THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0267 OF 2015

MUDHASI IVAN::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Entebbe before Alividza, J. delivered on 23rd July, 2015 (conviction) and 24th July 2015 (sentencing) in Criminal Session Case No. 0353 of 2015)

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT OF THE COURT

Background

On 23rd July, 2015, the High Court (Alividza, J.) convicted the appellant on two counts as follows. Count 1 - Aggravated Robbery contrary to **Section 285 and 286 (2) of the Penal Code Act, Cap. 120** and count 2 - Assault Occasioning Actual Bodily Harm contrary to **Section 236** of the same Act. On 24th July, 2015, the appellant was sentenced as follows: 27 years imprisonment on count 1, and 3 years imprisonment on count 2, both sentences to run concurrently.

The decision followed the trial of the appellant on an indictment that alleged, on the respective counts as follows. Count 1 - that the appellant had, on 5th October, 2012 at Akright Estate in Wakiso District robbed Estella Makumbi of two mobile phones (Samsung and Blackberry), a bag containing a British Passport, 7 credit Bank cards, USB sticks and cash 2,100 British Pounds and at or immediately after the said robbery used a deadly weapon to wit a big stick on the said Estella Makumbi. Count 2 - that on the same date and place referred to in count 1, the appellant assaulted Tigatege Ivan thereby occasioning him actual bodily harm.

The facts as accepted by the learned trial Judge may be summarized as follows. On 5th October, 2012, several intruders who included the appellant went into the residence of PW2 Ruth Mbabazi at Akright Estate in Wakiso District. They met PW1 Estella Makumbi, the victim in count 1 and PW3 Ivan Tigatege, the victim in count 2 at the said residence. PW3 had heard hooting at the gate, and gone to open, thinking that his mother PW2, had returned home. Instead, when he opened, one of the intruders had beaten him so badly that he became unconscious. PW1 who was inside the main house was also badly beaten, by the appellant who had made his way into that house, and she suffered serious injuries. The appellant also stole property from that residence, including PW1's hand bag containing 2 mobile phones and some money. The intruders then fled from the scene. Two days later, on 7th October, 2012, the appellant was arrested. At a subsequent date, PW1 picked the appellant out of a lineup at an identification parade, as one of the intruders who had attacked her the fateful day. PW1 had seen the appellant prior to the date of the attack.

The appellant denied the offence when he opened his defence. He stated that he had coincidentally been near PW2's residence at the time of the robbery and he had seen a motor vehicle drive off. He had met PW2 at that time and told her about that motor vehicle. On 7th October, 2012, he was called to the nearby police station and asked to give details about the car including the registration number, but he could not recall. He was thereafter surprised to be arrested in connection with the robbery at PW2's place. The learned trial Judge, nonetheless, believed that the appellant had been identified as one of the assailants, by PW1 the single identifying witness who gave consistent and reliable evidence. The learned trial Judge convicted the appellant as charged and thereafter sentenced him as stated earlier.

The appellant was dissatisfied with the sentences that the learned trial Judge imposed and appealed to this Court. The Court granted the appellant leave to proceed with his appeal against sentence only, on the sole ground that:

"The learned trial Judge erred in law and fact when she subjected the appellant to a sentence that was harsh and manifestly excessive in the circumstances of the case."

The respondent opposed the appeal.

Representation

At the hearing, Mr. Mutange Ian Derrick, learned counsel on State Brief appeared for the appellant. Ms. Fatina Nakafeero, learned Chief State Attorney in the Office of the Director of Public Prosecutions represented the respondent.

In accordance with existing Prison regulations to prevent exposure of inmates to COVID-19, the appellant followed the hearing remotely from Luzira Government Prison via Zoom Technology.

The Court allowed the respective counsel to adopt earlier filed written submissions in support of the respective parties' cases.

Appellant's Submissions

Counsel for the appellant began by making reference to the authority of **Abaasa and Another vs. Uganda, Court of Appeal Criminal Appeal No. 33 of 2010 (unreported)** for the applicable principles when this Court as an appellate Court is considering an appeal against a sentence imposed by the trial Court:

"...this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence is 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."

Counsel also referred to the authority of **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported)** for the holding that sentences imposed in previous cases of similar nature are relevant when an appellate Court is reviewing a sentence imposed by the trial Court. Counsel referred to previously decided similar cases of **Ouke Sam vs. Uganda, Court of Appeal Criminal Appeal No.**

251 of 2002; Adama Jino vs. Uganda, Court of Appeal Criminal Appeal No. 50 of 2006, Kusemererwa and Another vs. Uganda, Court of Appeal Criminal Appeal No. 83 of 2010, and Rutabingwa James s. Uganda, Court of Appeal Criminal Appeal No. 5 of 2001 (all unreported), and submitted that the sentences imposed in those cases of Aggravated Robbery, did not exceed 20 years imprisonment. Counsel faulted the learned trial Judge for failing to refer to any decided cases in her sentencing remarks, and contended that if she had made any reference, she would have imposed a shorter sentence. He urged this Court to apply the principle of consistency in sentencing as articulated in the authority of **Mbunya Godfrey vs. Uganda, Supreme Court Criminal Appeal No. 04 of 2011** where it was held that courts should try as much as possible to ensure consistency in sentencing, and impose a shorter sentence not exceeding 20 years imprisonment consistent with the precedents cited earlier. He invited the Court to consider the mitigating factors in favour of the appellant and impose a shorter sentence. The appellant was a young man, and was remorseful at sentencing. Counsel proposed to this Court to find a sentence of 15 years imprisonment appropriate in the circumstances.

Respondent's submissions

Counsel for the respondent supported the sentence that the learned trial Judge imposed. She reiterated that an appellate Court should not lightly interfere with a sentence imposed by the trial Court and referred to the authorities of **Wamutabenawe Jamiru vs. Uganda, Supreme Court Criminal Appeal No. 74 of 2007 and Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995 (both unreported).**

She noted that the appellant raised two grounds to justify this Court to interfere with the sentence imposed. First that the sentence was inconsistent with the sentences imposed in previously decided Aggravated Robbery cases. Secondly that the learned trial Judge omitted to consider some of the mitigating factors submitted for the appellant and responded as follows. The sentences imposed were not inconsistent with those handed down in previously decided Aggravated Robbery cases and in some cases, higher sentences have been imposed. In **Otim Moses vs. Uganda, Supreme Court Criminal Appeal No. 06 of 2016**, a sentence of life imprisonment

was upheld. In **Ojongole vs. Uganda, Supreme Court Criminal Appeal No. 20 of 2019**, a sentence of 32 years imprisonment was handed down by the Supreme Court in an Aggravated Robbery case. In **Kamukama Moses vs. Uganda, Court of Appeal Criminal Appeal No. 052 of 2002 (unreported)**, this Court upheld a sentence of life imprisonment imposed by the trial Court for Aggravated Robbery. It was further submitted that in any case, the Supreme Court and this Court have in recent cases cast doubt on the validity of the consistency principle and emphasized the primacy of the trial Court's discretion in arriving at an appropriate sentence. Counsel cited the authority of **Muwonge Fulgensio vs. Uganda, Court of Appeal Criminal Appeal No. 0586 of 2014 (unreported) and Kaddu Kavulu Lawrence vs. Uganda, Supreme Court Criminal Appeal No. 72 of 2018 (unreported)** in support of the submission on this point.

As for the submission that the learned trial Judge ignored to consider some of the mitigating factors submitted for the appellant, counsel submitted that this was simply untrue as all those factors had been considered.

Counsel concluded by submitting that the appellant deserved the sentence that the trial Court imposed and prayed this Court to uphold it.

Resolution of Appeal

We have carefully studied the Court record and considered the submissions of counsel for both sides, and the law and authorities cited. We have also considered other relevant law and authorities that were not cited.

This is a first appeal against the sentence imposed by the trial Court, and therefore we are mindful of the well-established duty of a first appellate Court, which is to reappraise the material placed before the trial Court and thereafter to come up with its own conclusions on all issues of law and fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10; and the authority of Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997).**

It is also worth reiterating the applicable principles, when, as in this case, an appellate Court is asked to review a sentence imposed by the trial Court. In

Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995 (unreported), it was stated:

> **"As Dunn L.J observed in Re Haviland's case (supra) at page 114, an appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his/her discretion. It is the practice that an appellate Court will not normally interfere in the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 EACA 270 and R v. Momedali Jamal (1948) 15 EACA 126."**

It was submitted for the appellant that although the learned trial Judge was obligated to apply the consistency principle and take into account the nature of sentences imposed in previously decided Aggravated Robbery cases, when sentencing the appellant, she had not done so. Thus, in counsel for the appellant's view, that omission is sufficient basis for this Court to interfere with the sentence imposed on the Aggravated Robbery count and impose a shorter sentence consistent with the precedents.

For the respondent, it was submitted that it is no longer required for trial Courts to consider such precedents when sentencing, and provided a trial Court does not exceed the statutory maximum sentence, an appellate Court should not interfere with the sentence imposed merely because it is higher than the sentences imposed in similar previously decided cases. Counsel for the respondent cited **Muwonge Fulgensio and Kaddu Kavulu cases (both supra)** where in each case, the Courts doubt on the consistency principle in submitted.

Although incapable of precise definition, the manner in which the principle of consistency in sentencing ought to be applied is straight forward. The principle requires that in exercise of its sentencing discretion, a trial Court ought to impose sentences that are similar to those imposed in previously decided cases with similar facts. The principle has emerged from case law, most famously in the oft-cited authority of **Aharikundira Yustina vs. Uganda, Supreme Court Criminal Appeal No. 27 of 2015 (unreported)** decided on 3rd December, 2018, where it was stated:

> **"It is the duty of this Court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation."**

The sentence in the present case was imposed on 24th July, 2015, over 3 years before the decision in Aharikundira, and therefore that decision could not be retrospectively applied by the learned trial Judge. However, the requirement for a trial Court to consider precedents when sentencing had been endorsed in the earlier decision of **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported)** which was decided on 8th November, 1994. In that case, the Supreme Court held that:

> **"Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration."**

We understand the above holding to mean that during appellate review of a sentence imposed by a trial Court, an appellate Court is justified to compare the sentence under review to those imposed in previously decided cases of a similar nature. Counsel for the respondent asked this Court to find that the consistency principle has been discredited by the Supreme Court in the **Kaddu Kavulu case (supra)** and by the Court of Appeal in **Muwonge Fulgensio (supra)**. We note that in the latter case, counsel for the respondent opposed the appellant's prayer to the Court to apply the consistency principle. She relied on the authority of Kaddu Kavulu (supra) where an appellant who had been sentenced to death prayed the Supreme Court to find that the sentence violated the consistency principle in that it was severer than sentences imposed in previously decided cases. The Supreme Court refused to interfere holding that the death sentence was appropriate in that case.

In **Muwonge Fulgensio (supra)**, this Court considered that there was variance in principle between the Kaddu Kavulu and Aharikundira Yustina cases on the significance of the consistency principle in appellate sentence review, and stated:

"The Aharikundira and Kaddu Kavulu cases seem to be at variance. However, the Kaddu case which was decided later in 2019 did not declare that the Aharikundira case (decided in 2018) or the consistency principle enunciated therein represented bad law. Until the Supreme Court does so, we believe that we may continue to rely on it."

Indeed, in the Muwonge Fulgensio case, this Court applied the consistency principle and reduced a sentence of life imprisonment to one of 22 years imprisonment on each of the two counts (Murder and Rape) on which the appellant was convicted. Indeed, to this day, this Court still applies the consistency principle. Therefore, we reject the respondent's submission that the consistency principle has been discredited.

We shall therefore proceed to consider the sentences imposed in previously decided aggravated robbery cases. In **John Katuramu vs. Uganda, Supreme Court Criminal Appeal No. 2 of 1998 (unreported)**, the Supreme Court confirmed a death sentence deemed appropriate by the lower Courts for aggravated robbery. The appellant was part of a group of assailants who went into the victim's house, stole various household items and badly injured the victim.

In **Guloba Rogers vs. Uganda, Court of Appeal Criminal Appeal No. 57 of 2013 (unreported),** this Court approved a sentence of 35 years imprisonment for aggravated robbery.

In **Ojangole Peter vs. Uganda, Supreme Court Criminal Appeal No. 34 of 2017 (unreported)**, the Supreme Court approved a sentence of 32 years imprisonment that the Court of Appeal had imposed for aggravated robbery.

In the present case, the learned trial Judge considered the relevant aggravating and mitigating factors. She rightly considered that the relevant offences were committed with some violence, which led to the victims suffering grave injuries. During the sentencing proceedings, it was submitted that Ms. Makumbi, the victim in count 1 suffered five serious open cuttings on her body and had to seek medical attention at Kampala International Hospital as well as Mulago Referral Hospital. Mr. Tigatege, the victim in count 2 sustained cuts to the head, and suffered permanent brain damage and continues to experience constant dizziness as a result of the injuries he

sustained during the attack. We have also considered the mitigating factors as counsel for the appellant invited us to do. It was stated that the appellant was a young man, aged 28 years at the time of sentencing. He was also a first offender. Further, that he had learned his lesson while at Kigo Prison and had become a preacher, and was therefore capable of reforming.

However, we have come to the conclusion that the sentence of 27 years imprisonment imposed by the learned trial Judge was neither manifestly harsh nor excessive. The learned trial Judge came up with the sentence after considering the aggravating and mitigating factors, as well as the period spent on remand. Accordingly, we find no reason to interfere with the sentence imposed for aggravated robbery.

We therefore dismiss the appeal.

We so order.

Dated at Kampala this 8th day of March 2022.

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Richard Buteera

Deputy Chief Justice

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Elizabeth Musoke

Justice of Appeal

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Cheborion Barishaki

Justice of Appeal