THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Kakuru, Egonda-Ntende & Madrama, JJA*]

CRIMINAL APPEAL NO. 414 of 2015

(Arising from High Court Criminal Session Case No. 97 of 2011 at Kampala)

BETWEEN

Nuwamanya Mark ==========Appellant no.1
Mukasa Tonny ==========Appellant no.2
Mugisha Stephen==========Appellant no.3

AND

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

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted and convicted of the offence of robbery contrary to sections 129 (1), (3) and 4 (a) of the Penal Code Act. The particulars of the offence were that the appellants together with Namanya Amon on the 7th day of January 2011 at Lugazi cell in Mbarara municipality/district robbed Musimenta Mary of her master's property to wit 4500 US dollars, 3,000 Indian rupees, 100 Singapore dollars, Malaysian Sutu ringgit, one note of Thailand bath, three pairs of golden necklaces, three pairs of golden earrings, three golden watches for men, three watches for men among other items and at or immediately before or immediately after the time of the robbery threatened to use deadly weapons to wit knives on the said Musimenta Mary.

[2] The learned trial Judge sentenced the appellants to a term of imprisonment of 15 years. The appellants were also ordered to compensate UGX 5,000,000 as loss suffered by Mr. Patel Pravin, the victim. Being dissatisfied with both the conviction and sentence of the trial court, the appellants have appealed to this court on the following grounds:

> '1. The learned trial judge erred in law and fact he convicted the appellants on the basis of the evidence of PW1, PW3 & PW4 which evidence was weak, unreliable and insufficient thereby occasioning a miscarriage of justice.
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> 2. The learned trial judge erred in law and fact he convicted the appellants without the evidence of Boda Boda riders who are said to have arrived at the scene first and arrested the 2nd appellant thereby occasioning a miscarriage of justice.
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> 3. The learned trial judge erred in law and fact he convicted the appellants on the basis of prosecution evidence which had major gaps, inconsistencies and discrepancies which rendered it weak, unreliable and insufficient thereby occasioning a miscarriage of justice.
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> **In the alternative but without prejudice to the above**
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> 4. The learned trial erred in law and fact when he sentenced the appellants to a period of fifteen years imprisonment without taking into account the period the appellants had spent on pre-trial remand.
>
> 5. The learned trial judge erred in law and fact he ordered that the appellants should compensate the victim Mr. Patel Pravin with Ushs. 5,000,000/= which amount had no basis according to the evidence.'

[3] The respondent opposed the appeal.

Submissions of Counsel

[4] At the hearing, the appellants were represented by Mr. Andrew Sebugwawo and the respondent by Ms. Fatina Nakafeero, Senior State Attorney in the Office of the Director of Public Prosecutions.

[5] Mr. Sebugwawo argued grounds 1, 2 and 3 together. He submitted that the evidence that was led by the prosecution had major gaps, inconsistencies and discrepancies which rendered it weak, unreliable and insufficient to sustain a conviction. He referred to the evidence of PW1 and submitted that the prosecution did not call the '*boda boda*' cyclists who allegedly arrested and beat up appellant no. 2 to give evidence. He argued that the evidence of the '*boda boda*' cyclists was relevant due to the fact that after the arrest of the appellants, there were no further steps taken to confirm from PW1 whether the persons who attacked her were the ones that had been arrested.

[6] Counsel for the appellants was of the view that this raises a gap in the prosecution evidence due to the possibility that another person that is, appellant no.2 could have been arrested instead of the real assailants when she raised the alarm. Counsel for the appellants further submitted that appellant no.2 in his evidence stated that he is not Mukasa but rather Semakula and therefore he was not the person that was allegedly arrested at the scene of the crime. He argued that identification processes ought to have been conducted either at the police station or at the scene of the crime to draw a nexus between the person who allegedly stole the said property and the one that was arrested. He submitted that given the evidence on record, the issue of mistaken identity cannot be ruled out. Mr. Sebugwawo also submitted that there were no printouts of the telephone records to confirm the evidence of PW3, PW4 and PW5 which was to the effect that appellant no.1 and appellant no.3 were arrested through using appellant no.2's phone.

[7] Turning to ground 4, Mr Sebugwawo submitted that the learned trial judge while sentencing the appellants did not specifically credit the period spent on remand to the appellants as required by the law. He also submitted that the order by the learned trial judge to the appellants to refund the victim UGX 5,000,000 has no basis considering the evidence on record. Counsel was of the view that whereas an order for compensation is premised on the law, it must be granted on an evidential basis. Counsel for the appellants stated that not only does the evidence show that the money that was stolen from the complainant was recovered but also the prosecution did not pray for any order of compensation.

[8] In reply, Ms Nakafeero submitted that PW1 in her testimony stated that she knew appellant no.2 before the incident and she saw his face when he was beating and cutting her. She stated that the evidence of PW2 corroborated the evidence of PW1 which was to the effect that appellant no.2 was arrested at his gate. Counsel for the

respondent argued that the evidence of PW1 captured the fact that appellant no.2 was arrested by '*boda boda*' cyclists. She was of the view that the evidence of PW1 alone was sufficient to identify the appellant.

[9] In reply to ground 4, Ms Nakafeero submitted that it was held in Abelle Asuman v Uganda [2018] UGSC 10 that it is not necessary that the period spent on remand must be calculated or mentioned in the sentence order and that each judge is free to adopt a his or her own style as longer as the period is taken into consideration. She was of the view that this period was taken into consideration while sentencing the appellants. She prayed that this court upholds the conviction of the appellants. With regard to the compensation order, she cited section 126(1) of the Trial on Indictments Act and submitted that the provision covers either material loss or personal injury. She averred that not all the stolen goods were recovered and that the law gives discretion to the trial judge to grant an award of compensation where he or she deems necessary. She prayed that the appellants be sentenced to 12 years' imprisonment after deduction of the period spent on remand should this court be inclined to set aside the sentences of the appellants.

Analysis

[10] As a first appellate court, it is our duty to review and re-evaluate the evidence adduced at the trial and reach our own conclusion, bearing in mind that this court did not have the same opportunity as the trial court had to hear and see the witnesses testify and observe their demeanour. See Rule 30 (1) (a) of the Rules of this Court, Pandya v R [1975] E.A 336, Kifamunte Henry v Uganda, [1998] UGSC 20, Bogere Moses & Anor v Uganda, [1998] UGSC 22.

[11] We shall proceed to do so.

[12] The facts of this case are on the 7th day of January 2011 at around 10:00 am, while Musimenta Mary (PW1) was at the residence of Pravin R. Patel working as a house girl, some men knocked at the gate claiming to be officials from National Water and Sewerage Corporation (NWSC). The allegedly wanted to check the meter box. Upon consulting with her boss on phone, she did not open the gate for them. At around midday, when she was taking lunch for her boss, she was assaulted by the same men who wielded a knife on her and forced her back into the house. They forcefully broke into her master's room and stole the items mentioned above. In the course of the robbery, the assailants also cut PW1 on her right thumb. She tried

to raise an alarm but one of the thugs covered her mouth. In the process of escaping, one of the thugs was arrested by '*boda boda*' cyclists and beat him up. Appellant no.2 was eventually handed over to the police. On him was recovered a knife and a blue file purportedly belonging to National Water and Sewerage Corporation. While appellant no.2 was in custody, the police used his phone to track down and arrest the other appellants.

[13] We shall handle grounds 1, 2 and 3 together because they are interrelated. The trial court mainly relied on the evidence of PW1, PW3, PW5 and PW6 to convict the appellants.

[14] PW1, Musimenta Mary stated in her testimony that she knew appellant no.2 though not by name. She stated that on 1st July 2011around 9:00 am, appellant no.2 with another person came knocking on the gate where she worked claiming to work for National Water and Sewerage Corporation. She did not open for them the gate but instead contacted her boss about the matter and he told her to get in touch with the landlord (mayor). The appellants never left the gate. She stated that when she opened the gate to take food to her master, appellant no.2 pushed her back inside, took her back to the house, held her mouth and told her not to raise an alarm. The assailants asked for the key to her boss' bedroom but she told him them that she did not have it. They asked her to call the boss but she refused. She stated that thereafter appellant no.2 got a knife and cut her while the other assailant broke down the door to her boss' bedroom.

[15] Thereafter, that the assailants took her inside the bedroom and made her sit on the bed. They cut the cupboard in the bedroom with a knife and started removing necklaces, watches, money, earring, bungles, rings which they took. She stated that during the robbery, the assailants ordered her to keep quiet lest they kill her. PW1 stated in her testimony that after the assailants left the house, she peeped through the window and saw them calling a '*boda boda*'. She ran and informed the '*boda boda*' cyclists that they were thieves whereupon the cyclist arrested appellant no.2 and the other ran away. She called her PW2 on the phone that appellant no.2 had been arrested and he came with the police who re-arrested the appellant.

[16] Upon cross examination, PW1 stated that she did know appellant no.2 before the incident but saw his face when he was beating and cutting her. She stated that she told the police that she could recognise her attackers. She also stated that she never made an alarm because appellant no.2 had a knife and was holding her mouth. PW1 stated that appellant no.2 ordered her to sit down and was standing on top of her.

She also stated that appellant no.2 was holding a file for National Water and Sewerage Corporation.

[17] PW2, Pravin Patel, corroborated PW1's testimony that some people had come to his gate on that fateful date claiming to be officials from National Water and Sewerage Corporation and he had told her not to open for them. He stated that later in the day PW1 informed him on the phone that he had been robbed and when he came to the scene, he found appellant no.2 had been arrested by '*boda boda*' cyclists. He stated that inside his house, a door and cupboard had been broken, a suit case was open and that his money, jewellery, rings, necklaces, bangles, watches were missing. Upon cross examination PW2 stated that appellant no.2 was arrested at his gate and beaten by '*boda boda*' cyclists though he did not know the cyclists.

[18] PW5, Bataringaya Karuya Denis, a UPDF soldier attached to special operations stated that he assisted the police in intelligence gathering organisations in 2011. He stated that on 9th July 2011, Wilson Tumwine (the mayor) came to the police station reporting that his tenant had been robbed and his house maid's finger had been cut by the robbers. He stated that Wilson Tumwine came with one of the suspects (appellant no.2) who had been arrested by '*boda boda*' cyclists after the maid made an alarm. PW5 testified that the mayor came with a knife and a file folder as exhibits. He stated that the appellant had a phone on him which his colleagues kept on calling. He got the phone and pretended to be appellant no.2. A one Amon Amanya called the phone and asked where the appellant was. PW5 then told him that he had been beaten and was hiding in a maize garden near the scene of the crime. PW5 asked Amon Amanya to come to the nearby road and pick up the appellant since there many people and that he could not leave the maize garden. He stated that he proceeded with Ochaka to the garden but Amon called again and informed them that he would send a woman with money so that he could get a '*boda boda*'. The lady came to the scene but they could not arrest her so the plan was postponed to later in the evening at the suggestion of Amon Amanya.

[19] PW5 stated that in the evening, the police laid an ambush to arrest the people they were communicating with. He stated in his testimony that he arrested appellant no.3 and Amon Amanya was arrested by the O/C CID following a struggle in which he was shot in the leg. PW5 stated that they called the number they had been calling and the phone in Amanya Amon's pocket rang. He also stated that Amon informed them that the phone belonged to appellant no.1 who was the master planner of the gang. He stated that Amon took them to Kisenyi to find appellant

no1 who ran when he saw Amon but he shot appellant no.1 in the leg to prevent him from escaping. He also stated that when appellant no.3 was arrested, he told them that the woman who had been sent to bring the money to appellant no.2 while in the garden was Sarah of Katete. The police again used the phone to call and arrest her in the guise of finding facilitation for appellant no.2 to move away.

[20] PW6, No. 31458 D/S GT Makula Benjamin, stated in his evidence that he interrogated the appellants while in custody and established that they knew each other. He reiterated the same upon cross examination.

[21] PW3, Assistant Superintendent of Police, Twisane's evidence reiterated the evidence of PW5. He also stated that they recovered UGX 41,000, golden rings, a finger ring and earrings upon arresting appellant no.2 and Amon Amanya. PW3 testified that on 8th January 2011, he realised that his phone was missing and upon suspecting that he left it at the place where appellant no.3 and Amanya Amon were arrested, he went back to look for it. He testified that he found at the place of arrest a wallet and small knife. The wallet had foreign currencies which included Singapore dollars and Indian rupees which he handed over to PW6 as exhibits. PW5 corroborated this evidence, he stated that we accompanied PW3 back to the place of arrest to search for his phone and discovered the stated items. PW6 in his testimony stated that he recovered a bag, knife and currencies of India, Malaysia and Singapore as exhibits.

[22] PW4, No. 30121 D/CPL Turayhiikayo Elifazi, stated in his testimony that his role was to take photos of the crime scene. He stated that at the scene, he took photos of droplets of blood, broken locks of doors, drawers, broken bags and wardrobes

[23] On the other hand, the appellants in their defences denied having participated in the offence. Appellant no.2 stated in his defence that on 6th January 2011, he left Kampala for Mbarara to do some causal work on a construction site, he reached late and slept at Rukungiri Exotic Lodge. He testified that on the following day, as he was moving to the '*boda boda*' stage, he was arrested by people claiming he was a thief, that they took him to the scene of the crime, claimed that he had looted the place and made him sit down until the police came and arrested him. On cross examination, he stated that he is Semakula and that he did not have a phone. Appellant no.1 also denied having known any of the appellants prior to his arrest.

[24] Appellant no.3 denied knowing any of the accused persons save for Amon Amanya whom he had known since 2004 when he was a cook at Rugando Rwampara in Mbarara district. He stated that at around 4:00 pm on 7th January 2011, he got a call from Amon Amanya claiming that he had been involved in an accident and was in a clinic at Kakoba and that he needed to go to a bigger hospital for treatment. He could not recall the name of the hospital. Appellant no.3 stated that they were arrested by the police as Amon came out of the clinic to receive money from him.

[25] Despite the fact that PW1 did not know appellant no.2 prior to the robbery, there is cogent evidence that the conditions were conducive for a proper and positive identification devoid of mistaken identity. PW1 had earlier on in the day seen appellant no.2 when he tried to enter the premises under the pretext of being an official from National Water and Sewerage Corporation. PW1 stated that she saw the face of appellant no.2 when he was attacking her during the robbery. She also confirmed that she saw through the window appellant no.2 being arrested by '*boda boda*' cyclists when she made an alarm. Appellant no.2, whatsoever his true name is, was the person who was arrested by the cyclists. The evidence on record was sufficient to warrant a conviction against appellant no.2 without the evidence of the 'boda boda' cyclists who arrested him. Appellant no.1 and appellant no.3's participation in the crime was established, by circumstantial evidence, through the evidence of PW3, PW5 and PW6 which we believe to be credible, leading to only one conclusion, and that is the appellant no.1 and no.3 participated in committing the offence in question.

[26] In light of the above, there is sufficient evidence on record implicating the appellants in the commission of the offence. Grounds 1, 2 &3 therefore fail.

[27] Turning to ground 4, it is now a well-settled position in law, that this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence imposed is either illegal, or founded upon a wrong principle of the law. It will equally interfere with 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 circumstance. 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.

[28] The appellants contend that the learned trial judge did not take into consideration the period they spent on remand while sentencing them. 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.'

[29] In Rwabugande Moses v Uganda [2017] UGSC 8, the Supreme Court held that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. Taking the period spent on remand into account is a mandatory requirement. The period to be taken into account is that period which an accused person spends in lawful custody before completion of the trial. This period should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. It must be considered and that consideration must be noted in the judgment. See Abelle Asuman v Uganda [2018] UGSC 10.

[30] The relevant part of the sentence is set out as follows:

> '**SENTENCE AND REASONS**:
> In arriving at a sentence, the following are the considerations.
> The offence of Aggravated Robbery is grave in nature and in line case done in a brutal manner and cunning means. It was highly organised by a gang and I see the need of discouragements.
> The victims' lost property a lot of it and the convicts injured a helpless housemaid. Such terror on Innocent people needs to be curbed by imposing deterrent sentences.
> The convicts claim to have become repentant while in prison and have learnt/ acquired life skills while therein there is need to impose a sentence that will now reform them into good responsible law citizens where and if, they come out.
> I have taken into account the majority (*sic*) factors as submitted on behalf of the convicts by their counsel and in their words. I have considered the true (*sic*) spent or (*sic*) remand. All factors taken together in the particular circumstances of this case, I conclude as appropriate a sentence of fifteen years (15years of imprison each convict and impose the court.'

[31] The Supreme court, in the case of Abelle Asuman v Uganda [2018] UGSC 10 while interpreting its decision in Rwabugande Moses vs Uganda (supra) where it had

held that taking into account the period spent on remand while determining the appropriate term of imprisonment should be an arithmetical exercise stated:

> 'What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.
>
> Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.'

[32] It appears to us that whether a court adopts the arithmetical approach or the non-arithmetical approach to complying with the aforesaid constitutional provision it is incumbent on the court to ascertain first the exact period the convict has spent in lawful custody and then choose whether to apply Rwabugande Moses v Uganda (the arithmetical formula) or Asuman Abelle v Uganda (the non-arithmetical approach). When this period is not ascertained it cannot be possible to correctly take it into account.

[33] In the case at hand during the sentence proceedings Ms Karungi Loi, Senior State Attorney for the State, stated, '**The convicts have on remanded(*sic*) for 3 years and 11 month. (*sic*)**'

[34] Mr Twinamatsiko for the convicts appears to state that the offenders spent 4 years which we presume was referring to pre conviction custody.

[35] The learned trial Judge stated '**I have considered the true (*sic*) spent or (*sic*) remand.**', which, we presume to mean the time spent on remand. It is, however, not clear whether he had taken into account the period provided by the Senior State Attorney or the period provided by the learned defence counsel which were at variance. In our view in light of that variance it was incumbent upon the learned

trial judge to establish the correct period spent on remand and take it into account, adopting either of the accepted approaches to doing so. In failing to do so the learned trial Judge erred and was not in a position to correctly apply the provisions of article 23 (8) of the Constitution.

[36] In light of the foregoing we would find that the sentence imposed upon the appellants was illegal for failure to comply with article 23 (8) of the Constitution. We therefore set it aside and pursuant to the powers granted to this court under section 11 of the Judicature Act we shall proceed and impose a new sentence.

[37] The appellants were arrested on the day the offence was committed, 7 January 2011. They were subsequently arraigned before a court of law on or about the 21st January 2011 and remanded into custody. They were convicted and sentenced on the 28th January 2015. They had spent 4 years and about 21 days in lawful custody. This period must be taken into account in sentencing them in compliance with article 23 (8) of the Constitution.

[38] The appellants were first time offenders that committed a very grave offence in a violent manner, inflicting injury on PW1, in the course of the robbery. The appellants were young men aged, 20, 28 and 26 years old at the time of the commission of the offence. It is possible that they will be able to reform and be integrated back into society. We find that a sentence of 16 years imprisonment would suffice to meets the ends of justice from which we deduct 4 years and 21 days resulting in a sentence of 11 years 11 months and 7 days imprisonment, which we impose upon each of the appellants.

[39] In the result ground 4 is allowed.

[40] Turning to ground 5, the appellants contended that the compensation order did not have an evidential basis. Section 126 (1) of the Trial on Indictments Act states:

> 'Compensation.
> (1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order

> the convicted person to pay to that other person such compensation as the court deems fair and reasonable'

[41] Section 286 (4) of the Penal Code Act provides:

> 'Notwithstanding section 126 of the Trial on Indictments Act, 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.'

[42] It appears to us clearly that from the law set out above, an order of compensation is granted where a person affected has suffered loss or personal injury and the compensation would be recoverable by civil action. The compensation should be reasonable given the circumstances of the case. In this case, 4500 US dollars, 3,000 Indian rupees, 100 Singapore dollars, Malaysian Sutu ringgit, one note Thailand bath, three pairs of golden rings, three pairs of golden necklaces, three golden watches for men, three watches for ladies were stolen from the victim. Of which only 140 Indian rupees, one Malaysian ringgit, 29 Singapore Dollars, earrings and a ring for his wife were recovered. Further, there was evidence that the appellants had destroyed property of Mr Pravin Patel. We find that this was reasonable compensation given the circumstances.

[43] We are satisfied that ground 5 lacks merit and therefore fails.

Decision

[44] This appeal succeeds in part and is dismissed in part as above.

Signed, dated and delivered at Kampala this 11th day of June 2020.

Kenneth Kakuru

Justice of Appeal

Fredrick Egonda-Ntende
Justice of Appeal

Christopher Madrama
Justice of Appeal

11/06/2020

Judgment delivered in presence of Mr. Nkaluba Robinson holding brief for Mr. Ssebugwawo Andrew for the Appellants; Also in presence of the Appellants and Ms. Nabakembe Vicky counsel for the Respondent.

Delivered via zoom technology this 11th day of June 2020.

Ayebare Tumwebaze
Ass-Reg. COA
11-06-2020