THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

[CORAM: OWINY- DOLLO, DCJ; MUSOTA and TUHAISE, JJA]

CRIMINAL APPEAL NO. 019 OF 2015

(Arising from the judgment of the High Court of Uganda at Jinja, (Bamugemereire J.) in Criminal Session Case No. 247 of 2012)

ABU SOLOMON KIRIBAKI ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

JUDGMENT

Background

The Appellant, and others, were indicted of the offence of aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act. The Appellant pleaded not guilty; wherefore, a trial was conducted. He was convicted and sentenced to serve 39 years in prison; while his co accused were convicted on their own plea of guilt, and each sentenced to serve 14 years in prison. The Appellant had initially appealed against both conviction and sentence.

Grounds of Appeal

However, at the hearing of the Appeal, counsel for the appellant sought leave to amend the Memorandum of Appeal to reflect only one ground; to wit that '***the sentence of 39 years imprisonment was harsh and manifestly excessive***'. This was granted; and it was on the basis of the amended memorandum of appeal that the appeal proceeded. Counsel prayed this honorable Court to reduce the sentence.

Representation

At the hearing of the Appeal, the appellant was represented by Counsel Jacob Osillo; while the respondent was represented by Counsel Gladys Macrina (Principal State Attorney).

Case for the Appellant.

Counsel argued that the sentence of 39 years imposed on the appellant is excessive and harsh in the circumstances. He submitted that Courts have established a range of sentences for this kind of offense of aggravated robbery; which is between 18 to 19 years in prison. He contended that the trial judge ought to have had due consideration of these decisions in sentencing the convict. He pointed out that the appellant was young; and so the sentence should accord him the opportunity to reform. He pointed out that this factor was not considered by the trial Court. He referred us to the case of ***Abel Asuman vs. Uganda - S.C. Crim. Appeal No. 66 of 2016.***

Counsel submitted that the Court should have addressed the remand period in the sentencing process by deducting it from the sentence it intended the convict to serve. As it is, Counsel contended, it remained unclear whether the remand period was deducted from the sentence or not; which leaves it hanging (See ***Tukamuhebwa David and another vs. Uganda).*** .Counsel then prayed that this appeal be allowed; and the sentence of 39 years be reduced to, or replaced with that of, 18 years.

Case for the Respondent

Counsel for the Respondent, in support of the sentence, stated that the trial Court took into account the aggravating factors, as well as the mitigating factors. In regard to the period a convict had spent on

remand, Counsel referred us to the case of ***Abel Asuman vs. Uganda SCCA No. 66 of 2016;*** which propounded the correct position of the law by clarifying that the arithmetical calculation principle that was held in ***Rwabugande Moses vs. Uganda*** - **SCCA No. 25 of 2014**, was not the correct position of the law.

Court's Consideration.

Rule 32(1) COA Rules provides as follows:

"On any appeal, the court may, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or order a new trial, and make any necessary, incidental, or consequential orders, including orders as to costs."

With regard to a complaint against sentence based allegedly on its severity, there are principles that guide this Court in so doing. In the case of ***Kiwalabye Bernard v Uganda, Criminal Appeal No.143 of 2001*** (unreported), the Supreme Court gave guidelines on when the appellate court may exercise its discretion to interfere with sentence imposed by a trial Court. It said:

"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that 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 the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

Counsel for the appellant did not fault the trial Court on grounds of error in the principle of sentencing. His contention was that the sentence imposed by the Court is manifestly harsh and excessive in the circumstances of this case. He submitted that the trial Judge did not consider the time the appellant spent on remand before conviction. The trial Judge in this case stated:

> *"I agree that this is not the rare case which would warrant a death penalty. I note with concern though that considering the nature of injuries meted out on their victim, he could have easily slipped out of this world. I note and have considered the fact that the convict has been on remand two years. Given his youthful age I want to imagine that he is capable of reform. These two years should be deducted. I noted that he is first time offender."*

The Appellant spent two years on remand prior to his trial and conviction. The principle of the law to apply in determining custodial sentence is no longer the arithmetical subtraction principle applied in ***Rwabugande Moses vs. Uganda (supra)***. The correct position, as was propounded in ***Abel Asuman vs. Uganda (supra)***, is that the Court takes into account the period a convict spent on remand before the conviction, without applying the arithmetical subtraction test, to determine the length of the custodial sentence to impose. From the record before us, it is manifest that in imposing the sentence the Appellant has complained against, the learned trial judge took into account the period the convict spent on remand; albeit that he applied the wrong principle.

In the instant case before us, the appellant was young, as he was merely 20 years of age at the time he committed the offence. He was

also a first time offender. Although a deadly weapon was used, there was no loss of life. These mitigating factors must be considered against the aggravating factors of the crime; namely that this is a serious offence, where deadly weapon was used on the victim of the robbery, and the sums of money stolen in the process were never recovered. Weighing all the factors above, and considering the need for this Court to be categoric that robbery is not an attractive enterprise, Court should impose on the appellant such custodial sentence as will serve as a deterrent punishment. But the sentence should still afford him the opportunity to reform, and be useful to society when he is re-integrated with it after serving the sentence.

In the circumstances then, the custodial sentence of 39 years the trial Court imposed on the appellant is manifestly harsh and excessive; so, we set it aside. We substitute therefore the sentence of 18 (eighteen) years imprisonment running from thge date of conviction.

Dated at Jinja this 4th day of Sept 2019

Alfonse C. Owiny - Dollo
Deputy Chief Justice

Stephen Musota
Justice of Appeal

Percy Night Tuhaise
Justice of Appeal