

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 179 OF 2009

(An Appeal from the Judgment of the High Court of Uganda at Arua (Kania, J.) in Criminal Case No. 077 of 2006 delivered on 17.08.2009)

OYIRWOTH CHARLES alias JACKSON BALIJUKA::: APPELLANT

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::::::: RESPONDENT

CORAM: Hon. Mr. Justice Remmy Kasule,JA

Hon.Lady Justice Hellen Obura, JA

Hon. Mr. Justice Byabakama Mugenyi Simon, JA

JUDGMENT OF THE COURT

Introduction:

The appellant was convicted of aggravated robbery contrary to Sections 285 and 286 (2) of the Penal Code Act. The particulars of the offence were that on 29.06.2002 at Padea Trading Centre, Nebbi District, the appellant robbed one Okello Innocent of bicycle spare parts valued at shs. 300,000= and at or immediately before or immediately after the said robbery used a deadly weapon, to wit a gun on the said Okello Innocent. The appellant was sentenced to fifteen (15) years imprisonment. He appeals against both conviction and sentence.

Grounds of Appeal:

These are:

1. That the learned trial Judge erred in fact and in law when he failed to a properly evaluate the evidence on record and came to a wrong conclusion.

2. That the trial Judge erred in law and facts in meting out a harsh sentence of 15 years upon the appellant.

At the commencement of hearing Court granted leave to the appellant's Counsel to amend Ground 1 to be:

“That the learned trial Judge erred in law and fact when he convicted the appellant based on circumstantial evidence that was not capable of proving the case against the appellant beyond reasonable doubt”.

Legal Representation:

Learned Counsel Ikilai Ben was for the appellant on state brief While Senior State Attorney Jacqueline Okui represented the respondent.

Submissions for the appellant:

In respect of Ground 1 Counsel for Appellant submitted that there was no credible circumstantial evidence upon which the trial Judge could have come to the conclusion that the prosecution had proved the offence beyond reasonable doubt against the appellant.

The evidence that was there was full of contradictions. While Pw 2 claimed that he heard big stones being hurled against the door of his shop on 28.06.02 at 12.30 a.m., Pw3 claimed to have heard the same and gunshots at 2.30 a.m, yet both Pw2 and Pw3 were in the same area of residence and so they could not have heard the same thing at different times. Pw3 claimed to have seen the appellant with Oyirwoth Morgan carrying a black bag, yet Pw4 claimed that the bag was a long red bag.

According to Counsel the above were major contradictions and they rendered the circumstantial evidence adduced by the prosecution to be unbelievable.

As to ground 2, Counsel submitted that the trial Judge had not taken into account the period spent on remand, and as such the appellant had been subjected to a harsh sentence.

Counsel prayed for the appeal to be allowed by this Court setting aside the appellant's conviction and sentence. In the alternative, just in case the conviction was not set aside, then the sentence of 15 years imprisonment should be reduced to such a period as would result in the appellant being released forthwith.

Submissions for the Respondent:

Counsel contended that the contradictions in the prosecution's case pointed out by the appellant's Counsel were extremely minor, if at all they existed.

Counsel further submitted that the circumstantial evidence that was there proved beyond reasonable doubt the offence against the appellant. This evidence consisted of the dying declaration by Oyirwoth Morgan to Pw2 and Pw3, the conduct of the appellant of disappearing from the area to Masindi, from where he was arrested. The appellant had also changed his names to Jackson Balijuka so as to hide his identity.

As to ground 2, Counsel maintained that the trial Judge considered the period the appellant spent on remand while dealing with the fact that the appellant had escaped from lawful custody while on remand. The maximum sentence for the offence of aggravated robbery being a death sentence, Counsel

submitted that the sentence of 15 years imprisonment was appropriate.

Duty of the Court:

As a first appellate Court, it is the duty of this Court to review and re-evaluate the evidence adduced before the trial Court and reach its own conclusions, taking into account the fact that the **appellate Court did not have the opportunity to hear and see the witnesses testify: See: Rule 30(1) of the Judicature (Court of Appeal Rules) Direction, and Mbazira Siragi and Another vs Uganda: Cr. App. No. 7/2004 (SC).**

Analysis:

The learned trial Judge reviewed the evidence that was before him. He properly directed himself and the assessors that the appellant was presumed innocent until his guilt had been proved; and that the burden to do so remained with the prosecution throughout the trial. The appellant had no burden to prove his innocence. The standard of proof was beyond reasonable doubt and any doubt had to be resolved in favour of the appellant.

The learned Judge then set out the ingredients of the offence of aggravated robbery and basing on the evidence of Pw2, Pw3 and Pw4 which the trial Judge evaluated together with all the other evidence, he held:

"Besides Mr. Oyarmoi, learned Counsel for the accused conceded the fact of theft has been proved beyond reasonable doubt

In the fact of the above undisputed evidence of the fact of theft, I find the prosecution has proved the first ingredient of the fact of the theft beyond reasonable doubt".

We have subjected the evidence as regards theft to a fresh scrutiny and we too agree that the trial Judge arrived at the correct conclusion.

We are unable to appreciate the submission that there were grave contradictions in the evidence of Pw2, Pw3 and Pw4 to be unworthy of belief, as submitted by Counsel for the respondent. We find the evidence of these witnesses to have been consistent and as such reliable. The difference in time as to when the robbery happened as well as the discrepancy in the colours of the bag in the evidence of Pw2,

Pw3 and Pw4 are minor contradictions and excusable given the fact that the witnesses were testifying four years after the event. We reject the said submission.

In the same measure, we find that the learned trial Judge was correct when he concluded that a deadly weapon was used at the time the theft was being carried out when he held that:

“The evidence of these three prosecution witnesses clearly proves that at or immediately before or immediately after the said theft which has been conceded to by the defence there was the use of a deadly weapon within the definition of Section 286(3) of the Penal Code Act.”

The three witnesses referred to were Pw2, Pw3 and Pw4, whom, we too, on a review of their evidence have found each one to have been credible.

There was no eye witness to the robbery and so the evidence that implicated the appellant in the commission of the robbery was circumstantial. It was evidence of surrounding circumstances which once put under intensified examination can prove a proposition with mathematical accuracy. We agree that the fact of the evidence being circumstantial does not amount to having less probative value. The trial Judge properly addressed himself and the assessors as regards circumstantial evidence. He guided himself with the case authority of **R VS TAYLOR WEAR AND DONOVAN [1928-29] 21 CR. APP.R. 20.**

He also cautioned himself and the assessors that circumstantial evidence can be the basis of conviction, only if the trial Court is sure that there are no other co-existing circumstances which would weaken or destroy the inference of the guilt of the accused. The accused's guilt is to be made from circumstantial evidence only if the surrounding circumstances irresistibly lead to no other hypothesis but the guilt of the accused. The trial Judge relied on the case of **TEPER VS R [1952] AC 489** in so directing himself and the assessors. The learned Judge then re-evaluated the circumstantial evidence that was before him. Pw4, who knew the appellant very well before the offence had seen the appellant with another person Oyirwoth Morgan walking in the direction of Padea Trading Centre on 28.06.02 at 6.00 p.m. Both told him (Pw4) that they were going to DRC Congo to do business.

Pw3 also saw the two at Padea Trading Centre and later at 12.30 a.m. of the night of 28.06.2002 at the shop of Pw2 when the robbery took place. There was shooting with a gun. One bicycle wheel and 2 chain wheels were stolen from the shop. One of the robbers was arrested by the mob as he ran away from the scene of the crime. He was later beaten to death by the said mob. This deceased robber was Oyirwoth Morgan who had been seen with the appellant earlier on 28.06.02. Before he died Oyirwoth Morgan told Pw2 and Pw3 that the appellant was involved in the robbery. The appellant had requested him to accompany him so as to help him carry a luggage. The same Oyirwoth Morgan also explained how the appellant had produced a gun from a bag.

After the robbery the appellant disappeared from the area, until two years later, when he was arrested and put in prison in Masindi on another offence. He had by then assumed another name of Jackson Balijuka.

In his defence the appellant claimed to have left Nebbi District in 1990, before the offence was committed and he had not returned to the area since then.

The trial Judge directed himself and the assessors that the appellant, on putting up an alibi, had no burden to prove its truthfulness. It was the prosecution who had the burden to disprove the same by adducing evidence that puts the appellant at the scene of crime. The Judge relied on the case of **Sekitoleko vs Uganda [1967] EA 53**.

The trial Judge on evaluating the evidence concluded that the evidence of Pw4 who knew the appellant very well and who was interacting with him very often, including playing Mweso with him, in Nebbi District all along after 1990 and who had seen him immediately before the robbery on 28.06.02, placed the appellant at the scene of the crime. It rendered the alibi of the appellant to be false.

Pw2 and Pw3 had also seen the appellant in the evening of 28.06.02. The father of the appellant had only not seen the appellant for some few days, but not years from 1990 as the appellant asserted in his alibi.

We have re-evaluated all the evidence that was before the trial Judge as to the issue whether the appellant participated in the robbery. We find that the conduct of the appellant of disappearing from Nebbi for almost two years, settling in Masindi and also assuming another different name are consistent with the conduct of someone evading the law thus hiding his identity. That

conduct on the part of the appellant is inconsistent with his innocence.

We are satisfied that the learned trial Judge properly directed himself and the assessors as to circumstantial evidence. He also properly dealt with the evidence that was before him and he arrived at the correct conclusion that the prosecution proved beyond reasonable doubt that the appellant participated in the robbery.

We accordingly find no merit in ground 1 of the appeal. We dismiss the same.

In ground 2, the appellant faults the learned trial Judge for having imposed a harsh sentence of 15 years imprisonment upon him.

We carefully considered the factors that the learned trial Judge considered when sentencing the appellant. The learned Judge noted that while on remand the appellant escaped a number of times from lawful custody, first on 25.02.06 and then in December, 2007. The Judge then held:

“The conduct of the accused person since his arrest by keeping running away from lawful custody is a testimony that the accused deserves a long sentence

While the learned trial Judge was justified to hold as above, this was no justification for him not to consider the period that the appellant had spent on remand and to take into consideration that period when determining the sentence that the appellant had to serve. Article 23(8) of the Constitution mandatorily imposed upon the trial Judge a Constitutional duty to take into account that period when sentencing the appellant.

Accordingly the sentence of the term of imprisonment of 15 years upon the appellant was wrong in law. We accordingly set aside the same.

We substitute the same with our own sentence.

We appreciate the fact that the appellant has a family of two wives and nine children to support. Also given his age, of 42 years at the time of the offence, he still has a future within which he can reform and be a better citizen.

We have also taken into account the period the appellant spent on remand of about two (2) years from 27.01.04 to 26.02.06.

Court notes however that while on remand the appellant twice escaped from lawful custody, thus putting the prison authority and police to employ additional measures and resources to re-arrest him and to keep him in custody. This conduct calls for a very severe sentence.

The nature of the offence and the circumstances under which the appellant committed the same also justify a severe punishment to be passed over the appellant.

Having taken into consideration all the above factors, we find the sentence of 15 years imprisonment to

have been very lenient. We would be inclined to increase it, but in the absence of a cross appeal from the State, we have refrained ourselves from doing so.

Accordingly we sentence the appellant to fifteen (15) years imprisonment and the appellant is to serve the same commencing from the date of his conviction of 17th August, 2009.

In effect ground No. 2 also fails.

Both grounds of the appeal having failed, the appeal stands dismissed.

It is so ordered.

Dated at Arua this 6th day of June 2016.

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Hon. Mr. Justice Remmy Kasule

Justice of Appeal

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Hon. Lady Justice Hellen Obura

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Justice of Appeal

Hon. Mr. Byabakama Mugenyi Simon

Justice of Appeal