THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 458 OF 2016

CORAM: (Cheborion Barishaki, Stephen Musota, Muzamiru Kibeedi, JJA)

1. **KASIBANTE ERICK**
2. **KIBALAMA RONALD::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the sentence of the High Court of Uganda at Mpigi before Hon. Lady Justice Hellen Obura dated 11th September, 2014 in Criminal Session Case No.053 of 2014)

JUDGMENT OF THE COURT

This is an appeal against both conviction and sentence arising from the decision of Obura J. whereby the appellants, Kasibante Erick and Kibalama Ronald were convicted of aggravated robbery contrary to sections 285 and 285 of the Penal Code Act on 3 counts and each sentenced to 18 years imprisonment on each count. The sentences were to run concurrently.

On 18/03/2012, Akineza Augustine, Kwizera Vian, Lubanga Yakobo, Nkambo Yusuf, Busanana James and Sentabire John boarded Bismarck Bus Reg No. UAQ 643 from Kisoro to Kampala at 6:00pm. In the morning of 19/3/2012, as they approached Kampiringisa in Mpigi District, unidentified persons

armed with guns and pangas stopped the bus and ordered the driver to drive off the main road which he did for about 100m and all passengers were robbed of their cash, phones and other valuable properties and the robbers disappeared in the bush.

On 14th /12/2012, the appellants were arrested after police tracked a phone which was robbed earlier from the passenger in another robbery which occurred on the night of 10/2/2012 at about 530 hours.

Upon interrogation by Nsangi police, the appellants admitted having robbed Bismarck Bus on 19/3/2021 and got phones, foreign currency, cash, laptops from passengers. In their police Charge and Caution statements, they admitted to have committed the offence.

They were tried, convicted of the offence of aggravated robbery on 3 counts and sentenced to 18 years imprisonment on each of the 3 counts. The sentences were to run concurrently.

Being dissatisfied with the decision of the learned trial Judge, the appealed to this Court against both conviction and sentence on the following grounds;

1. ***That the learned trial judge erred in law and fact when she convicted the appellants basing on retracted and repudiated charge and caution statements which occasioned a miscarriage of justice.***

2. That the learned trial judge erred in law and fact when she sentenced the first appellant to 18 (eighteen years imprisonment on count 1, 18 (eighteen years imprisonment on count 2, 18 (eighteen years imprisonment on count 5 to serve sentence concurrently, and the second

appellant to 18 (eighteen years imprisonment on count 118 (eighteen years imprisonment on count 2, 18 (eighteen years imprisonment on count 5 to serve sentence concurrently which was manifestly harsh and excessive.

At the hearing of this appeal, Mr. Andrew Tusingwire appeared for the appellants on private brief and Ms. Amumpaire Jennifer, assistant DPP State Attorney for the respondent.

Counsel for the appellants sought leave of court to validate the memorandum of appeal having it out of time on 9th /3/2021 and the same was granted.

It was submitted for the appellants that no prosecution witnesses identified the appellants at the scene of crime because all witnesses testified that the assailants were wearing, army uniform, caps, and face masks. That to prove the participation of the appellants, the prosecution and the trial judge relied on the charge and caution statements prove the appellants` participation and in convicting them respectively which statements had been exhibited as Exh 1 and Exh 2 which had been retracted by the appellants. He relied on S. 4 of the Evidence act and **Walugembe v Uganda SCCA no. 39 of 2000(unreported)** for the proposition that where an accused person objects to the admissibility of the confession, on grounds that it was not made voluntarily, court must hold atrial within a trial to determine if it was or was not caused by any violence, force threat inducement, promise calculated to cause an untrue confession to be made an in such a trial within a trail, as in any criminal trial the onus of proof is on the prosecution to prove that the

confession was made voluntarily. The burden is not on the accused to prove that it was caused by any of the factors set out in s. 24 of the evidence act.

Counsel further submitted that the 2 statements for both appellants were recorded on the same day 20/12/2012 by the same person. PW5 PTTI AIP Eweru John Michael. He contended that it's irregular for one police officer to record confessions from 2 suspects charged with the same offence as one cannot rule out the possibility that the police officer could have memorized the facts of the case in a bid to fabricate evidence. He relied on **Sewankambo Francis v. Uganda SCCA no.33 of 2001.**

It was further submitted that there was delay in recording the statements. That the appellants were arrested on 13/12/2012 and the statements were recorded on 20/12/2012 by PTTI, Eweru Michael five days after they arrested. He contended that courts have disapproved the unexplained delay by the police to record charge and caution statements from appellants who had admitted the offence and was already in custody. He relied on **RA 780664 Wasswa and Ninsiima Dan v Uganda SCCA NO 48 and 49 of 1997 (unreported).**

Counsel further submitted that after conducting a trial within a trial, the trial judge never gave reasons why the statements were admitted in evidence. That she never ruled whether the statements were made voluntarily or not. He relied on **Seebu shumba Augustine and 2 others v, Uganda CACA 358 of 2014** for the proposition that a ruling without reasons for the decision is a nullity. He contended that the trial judge ought not to have relied on the

charge and caution statement and in the result no evidence exists on the record that tied the appellants to the commission of the offence.

On ground 2, it was submitted for the appellants that the Constitution sentencing guidelines for the courts of judicature practice directions item 46 provides for consideration court should follow in determining a sentence for the theft related offence to include value of the property stolen, prevalence of the offence in the community and any other aggravating factors. That item 48 of the same guidelines provides for factors mitigating a sentence for theft related offences and among these include, remorsefulness and any other factor court may deem relevant. He cited Jackson Zita v Uganda CACA No. 19 of 1995 for the proposition that an appeal against sentence of imprisonment to succeed, the sentence must be illegal or the court must be satisfied that the sentence is manifestly excessive. He also cited **Kiwalabye Bernard v Uganda SCCANO. 143 of 2001** cited with approval in **Abaasa and Anor v Uganda CACA NO33 OF 2010** for principles to be followed if the appellate court is to interfere with the sentence passed by the trial court.

Counsel referred court to **Kusemererwa and Anor v Uganda CACA 20** where the appellants had been convicted of aggravated robbery and sentenced to 20 years imprisonment and on appeal while relying on mitigating factors court substituted their sentences to 13 and 12 years on the 1st and 2nd appellant respectively. In **Adam Jino v Uganda CACA 2006/50/ 2010 UGA 27** the appellant had been convicted of 3 counts of aggravated robbery and sentenced to death. On appeal while relying on the appellant`s mitigating factors substituted the sentence to 15 years imprisonment.

Counsel prayed that the appellants` sentences of 18 years imprisonment on each of the 3 counts be substituted to a more lenient sentence.

In reply, it was submitted for the respondent that when the appellants were arrested they admitted committing the robbery on 19/3/2012 and charge and caution statements were obtained from the appellants. He cited **Festo Androa Asenua and another versus Uganda SCCA 1 1998** as cited in **Lutwama David v Uganda SCCA 4 of 200203** an contended that the case directed the police to follow instructions set out by the chief justice in recording extra judicial statements in circular dated 2/3/1973 until the police authority hands the appropriate rules. That instructions demand that a statement of the accused person be recorded in a language which he understands and an English translation thereof be made by the interpreter. That the officer who recorded the charge and caution statement recorded them in compliance with the set procedures. That the PTTI, Eweru Michael testified that the appellants had signed their charge and caution statements after he had read them back to them in Luganda which they understood.

He contended that the appellants' allegations that they were tortured and made to sign pre-recorded statement and that there correct plain statements had been torn and removed from the record yet the same were on the police file and exhibited as CT EXH 1 and 2 was a lie. That it was after a trial within a trial that both statements were found to have been voluntarily made and admitted into evidence. That the narration of the events that took place during the robbery by the appellants and them making toy guns supports the

testimonies of the victims of the robbery i.e. That the robbers used guns and ordered them to handle over their properties including money, phones.

She further submitted that the appellants had no injuries as much as they claimed that they were tortured and both their medical reports ct Exh 3 and 4 findings show that none of the appellants had injuries.

Counsel referred to **Tuwamoi v Uganda 1967 EA 84** for the proposition that court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true.

On ground 2, it was submitted for the appellant that the case of **Kiwalabye Bernard v Uganda CACA 143 OF 2001** as cited in **Blasio Ssekawooya v Uganda CACA no 107 of 2009** for instances under which an appellate court should interfere with the sentences of the trial court.

Counsel submitted that the passengers were traumatized while in eminent fear of being killed and in addition of being robbed of their properties that include money and mobile phones. That the sentences of 18 years imprisonment on each count were lenient in the circumstances.

In the alternative, counsel cited **Naturinda Tomson v Uganda CACA 13 of 2011** where court sentenced the appellant to 16 years in a case of aggravated robbery. She submitted that a sentence of 16 years imprisonment would suit the circumstances.

We have carefully studied the Court record and considered the submissions of both counsel.

The duty of this Court as the first appellate Court is to re-appraise the evidence adduced at trial and make its own inferences on all issues of law and fact. **See Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, Statutory Instrument 13—10; Pandya V R (1957) EA 336; and Oryem Richard V Uganda, Supreme Court Criminal Appeal No.22 of 2014.**

This position was reiterated by the Supreme Court in the case of **Kifamunte Henry versus Uganda, SCCA No. 10 of 1997;** where it was held that the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

On ground 1 of the appeal, the trial Judge is faulted for convicting the appellants basing on retracted and repudiated charge and caution statements which occasioned a miscarriage of justice.

DW1, the 1st appellant testified that he first made a charge and caution statement before a one Jimmy which was read back to him, he understood it and then put his thumb. But later he stated that the following day he was called to the office of Jimmy and there in there was Ndamanyire Charles, PTT1 Eweru and Jimmy. That Charles and Jimmy slapped him and beat him. That they had a panga and a short and forced him to tear his previous statement since therein he had denied committing the offence. That he was asked to sign

another statement but he refused. He stated that he did not make any statement before AIP PTT1 Eweru. That the one he made was torn.

DW2, 2nd appellant testified that also testified and alluded to the same facts as the 1st appellant that his statement he made, he was forced to tear it after being tortured and when asked to sign another he refused.

Both appellants alluded to the fact that they had spent about 5 days in custody by the time they made their statements which were later torn. That while doing their first statements they were not tortured, and there was no fire arm and that they denied ever committing the robber therein. That the subsequent statements stating that they admitted committing the robbery are unknown to them and they never made them nor sign them.

PTT1, AIP Eweru Micheal testified that the 2 appellants were brought to him to obtain a charge and caution statement. That he explained the charges to them in the Luganda language which they stated to understand. That thereafter, he read the statements back to them and they said that they understood it and they went ahead to sign the same and he also counter signed. That the environment where he obtained charge and caution statements was a comfortable, only two persons were inside and there were no fire arms. He further testified that he went ahead to explain sections 285 and 286(1) (b) of the penal Code Act to help them under the charge

PW6, D/AIP Ndamanyire Charles testified that he recorded the plain statements of both appellants where in the 1st appellant admitted to the commission of the robberies that took place on 19th march 2012 and 10th

/12/2012 but the 2nd appellant denied. That he referred both appellants to PW5, AIP Eweru to record their charge and caution statement that the 1st appellant accepted the offence while the 2nd appellant denied it. He later stated that the 2nd appellant later admitted that he committed the robberies

The record at page 52 shows that the learned trial judge after conducting a trial within a trial to determine the admissibility of the charge and caution statements. She made a ruling wherein she found the statements to have been made by the appellants voluntarily and admitted in evidence as prosecution exhibit.

The law relating to retracted and repudiated statements was considered in ***Tuwamoi versus Uganda, (1967) 1 EA 84,*** where Court stated that; a trial Court should accept any confession which has been retracted and repudiated or both retracted and repudiated with caution, and must before finding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a Court will only act on the confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession can only be true.

In the circumstance, we are of the view that the appellants' statements were made voluntarily after they were transferred from Nsangi Police Station. PTTI AIP Eweru consistently told court how he conducted the proceedings. No

threats or force was exerted on the appellants. What can be discerned from the record and the analysis of the learned trial judge is that the appellants evidence seemed well rehearsed and given in the same style and almost similar wordings. We find that the appellants voluntarily made their charge and caution statements wherein they admitted to having committed the offence. There assertions that they were forced to tear their first made statements and forced to sign new ones was an afterthought.

It was also submitted for the appellants that there was delay in recording the charge and caution statements 5 days after their arrest and the statements were recorded on 20/12/2012. That the charge and caution statements were recorded on the same day 20/12/2012 by the same person AIP Eweru John Micheal. He contended that this was irregular.

PW6, Ndamanyire Charles testified that during interrogation by Nsangi police station, the appellants accepted to have been involved in the robbery of 19th march 2012 and that of 10/12/2012 of perfect bus company which occurred between Rukungiri and Kampala. That it was on that basis that Nsangi police communicated with Mpigi police to have the 2 taken to Mpigi Police station. That he picked the 2 appellants from Nsangi and took them to Mpigi on 19/12/2012.

Clearly, the appellant's statements were recorded on 20/12/2012 only one day after they had been brought to Mpigi Police station. The case cited by the appellants **RA 780664 Wasswa & Ninsiima Dan v Uganda** Supra the Supreme Court disapproved of the unexplained delay by the police to record

a charge and caution statement from the appellant who had admitted the offence and was already in custody. In the instant case, the delay before they were transferred can be best explained having regards to the fact that they were transferred from one station to another to wit; Kireka, Nsangi and then Mpigi. We find that this did not cause a failure of justice to the appellant.

Regarding the issue of the same person recording both statements the appellants` relied on the authority of **Sewankambo Francis and Others versus Uganda** supra, where in the Supreme Court stated that;

"A part from the failure by the trial judge to ascertain from the appellants whether the confessions could be admitted, there are other unsatisfactory features in the case which affect the voluntariness of these confessions. First, we think that it is irregular for one Police Officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. The temptation on the part of the policeman to use contents of statement to record a subsequent statement cannot be ruled out. In the instant case, we note that A.I.P. Otim (PV.) recorded the alleged confession of the second appellant after he had recorded a similar confession from the first appellant. .....

Third, all the appellants claimed that they were assaulted by the police before they were made to sign or thumb-print the alleged confessions. Indeed, the first applicant claimed that he was assaulted and injured on the left leg which was treated by Dr. Ssekitoleko. Strangely enough, the prosecution did not adduce

any evidence of medical examination in respect of all the appellants. No explanation was given."

It's clear from the evidence that both charge and caution statements of the appellants were recorded on the same day 20/12/2012 one after another and recorded by the same person. Indeed the temptations on the part of AIP Ewerü using contents of one statement to record a subsequent statement could not be ruled. We are bound to follow the above decision of the Supreme Court.

Well as the confession statements were correctly admitted in evidence as having been voluntarily made. We disregard the appellant`s charge and caution statements on the basis that they were recorded by the same person and we hereby expunge the same from evidence.

Whereas the charge and caution statements formed the basis to prove the appellants` participation, there were other pieces of evidence led by the prosecution to prove the appellants` participation in the robbery.

We are alive to the fact that none of the prosecution witnesses identified the appellants at the scenes of crime as they testified that the assailants were wearing army uniforms, caps and face masks. The available evidence is circumstancial. **In Bogere Charles vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1996** the Supreme Court held that before drawing an inference of the accused's guilt from circumstantial evidence, the Court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt.

CW1 D/IP Bazibu E. John testified that when the 1st appellant`s house was searched, foreign currencies exchange receipts for transactions carried out on 19/3/2012 were recovered and these were marked as exhibits C2 (ii), C3 and C4. Furthermore, CW1 Bazibu E. John and CW 5 both testified that the appellants led them to a swamp where 2 pairs of army uniforms, 2 army caps, 2 pairs of army shoes, two toy guns and a big torch used in the high way robberies were recovered. All these items and photographs of the appellants holding the toy guns were admitted in evidence and marked exhibits C6 and C7 respectively. This evidence corroborates the testimony of PW1 Yusuf Nkamba who testified that they were robbed by 2 assailants who wore army uniforms, had caps and covered their faces with masks. In addition PW2 Kwizera Viane a victim of the robbery testified that they were attacked by 3 assailants armed with a gun, knives, dressed in overalls, their faces covered with masks and had a big torch they were flashing.

CW3 Kiryowa George the LC1 Chairman of Busembe Zone, Maya Parish, Nsangi sub county Wakiso District testified that he witnessed the search of the 1st appellant `s house and listed the items that were found there to wit; foreign currency notes, 2 phones, Bank of Uganda receipts and a paper for Yamaha Motorcycle as in the search certificate exhibited as C1 (ii). This evidence was corroborated by the testimony of CW4 D/CPL Inyani Methedio who was also part of the search and who managed to identify the 1st appellant from the dock as the person whose house was searched and items recovered therefrom.

CW2 Salongo Lubanga John, the General secretary of Buloba Bunuwa Kapeka zone testified that he knew the 2nd appellant as one born and residing in Buloba and that he was present when the 2nd appellant`s house was searched and items were recovered therefrom including; a photograph, a phone and a big torch. CW5 D/IP Sembumbette Emmanuel further testified that he led the search in the 2nd appellant`s residence in the appellant`s presence where a black torch and a spice mobile phone for one of the victims were recovered and thereafter a search certificate was prepared and admitted into evidence as Exhibit C9. These testimonies corroborate PW2 Kwizera Viane`s testimony that the assailants had a big torch they used for flashing light.

It was PW5 Micheal Eweru and PW6 D/AIP Ndamanyire Charles`s testimony that the phone of one of the victims was tracked leading to the arrest of the 2nd Appellant and the search of his house in which some of the stolen items were found as listed in the search certificate to include; Nokia Phones, foreign currencies marked as Exhibit C5, 1 black berry phone, 2 sim cards of MTN and Ward. This was later corroborated by the testimony of a court witness CW1 Bazibu E. John who testified that they tracked a phone of a victim of a subsequent high way robbery of a bus which took place at Nsangi which lead to the arrest of the 2nd appellant whose house was searched and a search certificate was prepared with items that were recovered.

PW6 D/AIP Ndamanyire Charles testified that during the interrogations, the appellants accepted participating in the robbery of the Bismarkan Bus and he went ahead to record plain statements exhibited as C1 (i) and C2 (i) which were never contested by the defence.

On the other hand, the appellants gave sworn evidence and maintained that they never participated in the said robberies.

In **Simon Musoke vs. R [1958] EA 715** court held that:

"In a case depending exclusively or partially upon circumstantial evidence, the Court must before deciding upon a conviction find that, the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of guilt."

Furthermore, in **Teper vs. R (2) AC 480** the court held:

"It is necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

Taylor on Evidence (11th Edn.) at page 74 stated that *"the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."*

The above pieces of evidence constitute circumstantial evidence which point to only one conclusion, namely that the offences had been committed and that it were the appellants who committed them. The contradictions therein in the prosecution evidence in regards to the number of assailants being 3 (PW1`s evidence) were minor and did not go to the root of the prosecution case. The issue on contradictions in the prosecution evidence being minor was ably traversed by the learned trial judge at page 174 of the record. In conclusion

therefore, the above evidence without any reasonable doubt proves that it's the appellants who participated in the robbery and there are no other co-existing circumstances which weaken or destroy this inference.

On ground 2 of the appeal, the learned trial judge is faulted for having sentenced the first appellant to 18 years imprisonment on count1, 18 years imprisonment on count 2, 18 years imprisonment on count 5 and the 2nd appellant to 18 years imprisonment on count 1, 18 years imprisonment on count 2 and 18 years imprisonment on count 5 all sentences to run concurrently which was manifestly harsh and excessive. Counsel submitted for the appellants that they were still in their youthful age, both were remorseful and had families dependent on them which factors were stated during mitigation. Counsel contended that item 48 of the sentencing Guidelines provides for mitigating factors for theft to include remorsefulness of the offender and any factor court may consider relevant.

In reply, it was submitted for the respondent that the sentences of 18 years imprisonment on the respective counts for each appellant were lenient in the circumstances of the case. Counsel submitted that passengers were traumatized with eminent fear of being killed in addition of being robbed of their properties. That should court be inclined to reduce the sentence, an alternative sentence of 16 years imprisonment would suit the circumstances of the case.

I have read both the aggravating and mitigating factors put before the trial court. The mitigating factors by the appellants included the fact that they had

spent 2 years and 8 months on remand, were first time offenders, appeared remorseful, that some of the stolen items were recovered, they had family responsibilities and that they were still young.

In sentencing the appellants at page 177 of the record, the learned trial judge was alive to the factors that the appellants were first time offenders and had spent 2 years and 8 months on remand, she disregarded their factor that they had been remorseful and had family responsibilities. However, the learned trial judge did not consider the fact that the convicts were young.

In **Kabatera Stephen vs. Uganda Criminal Appeal No. 123 of 2001** cited with approval by the Supreme Court in **Magala Ramathan versus Uganda Criminal appeal No.01 of 2014** where the court stated that, *"we are of the opinion that the age of an accused person is always a material factor that ought to be taken into account before sentence is imposed ... failure to consider the age of the appellant caused a failure of justice.*

From the charge sheet at 8 of the record, the age of the 1st appellant was 25 years and the 2nd appellant aged 27 years. The learned trial judge ought to have considered the youthful age of the appellants before sentencing. We accordingly set aside the sentences of 18 years imprisonment for both appellants on all 3 counts.

We invoke court`s powers under section 11 of the judicature Act to sentence the appellants afresh.

We are also alive to the need to ensure consistency in sentencing. The Supreme Court has in **Mbunya Godfrey V Uganda, Supreme Court Criminal Appeal No.4 of 2011,** emphasized the need to maintain consistency while sentencing persons convicted of similar offences. Court stated that *"We are alive to the fact that no two crimes are identical. However, we should try as much as possible to have consistency in sentencing."*

In **Ogwal Nelson and 4 others vs Uganda; CACA NO. 606 of 2015** Court reduced sentences of 35 years, 25 years, 30 years and life imprisonment to a sentence of 17 years and 6 months for the offence of aggravated robbery.

In Saava Sedu Tonny versus Uganda; CACA600/2014 the appellant was sentenced to a term of 21 years and 7 months for the offence of aggravated robbery. On appeal, he was sentenced to 20 years imprisonment.

In **Rutabingwa James V Uganda, Court of Appeal Criminal Appeal No.57 of 2011,** this Court confirmed a sentence of 18 years imprisonment for aggravated robbery

In view of the above cited cases we of the strong view that the sentences of 18 years meted out against the appellants on counts 1, 2 and 5 falls within the sentencing range. However, into account all the aggravating and mitigating factors to wit; the youthful age of the appellants, we set aside the sentences of 18 years imprisonment that the learned trial judge meted out against the appellants on each of the 3 counts. We resentence the appellants as follows;

1. 1st appellant; 16 years on count1, 16 years on count 2 and 16 years on count 5. The sentences are to run concurrently from the date of conviction.
2. 2nd appellant; 16 years on count1, 16 years on count 2 and 16 years on count 5. The sentences are to run concurrently from the date of conviction.

We so order

Dated at Masaka this 11th day of February 2022.

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Cheborion Barishaki

Justice of Appeal

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Stephen Musota

Justice of Appeal

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Muzamiru Mutangula Kibeedi

Justice of Appeal