

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[Coram: Egonda-Ntende, Obura, Madrama, JJA]

Criminal Appeal No. 447 of 2016

(Arising from High Court Criminal Session Case No.793 of 2014 at Mubende)

BETWEEN

Munyantwale John..... Appellant

AND

Uganda Respondent

(An appeal from the judgement of the High Court of Uganda [Ibanda Nahamya, J] delivered on) 9th December 2015)

JUDGMENT OF THE COURT

Introduction

- [1] The appellant was indicted, tried and convicted on his own plea of guilty for the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act, Cap 120. The particulars of the offence were that the appellant, No. 27634 Corporal Musinguzi K. Stephen and others still at large on the 4th day of May 2014 at Kansambya LC.1 in Mubende District, being armed with a rifle AK 47 No. 56-128137427 code 17520 with 30 rounds of ammunitions robbed Kasana Peter of cash (200,000/=) two hundred thousand shillings and at, immediately before or immediately after the said robbery used a deadly weapon on Kasana Peter. On 9th December 2015, the learned trial judge sentenced the appellant to 17 years and 5 months' imprisonment.
- [2] Being dissatisfied with the decision, the appellant has appealed against the sentence on the following ground:

‘That the sentence passed was illegal as it contravened Article 23(8) of the Constitution or in the alternative the

sentence was harsh and manifestly excessive in the circumstances,'

[3] The respondent opposes the appeal.

Submissions of Counsel

- [4] At the hearing of the appeal, the appellant were represented by Mr. Bwiruka Richard and the respondent was represented by Mr. Ndamurani Ateenyi David. The appellant adopts his written submissions.
- [5] Mr. Bwiruka submitted that the learned trial judge did not fully take into consideration the period the appellant spent on remand as required by Article 23(8) of the Constitution. He contended that the learned trial judge only took into consideration 7 months instead of the 9 months the appellant spent on remand. He states that the appellant was arrested around 25th September 2014 and sentenced on 9th December 2015 and spent 5 months on bail which reduces the period he spent on remand to 9 months. He is of the view that failure to fully take into consideration this period renders the sentence illegal. He relies on the case of Rwabugande Moses v Uganda [2017] UGSC 8.
- [6] With regard to the alternate ground, counsel for the appellant submitted that the sentence of 17 years and 5 months' imprisonment was harsh and excessive because the appellant was about 24 years at the time of sentencing and had three children. He submitted that the appellant was remorseful, a first-time offender and admitted the offence in his charge and caution statement. He proposed a sentence of ten years' imprisonment and cited Nduru Banada & Anor v Uganda, Court of Appeal Criminal Appeal No. 249 of 2010 (unreported) in support thereof.
- [7] In reply Mr. Ndamurani submitted that the learned trial judge took into consideration the period the appellant spent on remand. He submitted that in allocutus the appellant stated that he had spent 5 months on remand before being granted bail and the state stated that the appellant spent 2 months on remand. It was his submission that the 7 months granted to the appellant by the trial court was a bonus compared to the actual period the appellant spent on remand. He also submits that the trial court was not bound by the decision in Rwabugande Moses v Uganda [2017] UGSC 8 because it was delivered two years after the trial court's decision. Counsel for the appellant further submits that should this

court find that there was an error in calculation of the period the two months that were left out should be credited to the appellant.

- [8] In reply on the alternate ground, he conceded that the sentence imposed against the appellant was harsh but not manifestly excessive in the circumstances. He submitted that the aggravated robbery carries the maximum penalty of death and the sentencing range is 30 years starting from 35 years' imprisonment. He submitted that the trial court took into consideration the mitigation factors and arrived at the appropriate sentence. He prayed that this court upholds the sentence and reduce it by 2 months that are part of the remand period.
- [9] In rejoinder counsel for the appellant submitted that section 98 of the Trial On Indictments Act obliges courts to first make inquiries to ascertain some facts prior to sentencing which the trial court did not do.

Analysis

- [10] The facts of this case are that on 4th May 2014 at around 1:00 am in the night, the complainant (Kasana Peter) together with his wife and children were in their home sleeping when the couple had somebody calling the appellant's name. The person told the complainant to come out and see the thieves he had arrested while stealing his maize on the veranda. No sooner had the complainant opened the door than the appellant, armed with a gun jumped into the door way and put him at gun point. He demanded for money and pulled shs200, 000 /= from the complainant's breast pocket while the other two robbers were struggling with wife. His wife managed to disarm the robbers and also raised an alarm. The complainant ran back into the house and the attackers ran away when they heard the neighbours responding to the alarm. The appellant left his shoes while he was fleeing which was used to identify him. Upon further investigation, the appellant was arrested and charged with aggravated robbery. He pleaded guilty.
- [11] It is now a well-settled position in law, that this court will only interfere with a sentence imposed by a trial court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with sentence, where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstance. See Bashir Ssali v Uganda [2005] UGSC 21, Ninsiima Gilbert v Uganda [2014] UGCA 65, Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported) and Livingstone Kakooza v Uganda [1994] UGSC 17.

Ground 1

[12] The appellant contends that the learned trial judge did not fully consider the period the appellant spent on remand as required by Article 23(8) of the Constitution. Mr. Bwiruka asserted that the court credited the appellant 7 months as the period he spent on remand yet in essence he spent 9 months on remand. Article 23(8) states:

‘Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.’

[13] In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. Taking the remand period into account is a mandatory requirement. The period to be taken into account is that period which an accused person spends in lawful custody before completion of the trial. This period should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. It must be considered and that consideration must be noted in the judgment. See Abelle Asuman v Uganda [2018] UGSC 10.

[14] From the record the appellant was arrested on 25th September 2014 and convicted on 9th December 2015. We are not sure of what happened in between that period but in allocutus, the appellant states that he had spent five months on remand prior to being given bail. There is no evidence on record as to when the appellant was granted bail. The learned trial judge in his decision stated that the appellant had spent close to 7 months on remand and he took into consideration the period of 7 months. If the period on remand is actually 9 months, then there was an error by the trial court in not crediting the appellant with the said 2 months.

[15] Much as the learned trial judge was alive to the requirements under article 23 (8) of the Constitution he made an error in failing to credit the appellant with the period of 9 months and instead credited him with only 7 months. He thus

failed to comply fully with the requirements of article 23 (8) of the Constitution rendering the sentence illegal. We shall set it aside. We now apply section 11 of the Judicature Act and sentence the appellant afresh.

- [16] The appellant's mitigation factors were that he had pleaded guilty. He had realised his mistake and was remorseful. He was a first time offender. He stated that he has three children and a wife to support. He also stated that the complainant did not get any injury. He asked for lenience. The respondent's aggravating factors were that the appellant had used an SMG rifle which was dangerous.
- [17] We note that the appellant committed a serious offence that carries the maximum penalty of death. The appellant was 23 years at the time of sentencing, remorseful and capable of reformation. He pleaded guilty and saved court's time and resources. He was a first-time offender with no previous record of conviction and no injury resulted from the robbery.
- [18] In Kajura & 2 Others v Uganda [2014] UGCA 37, the appellants were indicted for the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act and sentenced to 10 years' imprisonment. On appeal, this court re-sentenced them to ten years' imprisonment. In Twesigye Vs Uganda [2016] UGCA 78, the appellant was convicted of aggravated robbery contrary to Sections 235 and 286(2) of the Penal Code Act and sentenced to 10 years' imprisonment. The appellant and others attacked the home of the complainant while armed with a panga and a knife. The assailants tied him up together with his wife and demanded for money while threatening to cut them. They robbed shs. 380,000/- from the complainant. This court confirmed the sentence of 10 years' imprisonment.
- [19] In Kusemererwa & Anor v Uganda [2014] UGCA 38, the appellants were convicted of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act and sentenced to 20 years' imprisonment. The trial court found that the appellants had on the 17 February 2005 robbed one Gakyaro Omuhereza of Shs2, 000,000.00 and had used a deadly weapon in the process of the robbery upon the said Gakyaro. On appeal, this court found the sentence to be manifestly excessive and substituted it with 12 years' imprisonment. In Rutabingwa v Uganda [2014] UGCA 79, while the appellant was convicted and sentenced to

18 years for the offence of aggravated robbery, his co-accused was sentenced to twelve years on his own plea of guilty.

Decision

[20] Taking into account the mitigating and aggravating factors, we are of the view that a sentence of 10 years' imprisonment will meet the ends of justice. From that sentence we deduct the period of 9 months the appellant spent on remand. The appellant will therefore serve a sentence of 9 years and 3 months starting from 9th December 2015 the day he was convicted

[21] We so order.

Dated, signed and delivered at Fort Portal this 30th day of July 2019


Fredrick Egonda-Ntende
Justice of Appeal


Hellen Obura
Justice of Appeal

Christopher Madrama
Justice of Appeal