THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 464 OF 2015

BAMULANZEKI ZUBAIRI.....APPELLANT

VERSUS

UGANDA.....RESONDENT

(Appeal against sentence of the High Court at Masaka in Criminal Case No. 108 of 2012 before Hon. John Eudes Keitirima, J dated 3/12/2015)

Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

Introduction.

The appellant was charged with the offence of aggravated robbery contrary to sections 185 and 186(2) of the Penal Code Act, Cap. 120. He was tried and convicted as charged and sentenced to 45 years imprisonment. He was ordered to compensate Walugembe Jamiru (PW1), the owner of the Premio UAQ 043P, shillings 14,000,000/= at an interest rate of 10% per annum from 2011 when the vehicle was stolen until payment in full. He was further ordered to compensate Charles Kazibwe (PW5), the victim, shillings 1,000,000/= for the mobile phone and wallet stolen at an interest rate of 10% per annum from 2011.

The particulars of the offence are that the appellant and others still at large on the 16th day of December 2011 at Kigenyi Village in Rakai District robbed Kazibwe Charles of his motor vehicle registration no. UAQ 043P Toyota Premio, Mobile Nokia 6033 and a Driving Permit No. 1017514/3/1 all valued at 14,200,000/= and at or immediately before or immediately after the said robbery used a deadly weapon to wit a gun on the said Kazibwe Charles.

Brief background

The facts giving rise to this appeal, as far as we could ascertain from the record, are that on 16/12/2011 at around 9:30 am, the complainant was hired by the appellant and two of his other colleagues on special hire basis, to transport them to Kigenyi village in Kyotera to attend an introduction ceremony. They had some luggage part of which they entered in the car with, and the other locked in the boot of the car.

Before reaching Kigenyi Trading Centre the appellant and his colleagues told the complainant to branch off the main road near a eucalyptus forest so that they change clothes, as they were about to reach the venue. The complainant stopped, they changed clothes and after a while got back into the car.

When the complainant was about to drive off, the appellant and his colleagues pulled him to the back seat, pulled a soda bottle from one of the bags they had and ordered him to drink its contents, which he declined. At that moment, the appellant and his colleagues pulled out a pistol and an AK 47 rifle from the bag they had, pointed it at the complainant and ordered him to drink the contents of the soda bottle.

A few moments after drinking the contents, the complainant started feeling drowsy and eventually lost consciousness. He woke up the

following morning on 17/12/2011 admitted in hospital. It was then that his wife told him that the motor vehicle had been robbed from him.

The case was reported to Masaka Police Station on 18/12/2011, where investigations into the arrest of the robbers were started. On 24/12/2011, the appellant was arrested. He was examined on PF24 and found to be an adult of sound mind. He was accordingly charged with the offence of aggravated robbery, tried and subsequently convicted and sentenced to 45 years imprisonment.

Being dissatisfied with the sentence of the trial court, the appellant sought and was granted leave under section 132 (1) (b) of the Trial on Indictments Act, Cap. 23 and Rule 43 (3) of this Court's Rules, and appealed to this court against the said sentence only. The sole ground of appeal under the supplementary memorandum states:-

> ***"The learned trial judge erred in law and fact when he sentenced the appellant to imprisonment of 45 years for the offence of aggravated robbery which was manifestly harsh and excessive."***

Representation

At the hearing of this appeal on 25th September, 2019, Mr. Andrew Tusingwire, learned counsel on state brief, represented the appellant; while the respondent was represented by Ms. Nelly Asiku, learned Senior State Attorney. The appellant was present.

Submissions for the appellant

Counsel for the appellant faulted the learned trial Judge for not giving the mitigating factors raised at trial sufficient credit and thus came to a harsh and excessive sentence of 45 years imprisonment. He relied on ***Ainobushobozi Venancio v Uganda, Court of Appeal Criminal Appeal No. 242 of 2014,*** where the learned Justices of this Court referred to ***Livingstone Kakooza v Uganda, Supreme Court Criminal Appeal No.17***

of 1993, and argued that this is a case where this court can interfere with the sentence of the trial court.

Further, counsel pointed out that there was no loss of life in the commission of the offence and as such the learned trial Judge would have imposed a lesser sentence as was in ***Adama Jino v Uganda, Court of Appeal Criminal Appeal No. 50 of 2006,*** where this court reduced a death sentence to 15 years imprisonment for the offence of aggravated robbery. He asked court to invoke its powers under section 11 of the Judicature Act and reduce the sentence of 45 years imprisonment to 20 years imprisonment.

Submissions for the respondent

Ms. Asiku, the learned Senior State Attorney, opposed the appeal and supported the sentence of 45 years imprisonment imposed by the trial court. She submitted that the sentence was neither harsh nor excessive in the circumstances of this case, and that the learned trial Judge took into account all the mitigating and aggravating factors before he imposed the sentence.

She pointed out that the appellant was not a first offender as he had been previously convicted of aggravated robbery, and sentenced to 10 years imprisonment, a sentence he served. Counsel argued that the appellant had not reformed since he committed the same offence and as such the sentence of 45 years imprisonment was appropriate to enable him reform.

Further, counsel contended that the appellant used violence in the commission of the offence and this could have resulted into loss of life of the victim. She pointed out that the appellant used a rope on the neck of the victim to pull him out of the vehicle and also offered him substance that made him unconscious, an act that put the victim's life in danger.

Counsel added that property was lost in the course and has never been recovered. She argued that the property lost was the victim's source of earning a living. Counsel asked court not to interfere with the sentence meted out to the appellant considering the fact that the appellant was a habitual offender and the gravity of the offence attracts a maximum sentence of death.

Consideration by court

We have carefully listened to the submissions from counsel on each side, perused the court record, and considered the law and authorities cited to us and those not cited but relevant to the resolution of this appeal.

We are mindful of our duty as a first appellate court, to re-evaluate all the evidence adduced at the trial and come up with our own conclusions on all issues including sentence, bearing in mind that the trial court had the benefit of observing the demeanor of the witnesses and we have not. See: *Rule 30* of the *Judicature (Court of Appeal Rules) Directions SI 13-10* and ***Bogere Moses v Uganda, Supreme Court Criminal Appeal No. 1 of 1997,*** where the Supreme Court noted that:-

> ***"It is the duty of the first appellate court to rehear the case on appeal by considering all the materials which were before the trial court and make up its own mind."***

From our understanding of the memorandum of appeal, the appellant's complaint is against the severity of sentence.

The principles under which an appellate court may interfere with the sentence imposed by the trial court were considered in ***Kizito Senkula v Uganda, Supreme Court Criminal Appeal No. 024 of 2001*** where court observed as follows:-

> ***"...in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the***

appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James v R (1950) 18 EACA 147, it is evident that the judge had acted upon some wrong principle or overlooked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

The same principles were reiterated by the Supreme Court in ***Kiwalabye Bernard v Uganda, Criminal Appeal No. 143 of 2001*** where it stated:-

"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."

In his sentencing notes at pages 86 and 87 of the record of appeal, the learned trial Judge stated as follows:-

"I have heard both the aggravating and mitigating factors. The crime the convict was involved in was a heinous crime. At his age the convict should be engaged in useful production not engaging in acts that could even deprive people of their lives. The properties robbed were never recovered and even the weapons used have never been recovered and there is a possibility of them being used on other unsuspecting victims with fatal consequences.

It has been submitted by state that the convict is a repeated (sic) offender and therefore seems not to learn any lessons from his past mistakes. He is clearly a danger to society.

I have considered the time the convict has spent on remand and I will now sentence him to 45 (Forty Five years) imprisonment.

On top of that he is to compensate PW1 in the sum of Shs. 14,000,000/= (fourteen million shillings) the valve of the stolen car and that figure will attract interest of 10% per annum from 2011 when the vehicle was stolen until payment in full.

The convict is equally to compensate PW5 in the sum of one million shillings for his mobile phone and wallet which will equally attract 10% per annum from 2011 when the same were robbed from him until payment in full.

The convict has a right of appeal against both the conviction and sentence."

From the above passage, we find that the learned trial Judge took into account all the aggravating factors and mitigating factors that were available prior to determining the appellant's sentence.

We are alive to the principles of consistency and uniformity of sentencing. The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Direction, 2013*, under Part I; sentencing range for capital offences; the range of aggravated robbery is stated to be from 30 years up to death. We shall hereunder consider some of the earlier cases decided by this Court and the Supreme Court.

In ***Olupot sharif & Another V Uganda, Court of Appeal Criminal Appeal No. 0730 of 2014,*** the appellant was convicted of the offence of aggravated robbery and was sentenced to 40 years imprisonment. On appeal, this Court reduced the sentence to 32 years imprisonment.

In ***Muchungunzi Benon & Another V Uganda, Court of Appeal Criminal Appeal No. 0008 of 2008,*** this Court upheld a sentence of 15 years imprisonment for the offence of aggravated robbery.

In ***Tumusiime Obed & Another V Uganda, Court of Appeal Criminal Appeal No. 149 of 2010,*** the appellant was convicted of aggravated robbery and sentenced to 16 years imprisonment. On appeal to this Court, it was reduced to 14 years.

We find that the sentences imposed or confirmed by this Court for aggravated robbery range from 14 years to 35 years. See; - ***Tumusiime Obed & Another Vs Uganda,*** *(supra)*. It was contended by counsel for the respondent that the appellant was a habitual offender having been convicted of the same offence and sentenced to 10 years imprisonment which he served.

We are satisfied that in the circumstances of this case the sentence imposed by the learned trial Judge was manifestly harsh and excessive. It is out of range with sentences imposed in the cases of similar nature. However, the above cases are slightly distinguishable from this case in that the appellant in this case was a repeat offender.

This court has the same powers as the High Court, under section 11 of the Judicature Act which states:-

> ***"11. Court of Appeal to have powers of the court of original jurisdiction.***
>
> ***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."***

Consequently, we set aside the sentence of 45 years imprisonment. We find a sentence of 30 years imprisonment appropriate and will meet the ends of justice in this case. We deduct the period of 3 years the appellant had spent in pre-trial detention. He shall now serve a term of imprisonment for 27 years commencing from 3/12/2015 when he was convicted. We so order.

Dated at Masaka this.....20th.....day of.....Nov.....2019.

Elizabeth Musoke
Justice of Appeal

Ezekiel Muhanguzi
Justice of Appeal

Remmy Kasule
Ag. Justice of Appeal