THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 530 OF 2015

(Arising from High Court Kiboga Criminal Session Case No. 120 of 2013)

1. KALONGO JOHNSON
2. KAFEERO JAMIL :: APPELLANTS
3. SEKAJJA MULANI

VERSUS

UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kiboga before His Lordship Wilson Masalu Musene, J. delivered on 5th March, 2014 and 27th March, 2014 in Criminal Session Case 120 of 2013)

CORAM: HON. LADY JUSTICE MUSOKE ELIZABETH, JA

HON. LADY JUSTICE HELLEN OBURA, JA

HON.MR. JUSTICE EZEKIEL MUHANGUZI, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court sitting at Kiboga in Criminal Session Case No. 120 of 2013 delivered on 5th March, 2014 and 27th March, 2014 respectively by Masalu Musene, J in which the 1st, 2nd and 3rd appellants were sentenced to terms of imprisonment for 18 years, life imprisonment and 14 years imprisonment, respectively, for the offence of aggravated robbery contrary to section 285 and 286 of the Penal Code Act, Cap.120.

Brief Background

The three appellants were jointly indicted with 2 others and tried before Masalu Musene, J. for the offence of aggravated robbery contrary to sections 285 and 286 of the Penal Code Act, Cap.120. The particulars of the indictment were that Kalongo Johnson a.k.a Yona Saka, Kafeero Jamil,

Katongole Yossam, Ndagire Grace, Sekajja Mulani and others still at large on the 14th day of May, 2012 at Lufula Village, Kiboga Town Council, in the Kiboga District robbed Riziki Jackie of shs. 41,500,000/= and at the time of the said robbery used a deadly weapon, to wit a gun, on the said Riziki Jackie.

At the beginning of the trial proceedings, Kafeero Jamiru, the 2nd appellant pleaded guilty while Sekajja Mulani, the 3rd appellant changed his plea from not guilty to guilty after the prosecution had started calling its witnesses. They were both accordingly convicted and sentenced on their guilty pleas. The trial Court then proceeded to try the 1st appellant and 2 others for the offence as charged, subsequently convicting the 1st appellant and acquitting the other 2 accused persons.

Being dissatisfied with the decision of the learned trial Judge, the appellants lodged this appeal in this Court. The 1st appellant appealed against conviction and sentence, while the 2nd and 3rd appellants, have with leave of this Court under **Section 132 (1) (b)** of the **Trial on Indictment Act, Cap.23,** appealed against sentence only**.** The grounds of appeal, in the appellants' joint memorandum of appeal are framed as follows:

1. **The learned trial Judge having received evidence of facts Kafeero Jamil, A5 Sekajja Mulani, A4 Ndagire Grace failed to appraise evidence thereby wrongly convicted A1 Kalongo Johnson of aggravated robbery.**
2. **The learned judge erred in law and fact when he injudiciously exercised judicial function of sentencing by discriminating without considering equality in punishment thereby imposed upon appellant Kalongo Johnson 18 years imprisonment Kafeero Jamil life imprisonment and Sekajja Mulani 14 years imprisonment without deducting period on remand.**
3. **The learned Judge erred in law and fact when he injudiciously held that immediate properties such as car of convict money on account be given to complainant as compensation.**

Representation

At the hearing of this appeal Mr. Rukundo M Seth, learned Counsel, appeared for the appellants while Ms. Angomu Harriet, learned Senior State Attorney, appeared for the respondent.

Appellants' case

Counsel opted to argue the three grounds of appeal separately, submitting, on ground one that the learned trial Judge erred when he convicted the 1st appellant yet he had recorded pleas of guilty from the 2nd appellant and the 3rd appellant, wherein the two admitted to the crime. He pointed out that PW2, Riziki Jackie, testified that she was only able to identify the 2nd and 3rd appellants as the people who robbed her and did not implicate the 1st appellant. In counsel's view those who committed the offence pleaded guilty at the trial and the learned trial Judge ought to have acquitted the 1st appellant.

Furthermore, counsel faulted the learned trial Judge for disbelieving the alibi raised by the 1st appellant that he was in Kampala on the date the offence was committed without giving reasons for so doing. He cited **Bogere Moses and another vs. Uganda Supreme Court Criminal Appeal No. 1 of 1997** for the proposition that where the prosecution adduces evidence showing that the accused was at the scene of crime and the defence denies it and adduces evidence to show that the accused was elsewhere at that material time, it is incumbent upon court to evaluate both versions judiciously and give reasons why one version is not accepted and the other is accepted. He contended that the learned trial Judge did not give reasons for disbelieving the 1st appellant's alibi and for that reason ground one of the appeal should be allowed.

On ground two, counsel submitted that the learned trial Judge erred when he failed to take into consideration the period spent by the appellants on pre-trial remand thereby passing an illegal sentence. He faulted the learned trial Judge for failing to mathematically deduct the remand period from the sentence imposed against the appellants. Further still, that the learned trial Judge acted injudiciously when he sentenced the appellants to sentences of various lengths and yet they had been indicted for the same offence. Counsel argued that sentencing the 3rd appellant to a shorter term of imprisonment was discriminatory and in contravention of Article 21 (1) & (2) of the 1995 Constitution which prohibits discrimination. He then implored this Court to sentence all the appellants to 14 years imprisonment which is appropriate in

the circumstances, and thereafter deduct the 3 years each had spent on pre-trial remand so that they each serve a sentence of 11 years imprisonment.

On ground three, counsel criticized the learned trial Judge for making an illegal order of compensation against the 1st appellant alone and yet the other two appellants were also convicted for the offence which formed the basis for the compensation. He further submitted that there was no physical injury occasioned to PW1, Ntale Aloysious to justify the order and that the money on the 1st appellant's account should not have been used to compensate the complainant without the trial Court making a finding that the said money was obtained during the robbery. Further, that the learned trial Judge failed to carry out an inquiry to establish the reasonableness of the order of compensation, citing **Selemani v Republic [1972] EA 269** for this proposition. He concluded that had the learned trial Judge made this inquiry, he would have refrained from imposing an unreasonable order as he did. He then asked this Court to allow this appeal and set aside the compensation order.

Respondent's case

Counsel for the respondent supported the finding of the learned trial Judge that the 1st appellant had a common intention with the 2nd and 3rd appellants to commit the robbery in issue. She admitted that the 1st appellant was not at the scene of crime but that he masterminded the robbery via telephone communication with the 2nd and the 3rd appellants away from the scene of crime. In support of this submission, counsel referred to the testimony of PW6, that during the police investigations, they recovered a used airtime card at the scene of crime which was tracked to the 3rd appellant and after conducting further investigations, the police uncovered digital evidence consisting of call print-outs, which revealed that the 3rd appellant had been in constant communication with the 1st appellant shortly before and after the time of the robbery. She then prayed that the conviction against the 1st appellant is maintained by this Court.

In answer to ground two, counsel submitted that the learned trial Judge was justified to arrive at the sentences imposed on the appellants. She pointed out that the maximum penalty for the offence of aggravated robbery is the

death sentence, while the sentencing guidelines prescribe 35 years as the starting point for aggravated robbery. She was also of the view that the parity of sentences requested for by counsel for the appellants can be achieved by sentencing all the appellants to life imprisonment which was the most severe sentence handed out to any of the appellants by the learned trial Judge. She then prayed to this Court to maintain the sentences imposed by the learned trial Judge or to enhance them.

Furthermore, counsel supported the findings of the learned trial Judge regarding the order for compensation against the 1st appellant alone in opposition to the ground three. She justified the findings by submitting that the learned trial Judge reached his decision basing on the fact that the 1st appellant had deposited money on his account to the tune of the money which was robbed. Counsel, however, conceded that the learned trial Judge erred when he made the order for compensation against the 1st appellant only and submitted that this Court may exercise its discretion to fairly apportion the order of compensation among the 3 appellants.

Appellants' rejoinder.

On use of digital evidence, Counsel for the appellant rejoined that in relation to the 1st appellant, digital evidence was easily fabricated and that such evidence was inadmissible under the Law of evidence in Uganda. He re-iterated his earlier submissions and prayers.

Resolution by Court.

This is a first appeal and we are alive to the duty of this Court in such appeals to reappraise the evidence and come up with its own inferences. **See Rule 30 (1) of the Rules of this Court and Kifamunte Henry v. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.** As a first appellate Court, it is our duty to review and re-evaluate the evidence adduced at the trial and reach our own conclusion bearing in mind that this Court did not have the same opportunity as the trial Court had, to hear and see the witnesses testify and observe their demeanour.

Ground 1

The learned trial Judge was faulted for his finding that the 1st appellant had a common intention in conjunction with the 2nd and 3rd appellants to commit the offence of aggravated robbery. It was the 1st appellant's case that he was never placed at the scene of crime and that his alibi was injudiciously discredited by the learned trial Judge; and that although he made a telephone call to the 3rd appellant, the said call was to discuss family issues. Meanwhile, it was the case for the respondent that the learned trial Judge judiciously evaluated the 1st appellant's alibi and disregarded it, after considering digital evidence adduced by the prosecution which showed that the 1st appellant masterminded the aggravated robbery and he actively directed the 1st and 2nd appellants on telephone.

We observe that the learned trial Judge made a finding that there was a link between the 2 and 3rd appellants and the 1st appellant to commit the offence of aggravated robbery. He based that finding on the prosecution evidence as summarized by PW6, particularly the phone calls made by the 1st appellant to the 2nd and 3rd appellants during the commission of the crime. PW6 testified that the police officers discovered a used warid airtime card at the scene of crime and were able to track the person who used it as the 2nd appellant. That they subsequently obtained a phone printout which showed that the 2nd appellant had been in contact with the 3rd appellant, who in turn was in contact with the 1st appellant. The learned trial Judge also based his finding on the testimony of PW6 that the 1st appellant had called the 3rd appellant about 7 times during the time of commission of the aggravated robbery.

The law on the doctrine of common intention is laid down under Section 20 of the Penal Code Act, Cap. 120 and it provides:

> **20. Joint offenders in prosecution of common purpose.**
>
> **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature**

that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.

The doctrine of common intention was discussed in **Ismail Kisegerwa and another versus Uganda, Court of Appeal Criminal Appeal No.6 of 1978,** where the Court observed.

> **"In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now settled that an unlawful common intention does not imply a pre-arranged plan — see P —vs— Okute [1941] 8 E.A.C.A. at p.80. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to dissociate himself from the assault. See R —vs— Tabulayenka. It can develop in the course of events though it might not have been present from the start, See Wanjiro Wamiro —vs—R [1955] 22 E.A.C.A. 521 at p.52 quoted with approval in Mungai's case. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence."**

Further in **Uganda versus Beino Mugisha & Anor Cr Session Case No. 64 of 1998 and R v. Okule & others [1941] 8 EACA 80,** it was held:

> **"...for the principle of common intention to operate it is not necessary to establish that the two first sat to agree on a special plan. Whether or not the accused was part of the common intention can be deduced from his or her presence at the scene of crime and his or her actions or failure to disassociate himself from the pursuit of the common intention. It is even irrelevant whether the accused person did physically participate in the actual commission of the offences or not. It is sufficient to show that he associated himself with the unlawful purposes."**

Counsel for the 1st appellant did not specifically submit on the finding of the learned trial Judge regarding common intention. On this point, it was the respondent's submission that the 1st appellant masterminded the operations

of the 2nd and the 3rd appellant during the said aggravated robbery via telephone communication.

We observe that while there was prosecution evidence to the effect that the 1st appellant made a telephone call to the 3rd appellant around the time of the aggravated robbery, there was no evidence of what the two talked about. On his part, the 1st appellant, testified that he discussed matters relating to school fees for the 3rd appellant's daughter during the telephone conversation. This was not controverted by any available evidence. This raises doubt on the prosecution's case that the 1st appellant called the 3rd appellant to mastermind and direct the robbery. This doubt must be resolved in favour of the 1st appellant. We are unable to agree with the learned trial Judge's findings above as there was no evidence that the 1st appellant discussed anything relating to the robbery.

We, therefore, find that the 1st appellant did not have a common intention with the other two appellants to commit the robbery.

Regarding the alleged confession by the 1st appellant to PW6, the learned trial Judge made the following observations on page 80 of the record:

> **"PW6's evidence was that A1 disclosed to him how he had parked near Hoima Road at the fish market and that how (sic) he controlled and masterminded or coordinated the commission of the offence. A1 later aided A2 and A5 to escape. All that prosecution evidence revealed a common plan or agreement with A1, A2 and A5 fulfilling different tasks which contributed to the commission of the crime and without which commission of the same would not have been possible."**

Below is an extract of the relevant evidence of PW6, No. 26298 D/ Corporal Ojok Livingstone, who testified on page 38 to page 39 of the record as follows:

> **"...As we were waiting for Inspector General of Police, A1 said that he is a Robber but does not kill at all. A1 revealed that A2 had killed Hajji Kigejogejo in a Robbery at Ntinda Supermarket. A1 also revealed that A2 had shot a sheik (sic) in Bugiri town. We left A1, A2 and A3 in Kampala at Central Police Station and A5 was at Mulago Hospital. We had wanted to release A3 but were told the matter was in the hands of the Inspector General of Police. A1 further revealed how they planned the Kiboga Robbery. A1 revealed that he had used a lady, A4, Grace Ndagire whom**

he planted at the depot. She was to ring him as soon as the vehicle taking the money to the Bank was taking off. And that for him, A1, he parked along Kampala Hoima Road where they sell raw fish. And that as soon as A4 rang him, he rang A5, who was lying in church waiting.

A1 further revealed that when he received a phone call from A5 that the mission was over, he set off and they drove to Kaseka, Kampala road. And that at Kaseka, they abandoned the black car and entered that of A1 and they made a U-turn to Kiboga bye-passing the police Patrol Vehicle. He said they drove up to Hoima and Kasese. The revelation of A1 was consistent with the print-out we had earlier made. I asked A1 about No. 0753130554 used in the robbery. He told me he had destroyed that telephone because he knew we were looking for him..."

The statement made by the 1st appellant to PW6 amounted to a confession. That confession was, however, in our view, inadmissible. The Supreme Court in **Festo Androa Asenua & another versus Uganda Criminal Appeal No. 1 of 1998** observed that:

> **"...a confession is an admission of guilt made to another by a person charged with a crime."**

The law governing confessions is prescribed under **section 23 (1) of the Evidence Act, Cap. 6** as follows:

> **"23. Confessions to police officers and power of Minister to make rules.**
>
> **(1) No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of—**
>
> **(a) a police officer of or above the rank of assistant inspector; or**
>
> **(b) a magistrate,**

The alleged confession above was made by the 1st appellant to PW6, a Detective Corporal, a rank below the rank of Assistant Inspector, and was, therefore, inadmissible. It should not have been used to prove the case against the 1st appellant. Clearly the learned trial Judge erred when he relied on that impugned confession. When the testimony relating to that confession is severed, our earlier finding that the prosecution did not adduce enough evidence to implicate the 1st appellant in the participation or planning of the aggravated robbery, is even further fortified.

We now revert to the learned trial Judge's finding that the 1st appellant was placed at the scene of the crime by the evidence of PW6 and PW7. PW6, Ojok Livingstone testified that he saw the 1st appellant in Kiboga on the day of the robbery, some minutes after 11.00 am. However PW2, Riziki Jackie testified that only the 2nd and 3rd appellants executed the plan to rob her. Another prosecution witness, PW5, Gerald Sekyole, driver to PW2 at the time of the robbery, also testified that it was only the 2nd and the 3rd appellants who participated in the act of robbing PW2. In view of that evidence, we are unable to agree with the finding of the learned trial Judge that the 1st appellant was placed at the scene of the crime by any of the prosecution witnesses. It is probably true that the 1st appellant was in Kiboga District on the day of the incident but no evidence was adduced to place him squarely at the scene of crime.

We, therefore, allow ground one of appeal, and quash the conviction of the 1st appellant for the offence of aggravated robbery and set aside the sentence. We hereby order the immediate release of the 1st appellant unless he is being held on other lawful charges.

Having quashed the conviction of the 1st appellant, we hereby set aside the compensation order made against him by the learned trial Judge.

Ground 2

The 2nd and 3rd Appellants appealed against the respective sentences imposed on them by the learned trial Judge. It is trite that sentencing is at the discretion of the trial Court and the circumstances under which an appellate Court will interfere with such discretion are now settled.

In **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No.10 of 1995** the Supreme Court held that:

> **"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."**

In Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No.143 of 2001 it was held:

> **"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence."**

Counsel for the appellants challenged the legality of the sentences imposed, submitting that the learned trial Judge did not consider the period spent on pre-trial remand by either the 2nd or the 3rd appellant prior to sentencing. Below is the relevant extract of the learned trial Judge's judgment at page 61 of the record:

> "...**It has been submitted on behalf of convicts that they pleaded guilty. Whereas Kafeero Jamiru pleaded guilty from the beginning, Sekajja Mulani pleaded guilty in the middle of the prosecution case. In any case, this Court's finding is that the prosecution evidence against both of them was overwhelming, whether they pleaded guilty or not. However, and as I held in earlier cases, those who plead guilty will earn some leniency and in this particular case, this Court will not handle (sic) out the death penalty as prayed by the learned state Attorney. The other consideration will be the disabled condition of Sekajja Mulani who is on crutches.**
>
> **Otherwise in view of what I have stated in the circumstances of this offence, and taking into account the period of remand; I do hereby sentence A2, Kafeero Jamiru to life imprisonment. As for Sekajja Mulani in view of the Disability basically, which was cause (sic) by shooting in the process of arrest, I do hereby sentence him to 14 years imprisonment."**

The above quoted passage shows that the learned trial Judge took into account the period the 2nd and 3rd appellants had spent on remand. Nevertheless, counsel for the 2nd and 3rd appellants argued that the learned trial Judge should have mathematically deducted the said period from the final sentence. He relied on **Tukahebwa David Junior vs. Uganda, Supreme Court Criminal Appeal No. 59 of 2016** and **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014** for that proposition. We hasten to observe that the **Rwabugande Moses** case was decided in 2017 and was therefore not applicable to the present

case which was decided in 2014. The position at the time of sentencing, was, as stated in **Kizito Senkula vs Uganda Supreme Court Criminal Appeal No. 24 of 2001** wherein the Court observed as follows:

> **"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."**

We, therefore, find that the learned trial Judge complied with the provisions of Article 23 (8) of the 1995 Constitution, by taking into account the period spent by the 2nd and 3rd appellants on remand, while imposing sentences on them. Those sentences were therefore not illegal as alleged.

On the other hand, however, we observe the need to maintain consistency in sentencing and have, therefore, to refer to precedents of this Court which deal with sentencing pertaining to the offence of aggravated robbery. We take into account the fact that although the offence committed was abominable, no life was lost or injury inflicted during the commission of the offence.

In **Oyet Twol versus Uganda, Court of Appeal Criminal Appeal No. 115 of 2013**, this Court reduced a sentence of 40 years imposed by the learned trial Judge to 15 years imprisonment. In that case, this Court noted that the range of sentences for aggravated robbery were from 15 years to 32 years.

In **Nduru Banada & another versus Uganda, Court of Appeal Criminal Appeal No. 249 of 2010,** the appellants had been sentenced to 30 years imprisonment for the offence of aggravated robbery. This Court reduced the sentence to 15 years. The appellants had in that case cut their victim with a panga and the victim had died from the panga wounds.

In **Ogwal Nelson and 4 others versus Uganda, Court of Appeal Criminal Appeal No. 606 of 2015**, this Court reduced sentences for the various appellants ranging from 35 years imprisonment, 25 years imprisonment and life imprisonment to a sentence of 19 years for each appellant. The appellants had carried out pre-meditated robbery using a gun.

In view of the above precedents, we find the sentence of life imprisonment which was imposed on the 2nd appellant harsh and excessive. In our view, a sentence of 17 years imprisonment is appropriate in the circumstances. If we deduct the period of one (1) year and seven (7) months spent by the 2nd appellant on remand, the 2nd appellant is left to serve a period of 15 years and 5 months from the time of conviction.

We, however, uphold the sentence of 14 years imprisonment imposed on the 3rd appellant by the learned trial Judge because it was neither harsh nor excessive in the circumstances. We find no reason to interfere with it.

In conclusion,

The 1st appellant's conviction and sentence by the trial Court is hereby quashed. We hereby order the 1st appellant's immediate release unless held on other lawful charges. We also set aside the compensation order made against him by the learned trial Judge.

The 2nd appellant is sentenced to a term of imprisonment for 15 years and 5 months, to run from 5/03/2014, the date when he was convicted.

The 3rd appellant's term of imprisonment of 14 years is upheld, to run from 5/03/2014, the date when he was convicted.

We so order.

Dated at Kampala this 25th day of March 2019.

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Elizabeth Musoke
Justice of Appeal.

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Hellen Obura
Justice of Appeal.

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Ezekiel Muhanguzi
Justice of Appeal.