THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Hellen Obura & Ezekiel Muhanguzi, JJA)

CRIMINAL APPEAL NO. 0023 OF 2016

1. **KASUMBA KENNETH**
2. **KAWEESI FRANK::APPELLANTS**
3. **KIRYA RAJAB**
4. **KALEMERA AMOS**

VERSUS

UGANDA::RESPONDENT

(An appeal from the decision of the High Court at Kampala before Joseph Murangira, J in High Court Criminal Session Case No. 337 of 2014 dated 9.2.2016)

JUDGMENT OF THE COURT

Introduction

The appellants are jointly appealing against the decision of the High Court (Joseph Murangira, J) in which they were indicted, tried and convicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. They were subsequently sentenced to 12 years imprisonment and also ordered to compensate the complainant Ushs. 120,000,000/= (One Hundred Twenty Million Shillings).

Background to the appeal

The facts as found by the learned trial Judge are that on 25.1.2013 at about 2:30pm, the appellants while at Karaoke Zone, Semuto Town Council, Nakaseke District robbed cash Ushs. 20,000,000/= and airtime cards of MTN, AIRTEL and WARID worth Ushs. 90,000,000/= belonging to Baku Distributors Limited and at the time of the said robbery, they threatened to use deadly weapons to wit; a knife and pixel axe on Nyesiga Eunice and Nyesigomwe Dorothy.

The appellants were arrested and indicted with the offence of aggravated robbery. They were subsequently tried, convicted and sentenced to 12 years imprisonment each and also ordered to pay Ushs.120,000,000/=. Being dissatisfied with this decision, the appellants have appealed to this Court on the following grounds;

1. *The learned trial Judge erred in law and fact when he admitted and relied on the charge and caution statement of A3 and A4 without holding a trial with in a trial which occasioned a miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when he criticized and dismissed the evidence of DW5 in his judgment that caused a miscarriage of justice.*
3. *The Learned trial Judge erred in law and fact when he held that the appellants had the common intention to commit the offence of robbery with A4 which occasioned a miscarriage of justice.*

In the alternative but without prejudice to the above,

4. *The learned trial Judge erred in law and fact when he sentenced the appellants to 12 (twelve) years imprisonment and ordered them to pay UGX. 120,000,000 (Uganda Shillings One Hundred Twenty Million) as compensation to the complainant.*

Representation

At the hearing of this appeal, Mr. Andrew Ssebugwawo represented the appellants on State Brief while Ms. Josephine Namatovu the Assistant Director Public Prosecutions represented the respondent.

Appellant's case

On ground 1, counsel faulted the learned trial Judge for admitting and relying on the charge and caution statements of the 3rd and 4th appellants without conducting a trial within a trial which in his view, occasioned a miscarriage of justice. He relied on the cases of ***Obote William vs Uganda, CACA No. 12 of 2014*** and ***Kawooya Joseph vs Uganda, CACA No. 50 of 1999*** to support his submission.

In regard to ground 2, counsel submitted that by the learned trial Judge over criticising the evidence of Semaganda Robert (DW5) and stating that it did not cast doubt on the prosecution evidence, it was a misdirection of the law which occasioned a miscarriage of justice. He relied on the case of ***IP Buko Difasi & anor vs Uganda, CACA No. 14 of 2010*** to support his submission.

On ground 3, counsel submitted that much as DW5 admitted to committing the offence, he did not implicate the rest of the appellants in his evidence even though he knew them. He added that the evidence adduced before the trial Court does not in any way point to the fact that the appellants participated in the offence of aggravated robbery. Counsel argued that they were just accessories after the fact having bought and sold stolen goods from DW5. Further that dismissing the evidence of DW5 and holding that all the appellants had the common intention to commit the offence occasioned a miscarriage of justice.

On ground 4 which was argued in the alternative, counsel submitted that sentencing the appellants to 12 years imprisonment with an order to compensate the complainant Ushs.

120,000,000/= was harsh considering that the goods which had been stolen were recovered. He referred this Court to Article 28(8) of the Constitution which is to the effect that no penalty should be imposed on a convict that is severer in degree than it should be at the time of commission of a crime. Counsel prayed that the appeal be allowed, conviction quashed and sentence set aside.

The respondent's counsel did not file his written submissions as ordered by court. In the circumstances, we shall consider the appeal based on the arguments of the appellants' counsel and the evidence on record.

Court's consideration

As a first appellate court we are enjoined to re-evaluate the evidence on record and come to our own conclusion on findings of fact and Law. ***See; Rule 30(1) of the Judicature (Court of Appeal Rules) Directions; Kifamunte Henry vs Uganda, SCCA No. 10 of 1997 and Bogere Moses vs Uganda, SCCA No. 1 of 1997.***

We have carefully studied the court record, the submissions of both counsel and the authorities cited to us. We shall proceed to resolve the grounds of appeal in the order presented by counsel for the appellant.

On ground 1, counsel faulted the learned trial Judge for admitting and relying on the charge and caution statements of the 3rd and 4th appellants without conducting a trial within a trial which in his view, occasioned a miscarriage of justice because it was not established whether or not the statements were obtained voluntarily.

We are alive to the fact that a trial within a trial is purely a rule of practice and not a rule of law. As Lord Devlin said in ***Connelly vs Director of Public Prosecutions (4) [1964] 2 ALLER at pg.446,*** when comparing a rule of practice with a rule of law;

"A rule of practice is in my opinion different. When declared by a court of competent jurisdiction, the rule must be followed until that court or a higher court declares it to be obsolete or bad or until it is altered by statute."

We note from the court record at page 67 that the defence counsel informed court that they had agreed to admit the 3rd appellant's charge and caution statement without conducting a trial within a trial over the same. We further note at page 68 that when the defence counsel, Mr. Steven Senkezi, was asked whether he objected to the tendering in of that statement, he said he did not have any objection. We cannot now comprehend why we should fault the learned trial Judge for admitting the 3rd appellant's charge and caution statement on court record without conducting a trial within a trial which, according to the defence counsel, they had agreed not to carry out. A trial within a trial is only conducted where an accused person retracts or repudiates a confession attributed to him/her and at the trial, where tendering of the charge and caution statement in evidence is objected to. The purpose of a trial within a trial, would then be to decide based upon the evidence of both sides, whether the confession was voluntarily made and as such it should be admitted. ***See: M'Murari s/o Karegwa vs R (1954) 21 EACA 262*** and ***Mwangi s/o Njerogi vs R (1954) 21 E.A.C.A. 377.*** In the instant case, there was no objection to the tendering of the statement in evidence and so there was no need to conduct a trial within a trial.

Regarding the 4th appellant, we note at page 72 of the court record that during the trial, the defence counsel raised an objection to the tendering in of Semaganda Robert's (DW5) charge and caution statement in evidence for reasons that; firstly, the facts in the statement are not the same as those the appellant pleaded guilty to. Secondly that, the statement seemed to be having various handwritings which gravely affected the appellant. Thirdly that, the circumstances under which the charge and caution statement was made are not known. Lastly, that the signature of the alleged maker is very suspicious and it is not known whether

it is the appellant who signed or someone else. For those reasons, counsel prayed that a trial within a trial be conducted. In its ruling, the trial court rejected the prayer to conduct a trial within a trial on the ground that during the plea bargaining session which was attended by both counsel, DW5 pleaded guilty and the defence counsel never prayed to court to have the statement expunged from the prosecution witnesses' statement on the police file. Further that, the appellant was already convicted and sentenced on his own plea of guilty.

We note that during his evaluation of evidence on all the appellants' participation at pages 371-372 of the court record, the learned trial Judge noted that DW5's evidence was tinted with falsehoods having denied his other name "Kagugube" and his charge and caution statement, and having given contradictory evidence on oath from that of his admissions in the plea of guilty he entered on 7th October, 2015. For those reasons the learned trial Judge rejected DW5's evidence as unbelievable and he did not therefore rely on it. However, he relied on the evidence of PW1, PW3, PW5, PW6, PW7 and PW8 and also found that it was corroborated by the evidence of A1, A2, A3 and A5 wherefore in agreement with the prosecution and assessors' opinion, he convicted the appellants.

With this evidence on record, our considered view is that there was no prejudice occasioned to the appellants as a result of the irregularity because the learned trial Judge rejected the evidence of DW5 and did not rely on it in coming to his conclusion. We therefore, cannot fault him for finding as he did and arriving at the conclusion he made. In the premises, we do not find merit in this ground and it therefore fails.

On ground 2, the appellants fault the learned trial Judge for criticising and dismissing the evidence of Semaganda Robert (DW5) which according to him occasioned a miscarriage of justice. As we have already noted in our resolution of ground 1, the learned trial Judge rejected DW5's evidence and gave reasons for doing so. He found DW5 to be a witness who

appeared hesitant to tell the whole truth, could take long to answer, he looked carried away by the questions put to him by counsel for the state. These are some of the reasons why the learned trial Judge believed the prosecution evidence and disbelieved DW5's evidence.

In ***Baguma Fred vs Uganda, Criminal Appeal No. 07 of 2004***, this Court reiterated the legal position upheld by the then East African Court of Appeal in ***Pandya vs R [1957] EA 336*** that

> *"When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the appellate court has not seen."*

As a first appellate court, we did not have the benefit of observing the witnesses as they testified as the learned trial Judge did. In the circumstances we have to rely on the observations of the learned trial Judge. In our view, his observations with regard to DW5 were spot on. In the premises, we have not found any evidence on the record for us to conclude otherwise. In the result, this ground also fails.

In regard to ground 3, the appellants fault the learned trial Judge for holding that they had the common intention to commit the offence of robbery with A4 which occasioned a miscarriage of justice.

Section 20 of the Penal Code Act deals with common intention and provides as follows;

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."*

In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. If this can be shown then the doctrine of common intention would apply irrespective of whether the offence committed was the one intended or not. It is now settled that an unlawful common intention does not imply a pre-arranged plan. ***See: P vs Okute [1941] 8 E.A.C.A. at page 80***. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to dissociate themselves from the crime. ***See: R vs Tabulayenka s/o Kirya and ors [1943] 10 E.A.C.A. 51*** It can develop in the course of events though it might not have been present from the start. ***See: Wanjiro Wamiro vs R [1955] 22 E.A.C.A. 521 at page 52***. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence ***See: Mutebi and anor vs Uganda, Criminal Appeal 144/75 E.A.C.A***

In the instant case, the learned trial Judge directed himself on the law of common intention and found as follows:

> *"Thus from the evidence of A1, A2, A3, A4 and A5, it comes out clear that these accused persons were always in touch with each other. And the way they handled themselves as far as the selling and purchasing of the stolen airtime on the 26th January, 2013 at Busunju amongst themselves, all corroborates the prosecution case against them. The aforestated also proves that the accused before and during the robbery had common intention. Each accused person falls within the ambit of section 20 of the Penal Code Act (supra). The accused persons had a common intention that executed the common purpose that is the robbery. In this regard, each accused person committed the offence in his own omission. They are thus principal offenders pursuant section 19 (1) (a) and (c) of the Penal Code Act. (Sic)"*

From the court record, the complainant, Njirabakunzi John (PW1) stated that due to the robbery they lost airtime worth Ushs. 90,000,000/=. He added that he knew the 1st, 2nd and 4th appellants before the robbery. He testified that he had a shop in Busunju and the 1st appellant had an uncle in a shop next to it. In regard to the 2nd appellant, PW1 stated that he had established a shop in Semuto where he (PW1) also has a shop directly opposite it. As for the 4th appellant, he had a salon in a building next to PW1's shop which he closed three weeks after the robbery. Regarding the 3rd appellant, PW1 stated that he knew him after the robbery when he had been arrested as one of the suspects by the security organs.

PW1 further testified that on 25/01/2013 at around 3:20 am Nyesiga Eunice (PW2) and Ayesigomwe Dorothy went to him crying that close to 5 people who were unidentified went into their shop, held them hostage, broke everything in the shop and took all the airtime and money that had been worked for the previous day. They reported the matter to police which started tracking the money using the serial numbers of the 2000/= denominations for the Airtel airtime that had been stolen. The following day, police arrested the 1st appellant and a one Mubiru Hussein who had started using the airtime. Subsequently the 2nd appellant was arrested after 2 months having disappeared from the area and gone into hiding. Upon his arrest, the police recovered stolen airtime in his shop from under a crate of soda together with some cash. PW1 also added that when the print out for Airtel and MTN came out, it revealed that the 3rd appellant used his phone to communicate at the scene of crime and after a year of hiding, he was arrested. Regarding the 4th appellant, he was arrested by Mubiru Hussein to whom he had sold the stolen airtime.

Nyesiga Eunice (PW2) testified that on 25/01/2013 at around 2:00 am while she and Dorothy Ayesigomwe were sleeping in the shop where they were working, she was awakened by Dorothy and they saw 3 people who had broken into the shop and were holding flashing torches. They also had a knife and a bar. One of them remained guarding them (PW2 and Dorothy) and warned them not to make an alarm, the other remained guarding the behind

door while the third one picked up keys of the two drawers and entered the shop. He pushed the airtime boxes and the coin boxes into the bedroom and they were parked into PW2's suitcase. He then called someone and told him to get the car ready and not to put its engine off. Afterwards, they pushed PW2 and Dorothy into the shop, locked them in and left with the stolen items.

Detective AIP Okiriya James Francis (PW3) testified that on 25/01/2013 at around 4:00 am he received a telephone call from Detective Corporal Emojong who was by then in charge as CID station. He (Emojong) reported to him a case of robbery which had occurred the previous night at PW1's shop in Semuto Town Council. He then arranged personnel and at around 6:30 pm they proceeded to the scene of crime where he found PW2 and Dorothy (the victims) and he recorded their statements in detail. He also recorded PW1's statement and investigations commenced. On 1/02/2013, the 1st appellant together with a one Hussein Mubiru were arrested and brought before PW3. He interviewed them on 2/02/2013 and the 1st appellant revealed that the robbery was the deal of so many people and the leader was the 3rd appellant, who according to PW3, was a well-known criminal and was being looked for by several police stations. Further, that Mubiru revealed to him that the airtime he was found with was sold to him by the 4th appellant.

PW3 added that on 3/02/2013, he received information that the 2nd appellant together with a one Allan who had disappeared from the town had been seen around, so PW3 mobilized manpower and proceeded to arrest them. The 2nd appellant's house was searched and 154 cards of Airtel airtime of 2000/= denominations was recovered together with cash worth Ushs. 195,000/=. As a result, he was arrested. PW3 added that during Allan's arrest he lamented that it was the 3rd appellant who had brought these problems upon him because of the airtime that was robbed. They were both taken to Kiwoko Police Station in Nakaseke with the exhibits and the investigating officer allocated the file to AIP Adanga James to continue with the investigations. The 3rd appellant was arrested on 30/12/2013.

Katongole Edward (PW4) testified that he was at his shop and the 2nd appellant came and told him that he wanted to sell him airtime, which he accepted. He purchased Airtel airtime of 2000/= packs only worth 350,000/=. After sometime, while in Busunju town, police officers came and arrested the 2nd appellant for stealing airtime. PW4 then went to the GISO of the area and explained to him that he had also bought airtime from the 2nd appellant. The GISO then told him to bring the airtime that had been sold to him together with the money which he had got from its sale (Ushs. 30,000/=) and they went together to police where he made a statement.

No. 24967, Detective Corporal Ogoola Frederick (PW6) testified that on 3/02/2013 he was picked from Nakaseke police station by the then District CID Officer (PW3) and DPC Kyaligonza Edward to go to Busunju town council to make inquiries and effect an arrest of the 2nd appellant. When they reached there in the company of other officers, the 2nd appellant fled on seeing them. PW6 chased after him and arrested him and he was taken to his shop. He (PW6) carried out a search under the supervision of PW3 and he recovered 154 Airtel airtime cards in denomination of 2000/= concealed under the counter in his shop. PW6 also recovered money worth Ushs. 195,000/= under the carpet in the 2nd appellant's shop.

Detective AIP Aryong Chrispo William (PW7) testified that on 17/01/2014 he recorded the charge and caution statement of the 3rd appellant. He stated that the 3rd appellant confessed to him that in December, 2012 a one Kagugube Semaganda Robert approached him and told him about a deal to rob a certain mobile shop in Semuto Town Council, Katale zone which belonged to Baku Distributors and it dealt in stationery and mobile items. He disagreed to this deal and told Kagugube to get other people to deal with. On 5/02/2013, Kagugube went to his (3rd appellant's) home in Kampala and informed him that he was going to be arrested from Busunju on allegations of robbery. The 3rd appellant then advised Kagugube to stay with him in hiding at his home where he spent 6 months after which they got a misunderstanding and Kagugube went to Kiboga District to grow maize.

PW7 further testified that on 25/03/2014, Kagugube was also arrested and brought in to make a charge and caution statement. He told PW7 that in January 2013, the 3rd appellant instructed him to go to Semuto to spy on the business of Baku Distributors, which he did. The target was to see whether workers sleep in that building after work and if so, how many do. He spied and confirmed that two ladies sleep in the house while the men go away. He then invited the 3rd appellant to confirm which he did and after two days the 3rd appellant called him and told him that the mission had been executed but unfortunately they had not got enough money but airtime. He was then invited to the 3rd appellant's home to pick the airtime worth Ushs. 3,000,000/= and deliver it to the 1st and 2nd appellants who gave him Ushs. 1,200,000/= as part payment which money he took to the 3rd appellant and in return he was given Ushs. 300,000/= as a vote of thanks for the good job done. After a week, the 1st and 3rd appellants called and informed him to go pick the balance but when he reached Busunju he got information that the 1st and 3rd appellants had been arrested and that the call to pick the money was a trap set for him. He then decided to escape to Kampala where he met the 3rd appellant who advised him to hide himself for a while, which he did until he was arrested.

No. 32565 Detective Corporal Ogwok Chan Bruno (PW8) testified that he knew the 1st and 3rd appellants physically because he participated in investigating them in regard to the robbery. In his investigation, he identified some phone numbers which included one that was registered in the name of the 2nd appellant (0772314243) and using this number, he was able to find out his associates who included the 3rd appellant with whom he communicated at 2:00 am on the night the robbery took place in Semuto. PW8 also discovered in his investigation that Kagugube, while in Semuto, made calls to the 1st, 2nd and 3rd appellants on the night of the robbery and thereafter. Further, his investigations revealed that on the night of the robbery, the 1st appellant made calls to Kagugube and the 2nd appellant.

It is clear from the above prosecution evidence that the appellants knew each other and their conduct before, during and after the robbery indicated that they were acting in close concert

with one another. We also note from the above evidence that the actual perpetrators of the crime were the 3rd appellant (Kirya Rajab) together with his brother in law, Kagugube Semaganda Robert with whom the rest of the appellants shared a common intention to commit the offence of robbery. We find that the 'after the act' incidents of delivery and distribution of the airtime by Kagugube to the 1st and 2nd appellants shops who later sold to the 4th appellant and a one Hussein Mubiru who is already a convict on the same matter was a guise to cover up their involvement in the robbery. Otherwise, we cannot comprehend why the 3rd appellant would send Kagugube all the way back to Semuto to deliver the airtime to specific buyers other than selling it off here in Kampala to random buyers. To our minds, this is an indication that they all acted in close concert to profit from the robbery having failed to find enough money at the scene of crime. It suffices to add that initially, the 1st, 2nd and 4th appellants were not involved in airtime business and all of a sudden they started selling airtime and buying it from a random distributor, who in this case was Kagugube. It is therefore our finding that their actions and their failure to disassociate themselves from the robbery proves that they had a common intention. In the premises, we cannot fault the learned trial Judge for finding as a he did. In the premises, this ground also fails.

On ground 4 which was argued in the alternative, the appellants fault the learned trial Judge for sentencing them to 12 years imprisonment and in addition ordering them to pay Ushs. 120,000,000 (One Hundred Twenty Million shillings) as compensation to the complainant. Counsel argued that this was harsh considering that the goods which had been stolen had been recovered.

It should be noted that the offence of aggravated robbery which the appellants were convicted of carries a maximum penalty of death, as per section 286 (2) of the Penal Code Act. However, having considered both the aggravating and mitigating factors and the time the appellants had spent on remand, the learned trial Judge in his discretion sentenced the appellants to 12 years imprisonment which period we consider lenient given the maximum

penalty prescribed and the range of sentences in cases of a similar nature as we have considered below.

In ***Olupot Sharif & another vs Uganda, Court of Appeal Criminal Appeal No. 0730 of 2014,*** the appellant was convicted of the offence of aggravated robbery and was sentenced to 40 years imprisonment. On appeal, this Court reduced the sentence to 32 years imprisonment.

In ***Ogwal Nelson & 4ors vs Uganda, Court of Appeal Criminal Appeal No. 606 of 2015,*** the appellants were convicted of aggravated robbery and the 1st appellant was sentenced to 35 years, the 2nd to 25 years, the 3rd to 30 years and the 4th & 5th to imprisonment for life. On appeal to this Court, each of their sentences were reduced to 17 years and 6 months.

Similarly, in ***Adama Jino vs Uganda, CACA No. 50 of 2006***, the appellant was convicted of three counts of aggravated robbery and sentenced to death. This Court, in reviewing the sentence set aside the death sentence and substituted it with 15 years imprisonment.

From the above authorities, we do not accept the argument of counsel or the appellants that the sentence of 12 years imprisonment is harsh.

In regard to the order of compensation, counsel for the appellants submitted that the stolen goods were recovered and therefore, ordering for such compensation was harsh. We note from the evidence on record that, the complainant stated that he lost airtime worth Ushs. 90,000,000/= and cash of Ushs. 20,000,000/= and what was recovered was 154 Airtel cards of airtime of Ushs. 2,000/= each, (which amounts to Ushs. 308,000/=) and cash of Ushs. 195,000/=. It is our considered view, that what was recovered was too little compared to what was lost.

Section 286 (4) of the Penal Code Act empowers court to order a person convicted of the felony of robbery and not sentenced to death 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.

The learned trial Judge ordered the appellants to pay Ushs. 120,000,000/= to the complainant as compensation for his loss. In view, of section 286 (2) of the PCA , we cannot fault the learned trial Judge for ordering so and as such we find it proper that the appellants should compensate the complainant of what he lost. In the premises, ground 4 of the appeal also fails.

On the whole, we find no merit in this appeal and we accordingly dismiss it.

We so order.

Dated at **Kampala** this....15th....day of...January.....2020.

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Elizabeth Musoke

JUSTICE OF APPEAL

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Hellen Obura

JUSTICE OF APPEAL

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Ezekiel Muhanguzi

JUSTICE OF APPEAL