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THE REPUBLIC OF UGANDA

10 **IN THE COURT OF APPEAL OF UGANDA**

AT MASAKA

Criminal Appeal No. 66 of 2015

15 *(Arising from the Conviction and Sentence of the Learned Judge of the High Court of Uganda at Kabale, Margaret C. Oguli Oumo in Criminal Session Case No. 0112 of 2012: Uganda vs Saaka Lawerence, Senkasi Paul and Seremba Manuel conviction delivered on 13th February, 2015 and Sentences passed on 17th February, 2015)*

20 **Saaka Lawrence**
Senkasi Paul
Seremba Manuel :: **Appellants**

versus

Uganda ::**Respondent**

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Coram: **Hon. Lady Justice Elizabeth Musoke, JA**
Hon. Justice Ezekiel Muhanguzi, JA
Hon. Justice Remmy Kasule, Ag. JA

30 # JUDGMENT

The appellants appealed to this Court against both their respective convictions and sentences by the High Court at Kabale of Aggravated Robbery and Attempted Murder contrary to Sections 285 and 189 as well as 204(a) of the Penal Code Act.

35 The grounds of appeal as set out in the Memorandum of Appeal are:

1. The learned trial Judge erred in law and fact when she held that the accused persons were properly identified by the victim.
2. The learned trial Judge erred in law and fact when she considered a rope as per the circumstances of the case to be a deadly weapon. (40)
3. The learned trial Judge erred in law and fact by sentencing A1 to an imprisonment of 25 years on each count, A2 to an imprisonment of 20 years on the first count and 15 years on the second count and A3 to an imprisonment of 30 years on count 1 and 15 years on the second count which is manifestly harsh and excessive. (45)

By way of background, the facts as found proved by the trial Court, are that the appellants on 20th December, 2011 at about 11.00 p.m. at Kyabasita village, Kaliro Sub-county, Lyantonde District, robbed of one Sebukyu Ponsiano, who at the trial testified as Pw1, cash Ug. Shs. 960,000= and in the course of doing so used a rope which they tied around his neck. Thus, they also attempted to unlawfully cause his death. (50, 55)

A full trial was held at the end of which the appellants were convicted and sentenced. Dissatisfied, the appellants lodged this appeal.

At the hearing of the appeal, the appellants were represented by 60 learned Counsel Tusingwire Andrew on State brief, while Naluzze Aisha, Assistant Director of Public Prosecutions was for the respondent.

In respect of ground 1 of the appeal, Counsel for appellants submitted that the learned Judge erred when she held that the 65 appellants were properly identified by Pw1, the victim of the robbery and attempted murder, as the ones who committed the crimes against him. This is because Pw1 admitted under cross examination that there was no light to enable him identify his attackers. Indeed the fact that there was no light was corroborated 70 by Pw2, Detective Sargent Kizza who arrested the first appellant at about 2.30 a.m. on the night the crimes were committed. He testified that he used a torch to identify the first appellant at the scene of the crime.

Appellants' Counsel further submitted that, Pw1 was, at that 75 material time the offences were committed, gripped with fear and so he could not properly identify those attacking him, more so as the attack happened only in five minutes after which Pw1 was unconscious, with no opportunity to observe the attackers, even though Pw1 knew the appellants before the event. Hence this was 80 a situation of mistaken identity.

As to ground 2, Counsel contended that the learned trial Judge was wrong to hold that a rope, in the circumstances of the case,

was a deadly weapon in terms of Section 273(2) of the Penal Code Act. This is because the doctor's report describing and defining the nature or extent of the injuries caused upon Pw1 by this rope, was never tendered in evidence. The learned trial Judge therefore had no basis to conclude that the rope found at the scene of crime was a deadly weapon.

On ground 3, appellants' Counsel argued that the sentences passed against each appellant were manifestly harsh and excessive and as such the same ought to be set aside the appellants be acquitted and set free, or if not, then to set aside the sentences and substitute them with more lenient ones under Section 11 of the Judicature Act.

Learned Counsel for the respondent, opposed the grounds of the appeal.

As regards ground 1, Counsel maintained, that the appellants were properly and clearly identified at the scene of crime by Pw1 who very well knew them before, the first appellant being his relative and the second and third appellants being village mates since childhood. There was moonlight and the appellants were very close to him in the course of the attack and were talking throughout the commission of the offences and Pw1 was familiar with their voices. All these factors enabled him to identify them as the attackers. Counsel relied on the case of **Baguma Steven and Another vs Uganda: Supreme Court Criminal Appeal No. 42 of 2001** and defended the trial Judge as having come to the right conclusion that Pw1 had properly identified the appellants as his attackers.

110 Counsel submitted in respect of ground 2, that the trial Judge was right to hold that the rope was a deadly weapon because Pw1 in his testimony testified how the said rope was tied by the appellants around his neck to strangle him and in the process his neck got swollen. The medical report that was tendered before the trial 115 Court proved this. Hence the learned trial Judge came to the right conclusion that the rope was a deadly weapon, the fact that the said rope was not exhibited, notwithstanding.

On ground 3, respondents' Counsel argued that the sentences were not harsh and excessive, given the fact that the offence of 120 aggravated robbery carries a maximum sentence of death and that of attempted murder has life imprisonment as the maximum sentence.

The learned trial Judge had carefully considered the mitigating and aggravating factors of each appellant, as well as the remand 125 periods of each appellant, before she arrived at the appropriate sentence. Relying on **Lukwago Henry vs Uganda, Court of Appeal Criminal Appeal No. 36 of 2010,** Counsel submitted that the sentences as determined by the trial Judge were the right ones and the same be not disturbed.

130 As the first appellate Court, it is the duty of this Court to subject the evidence on record to adequate re-evaluation and proper scrutiny and, where appropriate, to draw inferences of fact of its own, different from those of the trial Court. This duty has to be carried out, bearing in mind that this Court did not have the 135 advantage, which the trial Court had, of observing the demeanour of witnesses in the course of their testimonies to Court: See: **Rule**

30 of the **Judicature (Court of Appeal Rules) Directions** and also **Supreme Court Criminal Appeal No. 07 of 2009: Haruna Turyakira and 2 Others vs Uganda**.

140 The first ground of appeal is as to whether or not the trial Judge was right in holding that the appellants were correctly identified at the scene of crime.

This is a case where Pw1 was the sole identifying witness. The trial Court therefore ought to have satisfied itself from the evidence
145 adduced, whether or not the conditions under which the identification is claimed to have been made were favourable or were difficult, and to warn itself of the possibility of mistaken identity: See: **Court of Appeal Criminal Appeal No. 12 of 2012: Mubangizi Alex vs Uganda.**

150 The learned trial Judge in her summing up to the assessors, stated that:

> ***"An accused person can be convicted on the evidence of a single identifying witness if factors exist for correct identification and there is no question of mistaken***
155 ***identity"***.

She then directed the assessors to consider whether there was enough light for visibility, whether the victim was familiar with the accused before the event, the distance between the victim and the accused and the duration period the witness had to observe the
160 accused.

In her Judgment, after being advised by the assessors to convict the appellants, the learned Judge found that the first appellant,

Saaka Lawrence had been very well known to the victim Pw1, before the event. The first appellant, was a relative of Pw1, they
165 went to school together and his daughter was, at the material time when the offences occurred, staying at the home of Pw1, where the first appellant used to go and see her very often. As to the second (Senkasi Paul) and third (Seremba Manuel) appellants, Pw1 had known them as village mates since childhood.

170 On attacking the victim, Pw1 when he had reached the bridge at Katindo, clearly saw and heard the appellants speaking at the scene of the crime. The second appellant attacked him from the left, the third appellant from the right and first appellant attacked him from the front. They were talking loudly demanding money
175 from him. The second appellant tried to blind him with a cloth. The first appellant suggested they tie him with a rope by the neck and he, first appellant, also pouring some substance on him, i.e. Pw1. There was moonlight all over the place and the struggle took about 30 minutes. They took all that was on him and when they
180 came to the conclusion that their victim was dead, they said so loudly stepping on his stomach and poured some substance in his eyes. They then threw him on the side of the road for dead. But he was alive, seeing and hearing what was going on, except when they threw some staff in his eyes at the end, which somehow
185 affected his sight. This is after he had clearly seen all of them and heard their voices.

Pw2 No. 25409 Detective Sergeant Kizza, who came to the scene of crime at about 2.30 a.m. also confirmed in his testimony that there was moonlight, even though he carried a torch with him.

190 The following day, early morning, at Kanabi Clinic, where Pw1 the victim, had been admitted, he the victim, though he could not talk due to injuries he had sustained in the course of the attack, was able to write down on a chit the names of the appellants as the ones he identified as his attackers. He handed the chit to Pw2, the 195 investigating Police Officer.

The learned trial Judge carefully considered the prosecution and the defence evidence as to the issue of identification of the appellants as the attackers of Pw1 and concluded that the evidence of Pw1, corroborated by that of Pw2 as to the presence of moonlight 200 at that material time, clearly placed the three appellants at the scene of crime and as the ones who carried out the robbery and attempted murder of Pw1.

This Court has carefully reviewed and re-appraised the said evidence and finds no reason to come to a different conclusion 205 than that of the learned trial Judge. Ground 1 of the appeal therefore fails.

Ground 2 of the appeal requires this Court to determine whether the learned trial Judge was correct to hold that a rope, in the circumstances of this case, was a deadly weapon.

210 Section 286(3) (formerly Section 273 (2)) of the Penal Code Act defines a deadly weapon as an instrument made or adapted for shooting, stabbing or cutting and any imitation of such instrument, and it also means any substance, when used for offensive purposes which is likely to cause death or grievous harm 215 or is capable of inducing fear in a person that is likely to cause

death or grievous bodily harm or to render the victim of the offence unconscious.

A robbery is a simple robbery if, in the course of its being committed, there is no deadly weapon used. Once a deadly weapon
220 is used or threatened to be used, then the offence becomes aggravated robbery. The maximum sentence for simple robbery is ten years on conviction by a Magistrate's Court and imprisonment for life on conviction by the High Court. The maximum sentence for aggravated robbery is death. See Sections 285 and 286 of the
225 Penal Code Act.

When the prosecution fails to produce the instrument used in committing the offence during trial, a careful description of the instrument will suffice to enable Court decide whether the weapon was lethal or not. See: **Ramathan Situma and 2 Others vs**
230 **Uganda: Criminal Appeal No. 9 of 2000 (SCU), Wasajja V Uganda (1975) EA 181** and **Birumba and Another V Uganda Criminal Appeal No. 32 of 1989 (SCU).**

In the case under consideration, Pw2 testified that he collected exhibits from the scene of crime being a rope, a walking stick and
235 a jacket, the rope being 1½ feet long. Pw1, the victim of the crimes, testified that a rope had been tied around his neck.

There was no rope exhibited at the trial. Pw2 did not give any explanation as to why the rope he collected from the scene of crime was not exhibited. Pw1 gave no description of this rope as to how
240 long it was, what was it made of and how it caused the injuries that he claims were caused by it. There was no evidence of a

medical doctor to confirm, one way or the other, whether the injuries on Pw1 were caused by this rope or by something else.

Given the above state of affairs, this Court holds that the learned 245 trial Judge had no basis to hold that a deadly weapon by way of a rope was used in the robbery against Pw1, the complainant. Accordingly ground 2 of the appeal succeeds.

It follows therefore that the conviction of each one of the appellants of aggravated robbery cannot stand. The same is accordingly set 250 aside in respect of each appellant. It is substituted with a conviction for simple robbery under Sections 285 and 286(i)(b) of the Penal Code Act.

Ground 3 of the appeal faults the trial Judge for having passed harsh and excessive sentences upon each one of the appellants.

255 The law on alteration of sentence by an appellate Court is that a sentence imposed by a trial Court may only be altered if it is evident that the trial Court acted on a wrong principle, or overlooked some material factor, or if the sentence is manifestly harsh and/or excessive in view of the circumstances of the case. 260 Sentences imposed in previous cases of similar nature, while not being necessarily precedents, are material for consideration for the sake of ensuring consistency and uniformity in sentencing: See: **Abelle Asuman vs Uganda, Supreme Court Criminal Appeal No. 66 of 2016** and **Court of Appeal of Uganda at Fort Portal** 265 **Criminal Appeal NO. 242 of 2014: Ainobushobozi Venancio vs Uganda**.

An examination of past Court decisions with facts having a resemblance to the case under consideration gives guidance to this

Court. In **Court of Appeal Criminal Appeal No. 146 of 2003: Haruna Turyakira and 2 Others vs Uganda**, the appellants robbed a family by violently hitting the door of the house where the family was sleeping at 1.00 a.m.-2.00 a.m. at night and robbed Ug. Shs. 2.5 Million, assaulted the occupants who included husband and wife and their children and tied some of them "kandoya". The trial Court passed a sentence of 14 years imprisonment on each accused and the same was confirmed by the Court of appeal as adequate sentence.

In **Court of Appeal Criminal Appeal No. 204 of 2003: Beingana Kanoni Willy vs Uganda**, the appellant was convicted of simple robbery and sentenced to 15 years imprisonment. He had, with others who escaped, attacked a gentleman who was approaching the gate of his house, stole a mobile phone and some money from him. The victim was assaulted but he fought off the attackers and recognized the appellant as one of them with the help of the security light at the gate. On appeal, the Court of Appeal dismissed his appeal and maintained the sentence of 15 years imprisonment.

The case of the victim, Pw1, in this appeal is however such that in the course of the robbery he was so much assaulted that he lost consciousness after he had been admitted at Kanabi Health clinic in Lyantonde District. All this was carried out on him by the appellants who included his relative and whose daughter was staying at his home, that is the first appellant, and then the other two appellants who were village mates of the victim since childhood.

Having carefully considered all circumstances of this case including the pain and loss caused to the victim, the Sentencing Guidelines as well as the need to maintain consistency and uniformity in sentencing, this Court, after taking into
300 consideration that each one of the appellants spent 3 years and 2 moths on remand, that is from 27th December, 2011 (date of arrest) to 13th February, 2015, the date of conviction, sentences each appellant to 18 years imprisonment on the count of Simple Robbery. The participation of the appellants in carrying out this
305 offence of simple robbery was of the same magnitude on the part of each appellant and each one was close to the victim of the robbery, the first appellant as a relative and the second and third appellants as village mates since childhood. As such the sentence given of imprisonment for 18 years is uniform for all the three
310 appellants. Each appellant is to serve a term of imprisonment of 18 years for the offence of Simple Robbery.

This Court, which is now exercising the powers of the trial High Court pursuant to Section 11 of the Judicature Act, is bound, like the trial High Court was also bound, though it did not comply, by
315 Section 286(4) of the Penal Code Act, to order the appellants to pay compensation to Pw1, Sebukyu Ponsiano, the victim of the robbery. The language of the Section is mandatory. It provides:

> *"286. Punishment for Robbery. [Amended Act 8/2007](4) Notwithstanding Section 126 of the Trial on Indictments Act,*
> 320 *where a person is convicted of the felony of robbery the Court shall, unless the offender is sentenced to death, order the person convicted to pay such sum by way of compensation to*

any person to the prejudice of whom the robbery was committed, as in the opinion of the Court is just, having regard to the injury or loss suffered by such person, and any such order shall be deemed to be a decree and may be executed in the manner provided by the Civil Procedure Act".

Pw1's testimony to Court was that at the time he was attacked he had Ug. Shs. 700,000= in one pocket, then Ug. Shs. 250,000= which one Matovu had paid to him in satisfying a debt for a cow he had previously delivered to the said Matovu. Then he had also shs. 10,000= in another pocket. So in all he had Ug. Shs. (700,000+250,000+10,000)=960,000= Pw1's testimony then continued thus:

"They stole my money. They removed the money while I was seeing, struggling with them from the coat and in the trousers. I saw them remove the money during the struggle".

The appellants, in their respective unsworn statements by way of defence, responded to Pw1's above evidence by denying having taken the said money from him. The learned trial Judge on reviewing all the evidence adduced, rejected the appellant's denials and held that the appellants were placed at the scene of the crime by the prosecution evidence and that they committed the robbery against the victim of the crime, Pw1, Sebukyu Ponsiano.

This Court, as the first appellate Court, having reviewed all the evidence and subjected the same to a fresh re-appraisal, agrees with the holding of the learned trial Judge that the appellants, in committing the robbery against Pw1, took from him Ug. Shs. 960,000=. This was loss to the victim of the robbery.

350 The learned trial Judge was bound by Section 286(4) of the Penal Code Act to order the appellants to refund by way of paying compensation the said sum of Ug. Shs. 960,000= that they robbed from the victim of the crime, Pw1: Sebukyu Ponsiano. The learned trial Judge did not do so. This Court vested by Section 11 of the 355 Judicature Act with the powers of the Court of original jurisdiction therefore orders the three appellants: Saaka Lawrence, Senkasi Paul and Seremba Manuel to jointly and/or severally pay compensation of Ug. Shs. 960,000= to Sebukyu Ponsiano being the money that the appellants robbed from him on 26th December, 360 2011 at Katindo, Kyabasita, Lyantonde District. The said sum shall carry interest at the Court rate as from the date of the robbery, that is 26th December, 2011 till payment in full.

It has also to be noted that Section 124 of the Trial on Indictments Act compulsorily requires the sentencing Court to order that, one 365 convicted and sentenced for robbery for a term of imprisonment that is less than life imprisonment, shall be subject to police supervision for a period not exceeding five years from the date of the expiration of the sentence: See: **Beingana Kanoni Willy vs Uganda (Supra)** and also **Haruna Turyakira and 2 Others vs** 370 **Uganda (Supra).**

Accordingly this Court orders that each one of the appellants: Saaka Lawrence, Senkasi Paul and Seremba Manuel are to be subjected to police supervision for a period of 3 (three) years from the date of the expiration of the sentence of imprisonment of 18 375 years imprisonment.

As to ground 3 of the appeal, this Court has already held that, on the review of the whole evidence the participation of the appellants in robbery was of the same magnitude by each one for the three appellants. This holding equally applies to the second count of

380 attempted murder.

Accordingly the sentences passed for attempted murder are to be the same for each appellant.

The learned trial Judge took into account, rightly in our view, the already mentioned mitigating and aggravating factors in respect of

385 each appellant as well as the periods spent on remand, and then proceeded to sentence the appellants for attempted murder.

It has been submitted for the appellants that the sentences imposed by the trial Court in respect of this count were harsh and excessive and therefore ought to be set aside.

390 The maximum sentence for attempted murder is imprisonment for life.

In **Supreme Court Criminal Appeal No. 31 of 2014: Opolot Justine and Another vs Uganda**, a sentence of 15 years imprisonment for attempted murder imposed by the trial High

395 Court was not disturbed by the **Court of Appeal (COA Criminal Appeal No. 155 of 2009)** and also by the Supreme Court. The facts were that on 28.01.2007 at Kabwalin village, Bukedea District, the two appellants, murdered a mother and her son and then attempted to murder another adult male. The appellants

400 were convicted of murder and attempted murder. They were sentenced to life imprisonment for murder and to 15 years imprisonment for attempted murder.

The learned trial Judge in the case before this Court also sentenced the second and third appellant to 15 years imprisonment for

405 attempted murder. This Court upholds as correct and appropriate the said sentence of 15 years imprisonment. To that extent ground 3 of the appeal is not allowed as regards the second (Senkasi Paul) and third (Seremba Manuel) appellants.

However, the learned trial Judge sentenced the first appellant to

410 25 years imprisonment on the count of attempted murder. As it has already been held above, no justification was given by the trial Judge for imposing different sentences for the same offence carried out by the applicants with equal participation of each one of them.

At any rate, in the considered view of this Court, the sentence of

415 25 years passed on the first respondent for attempted murder is too harsh and excessive and not consistent and uniform with past Court decisions.

Accordingly the sentence of 25 years imprisonment on the first appellant is hereby vacated. Having taken into consideration the

420 mitigating and aggravating factors and the period the first appellant spent on remand, this Court sentences the first appellant Saaka Lawrence to a sentence of 15 years imprisonment for attempted murder. The result is that each one of the appellants is sentenced to 15 years imprisonment on count 2 of attempted

425 murder.

From the Court record, the trial Judge ordered that the sentences are to run concurrently. However in the warrant of commitment to prison on a sentence of imprisonment issued under Section 106(1) of the Trial on Indictments Act, the sentences of each

430 appellant were stated to run consecutively. This was an error. This Court now removes this error by ordering that the sentences of each appellant for Simple Robbery and for Attempted Murder are to run concurrently.

In conclusion this appeal is partly allowed.

435 Ground 1 of the appeal is disallowed, while ground 2 is wholly allowed and ground 3 is only partly allowed. The following orders are made:

1. The conviction by the trial High Court of each of the appellants of the offence of aggravated robbery on count 1 is
440 set aside. Instead each of the appellants is convicted of the offence of simple robbery contrary to Sections 285 and 286 (1)(b) of the Penal Code Act.
2. The conviction by the trial High Court of each of the appellants for attempted murder contrary to Section 204(a)
445 and (b) of the Penal Code Act is hereby upheld.
3. Each appellant is accordingly sentenced to 18 years imprisonment for Simple Robbery and 15 years imprisonment for Attempted Murder. The sentences are to run concurrently from the date of conviction of 13th February,
450 2015.
4. The appellants are hereby ordered to pay jointly and/or severally to the victim of the simple robbery one Sebukyu Ponsiano, who testified as Pw1 at the trial, a sum of Ug. Shs. 960,000= compensation, with annual interest thereon at the
455 Court rate from the date of the commission of the crime of 26th December, 2011 till payment in full.

5. Each of the appellants is to be subjected to police supervision for a period of three (3) years from the date of the expiration of each appellant's sentence pursuant to Section 124 of the

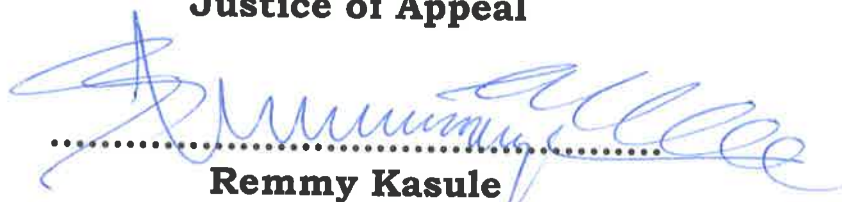
460 Trial on Indictments Act.

We so order.

Dated at Masaka this 6th day of Jan 2019 2020.

465 ....
Elizabeth Musoke
Justice of Appeal

470 ....
Ezekiel Muhanguzi
Justice of Appeal



475 ....
Remmy Kasule
Ag. Justice of Appeal