THE REPUBLIC OF UGANDA
IN THE COURT OF UGANDA AT MBARARA
CRIMINAL APPEAL No. 017 OF 2013

1. MBAINE NATHAN
2. SANDE EDSON
3. MANGI MAYER
4. KASIGAIRE PASTORI
5. NYONYINTONO SALIM **:::::::::::::::::::::::::::: APPELLANTS**

VERSUS

UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Bushenyi before His lordship Hon. Justice Bashaija K. Andrew in High Court Criminal Session Case No. 105 of 2012 delivered on 4th April, 2013.)

CORAM: HON. LADY JUTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

Introduction

This appeal arises from the decision of His Lordship Byabashaija K. Andrew in High Court Criminal Case No. 105 of 2012, in which the appellants were convicted on count 1 of the offence of Aggravated Robbery contrary to *Section 285* and *286(2)* of the Penal Code Act Cap 120 and each sentenced to 20 years imprisonment; on count 2, A1, A2 and A4 were convicted of the offence of unlawful possession of a Firearm contrary to section 3(1) (2) (A) & (B) of the Fire Arms Act, Cap 229 and sentenced to 5 years

imprisonment each; and on count 3, A1, A2 and A4 were convicted of the offence of unlawful possession of ammunitions contrary to section 3(1)(3) of the Firearms Act Cap 229, and sentenced to three (03) months imprisonment each. The sentences were to run concurrently. They were also ordered to pay PW1, the sum of shs 100,000,000/= as compensation for the robbery.

Background to the appeal

The facts as accepted by the trial Judge are that on 19th May, 2011 at around 11:00am, one Nuwabaine Bruhan (PW1) received information from Kamuleguja Ssali (PW2) that the accused persons were planning to rob him (PW1) of his money. Nuwabaine Bruhan also alerted police accordingly.

On 27th May, 2011 at around 13:00hours, the said Nuwabaine went to Centenary Bank Ishaka Branch and withdrew shs 100,000,000/=(One Hundred Million Shillings Only) which he put in a sack, and handed over to his driver Abdu Bayambana (PW3) to take to the coffee factory in a car as Nuwabane proceeded to the mosque for prayers.

The said driver proceeded to the coffee factory, but then noticed another white car trailing him. As he got out of the car and entered the factory compound bullets were fired at his vehicle damaging it seriously. The robbers removed the sack of money from the car and drove off, as police, which had been earlier alerted, chased after them. The Police managed to arrest A2 and A4. A1 was arrested later on.

Upon arrest, the said accused persons were found with guns and ammunitions (Exhibits P2, P3 and P4 respectively) A5 was also arrested

later on and is said to have confessed to the crime as A2 and A4 had done. A3 was also arrested as the leader of the group.

All the accused were charged as per indictment.

Being dissatisfied with the decision of High Court, the appellants now appeal against conviction and sentence in grounds set out in their amended Memorandum of Appeal dated 22nd August, 2018 stating that:-

1. ***The learned trial Judge erred in law and fact when he convicted the appellants of the offence of aggravated robbery when the ingredient of theft had not been proved by prosecution.***
2. ***The learned trial Judge erred in law and fact in ordering a refund of shs 100,000,000/= when it had not been proved that the said money had been stolen.***
3. ***The learned trial Judge erred in law and fact in ordering a trial and convicting the appellants on the same without the services of an interpreter.***
4. ***The learned trial Judge erred in law and fact in sentencing the appellants basing on the same without swearing in each of the assessors.***
5. ***The learned trial Judge erred in law and fact in sentencing the appellants to 20 years imprisonment without considering the period spent on remand.***
6. ***The learned trial Judge erred in law and fact in sentencing the appellants to 20 years imprisonment which was a harsh sentence.***

Counsel for the appellants with leave of Court abandoned ground 4 of the appeal and argued the rest of the grounds of appeal as set out in the Memorandum.

Representations

At the hearing of the appeal, Ms. Kentaro Specioza, learned Counsel appeared for the appellants on state brief while Ms. Jennifer Amumpaire, learned Principal State Attorney appeared for the respondent. The appellants were in Court.

The submissions

Ground 1:

It was submitted for the appellants that the learned trial Judge erred in law in convicting the appellants of aggravated robbery when the ingredient of theft had not been proved by the prosecution. Counsel submitted that according to the evidence of PW1, Nuwabaine Bruhan he withdrew the money and gave it to his driver who never acknowledged receipt of the same. Further, PW3, the driver also testified that he went with his boss to the bank and was given a white bag (*kadeya*) full of money but he did not know how much it was; and neither did he know whether it was money or not since the bag was sealed at the top. Neither did he sign anywhere acknowledging receipt of the said money.

Counsel referred court to the evidence of PW2, Kamuregeya Sali who testified that he was approached by A1 to join the deal of robbing PW1 and he informed the boss, PW1 of the said plan the following day. PW2 further testified that his duty to the group was to keep tabs on the movement of

the money from the bank to the factory and to inform the participants, which he did. He also alerted PW1. Counsel further referred to the testimony of PW6, Deputy AIP Onume Geoffrey who allegedly pursued the appellants to the point at which they abandoned the vehicle and they ran away into the bush before A2 and A4 were arrested and taken to Mbarara Central Police Station. He testified that a pair of army uniforms, an empty magazine of bullets, a drilling machine used for removing and changing the car's number plate, and some exercise books in a white sack were found in the abandoned car.

Counsel contended that the appellants were pursued by the police who had prior knowledge of the alleged robbery and only books in a white sack were recovered which books were never claimed to be the property of the appellant. In her view, this showed that there was no money stolen since each of the appellants is stated to have taken his own route before being arrested and so, if there was money, it would have been recovered by the police.

Counsel contended that PW6's assertion that there were other people still at large was unfounded since A2 and A4 who allegedly confessed only stated that they were five persons involved in the plot. This was corroborated by PW2 who stated that he was approached to join and assist a group of 5 in robbing PW1. No mention of any Wasswa was made, so the money could not be said to have been taken by him.

Counsel further contended that the evidence of withdrawal of shs. 100,000,000/= by PW1 by way of a bank statement did not mean that the

said sum indeed left the bank and was stolen by the appellants. PW1 had prior knowledge regarding the alleged robbery and it was most probable that he used this as a trick to confuse the would-be robbers.

Counsel for the respondent was of a different view. She submitted in reply that the ingredient of theft was proved by the prosecution beyond reasonable doubt when the prosecution adduced evidence of PW1 stating that he withdrew shs 100,000,000/= from Centenary Development Bank and handed it over to PW3 in a sack. PW3 had acknowledged receipt of the sack and this was sufficient evidence that the money was in the car when the car was shot at.

Counsel further submitted that even though the prosecution did not adduce evidence of who packed and sealed the money, the conduct of the appellants by running away from the motor vehicle and dispersing, meant that there was a possibility that they ran away with the money. The cogent evidence on record was that money was withdrawn from the bank, packed in a bag and put in the vehicle which the appellants robbed.

Ground 2:

It was submitted for the appellants that the learned trial Judge erred in ordering the refund of 100 million when there was no proof that the same had been stolen. Counsel reiterated her submissions on ground 1 and prayed that this court quashes that order of refund.

In reply, Counsel for the respondent submitted that the learned trial Judge rightfully ordered that shs 100,000,000/= be paid as compensation and be refunded since the prosecution had proved that it had been stolen.

Ground 3

Counsel for the appellants submitted that the learned trial Judge erred in law by conducting a trial without the services of an interpreter. She argued that the trial was conducted in the English language without interpretation and yet some of the appellants did not understand what was going on.

Counsel contended that 4 of the appellants were Banyankole who gave their evidence in court in Runyankole; and one muganda who testified in his language but that they were all denied interpreters in court. She further contended that even though their Defence was recorded in English, failure by their legal representative to raise this issue at trial was fatal and occasioned an injustice.

Counsel referred Court to **Article 28 (3) (f)** of the Constitution and a Canadian authority of **R vs. Quoc Dung Tran [1994] 2S.C.R. 952**, for the proposition that the right of an accused who does not understand or speak the language of the proceedings to obtain assistance of an interpreter ensures that a person charged with a criminal offense hears the case against him or her and he is given a full opportunity to answer it.

In reply, Counsel for the respondent submitted that there was an interpreter in court in as much as the particulars of the said interpreter were not specifically written in the record of proceedings of the trial Court. She contended that circumstantially during plea taking, the appellants responded and pleaded to the charge which implied that they understood what was being told to them. Further, that the appellants did not at any

time complain that they did not understand what was happening during the trial and neither was this issue raised by their legal representatives.

Counsel invited this court to find by implication that the services of an interpreter were employed during the trial of this case and dismiss this ground accordingly.

Ground 5

Counsel for the appellant submitted that at the time of sentencing, the learned trial Judge did not consider the period which the appellant had spent on remand contrary to Article 23(8) of the Constitution.

Counsel contended that the appellants had spent one year and 10 months on remand and according to **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 025 of 2014,** the sentence which is imposed without taking into account the period spent on remand is a nullity. Counsel prayed that the sentence of 20 years be declared a nullity.

In reply, Counsel for the appellant conceded that the custodial sentence passed by the learned trial Judge was a nullity in light of failure to consider the period which the appellants had spent during pre-trial detention.

Ground 6

Counsel submitted that the sentence imposed on the appellants was harsh and excessive considering the circumstances of this case. In her view, the motor vehicle was damaged but no human life was lost or threatened and that situation ought to have been considered when determining the sentence.

Counsel argued that the shots fired were meant to keep the occupants of the factory away. So in such a situation 20 years imprisonment was harsh and ought to be reduced to a lesser sentence.

In reply, Counsel for the respondent invited this honourable court to invoke its powers under Section 11 of the Judicature Act Cap 13 while evaluating the entire evidence in this case and to pass the appropriate sentence. He proposed that a sentence of 20 years imprisonment be found to have been appropriate and just in the circumstances.

Decision of the court

We have carefully studied the court record and considered the submissions, and/authorities relied on by Counsel on either side. We are alive to the fact that this court has a duty as the first appellate court under **Rule 30(1) (a)** of the Rules of this Court to re-appraise the evidence and come up with its own conclusions. We are also further guided by the Supreme Court decision in the case of **Father Narsensio Begumisa and others vs. Eric Tibebaga; SCCA 17/2002** in which Court held that:-

> ***"It is a well- settled principle that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."***

We shall therefore proceed to determine each ground of appeal in the same order as argued by Counsel for the appellants.

Regarding ground 1, Counsel for the appellant contended that the ingredient of theft had not been proved at trial and as such the appellants were wrongly convicted of the offence of aggravated robbery. It was her contention that the prosecution ought to have proved that the shs 100,000,000/= that was withdrawn by PW1 was actually put in the car and was the one which was allegedly robbed by the appellants, but this was not proved.

Counsel for the respondent, on the other hand maintained that the said ingredient had been proved beyond reasonable doubt by the evidence of PW1 who withdrew the money and gave it to his driver PW3 to take to the factory where it was robbed from.

In **Robert Sabiiti vs. Uganda, Supreme Court Criminal Appeal No. 004 of 1989**, the Supreme Court laid down the ingredients of the offence of aggravated robbery as theft of the property; use or threat to use actual violence; use of a deadly weapon; and participation of the accused in the crime.The legal definition of theft is set out in **section 254(1) of the Penal Code Act Cap 120**. It entails the fraudulent dispossession of another of something that is capable of being stolen, and which item the dispossessor has no claim of right over.

In **Sula Kasiira vs. Uganda, Supreme Court Criminal Appeal No. 020 of 1993** the following legal position from **Halsbury's Laws of England, Vol. 10, 3rd Edition, paragraph 1484** was cited with approval with regard to the act of taking or carrying away as an element of theft:-

"There must be what amounts in law to an asportation (that is carrying away) of the goods of the prosecutor without his consent; but for this purpose, provided there is some severance, the least removal of the goods from the place where they were is sufficient, although they are not entirely carried off. The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation, and so is a removal or partial removal from one part of the owner's person to another... The offence of larceny is complete when the goods have been taken with a felonious intention, although the prisoner may have returned them and his possession continued for an instant only." (emphasis mine)

It is a well settled principle of law that the burden of proof in criminal proceedings such as the present one lies squarely with the prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. The prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. **See Woolmington vs. DPP (1935) AC 462 and Okale vs. Republic (1965) EA 55.**

Further, the standard of proof in a criminal trial does not entail proof to absolute certainty. The standard that must be met by the prosecution's evidence is that no other logical explanation can be derived from the facts except that the accused committed the crime, thereby rebutting such accused person's presumption of innocence. If a trial judge has no doubt as to the accused's guilt, or if his/ her only doubts are unreasonable doubts, then the prosecution has discharged its burden of proof. It does

not mean that no doubt exists as to the accused's guilt; it only means that no reasonable doubt is possible from the evidence presented.

Furthermore, it is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. On the ingredient of theft, Counsel for the appellants contended that theft was not proved because no money was ever recovered or proved to have left the bank and been ferried by the driver of PW1, and only a white sack (Exhibit P9) containing exercise books (Exhibit it p8) was recovered from the car by police.

In the appeal before us, we have not been convinced otherwise. The evidence of PW3 was that he went to the bank with his boss who gave him a white sack. It was sealed and he did not know what it contained. While driving the same to the factory, he noticed that he was being trailed by a salon car. He parked at the factory and went to call the Manager to receive the money. That is when he heard gun shots which hit the car and damaged it. He never saw who fired the bullets; he only saw another car which had been parked behind him taking off and figured that his boss's property in the white sack had been taken. This witness whose evidence was relied upon to corroborate that of PW1 neither saw PW1 putting the money in the sack, nor the appellants taking away the sack and/or its contents. We are accordingly convinced that the prosecution did not discharge its duty in proving the ingredient of theft beyond reasonable doubt.

We find that the prosecution ought to have adduced sufficient cogent evidence to prove that indeed it was the sum of shs 100,000,000/= which was withdrawn from the bank by the complainant, was verified and/or counted by its holder, placed in the white bag and given to PW3 to deliver to the factory. With such a colossal sum involved, it is improbable that a person who has been warned of an impending plan of theft of such money, to put his property in harness way. The complainant in this case had been duly warned by PW2 of the plan to rob him and given the details of the impending robbery. With this in mind, it is unbelievable that he could go ahead and hand over the amount of shs 100,000,000/= to his driver, unguarded to take to the factory. The driver, PW3, did not know what he was carrying but simply drove the package to the factory and left it in the car while he went to call the manager to collect the same.

In our view, was a set up master minded by PW1 with the help of the police and PW3. It was not a coincidence that the car trailing the driver who was travelling alone unguarded was not attacked until he had parked safely at the factory premises. Further, it was also not a coincidence that upon pursuit of the robbers only books were found in a similar white bag and not the said colossal sum of 100,000,000/=. We cannot conclude that the appellants stole this money because the evidence before us creates other theories and explanations such as the fact the complainant, having been warned about the impeding threat, decided to set up the robbery with contents other than the money. Moreover, in a case of such gravity and importance, the police should have carried out proper investigations and provided Court with sufficient evidence and proof that indeed shs

100,000,000/= was packaged within the bag, handed over to the driver to take to the factory by the complaint and stolen by the appellants.

This did not happen.

Having found as we have, we accordingly set aside the conviction of aggravated robbery in count 1 and acquit the appellants of the said charge. This ground of appeal accordingly succeeds.

A3, Bangi Mayer, and A5 Nyonyintono Salim having been convicted and sentenced only on this count ~~is~~ are hereby acquitted. We order that A3 be immediately released and set free unless he is being held under another offence under the laws of Uganda.

Further, having found as we have on ground 1, ground 2 must succeed by implication. The order by the learned trial Judge that the appellants compensate the complaint by paying shs 100,000,000/= by way of a civil debt is accordingly set aside.

We shall now proceed to determine the other grounds of appeal as they relate to count 2 on unlawful possession of a fire arm and count 3 of the offence of unlawful possession of ammunitions for which the remaining appellants, A1, A2 and A4 were convicted and sentenced.

On ground 3, we agree with Counsel for the appellants that the record of proceedings from the trial court does not indicate a name of the interpreter, or whether there was interpretation or not. Be that as it may, we find that the right to an interpreter is neither an automatic nor an absolute one, as it stands to reason.

Generally courts appoint an interpreter when either of the following occurs:-

1. ***It becomes apparent to the Judge that an accused is, for language reasons, having difficulty expressing him or herself or understanding the proceedings, and that the assistance of an interpreter would be helpful; or***
2. ***An accused (or counsel for the accused) requests the services of an interpreter and the Judge is of the opinion that the request is justified.*** **[See R vs. Quoc Dung Tran [1994] 2S.C.R. 952 (supra)]**

We note that the right of the defendant to understand what is going on in court and to be understood is not a separate right, but an aspect of the right to a fair hearing. Courts are, therefore, not obliged to inquire, as a matter of course, into every accused's capacity to understand the language used in the court proceedings. At the same time, there is no absolute requirement on an accused that the right be formally asserted or invoked as a pre-condition to enjoying it. In **R vs. Tsang (1985) 27 C.C.C. (3d) 365 and R vs. Tabirizi [1992] OJ. No 1383,** it was stated that:-

> ***"Lawyers are officers of the Court; there is an obligation on both Crown and defence counsel to draw court's attention to the need for an interpreter where counsel become aware that such a need exists. While Court's must be alert to signs which suggest that an accused may have language difficulties, they are not, nor can they be expected to be mind-readers. Where there are no outward indications which point to a lack of understanding on the accused's part and where the right has not been invoked by the accused or by counsel (in the case of represented accused), these***

may be factors which are weighed against the accused if, after sitting quietly throughout the trial, the issue of interpretation is suddenly raised at appeal."

Section 56 of the Trial on Indictments Act, on interpretation, provides as follows:-

56. Interpretation of evidence to accused or his or her advocate.

1. Whenever any evidence is given in a language not understood by the accused person, it shall be interpreted to him/herin open court in a language understood by him or her.

2. If the accused appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

From the perusal of the trial record in this case, during plea taking at the commencement of the trial on 21st February, 2013, the indictment was read and explained to the appellants (then accused) and they all pleaded not guilty to the charges on all counts after stating that they had understood the charges. Further they sat quietly throughout the entire trial which commenced on 18th February 2013 and ended in June 2013. We find that Counsel for the appellants' contention that they were afraid to speak out in court is untenable because if that were the case, and considering the nature and gravity of the charges in this case, the appellants would have confided in their legal representative on this issue. Moreover, they ably set up their defences and presented them to court on issues which were clearly before court.

In our view the appellants waived their right to an interpreter when they did not assert it and the Court was not aware of any such need since there is nothing on the record of proceedings to reveal that need. The learned trial Judge in our opinion was not bound to inquire whether there was a need when there was no apparent basis for doing so. In such circumstances, it cannot be said that the appellants were denied an interpreter and as such, did not comprehend the proceedings.

Accordingly, this ground of appeal must fail.

On grounds 5 and 6 both Counsel agreed that, the custodial sentences imposed by the trial Judge ought to be set aside, as he did not take into account the pre-trial detention period the appellants had spent on remand. This omission, both Counsel agreed rendered the sentence illegal.

In this case, we find that, the learned trial Judge, with all due respect, did not comply with the provisions of **Article 23 (8) of the Constitution** which requires the Court to take into consideration the pre-trial detention period before passing sentence, by deducting it from the sentence that would otherwise have been imposed. The learned trial Judge while passing the sentence stated as follows:-

> ***"The following are the major considerations in arriving at the appropriate sentence in this case.***
>
> ***i. The offences with which the convicts have been found guilty are serious, particularly one on aggravated robbery. The seriousness is underscored by the penalty prescribed as the maximum; which is the death penalty.***

ii. ***The factor that the offence was committed using deadly force; to wit firing of guns and damaging the car of the complainant.***

iii. ***The amount of money involved being shs 100million, a big sum of money and as such needs to be taken into account.***

iv. ***The fact that the accused committed the offences with pre-meditation. The meticulously contrived a plan and executed it with precision, and unless such a group is put out of such activities, no citizen can be safe.***

v. ***The fact that the convicts are first time offenders with no known previous records.***

vi. ***The fact that the convicts have given mitigating factors that appear to be credible.***

vii. ***The need to protect society from organised crime such as the instant ones.***

viii. ***The need to strike balance between punishment and reforming the offenders.***

All the above aggravating and mitigating factors taken together each convict is sentenced to 20 years imprisonment on count 1.

On count 2, Convict A1, A2 and A4 are sentenced to 5 years imprisonment.

On count 3, A1, A2 and A4 are sentenced to 03 months imprisonment."

Clearly the leaned trial Judge did not comply with *Article 23 (8)* of the Constitution. Because of the above omission alone, we find that the sentence imposed by the trial Judge was a nullity as it contravenes the Constitution. **See:- Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014.**

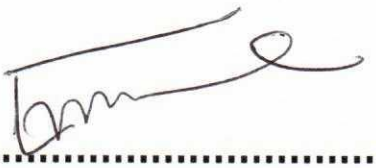
Having found so, we invoke the provisions of **Section 11 of the Judicature Act Cap 13**, which grants this Court the same powers as that of the trial Court, in circumstances such as we now find ourselves, to impose a sentence on counts 2 and 3 which we consider appropriate in the circumstances of this appeal.

We have considered the fact that the offence of unlawful possession of a fire arm carries a maximum penalty of imprisonment not exceeding 10 years imprisonment and the offence of unlawful possession of ammunitions carries a maximum sentence of imprisonment not exceeding 6 months as provided for under the Fire Arms Act, Cap 229. We have also taken into account the fact that A1, A2 and A4 were first time offenders aged 32, 23 and 22 years respectively at the time of commission of the offence. They were relatively young and capable of reforming. We find that a sentence of five years imprisonment on count 2 and a sentence of 3 months imprisonment on count 3 are appropriate and just in the circumstances. From that sentence we would reduce a term of 1 year and 10 months which the appellants had spent in pre- trial detention, and sentence them to a term of 3 years and 2 months imprisonment on Count 2, and 3 months imprisonment on Count 3. The sentences would run concurrently from the date of conviction.

However, we note that the appellants have been in prison since 27th May, 2011 for a period of 7 years and 3 months. They have already served their sentence. We order for the immediate release of A1 Mbaine Nathan, A2 Sande Edson and A4 Kasigaire Pastori forthwith unless they are being held on other lawful orders.

We so order.

Dated at Mbarara this 2nd day of October 2018



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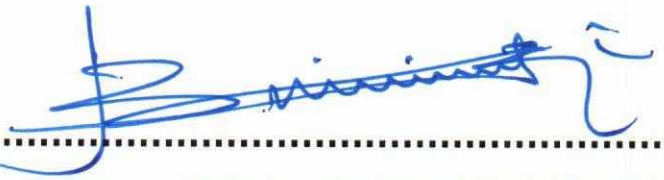
HON. LADY JUSTICE ELIZABETH MUSOKE

JUSTICE OF APPEAL



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HON. MR.JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL

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HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUSTICE OF APPEAL