THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

[Coram: R. Buteera, DCJ. C. Gashirabake, JA, O. Kihika, JA.]

CRIMINAL APPEAL NO. 0347 of 2016

(Arising from Criminal session case No. 090 of 2015, at Kabale)

BETWEEN

HABIBU ZUBAIRU alias

BYAMUGISHA SAMUEL ..... APPELLANT

AND

UGANDA ..... RESPONDENT

(Appeal against the sentence passed by Michael Elubu J. delivered on the 25th day of June 2015 at Kabale)

JUDGMENT OF COURT

Introduction

1.] The appellant was indicted, tried, and convicted of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act.

2.] FN (victim) was at the time of the commission of the offence a resident of Bataka Cell, Kirigime Ward, Southern Division -Kabale Municipality. Habib Zubairi (appellant) was at the time of the commission of the offence a resident of the same Cell as the victim.

3.] On the 11th day of November 2012 at around 6:30 a.m. the victim left her house for Mwanjari Cell. She went following her husband where the two were going to trap grasshoppers. On her way, the victim met the appellant near the home

of one Hamurungi Nicholas. The appellant was armed with a panga. The appellant asked the victim whether she had recognized him and she replied in the negative. The appellant ordered the victim to put whatever she had down and asked her whether she had money. The victim replied that she did not have any money. The appellant ordered the victim to remove her shoes and lie down so that the appellant could have sex with her but the victim resisted the appellant's move. The appellant moved closer to the victim, grabbed her, and attempted to put her down in vain. The appellant cut the victim using the panga on her right leg, face, and her hand as she tried to defend herself from the attacker. When the appellant left the scene of the crime, the victim rushed to the home of Hamurungi Nicholas for help. Nicholas called the victim's husband who in turn mobilized transport and the victim was taken to Rugarama Hospital for medical attention. The victim's husband reported the matter to Kabale police station and inquiries commenced.

4.] The appellant was arrested, charged, tried, convicted, and sentenced to 12 years' imprisonment. Aggrieved with the trial Court findings the appellant lodged this appeal on two grounds that;

1. *The learned trial Judge erred in law and fact when he failed to deduct the period spent on remand hence occasioning a miscarriage of justice.*
2. *The learned trial Judge erred in law and fact when he sentenced the appellant to 12 years' imprisonment which was manifestly harsh and excessive in the circumstances hence occasioning a miscarriage of justice.*

Representation

5.] At the hearing of the appeal, the appellant was represented by Mr. Vicent Turyahabwe on State brief. The respondent was represented by Mr. Moses Onencan, Assistant DPP, holding brief for Mr. Baguma Batson Chief State Attorney.

Submissions by counsel for the appellant

6.] Counsel for the appellant contended that the trial Judge erred in law and fact when he failed to deduct the period spent on remand hence occasioning a miscarriage of justice.

7.] It is submitted that under Guideline 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, it is a requirement to deduct the period spent on remand while passing a sentence. To buttress his argument counsel cited the case of **Wamala Meddie alias Taate Mzee Vs. Uganda, Criminal Appeal No. 038 of 2017,** where the court found that the trial Court's failure to deduct the period spent on remand was wrong and the appeal accordingly succeeded in part by correctly making the deduction.

8.] Furthermore, counsel submitted that this Honourable Court could not interfere with the discretion of the sentencing Judge if he complied with all the set principles regarding sentencing. Counsel relied on the case of **Kamya Johnson Wavamunno vs. Uganda, Criminal Appeal No. 16 of 2000,** and the case of **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001**.

9.] The principles regarding consideration of the period spent on remand were well enunciated in **Rwabugande Moses Vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014,** where it was 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 the period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.

We must emphasize that a sentence couched in general terms that the 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 office accounts for the remand period. As such, the remand period cannot be placed on the same scale with other factors developed under common law...".

10.] Counsel concluded that it was fatal that the trial Judge did not consider the years spent on record.

11.] On ground 2, counsel submitted that the appellant had a right to appeal against the sentence only by virtue of section 132(2) of the Trial on Indictments Act. Counsel cited the Supreme Court decision in the case of **Kakooza Vs. Uganda, Criminal Appeal No. 17 of 1993 citing Ogala s/o Owoura Vs. R (1954) 21 E.A.C.A. 270,** where it was stated 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 manifestly excessive given the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration.

12.] Guideline 6(e) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 provides that every court shall when sentencing an offender take into account the offender's personal, family,

community, or cultural background. During allocutus it was brought to the trial Court's attention that the appellant was living with his grandmother at the time of the offence, was a single father to a five-year-old son at the time, had lived the hard way, and that the child would not be able to study beyond Primary 7 if he were to be left under the grand parents' care.

13.] It was submitted that if this court examined the record and evaluated the evidence, it would be established that the sentence was harsh and manifestly excessive. Counsel prayed that the court accepts the appeal and set aside the sentence of 12 years.

Submissions by counsel for the respondent.

14.] The respondent opposed the appeal.

15.] On ground 1, the respondent's counsel argued that the learned trial Judge took into account the period spent on remand and there is nothing to fault him about.

16.] Furthermore, counsel submitted that he was alive to the Constitutional Command under Article 23 (8) and principle 15 of the Sentencing Guidelines referred to by counsel for the appellant that enjoins courts to take into account the period the convict has spent on remand. Counsel noted that he was alive to the position of the law in the case of **Rwabugande Moses Vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014**). However, he submitted that the case of **Rwabugande Moses** *(supra)* relied upon by the learned counsel for the appellant does not apply to this case because it was decided before the case of **Rwabugande** *(supra)*. To fortress his argument counsel cited the case of **Abelle Asuman vs. Uganda, Supreme Court Criminal Appeal No. 66 of 2016,** delivered on 19th April 2019, wherein it was held that the case of **Rwabugande Moses** (*supra*) does not operate retrospectively. The instant case was decided on the 26th of June 2015 way long before the

Rwabugande case (supra). Counsel submitted that the learned trial Judge did what was required of him and did not commit any error. He prayed that this ground be dismissed.

17.] On ground 2, counsel submitted that the sentence of 12 years' imprisonment is neither harsh nor excessive given the circumstances of this case. The appellant was convicted of an offence of aggravated robbery contrary to sections 285 & 286 (2) of the Penal Act which attracts a maximum sentence of death. It was added that the learned trial Judge exercised the sentencing discretion judiciously and within the precincts of the law.

18.] Counsel noted that it is trite law that sentencing is a discretion of the trial court and an appellate court will only interfere with a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material fact or the sentence is manifestly harsh or excessive given the circumstances of the case. He referred to the cases of **Asiimwe Brian vs. Uganda, (Court of Appeal Criminal Appeal No. 54 of 2016), Bakubye Muzamiru & Anor vs. Uganda, SCCA No. 56 of 2015, Bashir Ssali vs. Uganda, SCCA No 21 of 2005, Ninsiima Gilbert vs. Uganda, CACA No 65 of 2014** and **Muhwezi Bayon vs Uganda, CACA No.198 of 2013**)

19.] Additionally, counsel submitted that the trial Judge conformed to the requirement of consistency as provided for under paragraph 6 (d) of the Constitutional (Sentencing Guidelines for Courts of Judicatures) (Practice) Direction, Legal Notice No. 8 of 2016. In the case of **Livingstone Kakooza Vs. Uganda, SCCA No 17 of 1994**, it was held that sentences imposed in previous cases of a similar nature do afford material for consideration while the court is exercising its discretion in sentencing.

20.] In the case of **Asiimwe Brian Vs. Uganda, Criminal Appeal No. 54 of 2016 (COA),** the robbery was committed with broken bottles, this court

quashed the sentence of 17 years and substituted it with 15 years and after deducting 3 years' remand period, the appellant was sentenced to 12 years and 8 months' imprisonment.

21.] In the case of **Kusemererwa and others Vs. Uganda, No. 83 of 2010, Court of Appeal,** this court quashed a sentence of 20 years for aggravated robbery for each appellant for being harsh and excessive and substituted it with 13 years and 12 years respectively.

22.] In the case of **Aliganyira Richard Vs. Uganda, CCA No. 50 of 2010**. This court quashed a death sentence for aggravated robbery and substituted it with sentence of a 15 years' imprisonment.

23.] In the case of **Ssemiyingo Vs. Uganda, CCA No. 42 of 2018**, this court reduced a sentence of 15 years of aggravated robbery and substituted it with a sentence of 12 years' imprisonment. In the case of **Komakech Vs. Uganda, CCA No. 15 of 2014**, this court upheld a sentence of 14 years for the offence of aggravated robbery.

24.] With the above authorities in focus, Counsel submitted that the trial Judge adhered to the principle of consistency and as such cannot be faulted. He argued that the appeal lacks merit. It should therefore be dismissed.

Consideration of Court.

25.] We have carefully considered all the material in the appeal including the record, the submissions of counsel for either side, the law and authorities cited and those not cited. As this is a first appeal, we shall begin by reiterating the duty of this Court while handling such an appeal. Under **Rule 30(1) (a) of the Judicature (Court of Appeal Rules) Directions, S.I 13-10**, this Court, on appeal from a decision of the High Court, may reappraise the evidence and make inferences of fact. In the case of **Kifamunte Henry Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, it was held that a first

appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge, and then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. We shall now proceed to consider the grounds of appeal.

26.] For this court, as a first appellate court, to interfere with the sentence imposed by the trial court, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law, or that the trial Court failed to take into account an important matter or circumstance, or made an error in principle or imposed a sentence which is harsh and manifestly excessive in the circumstances. See **Kiwalabye Bernard Vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001, Rwabugande Moses Vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 and Livingstone Kakooza Vs. Uganda, SC Criminal Appeal No. 17 of 1993.**

27.] In arriving at the sentence of 12 years' imprisonment for the appellant, the trial Judge considered the following factors;

> *The Convict is treated as a first offender. He has readily pleaded guilty moving Court on his own to take his plea of guilty. He saved resources. He is a young man of only 22 years and was 18 years old when he committed the offence. I take note of his current family situation. He prayed for lenience and the sympathy of the Court. He also shows remorse for his actions. The court notes the grave circumstances of this case. The Convict was armed with a panga and inflicted multiple cuts on the Victim. He targeted the head. The medical evidence shows she suffered deep cuts on the face, leg, and palm. But for the intervention of the Public, she may have suffered a worse fate.*
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> *This offence of robbery is extremely rampant in Kabale municipality and the district in general. This Court must ensure a return to respect for the rule of law by punishing the guilty and deterring those of a similar mindset. The public years for the Courts to take the necessary action to curb the*

growing/worsening trend. The Convict has spent 3 years on remand. I have taken this into account. The State has prayed for a sentence of 25 years. The offence carries a maximum sentence of death. Taking all the above into account, I deem a sentence of 12 years to be appropriate

28.] On whether the trial Judge complied with the requirement of Article 23(8) of the Constitution, is a matter that can be established from the record. It is important to determine this question because it will determine whether this court can interfere with the sentencing discretion of the trial Judge. Article 23(8) provides that;

> *"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."* Emphasis ours.

29.] The Supreme Court in the case of **Rwabugande Moses Vs. Uganda** *(supra)*, which was delivered on the 03rd day of March 2017, clearly explained that *"taking into account"* meant arithmetic deduction of time spent on remand since the years were known with certainty and precision. This was a departure from the earlier position of the law set out in the case of **Kizito Senkula vs. Uganda, SCCA No. 24 of 2001**, which was to the effect 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 a 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 this into account does not mean an arithmetical exercise. Further, the term of imprisonment should commence from the date of conviction, not back-dated to the date when the convicted person first went into custody."*

30.] In the case of **Karisa Moses Vs. Uganda, SCCA No. 23 of 2016**, the court held that the authority of **Rwabugande** cited by counsel for the appellant

was irrelevant because the **Rwabugande** case was decided on 03rd March 2017. The appellant had been sentenced by the trial Court on the 27th of July 2010 and his appeal had been determined on the 21st of October 2016 long before the decision in **Rwabugande**. The court relied on the decision in the case of **Sebunya Robert and Anor vs. Uganda, SCCA No. 58 of 2016**, which clarified the applicability of the position in **Rwabugande** and stated as follows;

> *"Rwabugande does not have any retrospective effect on sentences which were passed before it by Courts 'taking into account the periods [a convict] spends in lawful custody'. Accordingly, we find no justifiable reason to fault the High Court for passing or the Court of Appeal for confirming the sentences that were imposed on the appellants as those sentences conformed with the law that applied at the time the sentences were passed"*

31.] Similarly, the foregoing position in **Karisa Moses Vs. Uganda***(supra)* and **Sebunya Robert and Anor Vs. Uganda** *(supra)* applies to the facts of this case. According to the record, the appellant was convicted on his own plea of guilty on 25/06/2015. This was long before the **Rwabugande case** *(supra)* was decided. We therefore find that the trial Judge properly considered the 3 years spent on remand according to the legal regime then.

32.] The second ground to consider on this appeal, is whether the sentence was harsh and manifestly excessive. This will require this court to re-evaluate and establish whether the trial Judge considered both the mitigating and aggravating factors and whether he exceeded the stated range of sentence provided by law. For mitigation, the trial Judge considered the fact that the appellant was a first time offender, his current family situation, he readily pleaded guilty, saved resources, he was only 22 years of age, and he had spent 3 years on remand, as seen in the extract above. Which also clearly shows that

he considered the aggravating factors as well. The trial Judge took into consideration the requirement of guideline 6(e) of the sentencing guideline when he stated that he took note of the current family situation of the appellant.

33.] Having considered all the mitigating and aggravating factors, in assessing whether the sentence was harsh and manifestly excessive, we are guided by the fact that the maximum penalty for aggravated robbery is death according to Section 286(2) of the Penal Code Act and the 4th Item of the 3rd schedule of the Sentencing Guidelines. Additionally, under the Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions, 2013, the starting point for sentencing aggravated robbery is 35 years. In the case of **Aharikundira Yustina vs. Uganda, SCCA No. 27 of 2015**, the Supreme Court had this to say when assessing whether the sentence is harsh or manifestly excessive;

> *"There is a high threshold to be met for an appellate court to intervene with the sentence handed down by a trial judge on grounds of it being manifestly excessive. Sentencing is not a mechanical process but a matter of judicial discretion therefore perfect uniformity is hardly possible. The key word is* ***"manifestly excessive".*** *An appellate court will only intervene where the sentence imposed exceeds the permissible range or sentence variation."*
> (Emphasis ours)

34.] Bearing in mind the above position of the law, we take cognizance of the principle of consistency. The same case of **Aharikundira Yustina Vs. Uganda,** *(supra)* held that this principle is rooted in the law of law and held thus;

> *"it is the duty of this Court while dealing with appeals regarding sentencing to ensure consistency with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is the*

vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that law be applied with equality and without unjustifiable differentiation."

35.] In the case of **Twinomujuni Baala Vs. Uganda, Criminal Appeal No. 24 of 2021**, the court imposed 13 years' imprisonment for aggravated robbery by the appellant who was 20 years old at the time of the commission of the offence. In addition to the cases cited by counsel for the respondent, we are persuaded that the trial Judge conformed to the principle of consistency. Considering the fact that the maximum sentence for aggravated robbery is death and the starting point for the sentence is 35 years of imprisonment, 12 years' imprisonment is within the accepted legal range. We find that the sentence of 12 years' imprisonment was neither harsh nor manifestly excessive.

36.] Accordingly, this appeal lacks merit, we confirm the sentence and the appellant shall continue serving his sentence as imposed from the date of his conviction.

We so order

Dated at Kampala this 12th **day of** October **2023**

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RICHARD BUTEERA

DEPUTY CHIEF JUSTICE

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR KIHIKA

JUSTICE OF APPEAL