

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT GULU
Coram: Egonda Ntende, Bamugemereire & Mulyagonja, JJA
CRIMINAL APPEAL NO 403 OF 2016

5 **AVUNI TIPAS MIKE:.....APPELLANT**

VERSUS

UGANDA:.....RESPONDENT

{Appeal from the decision of Keitirima, J, dated 22nd November 2015 in Arua High Court Criminal Session Case No. 004 of 2013}

10 **JUDGMENT OF THE COURT**

The appellant was indicted with the offence of aggravated robbery contrary to section 285 and 286 (2) of the Penal Code. He pleaded not guilty and was tried in a full trial where he was found guilty and sentenced to a term of 35 years' imprisonment and ordered to refund
15 UGX 11,500,000 to the victim, with interest thereon at 10% p.a. from 2011 until payment in full.

The brief facts upon which he was convicted were that on the 8th April 2011 at around 4:00pm the appellant, Avumi Tipas Mike, invited Borobi Muzamil to go to a bar and have a drink. The latter declined to do so
20 because he was still working. Borobi Muzamil, was a "money changer;" he was involved in foreign exchange business and the appellant was his customer whom he had known for about two to three months because he used to change money as his kiosk. When Borobi declined to go to the bar, the appellant left, went to a bar near the victim's workplace and
25 began to consume alcohol. The victim continued with his work up to about 5.00 to 6.00 pm when he decided to go home.

On his way, he met the appellant who asked him to escort him to visit his girlfriend, a neighbour to Borobi. The latter agreed to go with him and left him at the girlfriend's place. Borobi then went to his home, freshened up and then joined the appellant. The appellant and he went
5 to the bar and the appellant bought him beer. At 8.00 pm, Borobi left the bar, went home, and went to bed. But at about 1.30 pm, Borobi heard someone kick his door open. He woke up to find two people at his door, one of whom was the appellant, holding a gun

The two assailants forced Borobi onto the ground as they searched his
10 house. The appellant pointed his gun at Borobi. The other assailant gagged him with a cloth so he could not make an alarm. The assailants then pulled at the papyrus ceiling in which he kept his money and brought it down. They found money that he had kept in a big envelope, UGX 6,000,000/= and three million South Sudanese pounds, all
15 totalling to UGX 12,000,000/=. They took the money and fled. The appellant was arrested on 1st October 2011 and indicted for the offence. The second assailant though included in the charge sheet was not found for he had passed on. The appellant was thus tried alone, found guilty, convicted and sentenced as stated above. He now appeals against the
20 sentence only in the following ground of appeal:

1. The learned trial judge erred in law and fact when he sentenced the appellant to 35 years' imprisonment which was manifestly harsh and excessive in the circumstances.

The respondent opposed the appeal.

25 **Representation**

At the hearing of the appeal on 29th March 2023, Ms Harriet Otto represented the appellant. The respondent was represented by Ms

Tumuheise Rose, Assistant Director of Public Prosecutions (DPP) in the Office of the DPP.

Counsel for both parties filed written submissions and prayed that court considers them in the appeal. Ms Otto applied to appeal against sentence alone under section 132 of the Trial on Indictments Act. She also applied to validate the memorandum of appeal that had been filed out of time and both prayers were granted. The appeal was disposed of on the basis of written submissions.

Submissions of counsel

Counsel for the appellant submitted that the trial judge did not take into consideration the period that the appellant spent on remand while sentencing him, contrary to Article 23 (8) of the Constitution.

Counsel then referred court to **Otuke Sam v Uganda, Court of Appeal Criminal Appeal No 251 of 2002**, where court confirmed a sentence of 9 years' imprisonment for aggravated robbery. She further drew our attention to **Adana Jino v Uganda, Court of Appeal Criminal Appeal No 50 of 2006**, where the appellant had been sentenced to life imprisonment but the sentence was reduced to 15 years' imprisonment. She further submitted that in **Kusemererwa & Another v Uganda, Court of Appeal Criminal Appeal No. 83 of 2010**, the appellant who had been sentenced to 20 years' imprisonment for aggravated robbery had his sentence reduced to 13 years' imprisonment. She prayed that court considers the principle of consistency in sentencing and reduces the sentence of 35 years' imprisonment to a lesser period.

In reply, counsel for the respondent submitted that the trial judge considered all the factors that he had to before he sentenced the appellant to 35 years imprisonment. She referred us to the relevant text

at page 58, paragraph 3 of the record of appeal. She however conceded that the trial judge did not take the period spent on remand into consideration. She argued that this was not fatal to the prosecution case because this court has powers under section 11 of the Judicature Act
5 to impose sentence as does the court of first instance. She prayed that the sentence of 35 years' imprisonment be reduced by the period of 5 years and one month that the appellant spent on remand so that he is sentenced to 29 years and 11 months' imprisonment.

She further opined that this should be the course taken because the
10 maximum sentence for aggravated robbery is death. That in the circumstances of the case the sentence of 35 years was not harsh and excessive. That the appellant ought to be sentenced to a deterrent sentence for his crime and the sentence of 35 years' imprisonment was appropriate in the circumstances.

15 **Resolution of the appeal**

The principles upon which this court may interfere with a sentence imposed by the trial court are settled. They are that the appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion unless the exercise of discretion is manifestly
20 excessive or so low as to amount to a miscarriage of justice, or where a trial court ignores to consider an important circumstance which ought to be considered in passing the sentence, or where the sentence imposed is wrong in principle. [See **Kiwalabye Bernard v Uganda, SCCA No. 143 of 2001**].

25 While sentencing the appellant on 22nd November 2016, the trial judge stated thus:

5 *"I have read the mitigating and aggravating factors. The gun in the said robbery was never recovered and must be used for other illegal activities. The convict has not been remorseful throughout the trial. I have considered the period the convict has spent on remand and I will now sentence him to 35 years (thirty-five) imprisonment. (sic) The convict is also to refund (to) PWII 11,500,000/= (Eleven Million, Five Hundred Thousand Shillings) with interest of 10% per annum from 2011 until he pays in full. The convict has a right to appeal versus the conviction and sentence."*

10 It appears to us that counsel for the appellant's complaint that the trial judge did not take the period spent on remand into account is based on the fact that he did not arithmetically deduct it from the sentence that he finally imposed. It is important to note that the sentence against this appellant was handed down on 22nd November 2016. This was before
15 the decision of the Supreme Court in **Rwabugande Moses v Uganda, SCCA No 25 of 2014**, where judgment was handed down on 3rd March 2017. In that case the Supreme Court held that:

20 *"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 discretionary that a sentencing judicial officer accounts for the remand period. As such, the remand period cannot be placed on
25 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 discretionary 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
30 court's determination of sentence cannot be quantified with precision.*

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** which provides as follows:

35 **(1) The court shall take into account any period spent on remand in determining an appropriate sentence.**

(2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.

(Emphasis added)

5 Since the sentence in this case was handed down before the decision of the Supreme Court above, that decision could not apply retrospectively.

However, we note that the trial judge did not consider sentences for similar offences that had been handed down by the courts in order to observe the need for consistency with appropriate sentencing levels and
10 other means of dealing with offenders in respect of similar offences committed in similar circumstances, as it is provided for in paragraph 6 (c) of the Sentencing Guidelines for the Courts of Judicature. The court therefore ignored an important principle that ought to be observed during sentencing. We therefore reviewed sentences that had been
15 handed down in the past for the offence of aggravated robbery.

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

In **Ssenkungu Akim v Uganda, Court of Appeal Criminal Appeal No. 20 264 of 2015**, this court upheld the sentence of 27 years' imprisonment for the offence of aggravated robbery. The court emphasised that it is the trial judge who hears the case, with the primary role of determining the appropriate sentence. That the trial judge in that case imposed a sentence of 27 years' imprisonment which was well within the
25 sentencing range for aggravated robbery under the Sentencing Guidelines for the Courts of Judicature. The court found no reason to fault the trial judge and so upheld the sentence.

In **Lule Akim v Uganda, Criminal Appeal No. 274 of 2015**, this court upheld a sentence of 20 years' imprisonment for aggravated robbery that had been imposed by the trial court, which they found to be neither harsh nor excessive.

5 And in **Ntambi Robert v Uganda, Court of Appeal Criminal Appeal No 334 of 2019**, the appellant was convicted for the offences of murder and aggravated robbery on his own plea of guilty. The trial court sentenced him to 20 years and 18 years' imprisonment for murder and aggravated robbery, respectively, to run concurrently. On appeal to this
10 court, it was observed that considering the mitigating, aggravating factors and the precedents set by this court and the Supreme Court, the sentences were neither manifestly harsh nor excessive. Further that according to the sentencing range laid down in the third schedule of the Sentencing Guidelines, sentences for both offences range from 35 years'
15 imprisonment to the death sentence, after considering the mitigating and aggravating factors. The court thus found no reason to interfere with the sentences imposed by the trial court and they were upheld.

From the review of sentences above, we find that the sentence of 35 years' imprisonment was harsh and excessive in the circumstances of
20 the case and we hereby set it aside. Pursuant to section 11 of the Judicature Act, we shall now impose an appropriate sentence in the circumstances of the case.

During the sentencing proceedings, counsel for the respondent drew it to court's attention that the gun that the appellant used to commit the
25 offence was never recovered and therefore continued to be a danger to society. Counsel also submitted that the appellant was not remorseful yet the offence has a maximum sentence of death. For the appellant, counsel brought it to court's attention that the appellant was 33 years

old, with a wife and the father of three children. That he was breadwinner for his family who had been on remand for 5 years and one month. He prayed for leniency.

We have considered the aggravating and mitigating factors that were advanced before the lower court. We have also considered the sentences that have been imposed for similar offences and come to the conclusion that a sentence of 18 years' imprisonment would be appropriate in this case. From that we deduct the period of 5 years and one month that he spent on remand before conviction and hereby sentence him to a term of 12 years and 11 months' imprisonment. He shall also pay back to the victim the sum of UGX 11,500,000/= as ordered by trial judge. The sentence shall commence on 22nd November 2016, the day on which he was convicted.

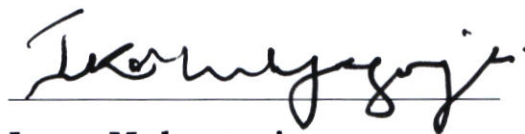
Dated at Gulu this 16th of June 2023.



Fredrick Egonda Ntende
JUSTICE OF APPEAL



Catherine Bamugemereire
JUSTICE OF APPEAL



Irene Mulyagonja
JUSTICE OF APPEAL