THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 118 OF 2013

1. **NAMINSI SAUL SSALONGO**
2. **MUTESA KEZONI**
3. **SERUGO GODFREY.....APPELLANTS**

VERSUS

UGANDA.....RESPONDENT

(Appeal against the decision of the High Court of Uganda at Kampala in Criminal Session Case No. 0289 of 2013, before Hon. Justice Joseph Murangira, dated 6/9/2013).

Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

JUDGMENT OF THE COURT

Introduction

The appellants herein were indicted with the offence of aggravated robbery contrary to sections 285 and 286 of the Penal Code Act. They were tried and convicted by Murangira, J in High Court Criminal Session Case No. 0289 of 2013 and were each sentenced to 30 years imprisonment and ordered to pay shillings 130,830,000/= as compensation to the complainant.

Brief background

The facts giving rise to this appeal as accepted by the learned trial judge are that on 04/5/2012 at Mutundwe in Kampala District, the appellants robbed one Bashkir Tucker of cash shillings 130,000,000/= (one hundred and thirty million) and before or immediately after the robbery used a deadly weapon to wit a pistol on the said Bashkir Tucker. The appellants were arrested and charged with aggravated robbery. At the trial, they pleaded not guilty to the charge. They were tried, convicted as charged and each sentenced to 30 years imprisonment and ordered to pay shillings 130,830,000/= to the complainant as compensation for the loss and injury caused.

Being dissatisfied with the decision of the trial court, the appellants appealed to this court against both conviction and sentence on the following grounds:-

1. ***The learned trial Judge erred in law and fact when he erroneously excluded the assessors from part of the proceeding without reasonable cause hence occasioned a miscarriage of justice.***
2. ***The learned trial Judge erred in law and fact when he convicted the appellants and yet the prosecution had failed to prove its case beyond reasonable doubt.***
3. ***The learned trial Judge erred in law and fact when he relied on insufficient evidence to convict the appellants.***
4. ***The learned trial Judge erred in law and fact when he convicted the appellants relying on the evidence which was full of contradictions and inconsistences.***
5. ***AND in the alternative and without prejudice to the foregoing the trial Judge erred in law when he sentenced the appellants to 30 years imprisonment and ordered them to pay 130, 830,000/= as compensation to the complainant when it was harsh and excessive in the circumstances.***

6. ***The learned Judge erred in law when he ordered that FUSO truck registration number UAR 387M that was recovered from A2 be sold to pay the complainant and yet the said motor vehicle did not belong to A2.***

Representation

At the hearing of the appeal, Ms. Esther Nakamatte, learned counsel represented the appellants on state brief while Ms. Harriet Angom, learned Senior State Attorney, appeared for the respondent. The appellants were present.

At the commencement of the hearing counsel for the appellants sought and was granted leave to file a memorandum of appeal on record and file written submissions.

Submissions by the appellant.

Counsel submitted on ground one separately, grounds two, three and four together and grounds five and six together.

It was submitted for the appellants that on the 26th day of August 2013 the learned trial Judge proceeded with trial in the absence of assessors. Counsel relied on section 69(2) of the Trial on Indictments Act and argued that in the circumstances the learned Judge would have stayed the trial and swore new assessors and held a new trial. She pointed out that the two assessors were absent on the 26th August, 2013 and did not see PW4, PW5, PW6, PW7 and PW8 testify and as such could not have been in position to determine the guilt of the appellants.

Further, that the learned trial Judge appeared biased while summing up for the assessors. She argued that the summing up notes point to nothing but the already formed decision of the learned trial Judge because he failed to highlight the major contradictions and inconsistences in the prosecution case. She relied on ***Twinomuhwezi Lauben v Uganda,***

Supreme Court Criminal Appeal No. 40 of 1995 and ***Wasswa Stephen & Anor v Uganda, Supreme Court Criminal Appeal No. 31 of 1995*** in support of this argument.

Counsel contended that the actions of the learned trial Judge were unfair and partial and thus denied the appellants their rights to a fair hearing provided under Article 28(1) of the Constitution.

On grounds two, three and four, counsel argued that there was no sufficient evidence on record to warrant a conviction. She faulted the learned trial Judge for shifting the burden of proof from the prosecution to the appellants. Counsel relied on ***Woolmington V DPP, (1935) AC 462*** to support the proposition that in criminal cases the burden of proof always lies on the prosecution.

Further, that the payment vouchers and receipts from Roofing Ltd Company tendered in court to prove the payments made to PW1, the complainant bore the names Bajo and there was no evidence adduced to show that Bashkir Tucker (the complainant) was also known as Bajo. Counsel argued that the prosecution failed to call Kato and Winyi who were stated by PW5 as the persons who issued the voucher and the receipts to clarify on who was present on the stated date in question. She contended that this left a lot to be desired and thus the charge against the appellants was not proved beyond reasonable doubt.

Furthermore, counsel submitted that use of actual violence was not proved as the alleged pistol was not tendered in court. She pointed out that the medical report did not show the type of weapon that could have caused the examined injuries sustained by PW1.

Counsel submitted further that the appellants were not properly identified as the persons who participated in the commission of the

crime and that PW1's evidence was contradictory in nature and was not corroborated with any other evidence on record.

On grounds five and six, counsel argued that the sentence of 30 years imprisonment was harsh and excessive given that the learned trial Judge ordered compensation of shillings 130,830,000/= million. According to counsel this sentence was out of the range of sentences imposed by this court in similar circumstances for the same offence. Further, that the FUSO truck that the learned Judge ordered to be sold to recover the complainant's loss did not belong to A2.

She prayed court to allow the appeal, quash the appellants' conviction and set aside the sentence and the compensation order. In the alternative, counsel asked court to substitute the sentence with an appropriate one.

Submissions by the respondent.

Counsel opposed the appeal and supported the findings of the learned trial Judge. She submitted on ground one that the appointed assessors in this case attended court proceedings on all the days that were set for hearing in this matter and duly executed their duty. Counsel contended that the submissions of counsel for the appellant are untruthful and court should dismiss the same.

In reply to grounds two, three and four, counsel argued that the prosecution proved the charge against the appellants beyond reasonable doubt and that the evidence on record was sufficient to support the conviction.

With regard to ground five, Ms. Angom submitted that the sentence of 30 years imprisonment was legal and therefore not harsh or excessive as submitted by counsel for the appellants. Further that the order for compensation of shillings 130,830,000/= was in line with Article 126(2)

(c) of the constitution that is to the effect that adequate compensation shall be awarded to victims of wrong.

In respect of ground six, counsel argued that the said FUSO truck belonged to A1 (co-accused) and was proceed of the crime as per PW7's evidence on record.

Counsel asked court to dismiss the appeal and uphold the findings and orders of the trial court.

Consideration by court

We have considered the submissions of both counsel, perused the court record and the law and the authorities cited to us.

We are alive to the duty of this court as a first appellate court to re-appraise all the evidence and to come up with our own inferences of law and fact. See: Rule 30(1) of the Rules of this court and ***Bogere Moses v Uganda, Supreme Court Criminal Appeal No. 1 of 1997.***

On ground one, the appellants faulted the learned trial Judge for failing to stay proceedings in absence of the assessors on the 26th day of August 2013. Counsel relied on sections 3, 67 and 69(2) of the Trial on Indictments Act. They expressly provide as follows:-

> ***"3. Assessors.***
>
> ***(1) Except as provided by any other written law, all trials before the High Court shall be with the aid of assessors, the number of whom shall be two or more as the court thinks fit."***
>
> ***"67. Oath of assessor.***
>
> ***At the commencement of the trial and, where the provisions of section 66 are applicable, after the preliminary hearing has been concluded, each assessor shall take an oath impartially to advise the court to the best of his or her knowledge, skill and ability on the issues pending before the court."***

"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."

We have perused the record and we find that the trial court record is silent as to whether the assessors were absent or present on the said date. It would therefore be baseless to conclude that the assessors were absent on that date in the absence of such record on the file. The appellants were all represented by counsel and none of them raised an objection as to absence of assessors. It is now being alleged on appeal. We cannot consider there was an irregularity on the part of the trial court and the question before us to determine therefore is whether failure to record presence of assessors was an irregularity that caused a substantial miscarriage of justice.

It was stated in ***Byaruhanga Fodori V Uganda, Court of Appeal Criminal Appeal No. 24 of 1999*** that:-

"In order to determine whether in fact any miscarriage of justice occurred, the role of the assessors in our criminal justice system must be taken into account. Their importance in advising a trial judge on matters of fact cannot be underestimated. However, their role is merely advisory and not binding on the trial judge. While their role might have been very important when the judges were foreigners and therefore not acquainted with our customary laws and usages, their role is diminishing with the replacement of foreigners with Ugandan judges. In our view, failure to record the particulars of the assessors or whether they were sworn in or not does not cause any miscarriage of justice. The judge could obtain their particular and

even swear them in but fail to record the fact. Where the defence is represented by counsel and no objection is raised, the accused cannot be said to have been prejudiced when he only remembers to raise such a matter on appeal."

Further, the learned justices of the court of appeal in that case were of the view that:-

"It is high time the impact of trials with assessors on our criminal justice system was assessed in light of the provisions of article 126(2)(e) of the Constitution which enjoins our courts to administer substantive justice without undue regard to technicalities."

We therefore find and hold that failure of the learned trial Judge to record whether the assessors were present or absent on the date in particular was an irregularity that did not cause substantial miscarriage of justice. Counsel for the appellants at trial should have raised this issue at trial if indeed the assessors were absent. They however chose to continue with the trial. The learned trial Judge summed up the matter to the assessors and gave them an opportunity to give their opinion.

We do not agree with the submissions of counsel for the appellant that the learned trial Judge appeared biased when summing up for the assessors. Section 81 (1) of the Trial on Indictments Act requires the trial Judge to sum up the law and the evidence to the assessors to enable them form their opinion. This the learned trial Judge did by summarizing evidence of both parties and we do not find any instances of bias in his summing up notes to the assessors. We find no merit in his ground and it is therefore disallowed.

In respect of grounds two, three and four, it was the appellant's submission that the prosecution did not prove the offence of aggravated robbery against the appellants beyond reasonable doubt. Counsel contested all the four ingredients of the offence of aggravated robbery namely:-

1. ***That there was theft of property.***
2. ***That there was use of violence at, before or after the theft or that the accused caused grievous harm to the complainant.***
3. ***That the accused was armed with a deadly weapon before, during or after the theft.***
4. ***That the accused participated in the robbery.***

Counsel contended that the vouchers and the receipts tendered in court from Roofing Ltd were not in the names of the complainant, PW1, Bashkir Tucker but rather in the names of Bajo.

Theft is defined under section 254 of the Penal Code Act as follows:-

> ***"254. Definition of theft.***
>
> ***(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."***

A thing is capable of being stolen where it is property of any person and which is transferable. In this case, we find and hold that money is a thing capable of being stolen because it is transferable.

PW1 testified in court that on the 4th of May 2012, he received payment from Roofing of shillings 106,830,000/= for the scrap he supplied and that on the same day he was robbed of the same by the appellants on his way home.

PW5 Simon Peter Ssenyange the auditor with Roofing testified that on 4th May 2012, the company paid PW1 whom they knew as Bajo shillings 106,830,000/= for the scrap he supplied.

The learned trial Judge found that there was no inconsistence in the prosecution case and that the prosecution had proved this ingredient beyond reasonable doubt. In our view, the learned trial Judge properly evaluated the evidence on record and came to a right conclusion that the

money alleged to have been stolen belonged to PW1. This ingredient was therefore proved beyond reasonable doubt.

The prosecution had to prove that there was use or threat of actual violence at the stealing or immediately before or immediately after to any person or property with the intention to obtain or retain the thing stolen. Under section 286 (3) of the Penal Code Act, aggravation includes use of any instrument made or adapted for shooting.

The prosecution submitted that the appellants assaulted the complainant PW1 with a pistol and in the process he sustained serious injuries. A medical report was tendered in court and showed that the complainant sustained injuries classified as grievous harm.

PW1's evidence is corroborated with PW'3 evidence. PW3 Musoke Clement testified in court that on the fateful day a car knocked a motorcycle and the person who was on the motorcycle fell down. Further that people came out of the car and started fighting with the person who was on a motorcycle and that the same people were beating PW1 and later drove off. He stated that when he got to the scene, he found an Indian man crying and blood coming out of his mouth. This evidence is therefore sufficient to prove that an act of violence was involved in this case. We therefore uphold the findings of the learned trial Judge that this case involved violence due to the injuries sustained by PW1. The second ingredient was therefore proved beyond reasonable doubt.

With regard to use of a deadly weapon, counsel for the appellants submitted that the pistol in question was never tendered in court to prove aggravation of the offence the appellants were convicted of.

PW1 testified that after the appellants had taken his bag of money, the appellants tried pulling him into the car but he held the second appellant

firmly who in turn hit him on the mouth with a pistol. There is no other evidence corroborating PW1's evidence. The medical report did not state an object that might have caused the injuries examined. PW7 the investigating officer did not testify as to any recovery of a pistol during his investigations in this matter and as a result no deadly weapon was tendered in court to prove aggravation.

The Court of Appeal for East Africa, in ***Wasaja vs. Uganda, (1975) EA 181***, considered a similar issue in relation to threatened use of a gun. At page 182, the court observed:-

> ***"Of course it is for the prosecution to prove all the ingredients of the offence, including that the weapon used to threaten was a deadly weapon. It may be that the judge was not satisfied on this point. In our view, once it is proved that a weapon is a deadly weapon, then using it to intimidate the victim of a robbery by pointing it at him is a sufficient threat within the meaning of s.273(2) aforesaid. The vital consideration is that the weapon must be shown to be deadly in the sense of 'capable of causing death'. As we have indicated, toy pistols, broken guns incapable of discharging bullets or guns without ammunition, or imitation guns are not, and cannot be deadly weapons. There was no evidence in this case that the gun held by the appellant was a deadly weapon. For all we know it may have been a harmless imitation."*** **(emphasis is added).**

In that case the alleged pistol used in the robbery had not been produced at the trial to prove it was a deadly weapon and secondly the pistol had not been fired in the course of the robbery nor had it been fire tested to prove whether or not it could fire ammunition. The former East African Court of Appeal found that this ingredient was not proved and upheld the conviction of simple robbery.

Similarly, we find the circumstances in the above case similar to the circumstances in this case and therefore follow the same reasoning that presence of a deadly weapon was not proved beyond reasonable doubt.

Further, the appellants contested the fourth ingredient. It was submitted for the appellants that the evidence on record was not sufficient to prove their participation.

The law regarding identification was settled in the case of ***Abdullah Nabulere &Another vs Uganda, Court of Appeal Criminal Appeal No. 9 of 1978*** in the following passage in the judgment:

> ***"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications, The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger.***
>
> ***When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a court can safely convict even though there is no other evidence to support the identification evidence, provided the court adequately warns itself of the special need for caution."***

The learned trial Judge at page 446 of the record of appeal found as follows:-

> ***"I took note of the prosecution witnesses, the demeanor when responding to the defence examination and I hold each of them as truthful witnesses. In the instant case, I am satisfied that the quality of identification was***

good. I make a finding that A2, A3 and A4 were properly identified by PW1. In a case like this one, proof of anything nor plurity (sic) of witnesses is necessary. The case of Abdullah Nabulere and two others supra and Mishikoma Watete supra are good cases in resolving the issue of whether there was proper identification of the accused at the time of the offence was committed."

The incident happened during broad day light, PW1 had a scuffle with the appellants for the bag of money and we consider this ample time for positive identification. These facts were not challenged. No question of mistaken identification was raised. Our careful scrutiny of the evidence relating to identification of the appellants leaves no doubt in our minds that the identification of the appellants as the assailants was correct and free from the possibility of error. We uphold the findings of the learned trial Judge that indeed the appellants participated in the commission of the offence.

Conclusion.

The appeal against conviction for aggravated robbery is allowed. The conviction is quashed and sentence of 30 years imprisonment set aside. We substitute it therefore with a conviction for simple robbery contrary to sections 285 and 286(1) (b) of the Penal Code Act.

The aggravating factors in this case are that the maximum sentence of the offence of simple robbery is life imprisonment. The complainant was injured on the head and large sums of money were stolen.

The mitigating factors are that the appellants were first offenders who asked for forgiveness. They all have family responsibilities and had spent 1 year and 3 months in pre-trial detention.

The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, in their Part III of the third schedule: sentencing range for robbery; the range for simple robbery is given as being from 3 years up to imprisonment for life. In ***Adam Owonda v Uganda, Supreme Court Criminal Appeal No. 8 of 1994,*** court found that the sentencing range for simple robbery by the high court is between 8 to 14 years.

This court in ***Criminal Appeal No. 146 of 2003, Haruna Turyakira & 2 ors v Uganda,*** upheld a sentence of 14 years imprisonment for the offence of simple robbery. In that case the appellants though charged with aggravated robbery, were convicted of a lesser offence of simple robbery and were each sentenced to 14 years imprisonment as well as each to pay compensation of Shs. 800,000 to the victim of the robbery.

In ***Adam Owonda v Uganda,*** (supra), a sentence of 8 and a half year's imprisonment was confirmed by the Supreme Court as appropriate for simple robbery. The appellant in that case had been indicted in the high court for aggravated robbery. He was acquitted of the charge but was convicted of the lesser offence of simple robbery on the ground that the gun used was not shown to be capable of releasing bullets. The appeal against sentence only contending inter alia that the term of 8 and a half years was manifestly excessive.

In ***Katuku Asirafu v Uganda, Court of Appeal Criminal Appeal No. 178 of 2014,*** a sentence of 20 years imprisonment was reduced to 12 years imprisonment for the offence of simple robbery considering the fact that the appellant was a first offender.

Having considered all the aggravating and the mitigating factors and the sentencing range in the above cited cases, we find a sentence of 10 years imprisonment appropriate in the circumstances. We deduct the period of 1 year and 3 months the appellants had been on remand. They will now serve a sentence of 8 years and 9 months imprisonment from 6/9/2013, when the appellants were first convicted.

We uphold the orders of compensation made by the learned trial Judge in relation to payment of compensation for the loss caused to PW1. However, we note from the record that PW1 testified that he was robbed of 106,000,000/= as payment from Roofings plus Shs. 24,000,000/= the other money he had thus making a total of shillings 130,000,000/=. It is not clear how the learned trial Judge came to the amount of Shs. 130,830,000/= as the money stolen from PW1. We therefore reduce the same to 130,000,000/=. The appellants shall pay shillings 130,000,000/= as compensation for the loss caused to PW1. Each appellant shall pay Shs. 65,000,000/=. It is so ordered.

Dated at Kampala this 19th day of Nov. 2019.

.....

Elizabeth Musoke

Justice of Appeal

420 .....

Hellen Obura

Justice of Appeal

425 .....

Ezekiel Muhanguzi

Justice of Appeal