THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT JINJA

CRIMINAL APPEAL NO. 282 OF 2011

Coram: Cheborion Barishaki, Stephen Musota, Percy Night Tuhaise, JJA

Kalenzi Faruku.....Appellant

V

Uganda.....Respondent

(Appeal from the judgment of the High Court sitting at Jinja in HCT-03-CR-SC-0451-2010, delivered by His Lordship Hon. Mr. Justice Akiiki-Kiiza on 16th November 2011)

JUDGMENT OF COURT

The appellant was indicted for 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 and others still at large in the night of 9th June 2009 at Buwongo Village in Iganga District robbed Mulidho Emmanuel of a motor cycle bajaj, and immediately before or after the said robbery, used a deadly weapon, a knife, to the said Mulidho Emmanuel. The appellant was convicted and sentenced to 23 years of imprisonment.

The appellant was granted leave by this Court to appeal against the sentence only. He filed a memorandum of appeal on one ground, namely:-

1. That the learned trial judge erred in law and fact when he failed to take into account essential mitigating factors and thus passed a sentence that is manifestly harsh.

Representation

Mr. Osillo Jacob appeared for the appellant on state brief, while Mr. David Ndamurani Ateenyi, Senior Assistant Director of Public Prosecutions, appeared for the respondent. The appellant was in court at the hearing of this appeal.

Submissions for the Appellant

Mr. Osillo submitted for the appellant that the sentence of 23 years imprisonment passed against the appellant was manifestly harsh, considering the matters raised in mitigation during his *allocutus*. These were that the appellant was a young man aged 22 years at the time; that he was capable of reforming, given the appropriate sentence; that a long custodial sentence would mean the appellant spends most of his youthful life in prison with no opportunity to demonstrate that he had reformed, or to serve his country as a reformed person.

Counsel also submitted that in the instant case, while a lethal weapon was used in the course of the commission of the offense, no life was lost. He contended that though that does not make the offense any less grievous, but considering the range of sentences for offenses like the instant one, Court ought to have handed the appellant at least 18 years imprisonment, which would enable the appellant to have a chance to reform and serve his country. He cited **Abelle Asuman V Uganda, Supreme Court Criminal Appeal No. 66 of 2016** where 18 years imprisonment was confirmed as an appropriate sentence.

Counsel prayed to this Court to allow the appeal, quash the sentence of 23 years imprisonment, and replace it with a more lenient sentence.

Submissions for the Respondent

Mr. Ndamurani Ateenyi, Senior Assistant DPP, submitted for the respondent that aggravated robbery is a very serious offense given that the law prescribes against it a maximum sentence of death upon conviction. He contended that the manner in which the offense was committed shows that the victim suffered serious injuries at the hands of the appellant. He submitted that as shown by PF3 on page 41 of the record, the victim was examined by a medical doctor who classified the injuries suffered as harm. He contended that a sharp object (knife) and some sticks were used, in addition to robbing the victim of his motorcycle.

Regarding the age of the victim, Mr. Ndamurani agreed that the appellant was a young man of 22 years at the time of committing the offence. He however argued that the factor of age cannot be construed in the appellant's favour, given that he should have put or directed his youthful energy into doing things that were more productive, instead of investing his youthful energy in committing crime.

Regarding the sentencing guidelines, Mr. Ndamurani submitted that the sentencing range for the offense of aggravated robbery begins with 30 years to death, with the starting point being 35 years. He contended that against that background, looking at both the maximum sentence set by the law and the range given under the guidelines, 23 years imprisonment was quite lenient and leaned towards mercy. He cited a number of cases, including **Sebuliba Sirajje V Uganda, Court of Appeal Criminal Appeal No. 319 of 2009,** on basis of which he

maintained that the trial Judge's sentence of 23 years imprisonment cannot be impeached. He invited this Court to uphold the sentence of 23 years.

Appellant's submissions in Rejoinder

Mr. Osillo submitted in rejoinder that the sentencing guidelines cited by the respondent do not erode the sentencing discretion of this Court which has powers to distinguish peculiar circumstances of different cases. He invited this Court to exercise its discretion in the interest of justice.

Resolution of the Appeal

This Court, as a first appellate court, has the duty to review and re-evaluate the evidence before the trial court and reach its own conclusions, as required under rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions 2005. However the Court should take into account the fact that, unlike the trial court, the appellate court did not have the opportunity to hear and see the witnesses testify. See **Pandya V R [1957] EA 336; Ruwala V R [1957] EA 570; Bogere Moses V Uganda, Supreme Court Criminal Appeal No. 1 of 1997; Okethi Okale V Republic [1965] EA 555**.

This appeal is against sentence only. In **Kiwalabye Bernard V Uganda, SCCA No. 143 of 2001**, the Supreme Court held that the appellate court is not to interfere with the 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 circumstance which ought to be considered while passing the sentence, or where the sentence imposed is wrong in principle.

The record of appeal shows on page 36 that the trial Judge gave his reasons for the sentence as follows:-

> *"The accused is allegedly a first offender. He has been on remand for 3 years and 9 months. I take this period into consideration, while sentencing the accused. He is said to be a young man of about 22 years at the time of commission of the offence. He has prayed for leniency. However, the accused has committed a serious offence....The accused attacked his colleague the victim, inflicted on him serious injuries before robbing his motorcycle. The accused is a young man who appears healthy. He could in my view earn an honest, living by working hard. However he has decided to reap where he has not sown. This cannot be supported by the Court...."*

The record shows that the appellant is a first offender. He was aged 22 years at the time of committing the offence. He has been on remand for 3 years and 9 months. The trial Judge took all this into consideration while sentencing the accused (appellant).

We have however sought guidance on sentences imposed by courts in Uganda in similar circumstances around the same time, in order to maintain consistency in punishment. In **Abelle Asuman V Uganda**, cited by the appellant's counsel, a sentence of 18 years imprisonment imposed by this Court was upheld by the Supreme Court as appropriate in circumstances which were similar to the instant case.

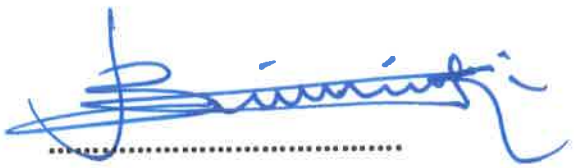
We also note that the trial Judge took the factor of the appellant's young age to be an aggravating factor, reasoning that he should have used his youth to earn an honest living. While this may be true, we hold the opinion that at a youthful age, and, since he was remorseful and repentant, the appellant was capable of reforming, given the appropriate sentence. We agree with the appellant that a long custodial sentence in such circumstances would deny the appellant the opportunity to reform, or to serve his country as a reformed person.

In such circumstances, we find the sentence of 23 years imprisonment to be excessive. We accordingly allow the appeal and set aside the sentence of 23 years imprisonment against the appellant.

Section 11 of the Judicature Act gives this Court the same power as the High Court when it comes to sentencing. Having set aside the sentence of 23 years imprisonment, we replace it with a sentence of 15 years imprisonment, having taken into account all the factors above, including the period the appellant spent on remand. The sentence of 15 years imprisonment shall run from the date of conviction, which is 16/11/2011.

It is so ordered.

Dated at Jinja this .....day of 2019



Hon. Mr. Justice Cheborion Barishaki
Justice of Appeal

Hon. Mr. Justice Stephen Musota
Justice of Appeal

Hon. Lady Justice Percy Night Tuhaise
Justice of Appeal