THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

5 **CRIMINAL APPEAL NO. 378 OF 2017**

KIWANUKA ERICK KIBUUKA ::::::::::::::::::::::::::::::: APPELLANT

VERSUS

10 **UGANDA :: RESPONDENT**

CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

15

JUDGMENT OF COURT

The appellant was convicted of murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act and sentence to 35
20 years imprisonment on both counts.

The appellant was dissatisfied with the judgment of the trial court and filed this appeal against conviction and sentence on the following grounds;

1. That the learned trial Judge erred in law and fact when she
25 relied on inconclusive and unsatisfactory circumstantial evidence to convict the appellant.

2. That the learned trial Judge erred in law and in fact when she misdirected herself as to the interpretation and application of the doctrine of recent possession.
3. That the learned trial Judge erred on law and fact when she passed ambiguous, illegal and manifestly harsh and excessive sentences against the appellant.
4. That the learned trial judge erred in law and fact when she replaced one of the assessor's oblivious of the law or accepted procedure.

Background

The deceased Kato Isaac was a manager of WADI (U) Ltd Mukono dealing in airtime products and mobile money transactions and neighboring the appellant's UTL shop. On the 10th day of December 2014, Kato Isaac was kidnapped by unknown persons. Nampeera Juliet a sale agent with WADI (U) Ltd reported for duty on 11/12/2014 at 8.00 am and met the sales representatives that is; Kiggundu Tonny, Kyeyune and Derrick and others stranded outside the shop, since it was locked. Nampeera and the sales representatives tried to contact Kato but his phone was off, knocked at his door and there was no response. They decided that Tonny jumps over the wall into Kato's house and found Kato's keys at the doorway to which Nampera called Nabyoto Eunice the Assistant Manager and informed her.

They opened Kato's door in the presence of the Managing Director one Bwire Tonny who opened the safe and realized that the safe had been broken into and all its contents that is cash 7.4 Million and airtime worth 7.5 million were missing. The black bag which Kato used to use to carry airtime and money were also found to be missing. Kiggundu, Kyeyune, Nabyoto, Nampeera, Bwire and others tried to search for Kato in vain. Nabyoto Eunice and Tonny Bwire reported the disappearance of Kato Eric at Mukono Police Station. On the 19th day of December 2014 at around 7.00 am, Namabale Richard and

other security officers of SCOUL saw a man's body in Block A22 of the SCOUL plantation. The man was facing on the ground and covered with a jacket and the officers had been attracted by the foul smell from the said dead body. Namabale Richard rang Mbalala Police Station for assistance who also communicated to Mukono Police Station and the body was taken from the scene for postmortem examination and it was identified by Mugambwa David as that of the deceased Kato Isaac.

The appellant was arrested on the 24th day of December 2014 after an informer one Namukasa Jane informed the police of how the appellant had murdered Kato in order to rob money to settle his loan. The appellant was eventually arrested on the 29th day of December 2014 and denied the allegations against him. That a search was conducted in the home of the appellant and airtime, a black bag, bunch of rubber bands cash deposit slips in the deceased's handwriting and other items were recovered.

Representation

At the hearing of the appeal, Mr. Henry Kunya appeared for the appellant while Ms. Namazzi Racheal (Senior State Attorney) appeared for the respondent.

Submissions of the appellant

Counsel submitted that grounds 1 and 2 are hinged on circumstantial evidence and doctrine of recent possession since there was no eye witness on how the deceased met his death and there was also no evidence as to how the alleged items were stolen from the shop. The circumstantial evidence was summarized by the learned trial judge to include the recovery of the black bag, the disappearance of the appellant from the place of work, deliberate false information to the court that the home had been attacked, an apology to the mother in law and the discovery of the discomposing body of the deceased within the proximity of the appellant's home. That this

circumstantial evidence did not irresistibly point to the guilt of the appellant. The searches that led to the recovery of the black bag were two, one at the home of the appellant and the other at the shop. From the evidence of PW4 and PW6 (Sgt Oketcho Steven), the 2nd search at the shop was not done in the company of the appellant and there had also been no condoning off of the area before the search.

While searching at the appellant's home, the appellant remained outside when the black bag was recovered. It was an ordinary bag and there was nothing peculiar about it that connected the appellant to the death of the deceased. The appellant had been arrested on 29th and the bag was discovered on 7th January. Also, the evidence relied on to recover the bag and the body was of an informer who was never disclosed and did not testify. As such, this was hearsay evidence under section 59 of the Evidence Act. Counsel relied on the case of **Mulindwa James Vs Uganda S.C.C.A No. 23 of 2014** in which it was held that a matchbox and a Fanta bottle are common items. Such items cannot be exclusively owned by a single person. The same police officers whom the learned trial judge had taken note of their shoddy work in investigations are the ones who came back to search.

Regarding the assessors, counsel submitted that the learned trial judge initially appointed 2 assessors and they were sworn. However when court resumed hearing, one of the assessors was engaged in some other activities and another assessor was appointed and the trial Judge proceeded without seeking the views of the state, the defence or the accused but went ahead to swear in the new assessor. Under Section 68(1) and 69(1) of the Trial on Indictments Act, in absence of one assessor, court should proceed with the remaining assessor which was not done in this case.

Counsel argued that the trial Jude did not take into account the period the appellant had spent on remand while sentencing. In addition, that the sentence passed was harsh and excessive in the circumstances of the case.

Respondent's submissions

In reply, counsel for the respondent submitted that the learned trial Judge properly considered the circumstantial evidence on record and convicted the appellant basing on the evidence. The deceased's black bag was recovered at the home of the appellant and yet he failed to give reasonable explanation of how it came into his possession. That on the very day the bag was recovered, the appellant apologized to his mother in law and this was interpreted by the trial judge as an expression of guilt of the appellant. The deceased's body was also recovered next to where the appellant lived.

Counsel relied on the case of **Simon Musoke vs. R [1958] (E.A) 715.** Before deciding upon conviction the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than guilt. Regarding the doctrine of recent possession, counsel relied on the decision in **Bogere Moses and another vs. Uganda Criminal Appeal Number 1 of 1997**, in which it was held that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing in that if there is no innocent explanation of the possession, the evidence is stronger and more dependable than that of an eye witness.

Counsel further submitted that whereas the black bag is a common item, the contents therein where unique and belonged to the deceased. The bag contained a polythene bag which had a deposit slip that had been used by the deceased dated 9th December 2014.

Court's consideration of the appeal

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weighing conflicting evidence, and reach its own conclusion on the evidence, bearing in mind that
5 it did not see the witnesses testify. (See ***Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997.*** In the latter case, the Supreme Court held that;

"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration
10 *and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment*
15 *appealed from but carefully weighing and considering it."*

We have kept these principles in mind in resolving this appeal.

Aggravated robbery is provided for under section 286 (2) of the Penal Code Act and it provides;

"285. Definition of robbery.

20 *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.*

25 *286. Punishment for robbery.*

(1) Any person who commits the felony of robbery is liable—

(a) on conviction by a magistrate's court, to imprisonment for ten years;

(b) on conviction by the High Court, to imprisonment for life.

(2) 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.

To prove the offence of Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act, the prosecution has to prove the following elements against an accused person:

1. There was theft of property.
2. Use of actual violence at, before or after the theft or that the accused caused grievous harm to the complainant.
3. The assailants were armed with a deadly weapon before, during or after the theft.
4. The accused participated in the robbery.

It is trite law that the burden of proof is on the prosecution to prove all the elements of the offence beyond all reasonable doubt. The burden never shifts save in a few cases provided for by the law. Even where the accused sets up a defence, it is upon the prosecution to prove that nonetheless, the offence was committed.

We shall proceed to re-evaluate the evidence on record for the offence of aggravated robbery.

Before we resolve the appeal, we must address the issue raised in ground 4 of the missing assessor being replaced in the middle of the trial. This ground will resolve this appeal. From the record, after the prosecution had closed its case and the defence case was due to open, the trial Judge noted that one of the assessors (Dr. Kiyondo) who attended the trial from the beginning together with Mr. Lugwire Peter was absent and unable to continue with the hearing. He was

replaced by Mr. Semukwano Fred. While replacing Dr. Kayondo, court noted thus;

"I hope my assessors are here. It has taken a while but you are reminded that you are still on oath. The last time we had Mr. Lugwire Peter and Dr. Kayondo but Dr. Kayondo has since been engaged in some other state duties and is not available so he is replaced by Mr. Semukwano Fred and he should take oath. I hope you do not have any objection to Mr. Semukwano Fred"

The trial Judge went ahead and administered the oath to Mr. Semukwano. She justifies this action by saying that the accused person is not going to be prejudiced because Mr. Semukwano had been in court throughout the trial while the accused was being tried.

The law on absence of assessor(s) is very clear. Section 69 of the Trial on Indictments Act provides that;

69. Absence of assessor.

(1) If, in the course of a trial before the High Court at any time before the verdict, any assessor is from sufficient cause prevented from attending throughout the trial, or absents himself or herself, and it is not practicable immediately to enforce his or her attendance, the trial shall proceed with the aid of the other assessors.

(2) If more than one of the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed, and a new trial shall be held with the aid of different assessors. (Emphasis ours)

In the case of **Byaruhanga Fodori Vs Uganda COA Criminal Appeal No. 24 of 1999**, it was held that "*we must hasten to add that we do*

not condone the failure of trial courts to strictly adhere to the provisions of the Trial on Indictments Act regarding the assessors."

The decision by the trial Judge to replace an assessor after the prosecution had closed its case and bringing in a new one at defence stage was contrary to the law. It occasioned a miscarriage of justice and rendered the trial a mistrial.

In addition, we noted from the record that summing up to the assessors was done before the prosecution and the defence filed their written submissions. In criminal trials it is preferable that evidence and submissions should be conducted *viva voce* so that the accused and assessors can follow the proceedings. In our view summing up before submissions and recording the opinion of assessors and using written submissions were grave procedural irregularities that cannot be cured. Therefore, the trial was a nullity on grounds of procedural irregularity. This ground resolves this appeal. We have not found it necessary to resolve the other grounds of appeal.

Consequently, this appeal is allowed. Since this was a mistrial, we order a retrial of the appellant in the next criminal session before another Judge.

Dated this 25th day of July 2019

Hon. Justice Cheborion Barishaki, JA

Hon. Justice Stephen Musota, JA

Hon. Lady Justice Percy Night Tuhaise, JA