THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: Hellen Obura, Catherine Bamugemereire and Christopher Madrama, JJA.)

CRIMINAL APPEAL NO. 0335 OF 2010

OREGO FRANCIS::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Soroti before His Lordship Hon. Justice Akiiki Kiiza, J delivered on the 29/11/2010 in Criminal Session Case No. 0013 of 2008.)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted and tried on two Counts of the offence of Aggravated Robbery contrary to sections 285 and 286 (2) of the Penal Code Act by the High Court (Akiki Kiiza,J.). He was convicted on Count I on the 29/11/2010 and sentenced to 22 years' imprisonment.

Background

The particulars of the offence in Count I were that Orego Francis alias Opolot Justine and others still at large, on the 16th day of January, 2008 at Senior Quarters, Plot 2A Kyoga Avenue in Soroti district robbed Eitu Sam of his mobile phone Motorola A-835 Serial No. 352711008236925 valued at Shs. 550,000/= and Shs. 84,000/= and at or immediately before or immediately after the said robbery, used a deadly weapon, to wit, a gun at the said Eitu Sam.

The particulars of the offence in Count II were that the appellant together with others still at large on the 16th day of January, 2008 at Senior Quarters, Plot 2A Kyoga Avenue in Soroti district robbed Bishop Eitu John of his hero bicycle size 24 valued at Shs. 110,000/= and at

or immediately before or immediately after the said robbery, used a weapon to wit a gun on the said Bishop Eitu John.

The appellant was consequently arrested, indicted, tried and convicted of the offence of aggravated robbery as contained in Count I and sentenced as aforementioned. However, he was not found guilty of the offence in Count II and he was accordingly acquitted.

Being dissatisfied with the sentence meted out on Count I, the appellant appealed to this Court on one ground, namely;

> ***"That the learned trial Judge erred in law and fact when he sentenced the appellant to a harsh and manifestly excessive sentence of 22 years' imprisonment."***

Representation

At the hearing, Mr. Obedo Deogratious, represented the appellant on State Brief whereas Hajat Fatumah Nakafeero, Chief State Attorney from the Office of the Director of Public Prosecutions (ODPP) represented the respondent. The appellant was present in Court. Counsel for the appellant sought leave of this Court to appeal against sentence only under S.132(1b) of the Trial on Indictments Act (T.I.A) and the same was granted since counsel for the respondent did not object. Counsel for both sides filed written submissions which were adopted and have been considered in this judgment.

Appellants' Submissions

Counsel submitted that the appellant was sentenced to 22 years' imprisonment for aggravated robbery which is harsh and manifestly excessive. He cited the authority of **John Kasimbazi vs Uganda, Criminal Appeal No. 167 of 2013,** where the appellants had been charged with murder and sentenced to life imprisonment and on appeal this Court reduced the sentence to 12 years.

He further submitted on the mitigating factors namely; that the convict is a first time offender with no previous record of conviction and he has been in prison for a period of 14 years which has made him reform and now wishes to contribute to society.

He also cited the authority of **Odongo Ronald vs Uganda, Court of Appeal Criminal Appeal No. 048 of 2010,** where the appellant was convicted of murder of two people by shooting and sentenced to death. On appeal, this Court found the sentence of death harsh and manifestly excessive and it was substituted with a sentence of 18 years and 4 months' imprisonment.

Relying on the above authorities, counsel prayed that this appeal be allowed and the illegal, harsh and excessive sentence be substituted with a lesser one which would result in the release of the appellant.

Respondent's Reply

Counsel opposed the appeal in its entirety and supported the sentence imposed by the learned trial Judge. She submitted that in arriving at the sentence of 22 years' imprisonment for the appellant, the learned trial Judge had a comprehensive consideration of both the mitigating factors and aggravating factors. Counsel pointed out that this Court can only interfere with the discretion of the sentencing Judge where the same is illegal or manifestly excessive. She also submitted that all the mitigating factors being raised before this Court were raised at the trial court and were in fact considered by the learned trial Judge before passing the sentence.

It was argued that the only remand period that can be considered at this point in time would be the pre-trial remand period if it is proved to this Court that it was never considered. Counsel submitted that the learned trial judge took into account the appellant's pre-trial period of 2 years spent on remand. She prayed that the sentence passed against the appellant be upheld by this Court and that the appeal be dismissed for lack of merit.

Resolution by the Court

We have carefully studied the record of appeal and considered the submissions of both counsel as well as the law and authorities cited to us plus those not cited but which we find relevant to this matter. We are alive to the duty of this Court as a first appellate court to review the evidence on record and 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 ***Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10.***

There is only one ground on sentence upon which this appeal is premised and this Court is required to consider whether the sentence of 22 years' imprisonment passed against the appellant by the learned trial Judge is harsh and manifestly excessive as contended for the appellant.

Counsel for the appellant submitted that the appellant is a first time offender and having been in prison for a period of 14 years, he has reformed and now wishes to go out to contribute to society.

Counsel for the respondent opposed the appeal and supported the sentences imposed by the learned trial Judge, thus submitting that in arriving at the sentence of 22 years' imprisonment for the appellant, the learned trial Judge had a comprehensive consideration of both the mitigating factors and aggravating factors. She also submitted that all the mitigating factors being raised before this Court were raised at the trial court and were in fact considered by the learned trial Judge before passing the sentence. Furthermore, that the learned trial Judge had taken into account the appellant's pre-trial period of 2 years.

It is well settled law that an appellate Court will only alter a sentence imposed by the trial Court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is illegal or manifestly low or excessive in view of the circumstances of the case.

(See Livingstone Kakooza vs Uganda, Supreme Court Criminal Appeal No. 17 of 1993 and Jackson Zita vs Uganda Supreme Court Criminal Appeal No. 19 of 1995).

In the instant case, the learned trial Judge while sentencing the appellant stated as follows;

> *"Accused is allegedly a first offender. He is said to have spent 2 years and 11 months on remand. I take this period into account, while determining the appropriate sentence to impose on him. He is said to be still a young man and has prayed for leniency. However, the accused committed a serious offence, capital robbery is a serious offence. The accused could easily be sentenced to death. This shows how the law treats convicted robbers. It is aimed at riding (sic) the public of the thugs like the accused who roam the country side with offensive weapons depriving the wanainchi of their hard earned property. In my view courts should impose stiff sentences to convicted robbers to discourage such behaviour. Putting everything into consideration I sentence the accused to 22 (twenty-two) years imprisonment".*

From the above excerpt of the record, it can clearly be seen that the learned trial Judge considered both the aggravating and mitigating factors while sentencing the appellant. He also took into account the fact that the appellant had been on remand for 2 years and 11 months but he did not arithmetically deduct that period from the said sentence.

We find as above that the period spent on remand was taken into account by the learned trial Judge as the sentencing regime then as held in **Kizito Senkula vs Uganda, Supreme Court Criminal Appeal No. 24 of 2001,** did not require a sentencing court to apply a mathematical formula. However, that position changed following the Supreme Court decision in **Rwabugande Moses vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014.**

The learned trial Judge could not have been bound to follow a decision that was made after his decision in this case was delivered. **(See Bakabulindi AU vs Uganda, Supreme Court Criminal Appeal No. 02 of 2017).** We therefore find that the learned Judge duly complied

with the constitutional stipulation under Article 23 (8) of the Constitution and as such he did not err in law and the sentence that was imposed was not illegal.

As to whether the sentence is harsh or excessive, in keeping with the principle on consistency of sentences as was stated by the Supreme Court in **Aharikundira vs Uganda, SCCA No. 27 of 2015 (reported on Ulii in 2018 as [2018] UGSC 49 (03 December 2018),** we shall consider the range of sentences in similar offences.

In **Olupot Sharif and Ojangole Peter vs Uganda, Court of Appeal Criminal Appeal No.0730 of 2014,** this Court reduced a sentence of 40 years' imprisonment handed down to the appellants to 32 years' imprisonment for the offence of aggravated robbery. In that case, the appellants robbed the victim of Shs. 800,000/=, a weighing scale and a radio and during the said robbery shot dead the victim.

In **Baingana Godfrey and 3 others vs Uganda, Court of Appeal Criminal Appeal No. 29 of 2013,** this Court substituted a sentence of 35 years with that of 20 years against the 4th appellant for the offence of aggravated robbery. This Court took note of the brutal manner in which the offence was committed and described it as short of causing death to the appellant. The 4th appellant in that case together with others hit the complainant with an iron bar until he was unconscious and stole his motorcycle, mobile phone, shoes and Shs. 7,000,000/=.

In **Okoth Julius and 2 others vs Uganda, Court of Appeal Criminal Appeal No.015 of 2014,** this Court upheld the conviction of the 3rd appellant for the offence of aggravated robbery and confirmed a sentence of 17 years' imprisonment against him. In that case, the 3rd appellant and others at large broke into shops and fired a gun to scare off the residents. They stole two motorcycles, a car battery, shaving machines, phone chargers and a phone. One of the stolen motorcycles was recovered from the home of the 3rd appellant.

In **Olupot Sharif and Ojangole Peter vs Uganda (supra),** the aggravating factor was that the victim was shot dead and this Court sentenced the appellant to 32 years. In **Baingana**

Godfrey and 3 others vs Uganda (supra), the aggravating factor was the brutal manner in which the offence was committed (the complainant was hit with an iron bar until he was unconscious). This Court reduced the sentence from 32 years to 20 years for the 4th appellant.

The case of **Okoth Julius and 2 others vs Uganda (supra),** has similar circumstances like in the instant case where no violence was meted out against the victim. It can be seen from the above cases that on the whole, extreme violence meted out on the victim leading to grievous injury or death attracts a harsher sentence than where there is no violence or injury or death but we hasten to add that it also depends on the mitigating factors that may include recovery of the items stolen. The range of sentences in the above authorities is between 17 years and 32 years.

The aggravating factor in the instant case was that the appellant used a gun during the said robbery and the mitigating factors were that the appellant was a first time offender, there was no violence and or injury occasioned during the robbery. We note from the evidence of the victim that the Motorola Phone that was among the items stolen was recovered and indeed there was no violence. We consider these to be mitigating factors in favour of the appellant.

Upon considering all the above aggravating and mitigating factors, we find that the sentence of 22 years' imprisonment imposed on the appellant was harsh and excessive in the circumstances of this case. We therefore set it aside and invoke the powers of this Court under section 11 of the Judicature Act to sentence the appellant afresh.

Taking into account both the aggravating and mitigating factors set out above and the range of sentences for similar offences of aggravated robbery, we are of the considered view that given the circumstances of this case, a sentence of 17 years' imprisonment would be appropriate. In accordance with Article 23(8) of the Constitution, we deduct the period of 2 years and 11 months spent on remand from the 17 years and sentence the appellant to 15

years and one month' imprisonment which he shall serve from the date of conviction, that is, 29/11/2010.

We so order.

Dated at Mbale this 18th day of January 2023 2022

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Hellen Obura
JUSTICE OF APPEAL

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Catherine Bamugemereire
JUSTICE OF APPEAL

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Christopher Madrama
JUSTICE OF APPEAL