and excessive in the circumstances of this case. He referred to the case of Adama Jino v Uganda [supra] as offering guidance, being a case of a similar nature. In that case the appellant was convicted of three counts of aggravated robbery and sentenced to death. The Court of Appeal, in reviewing the sentence, observed,

> 'Regarding sentence, we accept the appeal in mitigation made by counsel for the appellant that the process of robbery, though gunshots were fired, there was no loss of life.
>
> Secondly the appellant appears sorry/repentant. It is our view that an opportunity for him to reform and turn into a good citizen would not be wasted. The death sentence was set aside.

> Taking into account the period of 3 years and two months he was on remand before conviction, he is sentenced to 15 years imprisonment. On each count, sentences to run concurrently from 1/12/2006.'

9. Of course the foregoing case is not exactly a precedent to be followed in terms of sentence. Nevertheless it affords guidance in terms of the range of sentences. We agree that in the instant case there was no loss of life though a gun was fired. The appellants spent five years on remand prior to conviction. Both appellants are relatively young people who are first offenders. In imposing sentences we should bear in the mind the need for rehabilitation of the said young people and their possible return to society as useful citizens.

10. The maximum punishment for this offence is death. This is not the kind of sentence that would be visited on first offenders. This is, nevertheless, a serious offence and in which the sums stolen were never recovered. The appellant No.1 is a soldier whose cardinal duty is to defend the country rather than turn on its citizens in the criminal manner that he did.

11. The appellant spent 5 years on remand prior to his trial and conviction. Controlling precedents on taking into account the remand period are clear that taking into account the period spent on remand by the convict before conviction is not simply an arithmetical exercise. Nevertheless credit must be given to the convict for this period in addition to taking into account both the mitigating and aggravating circumstances of each particular case.

12. This point came up for consideration before the Supreme Court in Kizito Senkula v Uganda Criminal Appeal No. 24 of 2001 [unreported]. The court initially raised the issue with counsel and stated,

> 'We asked both the learned counsel to comment on whether the learned trial judge, and the Court of Appeal in upholding sentence, took into account the period of two years which the appellant had spent on remand before his trial, in view of the provisions of article 23(8) of the Constitution. Both Counsel were in agreement that since what the learned trial judge said was vague about the matter, the sentence of 15

years should be reduced by the two years spent by the appellant on remand.

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In the instant case, it is clear that the learned judge took into account the period of two years the appellant had spent in remand. But it is not clear whether he considered that the sentence to be imposed should be 17 years, reduced by 2 years to make 15 years, or whether the sentence was 15 years to be reduced by 2 years to 13 years. Both the learned Principal State Attorney and the counsel for the appellant were of the view that the latter was what the learned trial judge must have meant. The Court of Appeal did not advert to it.

As we understand the provisions of Article 23(8) of the Constitution, they mean that when a trial court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to his / her conviction. Taking into account does not mean an arithmetical exercise. Further, the term of imprisonment should commence from the date of conviction, not back-dated to the date when the convicted person first went into custody.

In the circumstances of this case, we would set aside the appellant's sentence of 15 years imprisonment and substitute it with one of 13 years from the date he was convicted of the offence of defilement. This appeal succeeds to this extent.'

13. It is clear from the foregoing that the Supreme Court actually credited the appellant in that case with the period spent on remand much as it stated that taking into account the period spent on remand was not an arithmetical exercise. It is our view that the period spent on remand ought to be credited to the appellants in addition to the present mitigating factors. The aggravating factors as noted above must also be taken into account and then a final sentence determined.

14. In the circumstances of this case we are satisfied that the sentence of 20 years imposed upon each of the appellants was manifestly excessive and we accordingly set it aside. We substitute it with a sentence of 13 years imprisonment on Appellant No.1, a soldier in the UPDF who violated his sacred duty to protect country, its people and their property. We impose a

sentence of 12 years imprisonment on Appellant No.2. Both sentences are to run from the date of conviction, 14 May 2010. We so order

Signed, dated, and delivered this 20th day of November 2014

Remmy Kasule
Justice of Appeal

Eldad Mwangusya
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal