THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Barishaki Cheborion and Kibeedi, JJA*]

CRIMINAL APPEAL NO. 138 OF 2016

(*Arising from High Court Criminal Session Case No. 159 of 2012 at Jinja*)

BETWEEN

Samanya Kanya==========Appellant

AND

Uganda==========Respondent

(*On Appeal from a judgment of the High Court of Uganda (Namundi, J.,) sitting at Jinja and delivered on 18th day of September 2015*)

Judgment of the Court

Introduction

[1] The appellant was indicted of 2 counts of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The particulars of count 1 were that the appellant and others still at large on the 26th November 2011 at Nsuube village along Jinja Kamuli Highway in Jinja District, robbed Luswata Matia of motor vehicle reg. UAJ 776 D, ten thousand eight hundred kilograms (10,800 Kgs) of clean coffee, one hundred thousand shillings (100,000) plus three mobile phones all valued at approximately 80,000,000/= and at or immediately before or immediately after the time of the said robbery, threatened to use a deadly weapon to wit a gun on the said Luswata Matia.

[2] The particulars of count 2 are that the appellant and others still at large on the 26th November 2011 at Nsuube village along Jinja Kamuli Highway in Jinja District robbed Bisegerwa Uthman of cash eighty thousand shillings (80,000/=) and at or immediately after the time of the said robbery, threatened to use a deadly weapon to wit a gun on the said Bisegerwa Uthman.

[3] The appellant pleaded not guilty and was tried and convicted of the said offences. He was sentenced to serve 15 years imprisonment from the date when he was first remanded in prison.

[4] The appellant has now appealed to this court on 2 grounds set forth below:

> '(1) The Learned Trial Judge erred in law and in fact when he relied on a repudiated confession to convict the appellant thereby occasioning a miscarriage of justice.
>
> (2) The learned Trial Judge erred in law and fact when he passed a sentence of 15 years imprisonment which was manifestly harsh and excessive occasioning a miscarriage of justice to the appellant.'

[5] The appellant prayed that the appeal be allowed, sentence quashed and that he be set free. The respondents opposed the appeal.

Submissions of Counsel

[6] The appellant was represented by Mr Kyabakaya while the Mr Sam Oola, Assistant Director of Public Prosecution, in the Office of the Director for Public Prosecutions, represented the respondent.

[7] Counsel for the appellant, in his written submissions, submitted that it was the duty of this court, as a first appellate court, to re-appraise the evidence on the court record and reach its own conclusions. He referred to Pandya v R [1957] EA 336 and Bugama Fred v Uganda SCCA No. 7 of 2004. With regard to ground 1 he submitted that the charge and caution statement produced by PW3 was admitted without the holding of trial within a trial to determine its admissibility and whether or not it was made voluntarily. He referred to Amos Binuge and Others v Uganda SCCA No. 23 of 1989 and Kasule v Uganda SCCA No. 10 of 1987 in support of his submissions.

[8] With regard to ground 2 of the appeal Mr Kyabakaya submitted that the sentence of 15 years imprisonment was manifestly harsh and excessive and did not take into account the mitigating factors raised by counsel for the appellant. The appellant was simply a naïve person who fell into was misled to participate in the commission of the crimes in question. The robbed properties were recovered and no life was lost in the robbery. He referred to Ainebushobozi Venancio v Uganda CACA No. 242 of 2014

and Livingstone Kakooza v Uganda SCCA No. 17 of 1993 to support the proposition that this court can interfere with a sentence of the trial court where that court acted on a wrong principle or overlooked some material facts or if the sentence was manifestly harsh and excessive.

[9] Mr Kyabakaya further referred us to Uganda v Waiswa & Others Criminal Session Case No. 420 of 2010 (unreported) where an accused convicted of aggravated robbery was sentenced to serve a caution on account of time spent on remand, age of the accused and that he was remorseful. He also referred to Uganda v Otto, Criminal Session Case No. 151 of 2016 (unreported) where a person convicted of aggravated robbery was sentenced to 6 years imprisonment. He submitted that these cases should be persuasive in relation to determining an appropriate sentence for the appellant.

[10] Mr Sam Oola, in his written submissions, submitted in relation to ground 1 of the appeal that the charge and caution statement was admitted without objection and there was therefore no need to hold a trial within a trial. The charge and caution statement was only repudiated during the time the defence was giving evidence long after it had been admitted and therefore it was not possible to hold a trial within a trial in those circumstances. Secondly, that the learned trial Judge was alive to the need to look for other evidence to support the case for the prosecution and there was circumstantial evidence that provided sufficient corroboration to the appellant's confession statement to support the conviction. He prayed that this ground should be rejected.

[11] With regard to ground 2 he submitted that the learned trial Judge made an error in ordering that the sentence should run from the date the appellant was first remanded in prison when he should have ordered to the sentence to run from the date of conviction. Apart from this error the sentence was quite appropriate and should remain undisturbed.

Analysis

[12] It is our duty as a first appellate court to re-appraise the evidence adduced at trial and reach our own conclusions of fact and law, bearing in mind that we did not have the opportunity to observe the demeanour of witnesses at the trial. **See** Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, Kifamunte Henry v Uganda, [1998] UGSC 20, Bogere Moses vs. Uganda [1998] UGSC 22. We shall proceed to do so bearing this duty in mind.

Ground 1

[13] In considering ground 1 it is pertinent to look at the record of the trial. PW3 was the police officer that recorded the charge and caution statement of the appellant. And it was during his testimony that it was tendered. After testifying as to how the appellant was brought to him for purposes of recording a charge and caution statement and the recording of the same, the record reads as follows:

> '**RSA**: I pray to tender the statement in evidence.
>
> **Wagira** (*Counsel for the Accused at the time.*): No objection.
>
> **Court:** Admitted as PEx8.'

[14] Thereafter counsel for the appellant commenced cross examination of the witness.

[15] The point at which to object to the introduction of a charge and caution statement or confession that is challenged for not being voluntary or for not having been made at all, is prior to its admission into evidence. Counsel for the accused can inform court prior to the witness who is to produce the same taking to the witness stand that his instructions are to oppose the admission into evidence the charge and caution statement because it is not voluntary or was not made at all. Prior to the commencement of the trial the defence will have been informed of the evidence that the prosecution intends to rely on and it is essential that counsel for the accused takes instructions on this rather vital piece of evidence.

[16] Once the trial starts the last opportunity to object to such evidence is at the stage when the prosecution applies to introduce it as an exhibit. Objection must be raised if it is denied that the accused made the statement (repudiated) or that the accused made the statement involuntarily (retracted). Otherwise it will be tendered in court as an exhibit.

[17] Once an objection is made the trial court will then be obliged to hold a trial within a trial to determine whether the statement was made or not by the accused, or if it was made by the accused, whether it was voluntary. It may be preferable that counsel for the accused notifies the court that he has instructions to object to the charge and caution statement as soon

as the witness to prove it is called. The court would then direct the holding of a trial within a trial without first listening to that witness.

[18] In the case before us it is clear that counsel for the appellant at the trial did not object to the admissibility of the said statement. In fact, he had no objection to its admission. It has not been suggested on appeal that he had instructions from his client to object to the statement but did not do so. It is only suggested that since the appellant in his defence repudiated the confession a trial within a trial should have been held. At that stage the prosecution had long closed its case, having proved the same, with no objection from the defence. There was no intimation whatsoever that the defence objected to voluntariness of this statement or whether it had been made at all.

[19] The thrust of the appellant's counsel submissions on this ground varied somewhat from the substance of the ground itself. We shall now address ourselves to the substance of ground 1 which was that the learned trial Judge erred in law and fact to rely on a repudiated confession and convict the appellant.

[20] As pointed out by Mr Sam Oola, for the respondent, the learned trial Judge was alive to the question of considering with caution a repudiated confession. The learned trial Judge considered circumstantial evidence that pointed to the guilt of the appellant. Firstly, the appellant was mentioned by PW1 as one of the persons who visited him in Iganga and wished to hire his house at Nabikoote for purposes of storing produce, prior to the commission of the offences in question. It is at this house where 70 bags of the stolen coffee were recovered. Secondly, according to the testimony of PW2, the appellant on being arrested the first time, ran off, with his hands handcuffed and escaped from the Police. When the police traced him later after some days to his home as soon as he saw the police officers, including PW2, he fled from his home and had to be chased before being finally arrested by PW2. Flight from the law enforcement officers is not consistent with the innocence of the appellant.

[21] The learned trial Judge inferred from the detailed nature of confession that it can only be true as only a participant would have been able to disclose all those details. This is a double-edged sword in the circumstances of this case. It is clear that the investigating officer, PW2, was capable of having this information in light of the other participants in this crime who he arrested and interviewed well before the appellant was re-arrested and his statement taken. However, even if the inference,

in relation to the detailed nature of the statement is excluded from consideration, it is clear that there is other independent evidence that points to the participation of the appellant in this crime, as noted above.

[22] The law governing repudiated and or retracted confessions was succinctly set out in Tuwamoi v Uganda [1967] EA 84 at 91 in the following words,

> '.....a trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.'

[23] We are satisfied that the learned trial Judge was alive to the above guidance. We are unable to fault the learned trial Judge in the circumstances of this case. We would reject ground 1 of the appeal as lacking merit.

Ground 2

[24] Ground 2 is in relation to the sentence imposed upon the appellant of 15 years imprisonment. Before we delve into this ground, we note that there are a number of unsatisfactory aspects of this case. In convicting the appellant, the learned trial court stated,

> 'I have already found that all the evidence leads to the guilt of the accused as discussed earlier. I accordingly agreed with the opinion of the assessors that the prosecution had proved all the ingredients of the offence. I accordingly find the accused guilty and convict him accordingly.'

[25] The appellant was charged with 2 counts or 2 offences, all of which were alleged to have contravened sections 285and 286 (2) of the Penal Code Act. He denied both counts and a plea of not guilty was entered on both counts. The learned trial Judge appears to have convicted him of one offence and does not indicate which one of the two.

[26] Section 86 of the Trial on Indictments Act specifies what the contents of a judgment must include. Subsection (3) thereof states,

> 'In the case of a conviction, the judgment shall specify the offence of which, and the section of the written law under, the accused person is convicted.'

[27] This requirement is couched in mandatory terms and ought to be complied with. Its obvious utility comes to the fore in the instant case.

[28] Secondly, the sentence too is for only one offence. The sentencing order which is rather short is reproduced below.

> 'Sentence
> The convict got involved in a robbery for quick gain when he could have continued with his humble vocation as a bicycle repairer. He is a first offender and a young man who should be given a chance to reform. He has been on remand for 3 ¾ years. That is taken into account. I accordingly sentence him to serve 15 years imprisonment which takes effect from the time he was first remanded in prison.'

[29] We are unable to say which of the offences was considered proved or that both offences were proved in the judgment of the learned trial Judge. We are unable to say in respect of which offence did the learned trial Judge impose a sentence or did he intend to impose one sentence for both offences? That is unlikely given that the learned Judge used the singular 'offence' in both conviction and sentence.

[30] As was submitted by Mr Sam Oola, and rightly in our view, the learned trial Judge made an error to require the sentence to be served from the date the appellant was first remanded in prison. Under section 106 (2) of the Trial on Indictments Act the sentences of imprisonment are to run from and including the day the sentence was pronounced. As this is often the day on which judgment is pronounced too, which explains why courts so often state that sentence is to run from the date of conviction.

[31] Given the various errors made by learned trial Judge are we in a position to correct them? Section 11 of the Judicature Act grants us the same jurisdiction as the High Court of Uganda in respect of the appeals from the High Court of Uganda in its original jurisdiction. Secondly section 132 (1) (d) of the Trial on Indictments Act, authorises the Court of

Appeal to confirm, vary or reverse the conviction and sentence by the High Court.

[32] Had the errors been restricted to sentencing alone it would have been possible for this court to step in and exercise the jurisdiction of the High Court pursuant to section 11 of the Judicature Act. However, given that the question of convictions is unclear as to which of the 2 counts the learned trial Judge convicted the appellant of, we are not able to step in. The learned trial Judge must first properly exercise that jurisdiction before we can intervene on appeal.

[33] Given the infractions of the law noted above we are left with no alternative but to quash the conviction and set aside the sentence. We direct that the trial record be returned to the learned trial Judge to record a conviction or convictions, as the case may be, as directed by the law and pass a sentence on each offence with the necessary consequential orders.

[34] We heard this appeal in Mbale and the trial Judge is currently stationed there. Equally the appellant is in Malukhu prison, Mbale, not too far from the court house. We trust that this exercise can carried out, expeditiously, if need be, by online hearing (given the *Covid 19* pandemic) and completed without delay. We direct that this exercise should be completed within 60 days from date of receipt of the court record, and this judgment by the trial court. The registrar of this court is directed to transmit without delay a copy of this judgment to the trial court.

Dated, signed and delivered at Mbale this 15th day of September 2020

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Kibeedi
Justice of Appeal