THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

Coram: Egonda Ntende, Bamugemereire & Mulyagonja, JJA

CRIMINAL APPEAL NO. 0297 OF 2014

BETWEEN

ARAC DOMINIC :: APPELLANT

AND

UGANDA ::RESPONDENT

JUDGMENT OF THE COURT

(Appeal from the decision of Byabakama Mugenyi, J (as he then was) delivered on 17th October 2012, at Lira in High Court Criminal Session Case No. 276 of 2009)

Introduction

The appellant was indicted with the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. He was convicted after a full trial and sentenced to 20 years' imprisonment.

Background

The facts that were accepted by the trial judge were that, in the evening of 14th September 2009, at Iyeme Girls' School in Oyam District, at about 9 pm, the victims who were both teachers at the school returned to the staff quarters where they lived. They were on a motorcycle ridden by Otiti Patrick. When they stopped at Otiti's residence the accused emerged from the dark and put them at gunpoint. He ordered them to surrender everything in their pockets including mobile phones which they dropped to the ground. As the accused stopped to retrieve them, Okello Moses

grabbed him and in the ensuing scuffle the accused pulled out a panga and cut him on the arm and head. However, the victims managed to overpower him and arrest him. A toy gun and panga were recovered from the scene. They handed him over to the police together with his weapons. He was then indicted with aggravated robbery on two counts.

In his defence on oath, the appellant admitted that he went to Otiti's home that evening but asserted that it was at Otiti's invitation. And that while there, Otiti and Okello Moses turned against him alleging that he was wearing Otiti's shoes. He was assaulted by the two men together with other people. He denied attacking them with a gun.

The trial judge found him guilty on both counts and sentenced him to imprisonment for 20 years on each count, to run concurrently. He further ordered that he pays compensation of UGX 400,000/= to the injured victim. He was dissatisfied with the sentence and appealed to this court on the following grounds:

1. The learned trial judge erred in law when he passed an illegal sentence in the circumstances whereby he imposed a jail term of 20 years without taking into consideration the period spent on remand which occasioned a miscarriage of justice.
2. The learned trial judge erred in law and fact when he imposed a sentence which in the circumstances was manifestly excessive and very harsh and occasioned a miscarriage of justice.

Representation

At the hearing of the appeal on 30th March, 2023, the Appellant was represented by Mr. Walter Okidi Ladwar on State Brief. The respondent

was represented by Mr. Semalemba Simon Peter, Assistant Director of Public Prosecutions. The appellant did not come to court but was facilitated to appear virtually from Ibuga Prison in Kasese District where he was being held.

Counsel for the appellant prayed for leave to appeal against sentence only under section 132 (2) (b) of the Trial on Indictments Act. He further applied to validate the Notice of Appeal which was filed out of time. Both applications were granted.

Counsel for both parties applied that the court considers the written submission that they filed in the appeal and their prayers were granted. The appeal was therefore disposed of on the basis of written submissions only.

Duty of the Court

The duty of this Court as a first appellate court, is stated in rule 30 (1) of the Rules of this Court (SI 10-13). It is to reappraise the whole evidence adduced before the trial court and reach its own conclusions on the facts and the law. We have therefore considered the whole of the record that was set before us, the submissions of counsel and the authorities cited and those not cited that were relevant to the appeal, in order to reach our decision on the grounds that were raised in the appeal.

Submissions of Counsel

Mr. Ladwar, for the appellant submitted that the trial judge, though aware of the period spent on remand, did not specify whether he took this into account. He explained that it was not clear whether the judge deducted

the period spent on remand from the sentence imposed on the appellant, and that this was contrary to Article 23 (8) of the Constitution. That in addition, the trial judge did not indicate when the sentence would begin to run. He further submitted that that he was aware that arriving at the appropriate sentence does not require a mathematical process but it has to be demonstrated how the period spent on remand was catered for in the sentence.

He referred court to the decision in **Ogalo s/o Owuora v R (1954) 21 EACA 270,** for the principle that the appellate court will not interfere with the sentence imposed by the trial court unless it is shown that the judge acted upon some wrong principle and that the sentence is manifestly harsh or excessive in the circumstances.

Counsel further submitted that even if the judge did consider the time spent on remand, the sentence that he passed was harsh. That there were several cases in which lower sentences were imposed for similar offences. He provided some of them in his list of authorities. They included **Kajura Kiiza & 2 Others v Uganda, Criminal Appeal No 136 of 2009,** in which this court approved a sentence of 15 years after which the period of 5 years spent on remand were deducted with the result that the sentence of 10 years imprisonment was found appropriate; and **Okulu Jimmy v Uganda, Criminal Appeal No 129 of 2013,** in which this court sentenced the appellant to 10 years' imprisonment from which the period spent on remand was deducted to come to the term of 9 years and 7 months imprisonment.

Counsel then submitted that the sentence of 20 years on each count was excessive as there were no grave injuries proved in respect of Count I, but

the judge sentenced the appellant to the same term of 20 years as that in Count II where there were injuries to the victim. Counsel went on to submit that the sentence of 20 years on each count with a fine of 400,000/= was manifestly harsh and excessive in the circumstances. He prayed that this court allows the appeal and sets aside the sentence and substitutes it with an appropriate one.

In reply, Mr. Semalemba Simon Peter conceded that while imposing the sentence on the Appellant, the trial judge did not take the period spent on remand into account. He referred court to the decision in **Mutebi Ronald v Uganda Criminal Appeal No. 0383 of 2019,** where this court referred the decision in **Rwabugande Moses v Uganda SCCA No. 25/2014** with approval, and held that any sentence passed without taking the time spent on remand into consideration is contrary to Article 23 (8) of the Constitution and therefore illegal.

Counsel however contended that the sentences passed against the appellant were neither harsh nor excessive in the circumstances. He pointed out that in **Mutebi Ronald (supra)** the appellant was sentenced to 23 years' imprisonment but on appeal this court sentenced the appellant to 20 years' imprisonment after deducting the 2 years and 6 months that he spent on remand. Accordingly, counsel prayed that this court finds the sentence of 20 years appropriate and deducts the period spent on remand. He also prayed that the order of compensation of 400,000/= imposed by the trial judge be upheld.

Resolution of the appeal

It is well settled principle that this court is not to interfere with a sentence imposed by the trial court exercising its discretion unless the sentence is

illegal or this court finds that the trial judge did not consider an important matter or circumstance which ought to have been considered while passing sentence. Further that the court may interfere with the sentence if it is shown that it was manifestly excessive or so low as to amount to an injustice. **[See Livingstone Kakooza v Uganda; SCCA No. 17 of 1993]**

We observed that in his submissions, counsel for the appellant raised three legal issues for this court to address with regard to the sentence imposed by the trial judge. The first was that the trial judge did not consider the period spent on remand. Secondly, that he did not consider sentences that had been imposed for similar offences by the courts before he imposed his sentence and therefore the sentence imposed was harsh and manifestly excessive in the circumstances. Finally, that he did not state the date from which the sentence would run.

We now proceed to address the appellant's grievances but before we do so, it is useful to set out the sentencing ruling from which our analysis flows. At page 25 of the record, the trial judge observed and ruled as follows:

> *I have heard both sides on sentence offences of this nature are rampant today. (sic) The offence of aggravated robbery caries the maximum penalty of death.*
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> *Society needs protection from the likes of the convict. The fact that he did not flinch from donning the uniform of the Uganda Police Force while exciting (sic) his mission, shows the levels of his intent to criminality. He was also armed with a panga which he did not hesitate to apply on one of the victims. The said victim (Okello Moses) was lucky he survived the injuries inflicted on him. My view is that society is safer without the convict in their most. (sic) It is also important to send a strong warning to others out there who are inclined to behave in similar fashion.*
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> *At 27 years the convict is still a young man. He is also a first offender and he has been on remand for 3 years. Court will exercise some leniency by not imposing the maximum penalty. Once he undergoes reform and*

rehabilitation he is capable of making positive contribution to society, given his age.

Considering all the above factors I sentence the convict to 20 (twenty) years imprisonment on count I and also 20 years on count II. Both sentences are to run concurrently.

In addition, the convict shall pay shs 400,000 to Okello Moses who suffered injury at his hands, as compensation.

The requirement to take the period spent on remand into account is Constitutional and provided for by Article 23 (8) of the Constitution, where it is stipulated that:

> **(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.**

In his ruling, the trial judge stated all the factors that he considered before he arrived at the sentence of 20 years' imprisonment. However, we note that he did not single out the period spent on remand as a specific factor to consider before imposing sentence.

We have considered Mr Ladwar's submission that the sentencing process did not require the trial judge to employ the method of mathematical deduction of the remand period from the sentence. However, he seems to contradict himself when he demands for a demonstration that the remand period was credited to the appellant.

We note that the sentence that is challenged here was imposed on 17th October 2012. This was clearly before the often cited decision of the Supreme Court in **Rwabugande Moses v Uganda (supra)** in which the court emphasised adhering to Article 23(8) of the Constitution, when they stated that a sentence arrived at without taking the period spent on

remand into consideration is illegal for failure to comply with a mandatory provision of the Constitution. The court reviewed its earlier decisions in **Kizito Senkula v. Uganda; SCCA NO. 24 of 2001; Kabuye Senvewo v. Uganda; SCCA No. 2 of 2002; Katende Ahamad v. Uganda; SCCA No.6 of 2004 and Bukenya Joseph v. Uganda SCCA; No. 17 of 2010,** to the effect that the court had only to show that it considered or took the period spent on remand into account or consideration. The court then changed its position in the cases cited and held that:

> *It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.*
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> *We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence. Article 23 (8) of the Constitution (supra) makes it mandatory and not discretional that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law such as age of the convict; fact that the convict is a first time offender; remorsefulness of the convict and others which are discretional mitigating factors which a court can lump together. Furthermore, unlike it is with the remand period, the effect of the said other factors on the court's determination of sentence cannot be quantified with precision.*
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> *We note that our reasoning above is in line with provisions of* ***Guideline 15*** *of the* ***Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*** *..."*

In **Abelle Asuman v Uganda; SCCA No. 66 of 2016** the Supreme Court reviewed its decision in **Rwabugande (supra)** and emphasized the application of the principle in Article 23(8) of the Constitution and held that:

*"This Court and the Courts below before the decision in **Rwabugande (supra)** were following the law as it was in the previous decisions above quoted since that was the law then.*

*After the Court's decision in the **Rwabugande case** this Court and the Courts below have to follow the position of the law as stated in **Rwabugande (supra).**"*

Since the appellant was sentenced on 17th October 2012 before the Supreme Court's decision in **Rwabugande (supra)** which was handed down on 3rd March 2017, the trial judge had only to demonstrate that he considered or took into account the period spent on remand, not deduct it from the sentence. We review some of the decisions before **Rwabugande** below.

In **Kabuye Senvewo** (supra) the Supreme Court did not fault the Court of Appeal for upholding a sentence where it was shown that the trial judge did not take into account the period spent on remand before imposing sentence because they found the sentence to be commensurate with the crime. The court held that:

"The constitutional requirement ranks the period spent on remand among the several factors to be weighed in assessing the term of imprisonment to impose on a person convicted of a criminal offence. It must not be construed as a provision of a formula of discounting the sentence." (sic)

In **Kizito Senkula** (supra) the Supreme Court considered the import of Article 23 (8) of the Constitution and held that:

"As we understand the provisions of article 23(8) of the Constitution, they mean that when a trial court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to his/her conviction. Taking into account does not mean an arithmetical exercise."

We therefore find that though he did not demonstrate exactly how he treated the period spent in lawful custody before sentence, the trial judge

complied with the requirements of Article 23 (8) as it was understood by the courts at the time he passed sentence. He therefore made no error when he considered the period of remand generally with all the other factors he considered before imposing sentence.

We next considered the complaint that the trial judge did not state the date on which the sentences imposed would commence. This is a matter of law and it is stated in section 106 of the TIA, which provides for warrants in the case of imprisonment of a convict. Subsection (2) thereof provides as follows:

> **(2) Subject to the express provisions of this or any other law to the contrary, every sentence shall be deemed to commence from and to include the whole of the day of the date on which it was pronounced**.

Therefore, in the absence of any other provision or reason for the sentence commencing on any other day, the sentences imposed on the appellant were deemed to have commenced on 17th October 2010, including that day in the reckoning.

As to whether the sentence of 20 years on both counts was manifestly harsh and excessive, counsel complained that the trial judge did not take into account the fact that the courts have imposed sentences that are lower than 20 years for the offence of aggravated robbery. He referred to the decisions that we have already reviewed above in which the sentences were 15 and 10 years, before deducting the period spent in lawful custody before conviction.

We agree with the submission of counsel for the appellant that the trial judge ought to have taken into consideration sentences for similar offences because this is one of the general principles for sentencing provided for in

the Sentencing Guidelines of the Courts of Judicature, 2013. Paragraph 6 (c) thereof provides that every court when sentencing an offender shall take into account;

> **(c) the need for consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offences committed in similar circumstances;**

The trial judge therefore failed to observe one of the cardinal principles of sentencing set out in the Guidelines. The sentences imposed then fall among those where this court may interfere with the sentencing discretion of the trial judge. We therefore set aside the sentence and shall proceed to impose an appropriate sentence after considering sentences imposed in similar cases committed under similar circumstances. We invoke the powers of this court granted in section 11 of the Judicature Act to do so.

In **Wotoba & 3 Others v Uganda; Criminal Appeal No 874 of 2014 [2023] UGCA 77** this court upheld the sentence of 20 years that was imposed by the trial judge for aggravated robbery. The court took into consideration that one of the assailants was a policeman who turned into a rogue and engaged in armed robbery. The victim who was a police man was attacked with a *panga* with the intention of stealing a gun from him. The injuries of the victim were very serious because the assailants hacked at his head. They stole the gun and it was never recovered. After reviewing several precedents on sentence, the court came to the conclusion that sentences for aggravated robbery where violence is inflicted ranged from 15-20 years. The court thus upheld the sentence of 20 years' imprisonment that was imposed by the trial court.

In **Muhindo Crescent v Uganda, Criminal Appeal No. 0119 of 2011**, in which judgment was handed down in December 2022, this court

sentenced the appellant who, with others at large, attacked one of the victims and hacked at his head with a hoe causing him grievous harm. They then stole money, mobile phones and other household property. This court sentenced the appellant to a term of 17 years' imprisonment before taking into account the period that he had spent in lawful custody before conviction.

In **Ssentogo Eric v Uganda Criminal Appeal 98 of 2018; [2023] UGCA 14,** the appellant administered a noxious drink to his assailants, *a boda boda* rider and his passenger which caused them to fall into a deep sleep or comma. He then made off with the motorcycle but was apprehended before he could dispose of it. The victims were unconscious for up to 4 days. He was convicted of aggravated robbery and sentenced to 19 years and 8 months' imprisonment by the lower court. On appeal, this court upheld the sentence having found no fault in the manner in which it was imposed by the trial judge.

Given the sentences imposed by this court in decisions that were commended to us by counsel for the appellant and our own review of past decisions, the range of sentences for aggravated robbery, where harm has been occasioned to the victim with a deadly weapon, would fall anywhere between 10 and 20 years' imprisonment. We also observed that he magnitude of violence is the main aggravating factor that determines the sentence. This is consistent with the significance that violence is given in Paragraph 31 of the Sentencing Guidelines in which the first six items/factors relate to violence as follows: (a) degree of injury or harm; (b) the part of the victim's body where harm or injury was occasioned; (c) whether there was repeated injury or harm to the victim; (d) use and nature of the weapon; (e) whether the offender deliberately caused loss of

life in the course of the commission of the robbery; and (f) whether the offender deliberately targeted or caused death of a vulnerable victim.

In this appeal, the appellant attacked the victims while armed with a toy pistol and a panga. He caused injuries to Okello Moses with and a *panga* and blunt object. He was dressed in police uniform and aided by another person who was not arrested. The injuries were described as cut wounds on the right of the scalp and on the right palm. They were classified in PF3, admitted as **PEII**, as harm. The other victim, Otiti Patrick suffered no bodily harm. The stolen items were all recovered because the appellant did not get away from the scene of the crime; he was immediately overpowered and arrested. However, the effect of the appellant putting on a police uniform which he used to stage a robbery with a toy pistol and a *panga* cannot be under estimated. It was exactly such circumstances that led to the amendment of the Penal Code Act in 2017 to include imitation deadly weapons.

Nonetheless, in the circumstances of the case we find that the sentence of 20 years' imprisonment on both counts was excessive given that the second victim sustained no physical injury during the robbery. We are therefore of the opinion that a sentence of 15 years and 10 years' imprisonment on the first and second counts, respectively, would serve the cause of justice. From the two sentences we subtract the period of 3 years that he spent in custody before conviction, with the result that we sentence the appellant to 12 years' imprisonment on Count I and 7 years' imprisonment on count II. The sentences shall run concurrently from 17th October 2012, the date on which he was convicted.

We found no reason to interfere with the order for payment of compensation of UGX 400,000/= to the victim, Okello Moses, for his injuries. It is provided for by section 126 of the TIA and there was no justification for our interference with the discretion of the trial judge in that regard. The order for compensation is thus upheld.

Dated at Gulu this 16th day of June 2023

Fredrick Egonda Ntende
JUSTICE OF APPEAL

Catherine Bamugemereire
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL