THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT ARUA

CORAM: CHEBORION; MUGENYI AND GASHIRABAKE, JJA

CRIMINAL APPEAL NO. 404 OF 2016

ETOMA TOM ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from the High Court of Uganda at Arua (Keitirima, J) in Criminal Case No. 71 of 2014)

JUDGMENT OF THE COURT

A. **Background**

1. Mr. Etoma Tom ('the Appellant') was convicted of the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act, Cap. 120 and sentenced to thirty-five (35) years' imprisonment.

2. His conviction was pursuant to proof by the Prosecution that on 29th March 2013, the Appellant together with another person that is still at large had physically attacked Lawrence Alisiku ('the Complainant') on his way from Okokoro Trading Centre and robbed him of his ZTE cellular phone. The Appellant was later apprehended by persons that responded to the Complainant's distress call.

3. The Appellant has since lodged this Appeal against the conviction and sentence on the following grounds:

    I. *The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record thus making a wrongful finding that the injuries sustained by the complainant constituted an element of grievous harm (and) thus occasioned a miscarriage of justice.*

    II. *That the learned trial Judge erred in law when he handed the Appellant a harsh and excessive sentence of 35 years imprisonment.*

4. At the hearing, Mr. Paul Abiti Paul of the Legal Aid Project of the Uganda Law Society – Arua Branch appeared for the Appellant while Ms. Fatinah Nakafeero, Chief State Attorney appeared for the Respondent.

B. **Determination**

5. The jurisdiction of this Court in an appeal against conviction and sentence is spelt out in Section 132 of the Trial on Indictment Act, Cap. 23 as follows:

> **(1) Subject to this section –**
>
> **a. An accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact;**
>
> **b. .....**

c. .....

And the Court of Appeal may –

d. **Confirm, reverse or vary the conviction and sentence;**

Ground 1: *The learned trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record thus making a wrongful finding that the injuries sustained by the complainant constituted an element of grievous harm* (and) *thus occasioned a miscarriage of justice.*

6. It is the Appellant's contention that the ingredient of grievous harm (one of the ingredients of the offence of aggravated robbery) was not proven by the Prosecution to the required standard. It is argued on his behalf that in the absence of the testimony of the medical practitioner that examined the Complainant, the evidence before the trial court could not sustain a finding that the injuries sustained by the Complainant amounted to grievous harm. The trial judge is further faulted for relying on a medical report that was adduced in evidence as Exhibit P2 without ascertaining its author's professional qualifications or claim to medical expertise.

7. In Mr. Abiti's view, on the authority of the decision in **Tranby (1991) 52 A Crim R 228, the Court of Criminal Appeal (Queensland)**, the Complainant's injuries do not correspond to the definition of grievous harm as stipulated in section 2(f) of the Penal Code Act. In that case, an appellant that had bitten off a part of the complainant's ear was acquitted of the offence of grievous bodily harm on the premise that the said action had not affected the complainant's capacity to hear, only leaving a cosmetic disability that was not a permanent injury to health. Urging this Court to follow the above persuasive decision, Mr. Abiti proposed that the injuries under consideration presently neither amount to grievous harm nor would they support a conviction for aggravated robbery; and thus sought the substitution of the conviction for aggravated robbery with one for the lessor offence of simple robbery.

8. Conversely, learned State Counsel supports the finding of grievous harm by the trial court on the basis of the impugned medical report that was adduced in evidence under a memorandum of agreed facts dated 15th October 2016 and

admitted on the record as Exhibit P1. It is opined that the admission of the medical report as an agreed document rendered its contents factual and uncontested. Section 57 of the Evidence Act is cited in support of this contention.

9. By way of rejoinder, however, it is argued that the admission of the report by the Appellant's previous advocate was restricted to the document and not its contents, therefore the Prosecution should have produced the medical practitioner who classified the injuries as grievous harm. Citing section 28 of the Evidence Act, it is proposed that the report's admission in evidence did not prove the contents thereof; rather, the trial Judge was duty bound to cause the production of the medical practitioner to prove the facts therein in accordance with section 57 of the same Act.

10. For ease of reference, sections 28 and 57 of the Evidence Act are reproduced below:

> Section 28
>
> **Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereafter contained.**
>
> Section 57
>
> **No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; except that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.** (our emphasis)

11. We carefully considered the material on record. For purposes of this ground of appeal, the trial court considered the ingredients of aggravated robbery to be theft of the phone, grievous harm to the Complainant and the participation of the Appellant in the said robbery. It then rendered itself as follows on the question of grievous harm:

> *The medical report tendered in court by consent of both the prosecution and the accused and marked as Exh. P2 indicates that when PW1 was taken to Arua Regional*

hospital he was examined and found with a cut wound and bruises on his chest, neck and head. The injuries were classified as grievous harm. This ingredient was therefore proved beyond reasonable doubt.

12. The offence of aggravated robbery is defined in sections 285 and 286(2) of the Penal Code Act as follows:

> Section 285
>
> **Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.**
>
> Section 286
>
> **(1)** .....
>
> (2) **Notwithstanding section 1(b), where at the time of or immediately before or immediately after the time of the robbery, an offender is in possession of a deadly weapon, or causes death or grievous harm to any person, the offender or any other person jointly concerned in committing the robbery shall, on conviction by the High Court, be liable to suffer death.**
>
> **(3) In subsection (2) 'deadly weapon' includes –**
>
> **a. ...**
>
> **i. an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument;**
>
> **ii. any substance, which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that is likely to cause death or grievous bodily harm; and**
>
> **b. any substance intended to render the victim of the offence unconscious.**

13. From the foregoing definition, it may be deduced that aggravated robbery is comprised of the following ingredients:

(a) theft with use or threat of violence, and

(b) possession of a deadly weapon or causing death or grievous harm at, immediately before or immediately after the said theft.

14. It will suffice to observe here that where an offender is neither in possession of a deadly weapon nor causes death or grievous harm as highlighted in section 286(2), the offence would amount to the lessor offence of simple robbery as defined in section 285 of the Act.

15. In the instant case, there undoubtedly was violence in the course of the theft so as to establish the offence of robbery contrary to section 285 of the Penal Code Act. As to whether the robbery was aggravated in nature, there is no evidence whatsoever of the possession or use of a deadly weapon as defined in section 286(3) of the Penal Code Act. Whereas the Complainant attested to having been beaten on the forehead before he was thrown down and kicked in the chest and stomach; by the time PW2 arrived at the scene of crime he only witnessed the kicking. No evidence was adduced in court of what had been used to hit the Complainant on the forehead before he fell down.

16. The trial judge nonetheless relied on the medical report that classified the Complainant's injuries as grievous harm to make a finding that the second ingredient of the offence had been proved beyond reasonable doubt. That report mentioned a deep cut wound on the forehead (slightly above the left eye) that required stitching, as well as a blunt injury to the chest that could cause internal organ damage. An x-ray was recommended but not done as at the date of reporting because it was public holiday. The report was made and signed by a Senior Medical Officer with a Diploma in Clinical Medicine.

17. It is noteworthy that the report form included notes on what would amount to grievous harm, which definition substantially echoes the definition of the term in section 2 of the Penal Code Act as follows:

> **"grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.**

18. The deep cut injury described in the medical report, coupled with the observation that the blunt injury to the chest could cause internal organ damage and necessitated an x-ray, depict serious injuries that were likely to injure health in the short to medium term and certainly so endangered the Complainant's life as to amount to dangerous harm, a component of grievous harm. The definition of grievous harm in the Penal Code Act is such that permanent injury is only but one of the manifestations thereof, not the sole indication of grievous harm. We would therefore respectfully decline the invitation to follow the decision in **Tranby (1991) 52 A Crim R 228** (supra).

19. The medical report having established the incidence of grievous harm and been conceded in the memorandum of agreed facts, we cannot fault the trial judge for his reliance upon it. He did have the prerogative to seek further proof of the facts therein but, having established the ingredient of the offence therefrom, he was under no obligation to do so. A memorandum of agreed facts speaks for itself, that is, the contents of the documents conceded thereunder would amount to conceded facts. If the Appellant was not comfortable with the findings in the medical report or the credentials of the author thereof, as is the contention before us now, he should never conceded to its admission under the memorandum of agreed facts. That is the import of section 57 of the Evidence Act, which obviates the need for further proof of a fact that has been admitted by consent of the parties.

20. We are satisfied, therefore, that the trial judge correctly convicted the Appellant for aggravated robbery and not the lessor offence of simple robbery. *Ground 1* thus fails.

Ground 2: *The learned trial Judge erred in law when he handed the Appellant a harsh and excessive sentence of 35 years imprisonment.*

21. It is the Appellant's contention that 35-year sentence handed down to him is not only manifestly harsh and excessive, but that it was imposed without regard for the principle of uniformity and proportionality that requires similar offences that are premised on similar facts to attract similar sentences. Guideline 6(c) of the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions,*

2013 ('the Sentencing Guidelines') is cited in support of the need for consistency in sentencing. It reads as follows:

> **Every court shall when sentencing an offender take into account the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances.**

22. That principle was re-echoed by the Supreme Court in **Aharikundira Yusitina vs Uganda, Criminal Appeal No. 27 of 2015** in the following terms:

> 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.

23. To that end, Counsel referred us to the cases of **Bakabulindi Ali vs Uganda, Criminal Appeal No. 2 of 2017** and **Baluku Fred vs Uganda, Criminal Appeal No. 10 of 2017**, where the Supreme Court confirmed sentences of 22 years' imprisonment for aggravated robbery entailing grievous harm. Whereas in the former case the object of the robbery was a motorcycle, in the latter case a cellular phone, radio and money in the sum of Ushs. 90,000/= had been stolen. This Court is, nonetheless, urged to consider a reduced term sentence of eighteen (18) years as was confirmed by the Supreme Court in **Abelle Asuman vs Uganda, Criminal Appeal No. 66 of 2016** on the premise that the Appellant is a first offender and a young man with a young family.

24. On the other hand, learned State Counsel referred the Court to the case of **Wamutabaniwe Jamiru vs Uganda, Supreme Court Criminal Appeal No. 74 of 2007** (citing with approval **Kamya Johnson Wavamunno vs Uganda, Criminal Appeal No. 16 of 2000**) in support of the proposition that appellate courts are enjoined not to interfere with a sentence imposed by a trial court in exercise of its judicial discretion, save where the resultant sentence is manifestly excessive or low as to amount to miscarriage of justice, where the sentencing court overlooks an important circumstance in passing sentence or where the sentence imposed is wrong in principle. She further advances the additional principle espoused in

Kyalimpa Edward vs. Uganda, Criminal Appeal No.10 of 1995 (Supreme Court) that appellate courts may interfere with an illegal sentence.

25. In response to the principle of consistency advanced by Counsel for the Appellant, it is argued that each case must be considered on its own merits, to which judicial discretion would be applied. This principle is reiterated in **Kaddu Kavulu Lawrence vs Uganda, Criminal Appeal No. 72 of 2018**. In any case, Ms. Nakafeero opined that the sentence passed in the matter before us presently was neither harsh nor inconsistent with sentences passed in respect of the same offences. Thus, in **Otim Moses vs Uganda, Criminal Appeal No. 6 of 2016**, the Supreme Court upheld a sentence of life imprisonment for aggravated robbery. She urged the Court to uphold the 35-year imprisonment handed to the Appellant as, in her view, it was the appropriate sentence in the circumstances of the case.

26. From the judicial precedents cited by both parties, it becomes apparent that to the extent that the sentencing of convicts is an exercise of judicial discretion, no two sentences (even in cases of similar facts) would necessarily attract similar sentences. Rather, the circumstances of each case would be considered on their merits and the aggravating and mitigating factors engrained therein may yield a different sentence from that imposed in a case arising from a similar offence. I am therefore disinclined to abide the views of learned Counsel for the Appellant in that regard.

27. The more pertinent question would be whether the sentence passed by the trial court was illegal, manifestly excessive or grounded in the wrong principles. First and foremost, considering that the Sentencing Guidelines prescribe a sentencing range of 30 years' imprisonment to the death penalty for the offence of aggravated robbery, the proposition that a 35-year sentence is manifestly excessive would in principle be scarcely sustainable.

28. On the other hand, an interrogation of the basis of the imposed sentence would inform the determination as to whether or not it was arrived at in contravention of established sentencing principles. The trial judge rendered himself as follows:

I have heard both the aggravating and mitigating factors. Instead of engaging in production, the accused engaged in a robbery that could even cost the victim his life considering the injuries the victim sustained. The convict is therefore a danger to society. I have considered the period spent on remand, and I will now sentence him to 35 (thirty-five) years imprisonment.

29. It would appear that, despite the mitigating circumstances, the trial judge considered the gravity of the attack, as well as the deterrent principle of sentencing, in arriving at the sentence that he passed. He cannot be faulted for either principle as they are recognised considerations in the sentencing of a convict. However, it seems to us that the attack in issue presently where there was no deadly weapon either in use or possession was not so grave as to attract a 35-year sentence. This was a 25-year old man that, with the folly of youth and possibly peer pressure, elected to participate in the petty robbery of a phone. There would be room for such a young man to reconsider his errant ways and retrace his steps back to more beneficial enterprises. We would thus consider a sentence of twenty (20) years more appropriate in the circumstances of this case.

30. Additionally, we do take into account the dictates of Article 23(8) of the Constitution and Guideline 15 of the Sentencing Guidelines as elaborately elucidated in **Rwabugande Moses vs Uganda, Criminal Appeal No. 25 of 2014** and the latter case of **Asuman Abelle vs Uganda (2018) UGSC 10** (both, Supreme Court), as well as that court's construction thereof as espoused in **Geoffrey Nkurunziza vs Uganda, Criminal Appeal No. 686 OF 2014** (Court of Appeal). The import of those authorities is to enjoin courts to demonstrably ascertain a convict's time spent on remand prior to determining the appropriate sentence to render whether by arithmetic deduction or non-arithmetically by simply factoring that period into the final sentence.

31. In the instant case, we find no proof of ascertainment by the trial court of the period spent on remand. As a first appellate court, we have since ascertained that period to have been three (3) years and seven (7) months as at the date of sentencing. We would deduct that period from the 18-year reduced sentence.

C. **Conclusion**

32. In the result, the Appeal partially succeeds in so far as the appeal against sentence is upheld. The 35-year sentence imposed upon the Appellant by the trial court is hereby set aside and substituted with a term sentence of 20 years from the date of conviction, from which are deducted the 3 years and 7 months spent on remand.

33. The Appellant is to serve a sentence of sixteen (16) years and five (5) months from the date of his conviction by the trial court.

It is so ordered.

Dated and delivered at Kampala this 29th **day of** March **, 2022**

Barishaki Cheborion
Justice of Appeal

Monica K. Mugenyi
Justice of Appeal

Christopher Gashirabake
Justice of Appeal