THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

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

CRIMINAL APPEAL NO. 54 OF 2016

(*Arising from High Court Criminal Session Case No.131 of 2013 at Jinja*)

BETWEEN

Asiimwe Brian==========Appellant

AND

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

(*On appeal from the judgement of the High Court of Uganda [Basaza Wasswa, J] delivered on 31st March 2016*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted and convicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The particulars of the offence were that the appellant and others still at large on or about the 16th day of December 2012 at Mafubira zone C, Mafubira sub county in Jinja district robbed a one Mpaso Faruku of UGX 240,000 and at or immediately after the time of the said robbery threatened to use a deadly weapon to wit broken bottles on the said Mpaso Faruku. The learned trial judge sentenced the appellant to 17 years' imprisonment. The learned trial Judge also ordered the appellant to compensate the victim UGX 1,000,000 after serving his sentence of imprisonment before his eventual release from prison.

[2] Dissatisfied with the decision of the trial court, the appellant appealed against conviction and sentence on the following grounds:

> '1. The learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence on court record,

ignored major contradictions in the prosecution evidence and convicted the Appellant of aggravated robbery.

2. The learned Trial Judge erred in law and fact when he sentenced the Appellant to seventeen years (17) of imprisonment which sentence was harsh and excessive.'

[3] The respondent opposed the appeal.

Submissions of Counsel

[4] At the hearing of the appeal, the appellant was represented by Mr. Nanguru Eddy while the respondent was represented by Ms. Nabusenke Vicky, Assistant Director of Public Prosecutions in the Office of the Director, Public Prosecutions. Counsel filed written submissions.

[5] In relation to ground 1 of the appeal, counsel for the appellant cited Kifamunte Henry v Uganda [1998] UGSC 20 in relation to the duty of a first appellate court. With regard to the standard of proof in criminal cases, counsel referred to section 101 of the Evidence Act, Woolmington v DPP (1935) AC 462 and Miller v Minister of Pensions 1947 ALL ER 372.

[6] Counsel for the appellant submitted that there is no evidence on record to prove that at the alleged time of commission of the offence the complainant had in his custody the sum of UGX 240,000. Counsel submitted that other than PW1, all the prosecution witnesses denied knowledge of the said money. Counsel also submitted that PW3 and PW4 who searched the appellant immediately after they had restrained him from allegedly fighting with the complainant did not mention finding any money in the custody of the appellant.

[7] Counsel for the appellant further submitted that PW1 did not directly indicate that the appellant had picked money from his pocket but merely stated that he realised that his money was missing. Counsel for the appellant stated that PW1 did not show when he came to the realisation that his money had been stolen that is; whether at the time of the incident or when he had regained his consciousness while in hospital. It was counsel for the appellant's submission that PW2 testified that she never saw anything being removed from PW1's pocket and that PW3 testified that the appellant was searched but not found with any money. Counsel for the appellant submitted that PW4's allegation that the appellant had handed over the money to one of his colleagues who ran off with it was merely hearsay evidence that was not corroborated.

[8] Counsel for the appellant further submitted that there was insufficient evidence on record to prove whether a deadly weapon was used in the commission of the crime. Counsel submitted that the appellant denied having participated in the commission of the offence. Counsel for the appellant argued that the evidence of PW2, PW3 and PW4 was contradictory, that PW2 testified that beer bottles were found on the appellant which he used to threaten or injure the victim while PW3 stated that he found a piece of a broken beer bottle on the appellant and another at the scene of the crime. On the other hand, PW4 tendered in two pieces of broken soda bottles as the actual weapon used by the accused. Counsel for the appellant argued that these contradictions are major and they should not have been ignored by the trial judge.

[9] Counsel for the appellant cited Abudalla Nabulere & 2 Others v Uganda [1978] UGSC 5 on how courts should handle identification evidence. Counsel for the appellant argued that insufficient evidence was led to explain the nature of lighting and the circumstances favouring proper identification. Counsel for the appellant contended that from the evidence given by PW1 and PW2, the conditions could not have been ideal for proper identification because the incident took place late in the night, in a crowded night club and that PW1 and the appellant had never met before the incident. Counsel for the appellant also submitted that there were contradictions in the prosecution evidence with regard to the time when the offence was committed. Counsel stated that based on the foregoing, the learned trial judge erred in law and fact when he failed to properly evaluate the evidence.

[10] Counsel for the appellant, in relation to ground 2, submitted that the principles under which an appellate court can interfere with a sentence imposed by a trial court were set out in Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 142 of 2001(unreported). Counsel for the appellant submitted that appellant stated in mitigation that he was a first offender, remorseful, a sole bread winner with dependants and that due to his age, he was still resourceful to society and that he is asthmatic and a heart patient. Counsel for the appellant submitted that according to the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, the trial court was enjoined to consider the fact that the accused is a first offender, that it was a single and isolated incident and no injury or no threat of death or harm was done to the victim. Counsel also argued that the value of the stolen property being UGX 240, 000 and that according to part III of the sentencing guidelines, a term of ten years' imprisonment should have been the starting point. Counsel for the

appellant prayed that this court imposes a term of 7 years imprisonment in consideration of the 7 years the appellant has already spent in custody.

[11] Finally, counsel for the appellant prayed that this court allows the appeal, quashes the conviction of the appellant and sets aside his sentence in the interest of justice and fairness.

[12] In reply, counsel for the respondent restated the duty of a first appellate court as set out in Kifamunte Henry v Uganda [1998] UGSC 20 and Rwabugande Moses v Uganda [2017] UGSC 8. Counsel for the respondent submitted that the prosecution led evidence to prove that the complainant's money was stolen during the incident. Counsel stated that PW1 testified that the appellant and his friends took money from his pocket which was confirmed by PW2 in her testimony in which she stated that the complainant complained at the scene of the crime about his money that had been taken by the appellant. Counsel for the respondent stated that PW4, the investigating officer testified that immediately they reached police station and afterwards at the hospital, PW1 complained about his money being stolen and he also stated that during the course of investigations, he got information from other people that the appellant indeed robbed the complainant of his money and passed it to his colleagues who ran away with it.

[13] Counsel for the respondent submitted that section 286 (2) of the Penal Code Act provides that mere possession of a deadly weapon is sufficient to prove a charge of aggravated robbery and that an assailant need not use or threaten to use the weapon. Counsel submitted that even if the weapon used does not qualify as a deadly weapon, if the victim is occasioned grievous harm, then the charge automatically becomes that of aggravated robbery if coupled with the other ingredients. Counsel for the respondent stated that PW1 testified that the appellant pulled out a sharp object which he used to stab him on his hands, fingers and face thus causing him multiple injuries and that it was during this scuffle that he lost money worth UGX 240,000. Further, that PW1 testified that when he was examined at the hospital, pieces of broken bottle parts were removed from his body. Counsel for the respondent submitted that PW3 testified that when he was called to the scene of the crime by PW2, he found the complainant bleeding from his hands, ear, nose and head and that PW1 told him that he had fought with the appellant and two people had taken his money. Counsel for the respondent submitted that PW1's medical examination report showed that he had suffered grievous harm. Counsel submitted that the nature of injuries sustained by PW1 coupled with the exhibits of the broken bottles found on the appellant is irrefutable proof that the prosecution proved its case beyond reasonable doubt.

[14] With regard to the participation of the appellant in the commission of the offence, counsel for the respondent submitted that PW1 managed to identify the appellant using lights at the club. He stated that the scuffle lasted for about 30 minutes and that there were fluorescent bulbs outside the club. Counsel for the appellant submitted that PW2 corroborated PW1's evidence of identification when she testified that she had known the appellant for 4 years as Vimba since they both lived in Mafubira and that she found the appellant with two others fighting with PW1. Counsel for the respondent submitted that although the attack took place at night, there was sufficient lighting from the fluorescent bulbs at the scene, the appellant was well known to PW2 and the scuffle lasted for over 30 minutes which was enough time for PW1 to correctly identify the appellant.

[15] Counsel for the respondent was of the view that the contradictions pointed out by counsel for the appellant are minor and do not go to the root of the case. Counsel argued that the evidence on record is clear that the appellant used broken bottles to inflict injury upon PW1. Counsel submitted that it was immaterial whether the broken bottles were soda or beer bottles. Counsel was of the view that broken bottles by their very nature are deadly weapons since they are capable of being used to stab or cut an individual.

[16] Counsel for the respondent also argued that the exact time the incident took place is immaterial and that what is material is that the offence took place at night. Counsel for the respondent relied on Kato Kyambadde & Anor v Uganda [2017] UGSC 32 to state the law on inconsistencies in evidence. Counsel for the respondent submitted that the contradictions in this case were minor and prayed that this court finds that they are immaterial since they do not point to deliberate untruthfulness and can easily be explained by the fact that the crime took place at night.

[17] Counsel for the respondent concluded by submitting that all the ingredients of the offence of aggravated robbery were proved beyond reasonable doubt. Counsel prayed that this court finds that the learned trial judge properly evaluated the evidence on record.

[18] In reply to ground 2 of appeal, counsel for the respondent submitted that the principles under which an appellate court can interfere with a sentence imposed by the trial court are set out in Livingstone Kakooza v Uganda [1994] UGSC 17. Counsel for the respondent submitted that the offence of aggravated robbery carries a maximum sentence of death. Counsel conceded that while passing the

sentence, the trial judge did not indicate whether he had taken into account the mitigating factors alongside the aggravating factors. Counsel for the appellant stated that a review of precedents by this court reveals that this court has in previous similar cases sustained sentences of life imprisonments. Counsel for the respondent referred to the cases of Katunda Johnson v Uganda [2009] UGCA 27 and Kamukama Moses v Uganda [2009] UGCA 38 where the appellants were sentenced to life imprisonment for the offence of aggravated robbery.

[19] Counsel for the respondent was of the view that given the foregoing precedents, the trial court exercised extreme leniency to impose a sentence of 17 years. Counsel prayed that this court upholds the sentence since it is neither harsh nor excessive and that the appeal be dismissed.

Analysis

[20] It is our duty as a first appellate court to subject the evidence adduced at trial to a fresh re-appraisal and reach our own conclusions of fact and law, bearing in mind, however, that we did not have the opportunity to see the witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, Bogere Moses v Uganda [1998] UGSC 22, Kifamunte Henry v Uganda [1998] UGSC 20.

[21] The facts of this case according to the prosecution are that while at Batoma club on the night of 16th December 2012, the appellant approached Mpanso Faruku (PW1) asking for UGX 1,000 so that he could buy some beer. When PW1 told the appellant that he did not have the money, the appellant attacked him. The appellant slapped him in the face and threw him down as he tried to move away. The appellant stabbed the victim with a sharp object while two other people joined him and in the process money worth UGX 240,000 was stolen by the assailants. PW2 who witnessed the scuffle called PW3, a member of the area defence committee who arrested the appellant and took him to police together with PW1 on a motorcycle. He handed the appellant over to the police together with the exhibits he had collected at the scene of the crime and proceeded to take the appellant to hospital. Upon medical examination, PW1 was found to have suffered grievous harm from the attack.

Ground 1

[22] Counsel for the appellant contended that the prosecution failed to prove that the appellant stole the alleged money from the victim (PW1). PW1's testimony was to the effect that while the appellant beat him up, his two friends picked money from his pocket. Upon cross examination, PW1 stated that it was the appellant who took the money he had in his pockets. The appellant claimed to have had UGX 240,000 that went missing after the scuffle. PW1 testified that the appellant started attacking him after he had asked him to give him UGX 1,000 and he declined to do so. PW3 who was a member of the defence committee stated that when he reached the club, he found PW1 holding the appellant's hand and that PW1 told him that the appellant and his colleagues had grabbed his money. He also stated that when the appellant was searched, he was not found with the money. This was confirmed by PW4.

[23] From the evidence, it is clear that PW1's money was stolen during the attack of PW1 by the appellants and his two colleagues. An inference can be drawn that the money was taken by the appellant's colleagues who managed to escape from being apprehended.

[24] Counsel for the appellant also contended that the prosecution failed to prove that a deadly weapon was used during the incident. Counsel for the appellant mainly relied on the inconsistencies in the prosecution evidence with regard to the nature of weapon that was used. PW1 stated in his testimony that when the appellant threw him down, he pulled out a sharp object and started stabbing him. The appellant stabbed him in his hands, face, left ear and at the back of the right side of his head. He stated that while he was being examined the following morning in hospital, broken bottle pieces were removed from his ears, hands and head. Upon cross examination, PW1 stated that he realised that the appellant had used a bottle piece to hurt him during the attack. PW2 stated in her testimony that she had found broken bottles inside the club. PW3 testified that when he found the appellant, he was bleeding from his hands, ear, nose and head and there were wounds in those places caused deep cuts made by broken bottles. He stated that he found some people holding the appellant's hand and a beer bottle with a broken top. He took the accused and the victim to the police station and when the appellant was searched at the police station, he was found with another broken beer bottle.

[25] PW4, the police officer who was on duty at Mafubira police post on the night of the incident stated that PW3 handed over the appellant to her at around 4:00 am. The victim claimed to have been badly pierced by broken bottle and his

whole face was filled with blood and his ears and hands had been cut with broken bottles. She stated that they found the appellant with three soda bottles whose tops had been broken in his pockets upon searching him. She exhibited the bottles in court which were admitted into evidence. Upon cross examination, she confirmed that the bottles that were removed from the appellant's pockets were soda bottles and not beer bottles.

[26] The law on contradictions and inconsistencies is well settled. Major inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to the rejection of the evidence if they point to deliberate untruthfulness. See Twinomugisha Alex alias Twine and Others v Uganda [2003] UGSC 20. We are unable to find in this case that the inconsistencies were major and intended to tell deliberate lies to court. The trial judge was justified when he treated the contradictions and inconsistencies in the prosecution case as minor and ignored them.

[27] Counsel for the appellant also contended that the appellant was not properly identified given the existing conditions at the time of the commission of the offence. From the evidence on record, it is clear that the offence took place late in the night of 16th December 2012. PW1 testified that the incident happened between the hours of 12:00 am to 2:00 am while PW2 stated that she witnessed the attack between the hours of 2:00 am to 4:00 am. Much as there is discrepancy as to the time when the incident took place, this inconsistence is minor. What is clear is that the attack on PW1 took place late in the night of that fateful date. PW1 testified that he first saw the appellant when he approached him asking for money. He stated that the scuffle lasted about 30 minutes and that while he was being beaten, the appellant took him outside of the club. Upon cross examination, PW1 stated that there were fluorescent bulbs outside the club therefore he could identify the appellant. He stated that it was the accused and his friends who pulled him outside of the club.

[28] PW2 stated in her testimony that she was heading to the club when she encountered the appellant, PW1 and other people in a scuffle outside the club. She testified that she had known the appellant as Vimba for about four years prior to the incident. Upon cross examination, she stated that the she observed the scuffle for about 2 minutes before calling the club owner. She also stated that she did not know the two people who were with the appellant. PW1 stated in his evidence that he saw PW2 witness the scuffle while outside the club.

[29] While dealing with evidence of identification, courts have to consider whether the conditions were favourable for a proper identification. In Abudalla Nabulere & 2 Ors Vs Uganda [1978] UGSC 5, the Supreme Court stated:

> 'Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.'

[30] Upon considering the evidence on record, we are of the view that the appellant was properly identified. The scuffle lasted for about 30 minutes which was adequate time for the victim to identify the appellant. There were fluorescent bulbs outside the club which provided enough lighting for the appellant to make a proper identification. PW1 testified that he continued holding onto the appellant's hand as he was raising an alarm until PW3 came and got hold of the appellant. PW2 who witnessed part of the scuffle had prior knowledge of the appellant and was able to identify him.

[31] Secondly the appellant was arrested at the place of the incident by PW3, while PW1, the victim, was holding his hand and taken to the police station at Mafubira. Given that the chain of custody of the appellant is so well established, there is no possibility that there was mistaken identification.

[32] In the circumstances we find that the appellant's contentions are unfounded. Ground 1 fails.

Ground 2

[33] It is now a well-settled position in law, that this Court will only interfere with a sentence imposed by a trial Court where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with the 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 circumstances of that particular case. 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

[34] We note that the sentence in this case is illegal as the learned trial judge did not comply with Article 23(8) of the Constitution. The sentencing order is set out as follows:

> **'Sentence:-**
>
> I have carefully considered that the convict Asiimwe Brian, while drunk, ruthlessly attacked the victim and repeatedly cut him using sharp broken bottles on the victim's head and face causing him grievous harm and maiming. The convict is, in my view a danger to the community and should be separated from society while he is assisted to rehabilitate.
>
> For these reasons, I sentence him to seventeen (17) years' imprisonment.
>
> I also order that after serving his sentence, before his eventual release from prison, the convict shall compensate the victim with UGX. One (1) million shillings for the treatment costs incurred by the victim. The period the convict has been on remand is deducted from the custodial sentence.'

[35] The appellant spent a period of 3 years and 4 months on remand. The learned trial judge stated that this period is deducted from the custodial sentence but the sentencing order does not reflect that this was done. Article 23(8) of the Constitution 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.'

[36] Guideline 15 of the Constitution (Sentencing Guidelines for courts of Judicature) (Practice) Directions 2013 states:

> **'Remand period to be taken into account.**
> (1) The court shall take into account any period spent on remand in determining an appropriate sentence.

(2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into.'

[37] In Rwabugande Moses vs Uganda [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal. We cannot ignore this illegality despite the absence of an appeal on this point.

[38] For the aforementioned reason, the sentence against the appellant is set aside. We now invoke Section 11 of the Judicature Act which gives this court power as that of the trial court to impose a sentence of its own.

[39] In mitigation, counsel for the appellant stated that the appellant was a first offender. He was a young man with a productive life and he prayed for a sentence of 14 years imprisonment. The appellant told court that he was asthmatic and a heart patient with a 3 ½ years old child who he had left at one month; that his mother was sick and that he was also looking after his deceased brother's children. The appellant prayed for leniency.

[40] The aggravating factors were that the appellant had committed a capital offence that carries the maximum sentence of death. The appellant had used a deadly weapon to rob the victim of his hard earned money. He put the victim's life in danger due to the injuries that he caused him. Counsel for the state stated that the appellant was not remorseful throughout the trial. Counsel for the respondent prayed for a deterrent sentence ranging between 18-20 years' imprisonment.

[41] In Livingstone Kakooza vs Uganda [1994] UGSC 17, the Supreme Court was of the view that sentences imposed in previous cases of similar nature do afford material for consideration while this court is exercising its discretion in sentencing. We are duty bound to maintain consistence or uniformity in sentencing while being mindful that cases are not committed under the same circumstances.

[42] In Kajura & 2 others v Uganda [2014] UGCA 37, the appellants were convicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act and sentenced to 10 years' imprisonment. The particulars of the offence were that on the 27th day of December 2003 at Mbaale village, Mbale Parish, Bufunjo Sub-County in Kyenjojo District, the appellants robbed Rwamayaga Wycliff of UGX 250,000 and a motor cycle Reg. No. UAG 225G

all valued at approximately UGX 1,750,000, and at or immediately before or immediately after the said robbery, used a deadly weapon, to wit pangas on the said Rwamayaga Wycliff and caused grievous harm to him. This court allowed the appeal against the sentences on the ground that the learned trial judge did not take into consideration the period spent on remand. After considering the period of 5 years the appellants spent on remand, this court imposed a sentence of 10 years' imprisonment.

[43] In Komakech v Uganda [2014] UGCA 15, this court upheld a sentence of 14 years' imprisonment for the offence of aggravated robbery. The appellant was a security guard at Mo Petro station at Kagoma in Wakiso district, while on night shift on 30th March 2006, the appellant put the attendants that were working that night at the petrol station on gun point as they were counting money. He stole the money which was worth the day's sales and during the scuffle he fired a bullet which injured a one Kigozi John thus injuring his bladder.

[44] In Ssemiyingo v Uganda [2018] UGCA 42, the appellant was indicted and convicted of aggravated robbery contrary to sections 285 and 286 of the Penal Code Act and sentenced to 15 years' imprisonment. On appeal against the sentence, this court reduced the sentence to 12 years' imprisonment. While in Okuja Vs Uganda [2017] UGCA 90, the appellant and another were indicted of the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. Upon rendering the sentence by the trial court illegal for failure to comply with Article 23(8) of the Constitution, this court imposed a sentence of 10 years' imprisonment against the appellants. In Aliganyira Richard v Uganda [2010] UGCA 50, the appellant was convicted of aggravated robbery and sentenced to death. On appeal, the death sentence was set aside and substituted with a sentence of 15 years' imprisonment.

[45] 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. The trial court found that the appellants had on the 17th February 2005 robbed a one Gakyaro Omuhereza of UGX 2,000,000.00 and had used a deadly weapon in the process of the robbery upon the said Gakyaro. The trial court sentenced each of the appellants to 20 years' imprisonment. The appellants appealed to this court against the sentence contending that it was harsh and excessive in the circumstances of the case. This court substituted the sentence of 20 years' imprisonment with a sentence of 13 years' imprisonment for Appellant No.1 while it imposed a sentence of 12 years' imprisonment on Appellant No.2.

Decision

[46] We find that under the circumstances of this case the appropriate sentence would be imprisonment for 15 years. We deduct the period of 3 years and 4 months the appellant spent in pre-trial detention from that period. **We accordingly sentence the appellant to a term of 12 years and 8 months' imprisonment to be served from the 31st day of March 2016, the date of conviction.**

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

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Mutangula Kibeedi
Justice of Appeal