

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
CRIMINAL APPEAL NO. 0381 OF 2014**

**BYAMUKAMA JONAS:.....APPELLANT**

**VERSUS**

**UGANDA:.....RESPONDENT**

*(Appeal from the decision of the High Court of Uganda at Kampala before Alividza, J. delivered on 22<sup>nd</sup> January, 2014 (conviction) and 11<sup>th</sup> February, 2014 (sentencing) in Criminal Session Case No. 0215 of 2012)*

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA  
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA  
HON. MR. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF THE COURT**

**Background**

On 22<sup>nd</sup> January, 2014, the High Court (Alividza, J.) convicted the appellant on two counts as follows – count one of the offence of **Murder** contrary to **Sections 188 and 189** of the **Penal Code Act, Cap. 120**, and count two of the offence of **Aggravated Robbery** contrary to **Sections 285 and 286 (2)** of the Same Act. On 11<sup>th</sup> February 2014, the High Court sentenced the appellant to two concurrent sentences of 20 years imprisonment, on each count.

The High Court decision followed trial of the appellant on an indictment alleging that he had on the 10<sup>th</sup> day of December, 2011 at Nabukeera Arcade in Kampala City, with malice aforethought unlawfully killed Lubwama Umar (count one). The indictment also alleged that the appellant and others still at large had on the same date and at the same place, robbed one Mwebese Almadan of cash Ug. Shs. 500,000/= and immediately before and after the said robbery threatened to use deadly weapons – to wit a gun and a baton on the said victim (count two).



The facts as adduced by the prosecution and accepted by the learned trial Judge can be briefly summarized as follows: at about 6.00 p.m on 10<sup>th</sup> December, 2011, the deceased Lubwama Umar and PW3 Tumwebaze Almadhan Temusatu (the victim in count two) were part of a group carrying out works involving construction of toilets at Nabukeera Plaza in Kampala City. The appellant and another unidentified person were both security guards at that plaza and had reported for duty at about the same time. The security guards were armed with weapons including a gun and a baton. They also appeared to have been drinking. On getting to the plaza, the security guards began harassing the deceased and his group and demanded that they stop carrying out the works. The deceased's group resisted and a confrontation ensued. In the ensuing commotion, the deceased was shot in the knee and he bled seriously.

After the shooting of the deceased, the security guards ordered the other members of the deceased's group to lie down on the floor. The security guards began demanding for money and PW3 gave them Ug. Shs. 100,000/=. Thereafter, the deceased's colleagues, seeing that the deceased was seriously injured, requested to be allowed to take him to a hospital for medical attention, but the security guards refused, demanding for more money before doing so. After PW3 giving the security guards an extra Ug. Shs. 400,000/=, the deceased's colleagues were allowed to take him to Nsambya Hospital, but he passed away soon after reaching the hospital.

Later that night, the police were notified about the incident and they sent officers to Nabukeera Plaza, where they found the appellant and arrested him. He was taken into custody at the Central Police Station, and while there, he made a charge and caution statement where he admitted to shooting the deceased. He was subsequently charged with murder and aggravated robbery.

The learned trial Judge believed the prosecution evidence and rejected the appellant's defence denying commission of the offences. She therefore convicted the appellant as charged and sentenced him as stated earlier.



Being dissatisfied with the decision of the learned trial Judge, the appellant now appeals to this Court on the following grounds:

- "1. The learned trial Judge erred in law and fact when she disregarded the defence of intoxication available to the appellant thereby occasioning a miscarriage of justice.**
- 2. The learned trial Judge erred in law and fact in passing a harsh and excessive sentence thus occasioning a miscarriage of justice."**

The respondent opposed the appeal.

### **Representation**

At the hearing, Mr. Richard Kumbuga, learned counsel, appeared for the appellant on State Brief. Ms. Ann Kabajungu, learned Chief State Attorney in the Office of the Director of Public Prosecutions appeared for the respondent.

Due to existing Covid-19 prevention measures placing restrictions against prisoners leaving prison premises, the appellant followed the hearing via video link from prison.

Both parties filed written submissions that were adopted at the hearing.

### **Appellant's submissions**

#### **Ground 1**

Counsel for the appellants faulted the learned trial Judge for disregarding the defence of intoxication which was available to the appellant. He pointed out that PW1, PW2 and PW3 all gave evidence that the appellant was drunk when he shot the deceased. Further, the police officers who went to the scene found the appellant carrying a bottle of waragi, and when they tried to interrogate him, he was incapable of making coherent statements. In counsel's view, the conduct of the appellant showed that the appellant was intoxicated when he committed the offences.

Counsel further submitted that it was immaterial that the appellant did not plead intoxication, the learned trial Judge was under a duty to consider that defence since it was brought out by the evidence. He relied on **Kiyengo**

**Zaverio vs. Uganda, Supreme Court Criminal Appeal No. 35 of 2003 (unreported) and Atiku Lino vs. Uganda, Court of Appeal Criminal Appeal No. 41 of 2009 (unreported)** in support of his submissions on this point.

It was further submitted that the learned trial Judge erred in considering the appellant's intoxication as a mitigating factor and not a defence to the murder and aggravated robbery charges. Counsel urged this Court to consider the applicable principles for the defence of intoxication as articulated in the decision of **Uganda vs. Adriko, High Court Criminal Session Case No. 64 of 2014 (unreported)**, and find that the defence was applicable in the circumstances of the present case. Where intoxication is proved, a murder charge will be reduced to manslaughter for lack of mens rea as stated in the case of **Okema vs. Uganda, Court of Appeal Criminal Appeal No. 7 of 1999 (unreported)**. Counsel urged this Court to apply the principles on intoxication and reduce the appellant's murder conviction to manslaughter.

Counsel further submitted that the intoxication defence was also applicable to the aggravated robbery charge because the appellant was laboring under intoxication and did not have the capacity to share a common intention with the actual perpetrator to commit the said offence. The appellant should therefore not have been convicted of aggravated robbery.

Counsel prayed that the Court allows ground 1 and sets aside the appellant's convictions for the offences of murder and aggravated robbery.

## **Ground 2**

In view of the submissions on ground 1, counsel contended that the appellant ought to have been convicted and sentenced for manslaughter and not murder. Counsel therefore prayed that this Court sets aside the sentence for murder and substitutes an appropriate sentence for manslaughter.



## **Respondent's submissions**

### **Ground 1**

In relation to the intoxication defence, counsel for the respondent submitted that the evidence showed that the appellant was in control of his faculties when he committed the offences. PW3 who was at the scene of crime testified that the appellant was able to follow the orders of the other security guard who ordered him to cock his gun just before shooting the deceased. In addition, the appellant made a charge and caution statement (P.EX. 7) in the aftermath of commission of the offences in which he narrated details of the incident relating to the victim of the shooting and the fact that the victim was seated on a chair when he was shot. The details given by the appellant were similar to those narrated by PW3. Further still, the appellant obeyed the orders of the police officers who came to arrest him at the scene of crime. The officers told him to put up his hands, which he did. Counsel submitted that being found in possession of a bottle of waragi was not conclusive evidence that the appellant was intoxicated and incapable of forming the necessary intent. There was no evidence that the appellant was so drunk that he did not know what he was doing within the meaning of **Section 12** of the **Penal Code Act, Cap. 120**. In counsel's view, had the appellant been intoxicated, he would have been incapable of perceiving what he was doing and would likely have had no memory of the incident.

Counsel cited the authority of **Kiyengo Zaverio vs. Uganda, Supreme Court Criminal Appeal No. 35 of 2003 (unreported)**, for the principle that an intoxication defence will fail if after considering all the circumstances of the case, it could safely be said that the prosecution proved beyond reasonable doubt that the appellant had the requisite intent to kill the deceased. In the present case, considering the appellant's actions before and after the shooting of the deceased, counsel submitted that the appellant had the necessary intention to kill the deceased, who was seated on a chair at the time he was shot.



With regard to the learned trial Judge's failure to consider intoxication as a defence, counsel submitted that that failure did not occasion a miscarriage of justice, considering that the prosecution evidence proved the case against the appellant beyond reasonable doubt. She prayed that this Court reappraises the evidence and finds that ground 1 should fail.

## **Ground 2**

Counsel submitted that there was no reason for this Court to interfere with the sentences imposed on the appellant. She relied on the authority of **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported)** for the reasons justifying appellate intervention with sentences imposed by the trial Court, namely, if the trial Court acted on wrong principles or if it overlooked some material factors, or where the sentence is illegal or manifestly harsh and excessive. Counsel submitted that the concurrent sentences of 20 years imposed on the appellant for murder and aggravated robbery were neither harsh nor excessive, but were lenient. The appellant, who was a security guard and was employed to protect life and property, shot and killed the deceased, merely because the deceased had argued with him. In addition to the fatal shooting, the appellant stood guard as his colleague stole money from PW3.

Counsel further referred to two similar cases, where similar sentences were imposed – **No. 017 LDU Kyarikunda Richard vs. Uganda, Court of Appeal Criminal Appeal No. 296 of 2009 (unreported)**, where this Court imposed a sentence of 35 years imprisonment for murder, and the case of **Aramanthan Hassan and Another vs. Uganda, Court of Appeal Criminal Appeal No. 715 of 2015 (unreported)** where this Court imposed sentences of 31 years and 9 months for murder and 16 years and 9 months for aggravated robbery. She urged this Court to find that the sentences imposed on the appellant were neither harsh nor excessive and to uphold them.



## **Resolution of the Appeal**

We have carefully studied the Court record, and considered the submissions of counsel for both sides, and the law and authorities cited in support thereof. Other relevant law and authorities not cited have also been considered.

This is a first appeal against the decision of the trial High Court, and on such appeals, this Court is expected to reappraise the evidence and draw inferences of fact. **(See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10)**. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge, and make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it. **(See: Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported))**. We shall remain alive to the above principles as we resolve the grounds of appeal.

### **Ground 1**

Ground 1 faults the learned trial Judge for not considering the intoxication defence which on the evidence, was available to the appellant. we note that the defence of intoxication is provided for under **Section 12** of the **Penal Code Act, Cap. 120** which provides:

#### **"12. Intoxication.**

**(1) Except as provided in this section, intoxication shall not constitute a defence to any criminal charge.**

**(2) Intoxication shall be a defence to any criminal charge if by reason of the intoxication the person charged at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing and—**

**(a) the state of intoxication was caused without his or her consent by the malicious or negligent act of another person; or**

**(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.**



**(3) Where the defence under subsection (2) is established, then in a case falling under subsection (2)(a) the accused person shall be discharged; and in a case falling under subsection (2)(b), the provisions of the Magistrates Court Act relating to insanity shall apply.**

**(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he or she would not be guilty of the offence.**

**(5) For the purposes of this section, "intoxication" shall be deemed to include a state produced by narcotics or drugs."**

In our view, the interpretation of the above provision is that as a general rule, intoxication is not a defence to a criminal charge. However, intoxication can be relied on as a defence to a criminal charge, in exceptional circumstances, where; a) the state of intoxication was caused without the accused person's consent by the malicious or negligent act of another person; and b) by reason of the intoxication, the accused person, at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing or c) the accused person was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

As counsel for the appellant correctly submitted, a Court must evaluate all defences which appear from the evidence, although not relied on by the accused person. In **Kiyengo Zaverio vs. Uganda, Supreme Court Criminal Appeal No. 35 of 2003 (unreported)**, the Court acknowledged the duty of the trial Court to avail to an accused person every defence disclosed by the evidence, even where the accused does not rely on it.

We also accept the submission by counsel for the appellant that there was evidence upon which a plea of intoxication for the appellant could be founded. PW1 Abwango Emmanuel who arrested the appellant shortly after the commission of the offences stated that the appellant appeared to have been drinking. PW3 Tumwebaze Almadhan, who was part of the deceased's group that was harassed by two security guards (including the appellant)



testified that the guards appeared drunk just before the deceased was shot. In the circumstances, we find that the learned trial Judge erred in failing to consider the intoxication defence which was available on the evidence.

We have considered the intoxication defence raised for the appellant. The case for the appellant is that he was too intoxicated that he was unable to control his actions when he shot and killed the deceased. Further, that because of intoxication, the appellant was unable to form common intention with the second security guard to commit the offence of aggravated robbery as found by the learned trial Judge. The first question for consideration however is whether the appellant's state of intoxication was caused voluntarily or not, because voluntary intoxication cannot be a defence to a criminal charge. PW1 who arrested the appellant testified that the appellant was found holding a bottle of waragi. This indicates that the appellant had gone out and purchased waragi, and got intoxicated voluntarily. For that reason alone, we conclude that the intoxication defence was not open to the appellant.

We therefore accept the respondent's submission, that no miscarriage of justice was occasioned to the appellant, because, although the learned trial Judge omitted to consider the defence of intoxication, that defence would have failed any way for the reasons stated above. We would therefore reject the defence and uphold the appellant's murder and aggravated robbery convictions.

Ground 1 of the appeal must therefore fail.

## **Ground 2**

Ground 2 challenges the sentences that the learned trial Judge imposed on the appellant. Counsel for the appellant's submissions on this ground were based on the assumption that ground 1 would succeed, resulting; 1) in reducing of the murder conviction to manslaughter, and 2) in setting aside of the aggravated robbery conviction. However, ground 1 failed, with the consequence that we upheld the murder and aggravated robbery convictions. We would therefore reject the appellant's submissions in so far



as they were based on the incorrect assumption that ground 1 would succeed.

We further note that as correctly submitted by counsel for the respondent, an appellate Court may only interfere with a sentence imposed by the trial Court in limited circumstances. In **Livingstone Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported)** it was stated that an appellate Court will only alter a sentence imposed by the trial Court if it is evident that the trial Court acted on a wrong principle or overlooked some material factor, or if the relevant sentence is manifestly excessive in view of the circumstances. An appellate Court may also interfere where the sentence passed by the trial Court is illegal. **(See: Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995 (unreported))**

In the present case, we observe that counsel for the appellant made no allegation that the sentences imposed on the appellant were illegal or that when sentencing the appellant, the learned trial Judge omitted to consider any mitigating factor submitted for the appellant, so as to justify this Court to interfere with the sentences.

We also find that a sentence of 20 years imprisonment for murder or aggravated robbery is neither harsh nor manifestly excessive. In **Muhwezi Bayon vs. Uganda, Court of Appeal Criminal Appeal No. 198 of 2013 (unreported)**, after reviewing sentences in previously decided cases, noted that the term of imprisonment for a murder of a single person ranges between 20 to 35 years imprisonment, although in exceptional circumstances, the sentences may be higher or lower.

In relation to aggravated robbery, we have considered the case of **Aramanthan Hassan and Another vs. Uganda, Court of Appeal Criminal Appeal No. 715 of 2015 (unreported)**, where this Court substituted a sentence of 20 years imprisonment (before deducting the remand period) for that of 50 years imprisonment imposed by the trial Court for aggravated robbery. The appellants were found to have committed



aggravated robbery by stealing the victim's motorcycle and in the process had killed the victim using an iron bar.

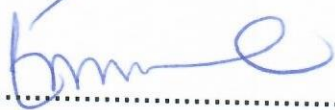
In view of the nature of sentences passed in previous murder and aggravated robbery cases, we find the two sentences of 20 years imprisonment imposed on the appellant to be within the respective sentencing ranges, and not to be manifestly harsh and excessive.

Ground 2 of the appeal, too, must fail.

In conclusion, having found no merit in both grounds of appeal, we hereby dismiss this appeal and uphold the appellant's convictions for murder and aggravated robbery, and also maintain the sentences imposed on the appellant.

**We so order.**

Dated at Kampala this 22<sup>nd</sup> day of March 2022.



**Elizabeth Musoke**

Justice of Appeal



**Catherine Bamugemereire**

Justice of Appeal



**Stephen Musota**

Justice of Appeal