THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORTPORTAL

(Coram: F.M.S Egonda-Ntende, Hellen Obura & Christopher Madrama, JJA)

CRIMINAL APPEAL NO. 114 OF 2011

MUGISHA WILSON::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of Hon. Justice Akiiki Kizza holden at Fortportal High Court in Criminal Session Case No. 0042 of 2009 delivered on 18/04/2011)

JUDGMENT OF THE COURT

This appeal is against the sentence of 26 years imprisonment imposed by the High Court at Fortportal (Akiiki Kiiza, J) on 18/04/2011 upon the appellant being convicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act.

The facts as found by the trial Judge are that on 21/10/2008 at 1:30 am PW2, Mbabazi Margaret was sleeping in the same house with PW3, Bwambale Muraba and she heard a loud noise which sounded like an earth quake. As she was trying to flee from the house, she saw the door had been broken down and she met 3 people including the appellant who pushed her back into her bedroom. They all had torches and pangas and they immediately started demanding for money from her. When she tried to make an alarm, the appellant cut her on the head while his colleagues looked for money from a suit case. She was again cut and she fell on the bed and lost consciousness and only regained it while in Bundibugyo Hospital. PW4, Detective Corporal Kule Eric the Investigating Officer interviewed the victim and she revealed that she had recognized the appellant among the robbers whereupon, he

was arrested and indicted with the offence of aggravated robbery. He was tried and convicted of that offence and subsequently sentenced to 26 years imprisonment. Being dissatisfied with the above sentence, he now appeals to this Court on the ground that;

"The sentence of 26 years is illegal, harsh and excessive in the circumstances."

Representations

At the hearing of this appeal, Mr. Businge Asiimwe Victor represented the appellant on state brief while Mr. David Ndamurani Ateenyi Senior Assistant Director Public Prosecutions represented the respondent.

At the commencement of the hearing, counsel for the appellant sought leave under section 132 (1) (b) of the Trial on Indictments Act (TIA) to appeal against sentence only which was granted. He also informed court that he had filed written submissions which he prayed court to adopt. Counsel submitted that the trial Judge did not deduct the period of 2 years and 5 months which the appellant had spent on remand and this contravened Article 23 (8) of the Constitution. Counsel also submitted in the alternative that the sentence of 26 years imprisonment that was imposed on the appellants was harsh since the victims were not badly hurt and the money that was stolen was only Ushs. 300,000/=.

In reply, counsel for the respondent submitted that the trial Judge took into consideration the period the appellant had spent on remand when he stated thus;

"Accused is allegedly a first offender. He has been on remand for 2 years and 4 months, which period I take into consideration, while deciding an appropriate sentence to impose on him..."

He argued that this was not an illegality except that there was an arithmetical error which can be corrected. Further that, since the trial Judge took into account the period spent on remand, much as the figure was incorrect, he did not contravene the Constitution.

On severity of sentence, counsel submitted that the sentence is not harsh given the aggravating circumstances of the case which among others included the fact that the appellant commanded his colleague to shoot the victim if she did not surrender the money. At this point, Court pointed out that theft of the money (Ushs. 300,000/=) had not been proved by the prosecution, and counsel for the respondent conceded and prayed that a re-trial be ordered. However, in rejoinder, counsel for the appellant objected to a re-trial and submitted that since theft had not been proved, the appellant be convicted of a minor cognate offence of attempted robbery.

Court's Consideration

We have carefully perused the court record and considered the submissions of both learned counsel. We are alive to the duty of this Court as the first appellate court under rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10 which is to review the evidence on record and to reconsider the materials before the trial Judge, and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. ***Also See: Kifamunte Henry vs Uganda; SCCA No 10 of 1997.***

Although this appeal was against sentence only, we noted that it would appear from the court record that there was no evidence on record to prove the offence of aggravated robbery as the element of theft was not proved. We did point out this to counsel for the respondent during his submission and he conceded to it and agreed that both PW2 and PW3 who were victims of the crime and eye witnesses to the offence did not testify about the alleged theft of Ushs. 300,000/= which allegedly belonged to PW2. It is therefore pertinent for us to consider this matter since it is a point of law and where there is a glaring illegality this Court cannot overlook it. This is explained in the well-known legal maxim, *"Ex turpi causa non oritur action"* which means a court of law cannot sanction that which is illegal. ***See: Makula International Limited vs His Eminence Cardinal Nsubuga and anor CACA No. 4 of 1981***

It is a cardinal principle of law that in a criminal trial, the burden of proof lies with the prosecution and the standard is proof beyond reasonable doubt. It follows therefore that each ingredient of the offence must be proved beyond reasonable doubt for a conviction to be found.

In the instant appeal, the appellant was convicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act.

Section 285 of the Penal Code Act provides that; *"Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery."*

Section 286 (2) of the Penal Code Act provides that; *"Notwithstanding subsection (1)(b), where at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death."*

The legal position regarding the act of taking or carrying away as an element of the crime of theft requires what amounts into law an asportation, i.e, 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. ***See: Sula Kassira vs Uganda, SCCA No. 20 of 1993***.

We have carefully considered the evidence on record, especially regarding the testimony of PW2 and we find that it was not sufficient to sustain a conviction on aggravated robbery since theft which is an essential ingredient of the offence was not proved by the prosecution. We therefore quash the conviction and set aside the sentence. Counsel for the respondent prayed

that we order for a retrial whereas counsel for the appellant prayed that we convict the appellant of a minor cognate offence.

An order for a retrial is as a result of the judicious exercise of the Court's discretion. This discretion must be exercised with great care and not randomly, but upon principles that have been developed over time by the Courts: ***See: Fatehali Manji vs R, [1966] EA 34***

In ***Rev. Father Santos Wapokra vs Uganda, CACA No. 204 of 2012,*** this Court stated a number of considerations to be taken before ordering a retrial. It stated thus;

> *"The overriding purpose of a retrial is to ensure that the cause of justice is done in a case before Court. A serious error committed as to the conduct of a trial or the discovery of new evidence, which was not obtainable at the trial, are the major considerations for ordering a retrial. The Court that has tried a case should be able to correct the errors as to the manner of the conduct of the trial, or to receive other evidence that was then not available. However that must ensure that the accused person is not subjected to double jeopardy, by way of expense, delay and inconvenience by reason of the retrial.*
>
> *Other considerations are; where the original trial was illegal or defective, the rule of the law that a man shall not be twice vexed for one and the same cause (Nemo bis vexari debet pro eadem causa), where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, strength of the prosecution case, the seriousness or otherwise of the offence, whether the original trial was complex and prolonged, the expense of the new trial to the accused, the fact that any criminal trial is an ordeal for the accused, who should not suffer a second trial, unless the interests of justice so require and the length of time between the commission of the offence and the new*

trial, and whether the evidence will be available at the new trial. ***See: Ahmed Ali Dharamsi Sumar vs R [1964] EA 481; Tamano vs R [1969] EA 126.*** *"*

Similarly, a retrial is not to be ordered merely because of insufficiency of evidence or where it will obviously result into an injustice that is where it will deprive the accused/appellant of the chance of an acquittal: ***(See: M'kanake vs R [1973] EA 67).***

In the instant case, the victims of the crime were given an opportunity to present their evidence and they did so without bringing out the element of theft. Allowing a retrial, in our view, would be prejudicial to the appellant as it would instead give prosecution opportunity to fill the gaps in its evidence. In addition, even if that was not so, we note that the appellant was convicted on 18/04/2011. In our considered view, since a period of about 8 years and 2 months has passed, ordering a retrial may not yield any fruit because of the challenge of locating the witnesses.

Having carefully considered the factors for and those against ordering a retrial as laid out in ***Rev. Father Santos Wapokra vs Uganda (supra)*** we find that the interest of justice will best be served by disallowing the prayer for an order for a re-trial as proposed by counsel for the respondent .

Turning to the prayer of counsel for the appellant that the appellant be convicted of a minor cognate offence, we have considered the provision of section 87 of the Trial on Indictments Act which states that;

"When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it."

The East African Court of Appeal in ***Robert Ndecho and anor vs R (1951) 18 EACA 171*** also stated the same principle in the following words:

> *"...where an accused person is charged with an offence he may be convicted of a minor offence although not charged with it, if that minor offence is of a cognate character, that is to say of the same genus or species...the test the court should apply when exercising its discretion is whether the accused person can reasonably be said to have a fair opportunity of making his defence to the alternative."*

A minor cognate offence of aggravated robbery would be attempted robbery contrary to section 287 of the Penal Code Act. It provides thus;

> *"Any person who assaults any other person with intent to steal anything and at, immediately before or immediately after the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen or to prevent or overcome resistance to its being stolen commits a felony"*

It was the evidence of PW2 that the assailants who broke into her house and attacked her first demanded for money from her and even cut the suit case looking for money. It is therefore clear that their mission was to steal and in the process they assaulted the victims using actual violence. We therefore find that the offence of attempted robbery was proved beyond reasonable doubt. Had the trial Judge properly evaluated the evidence on record, he would have found so and convicted the appellant accordingly. Having failed to do so, we now invoke section 11 of the Judicature Act which gives this Court the powers of the court of original jurisdiction and convict the appellant of the offence of attempted robbery contrary to section 287 (1) of the Penal Code Act.

Section 287 (2) (b) of the Penal Code Act provides for the maximum sentence of life imprisonment for the offence of attempted robbery. We have considered both the aggravating

and mitigating factors so as to determine the appropriate sentence. The victim (PW2) was cut badly on the head, a vulnerable part of the body and was unconscious for some time. She almost lost her life. The 2nd victim (PW3) also suffered some injuries as a result of being cut.

In the circumstances of this case, we find that a sentence of 13 years will meet the ends of justice. However, we have noted herein above that the appellant spent 2 years and 6 months in lawful custody. We therefore deduct that period from the sentence of 13 years which leaves a period of 10 years and 6 months as the sentence to be served by the appellant from the date of conviction which is, 18/04/2011.

Before we take leave of this matter, we must observe that the appellant was poorly represented at the trial which denied him the right to a fair hearing as guaranteed under Article 28 (1) of the Constitution. Had his counsel, Mr. Musinguzi, pointed out to court that the ingredient of theft of Ushs. 300,000/= had not been proved by the prosecution beyond reasonable doubt and that the evidence on record was not sufficient to support a conviction of aggravated robbery, the trial Judge would not have convicted the appellant of that offence whose maximum penalty is death. It is incumbent upon every counsel to fully and ably represent his client well especially in criminal trials where the rights and freedom of an accused person are at stake.

On the whole, the appeal is allowed in the above stated terms.

We so order.

Dated at **FortPortal** this 20th day of June 2019

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F.M.S Egonda-Ntende

JUSTICE OF APPEAL

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10 Hellen Obura

JUSTICE OF APPEAL

.....

Christopher Madrama

15 **JUSTICE OF APPEAL**