THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0009 OF 2013

(Arising from High Court Criminal Session Case No. 317 of 2000)

KABAZA JACKSON :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala before Her Lordship Monica Mugenyi, J. delivered on 11th October, 2011 in Criminal Session Case No. 317 of 2000 (re-sentencing))

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 Kampala in Criminal Session Case No. 317 of 2000 (in re-sentencing) delivered on 11th October, 2011 by Monica Mugenyi, J in which the appellant was sentenced to a term of imprisonment for 30 years for the offence of aggravated robbery contrary to section 285 and 286 of the Penal Code Act, Cap.120.

Brief Background

This case has a long history. The appellant was indicted, committed and tried along with his co-accused Robert Lubowa by Sebutinde, J. for the offence of robbery contrary to section 272 and 273 (2) of the Penal Code Act, Cap. 106. On the 15th of February, 2001, the two accused persons were convicted and sentenced to the mandatory death sentence which was then by law the only sentence handed out to persons convicted of a capital offence. However, following the decision of the Supreme Court in **Susan Kigula & 417 others versus Attorney General Constitutional Appeal No. 03 of 2006**, where the mandatory death sentence was held to be unconstitutional, the

appellant's file was remitted back to the High Court for re-sentencing. The appellant was then sentenced to serve a term of 30 years imprisonment for his earlier conviction of aggravated robbery by the learned re-sentencing Judge, Monica Mugenyi, J.

Being dissatisfied with the decision of the learned re-sentencing Judge, the appellant lodged this appeal in this Court against sentence only with leave of this Court under **Section 132 (1) (b)** of the **Trial on Indictment Act, Cap.23.** The single ground was framed as follows:

The sentencing was extremely harsh given the circumstances.

Representation

At the hearing of this appeal Mr. Musa Nakueira, learned Counsel, appeared for the appellant while Ms. Jacquelyn Okui, learned Senior State Attorney, appeared for the respondent.

When this appeal last came up for hearing on 26th March, 2019, we made a ruling that the respective counsel for the appellant and the respondent shall file and serve their written submissions in mitigation of the sentence imposed by the learned re-sentencing Judge. We decided so because the record of the proceedings before the learned re-sentencing Judge could not be found. Consequently, the respective counsel in this appeal filed their written submissions and authorities relied on to support their respective cases.

Appellant's case

Counsel for the appellant submitted that the sentence of 30 years imprisonment imposed by the learned re-sentencing Judge was harsh and excessive given the circumstances of this case. He urged this court to find that the following mitigating factors could have led to a lesser period of imprisonment had they been considered by the learned re-sentencing Judge:

Firstly, the fact that there was no loss of life and no physical injuries occasioned on the victims by the appellants should be considered by this Court in reducing the sentence imposed on the appellant. He referred to the learned trial Judge's finding that although the victims were robbed using deadly weapons, to wit, a knife and a gun, the victims were left unhurt. He cited **Pte Kusemererwa & Anor vs Uganda, CACA No. 83 of 2010**

where this Court held that where there was no loss of life in an aggravated robbery, that would be considered as a mitigating factor.

Secondly, the appellant was a first offender. Counsel referred to the learned trial Judge's observation that Lubowa Robert, the appellant's co-convict was a repeat offender. In counsel's view, had the appellant been a repeat offender, the learned trial Judge would have made a similar observation. Further still, counsel contended that although the **Constitutional (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** sets 30 years as the starting point for the offence of aggravated robbery, there was no justification for imposing such a sentence on the appellant who was a first offender. In counsel's view, upholding the sentence imposed on the appellant would be a departure from the precedents of this Honourable Court whereby custodial sentences of 20 years have been imposed, especially where no death or physical injury of the victim had occurred.

Counsel further faulted the learned re-sentencing Judge for failing to consider the period of 3 years spent on remand by the appellant prior to his conviction in 2001. He cited the provisions of **Article 23 (8)** of the 1995 Constitution to the effect that a trial Court shall take into account the period spent on remand by a convict prior to his conviction.

Counsel then implored this Court to find that the appellant had reformed and turned into a good citizen, and that this should be considered as a mitigating factor in the circumstances. He relied on **Adama Jino vs Uganda, CACA No. 50 of 2006** in support of this contention. Counsel pointed out that the appellant has been consistently reporting to the Registrar in line with his bail conditions which exemplified his reformed character.

Counsel therefore invited Court to set aside the sentence imposed by the learned re-sentencing Judge for being very harsh and excessive in the circumstances and asked Court to release the appellant who has already served a substantial part of his sentence.

Respondent's case

Counsel for the respondent opposed the appeal and supported the sentence imposed by the learned re-sentencing Judge arguing that it was not harsh considering both the aggravating and mitigating circumstances of the case. In supporting the sentence, she contended that the offence committed by the appellant was a grave offence which carries a maximum penalty of death. Further, that the appellant and his accomplice used deadly weapons, to wit, a gun and a knife during the commission of the offence. That the learned trial Judge made a finding that the appellant had pointed a gun directly at PW1, James Nangwala during the alleged robbery. This was further aggravated by the presence of vulnerable people like children and a pregnant woman whom the appellant threatened and ordered to lie down on the floor.

On the sentence imposed, counsel supported and justified it on the ground that the appellant was a police officer who had a duty to protect civilians but instead used his gun to terrorize them. Further, that most of the items stolen by the appellant were not recovered except for a television set, a rechargeable lamp and a few kitchen utensils. In counsel's view the sentence of 30 years imprisonment was within the sentencing range for the offence of aggravated robbery. She cited the case of **Kamukama Moses versus Uganda, Court of Appeal Criminal Appeal No. 52/2002** where the Court of Appeal imposed a sentence of life imprisonment for an appellant who committed the offence of aggravated robbery in more or less similar circumstances.

Finally, counsel submitted that considering the above aggravating and mitigating factors, the sentence of 30 years imprisonment was not harsh in the circumstances. She then prayed to this Court to uphold the sentence imposed by the learned re-sentencing Judge and dismiss this appeal for lack of merit.

Resolution by Court

We have carefully listened to the submissions of counsel on either side, carefully perused the record of appeal and the law and authorities cited to us.

We are mindful of the duty of this Court as a first appellate Court, as set out in Rule 30 (1) of the Rules of this Court and as explained by the Supreme Court in **Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997** and **Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997**.

Even in respect of an appeal against sentence alone, we are still required to evaluate the whole evidence that was adduced at trial and to come up with our own inferences on all issues of law and fact in as far as they relate to sentence. We shall proceed to do so.

The principles upon which the first appellate Court will act to interfere with the sentence imposed by a trial Court were considered in **Kizito Senkula versus Uganda Supreme Court Criminal Appeal No. 024 of 2001** where court observed that:

> **"...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 the appellate court will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in James versus R (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."**

In this case the legality of the sentence is being challenged. Counsel for the appellant contended that, while passing a sentence of 30 years imprisonment, the learned re-sentencing Judge did not comply with the provisions of Article 23 (8) of the Constitution by deducting the two (2) years and ten (10) months the appellant had spent on remand. In the absence of the record of proceedings of re-sentencing, we are unable to determine whether the learned re-sentencing Judge complied with Article 23 (8) of the Constitution or not. Hence we have no basis on which to declare the sentence illegal. We shall, nevertheless proceed to be guided by the principles laid down earlier.

We have carefully considered the aggravating factors as well as the mitigating factors. The appellant committed a pre-meditated offence aimed at unjust enrichment by robbing other people's property, putting them at

gun point and ordering them to lie down. Such conduct is reprehensible and must be strongly condemned by this Court.

On the other hand, we accept the submission by counsel for the appellant that the appellant was a first time offender whose criminal acts, though abhorrent, had not caused death or injury to his victims. We believe that it is the duty of the criminal justice system to aid convicted criminals in their rehabilitation process so that they can be re-integrated back into society as reformed citizens once released. This may not be achieved by imposing a very long custodial sentence as was imposed by the learned re-sentencing Judge.

We find that the sentencing guidelines have no application to this case since they were not in operation in 2011 when the re-sentencing took place. We, however, observe the need to maintain consistency in sentencing and have, therefore, found it necessary to refer to the precedents of this Court which dealt with sentencing pertaining to the offence of aggravated robbery.

In **Mwesige Adolf & 2 others versus Uganda, Court of Appeal Criminal Appeal No. 0076 of 2018,** the appellants' sentence of 27 years imprisonment imposed by the trial Court was reduced by this Court to 18 years imprisonment. This was despite the fact that the appellants had used violence on their victim during the commission of the aggravated robbery.

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, 30 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 **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 this case, this Court noted that the range of sentences for aggravated robbery were from 15 years to 32 years.

Considering the circumstances of this case, we find that a sentence of 19 years imprisonment is appropriate. From the sentence of 19 years we deduct the period spent by the appellant on pre-trial remand which is 2 years and 10 months, leaving the appellant to serve a term of imprisonment for 16 years and 2 months. This term of imprisonment would have run from 15/02/2001, the date on which the appellant was convicted but as the appellant has already served 18 years and 2 months imprisonment for this offence, we hereby order his immediate release unless he is being held on other lawful charges.

We so order.

Dated at Kampala this ..... day of ..... 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