THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[CORAM: Kakuru, Egonda-Ntende & Musoke, JJA]

Criminal Appeal No.397 of 2015

(Arising from High Court Criminal Session Case No. HCT-01-CR-SC-0183-of 2010 at Fort Portal)

Between

Byamukama Francis==========Appellant

And

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

(On Appeal from the Judgment of the High Court of Uganda [Chibita, J.,] sitting at Fort Portal and delivered on the 12th June 2013)

REASONS FOR JUDGMENT

Introduction

1. After hearing this appeal we allowed it and promised to provide the reasons later. We now do so.

2. The appellant was indicted with other persons of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The particulars of the offence were that the appellant, Rwatooro Moses, Mugisha Alex and others still at large on the 27th May 2010 at Byeba village in Kyegegwa district robbed Asiime Joseph of his cash, Shs.40,000.00, two bicycles-Hero, Nokia Mobile Phone, Premier Radio, 50 kilos of maize flour, one crate of soda, two empty crates of beer, two boxes of dry cells, 4 kilos of Sugar all worth Shs.380,000.00 and at the time of the said robbery were armed with and threatened to use a deadly weapon to wit swords and pangas.

3. The appellant was convicted after a trial and sentenced to 14 years imprisonment. He appealed against both conviction and sentence and set forth 4 grounds of appeal. We set them out below.

> '(1) That the learned Trial Judge conducted the trial irregularly when he failed to properly conduct a preliminary hearing, failed to properly appoint the assessors, failed to swear in the assessors, failed to sum up to the assessors and admitted a joint opinion of the assessors and all these irregularities occasioned a miscarriage of justice.
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> (2) That the Learned Trial Judge erred in law and in fact when he convicted the appellant without sufficient evidence of participation in the commission of the offence.
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> (3) That the Learned Trial Judge erred in law and in fact when he disbelieved the alibi of the appellant without sufficient evidence to disprove it. (4) That the sentence passed was illegal as it contravened Article 23 (8) of the Constitution or in the alternative the sentence was harsh and manifestly excessive in the circumstances.'

4. The respondent conceded ground no.1 of the appeal.

Representation and Submissions of Counsel

5. Mr Bwiruka Richard appeared for the appellant on state brief. Mr Wasswa Adam, Senior State Attorney in the Office of the Director, Public Prosecutions, appeared for the respondent.

6. Mr Wasswa conceded ground 1 of the appeal and prayed that this court should quash the conviction, set aside sentence and order a re-trial.

Resolution

7. When the trial started on the 20th February 2013 made a note on record of those present in court and included, 'Assessors: Daniel, Jackson'. The learned judge then took the plea of the accused persons before him. He then fixed the case for hearing on the 26 February 2013. On the 26th February 2013 the learned trial judge recorded those present to include, 'Assessors: Mugwisagye Daniel, Jackson Kyalimpa'. He then held a preliminary hearing

in which he admitted PE1, a medical report examining the complainant. And recorded the maker of PE1 as PW1. He then proceeded to hear the testimony of witnesses *viva voce*. The assessors were not sworn.

8. After hearing the witnesses in the case and hearing addresses from the parties there is a note, 'Summing Up'. There is no record of summing up notes on the signed transcript of proceedings by learned trial judge. The judge asks the assessors when they will be ready with their opinion. The response is recorded as follows: 'Assessors: We request for one hour.' The proceedings were adjourned to the following day to receive the assessors' opinion.

9. On the 16th May 2013 there is the following record,

> '**Assessors**: We are ready with a joint opinion. We made several observations but concluded that the accused persons were put at the scene of the crime. The state proved beyond reasonable doubt that A1 and A3 participated and pray that they be convicted.'

10. Judgment was delivered on the 12th June 2013.

11. It is clear that the assessors were appointed but not sworn. There are no summing up notes to the assessors on record. We cannot assess whether or not the learned trial judge summed the case to the assessors in accordance with the law and the evidence in the case. In giving their opinion it is not clear, much as it was indicated to be a joint opinion, who read out such opinion. Both assessors could not have read it at the same time. Whereas there might be nothing wrong with a joint opinion ordinarily the name of the assessor that reads it out should be recorded and the other assessor should indicate that he or she agrees that what has been read or stated in court was the joint opinion of both of them.

12. The relevant law to the appointment and swearing of assessors is found in sections 65, 66 and 67 of the Trial on Indictments Act. We shall set them out in full.

> '**65. Proceedings after a plea of not guilty**.
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> If the accused person pleads not guilty, or a plea of not guilty is entered in accordance with section 62 the court

shall (subject to the provisions of section 66) proceed to choose assessors and to try the case.

66. Preliminary hearing.

(1) Notwithstanding section 65 if an accused person who is legally represented pleads not guilty, the court shall as soon as is convenient hold a preliminary hearing in open court in the presence of the accused and his or her advocate and of the advocate for the prosecution to consider such matters as will promote a fair and expeditious trial.

(2) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed; and the memorandum shall be read over and explained to the accused in a language that he or she understands, signed by the accused and by his or her advocate and by the advocate for the prosecution, and then filed.

(3) Any fact or document admitted or agreed (whether the fact or document is mentioned in the summary of evidence or not) in a memorandum under this section shall be deemed to have been duly proved; but if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.

(4) Whenever possible, the accused person shall be tried during the sessions at which he or she is arraigned, and if a case has to be adjourned to the next sessions due to the absence of witnesses or any other cause, nothing in this section shall be read as requiring the same judge who held the preliminary hearing under this section to preside at the trial.

(5) The Minister may, after consultation with the Chief Justice, by statutory instrument, make rules for better carrying out the purposes of this section and, without prejudice to the generality of the foregoing, the rules may provide for—

(1) delaying the summoning of witnesses until it is ascertained whether they will be required to give evidence at the trial or not;

(2) giving of notice to witnesses warning them that they may be required to attend court to give evidence at the trial.

67. Oath of assessor.

At the commencement of the trial and, where the provisions of section 66 are applicable, after the preliminary hearing has been concluded, each assessor shall take an oath impartially to advise the court to the best of his or her knowledge, skill and ability on the issues pending before the court.'

13. The law requires the assessors appointed to take an oath prior to the commencement of receipt of the evidence. This matter relates to jurisdiction. Assessors are part of the court. If their appointment is irregular including not taking an oath it renders their participation in the trial irregular. As the matter relates to the constitution of the court and hence jurisdiction the irregularity is fatal to the proceedings that followed.

14. Secondly section 82 of the Trial On Indictments Act imposes an obligation on the trial judge to sum up to the assessors the evidence and law in the case. It states,

'(1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case for the assessors and shall require each of the assessors to state and his or her opinion orally and shall record each such opinion. The judge shall take a note of his or her summing up to the assessors.'

15. It appears this is a mandatory requirement. The Judge must sum up to the assessors the law and evidence in the case. Where he fails to do so it is a fatal irregularity.

16. The other requirement is for each of the assessors to state orally their opinion. Whereas a joint opinion may not necessarily be objectionable the record itself must reflect that each assessor indicated that to be the position. It was not the case here.

17. The Supreme Court considered section 82 (1) of the Trial On Indictments Act in Sam Ekolu alias Obote v Uganda SC Criminal Appeal No. 15 of 1994 (unreported) and stated,

> 'We think that the provisions impose a statutory obligation on a trial judge to sum up to the law and the evidence in a case to the assessors. The provision are different from the those of section 283 (1) of the Tanzanian Criminal Procedure Code, in which the word "may" was used instead of "shall", used in section 81 (2) of the T.I.D. The Tanzanian Statute was considered in Miligwa s/o Mwinje and Another V. R. (1953), 20 EACA, 255; Washington s/o Odinga V. R. (1954), 21 EACA 392, and Andrea s/o Kuhinga and Another V. R. [1958] E A 684.
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> In these cases it was decided that the Tanzanian Statute imposed no such obligation.
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> In the instant case there is no evidence on the record that the learned trial judge summed the case to the assessors after the close of the case of both sides. **This in our view amounted to a failure to comply with the obligatory requirement of section 81 (1) by the learned trial judge. It was a procedural error, which was fatal to the appellant's conviction.**
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> Another error connected with the assessors in this case was that the combined opinion of the assessors was recorded in a reported form. The learned trial judge reported on behalf of the assessors what they had said in giving their opinion, instead of recording what they actually said which, had he done so, would have been no problem For this court has accepted a joint opinion of assessors but it is upon the trial judge to ascertain and make a note that each assessor is of that opinion'

18. There were multiple procedural errors that combine and render the conviction of the appellant fatal. These errors were not curable under section 139 of the Trial On Indictments Act.

19. For those reasons we quashed the conviction of the appellant and set aside the sentence imposed on him. It was unnecessary to consider the rest of the grounds of appeal.

20. Mr Wasswa had requested that we order a retrial. We declined to do so given the fact that the appellant had already spent 7 and ½ years in custody over this case. The ends of justice would not have been served with an order for a re-trial.

Signed, dated and delivered at Fort Portal this 12th day of March 2018

Kenneth Kakuru
Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

Elizabeth Musoke
Justice of Appeal