THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Mulyagonja & Mugenyi, JJA

CRIMINAL APPEAL NO. 0016 OF 2018

1. KIBUUKA JOHN

2. KASANDA ABDUL AKIMU :::::::::::::::::::::::::::: APPELLANTS

VERSUS

UGANDA:: RESPONDENT

(Appeal from the decision of Moses Kazibwe, J, delivered on 16th January 2018 at Kampala in High Court Criminal Session Case No. 29 of 2013)

JUDGMENT OF THE COURT

Introduction

The appellants were indicted with three others for the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act, and attempted murder contrary to section 204 of the Penal Code Act. The appellants pleaded guilty to both offenses and the first appellant was sentenced to 25 years' imprisonment on the first count and 10 years' imprisonment on the second count, both sentences to run concurrently, The 2nd appellant was sentenced to 23 years' imprisonment on the first count and 10 years' imprisonment on the second count, both sentences to run concurrently.

Background

The facts that were admitted by the appellants were that on 21st March 2015 at about 10:00 pm, while locking her mobile money shop, Nalwadda Harriet was waylaid and attacked by a group

which included the appellants dressed in police uniform and in possession of two guns. That one of them grabbed her bag which contained UGX 12,000,000/=, airtime worth UGX 4,000,000/=, an Agent MTN line No. 078351115 with commission of UGX 2,700,000/=, another line with UGX 300,000/= as well as two other mobile phones.

When the victim resisted the taking of her bag, one of the assailants used a gun to shoot her in the right thigh and another shot her in the stomach. She sustained grave injuries. The assailants sped away on motorcycles while the victim was taken to Mengo Hospital, unconscious. The Police tracked down one of the assailants and he identified the other four. All five of them, two of whom are the appellants in this appeal, were arrested and charged with aggravated robbery and attempted murder.

The appellants here pleaded guilty and the trial judge convicted and sentenced them as we have indicated above. Dissatisfied with the sentences they now appeal on one ground as follows:

> **That the learned trial judge erred in law and fact when he sentenced the appellants to a harsh and excessive sentence in the circumstances.**

Representation

At the hearing of the appeal on 17th August 2023, Ms. Sheila Kihumuro represented the appellants on State Brief. The respondent was represented by Ms. Sharifa Nalwanga, Chief State Attorney, from the Office of the Director Public Prosecutions.

The appellants' Advocate applied for leave to appeal against sentence only and her prayer was granted. Counsel for both

parties filed written submissions before the hearing. They each prayed that the submissions be considered by the court as their final arguments and their prayers were granted.

Submissions of Counsel

Ms. Kihumuro, for the appellant, referred to **Kifamunte Henry v Uganda; Criminal Appeal No. 10 of 1997** and **Bogere Moses & Anor v Uganda; Criminal Appeal No. 1 of 97** and submitted that as a principle, on a first appeal the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law.

She relied on the decisions in **Aharikundira Yustina v Uganda; Supreme Court Criminal Appeal No. 27 of 2005**, **Epuat Richard v Uganda; Criminal Appeal No. 0199 of 2011** and **Naturinda Tamson v Uganda; Criminal Appeal No. 13 of 2011** to support her submissions on the sentences. She argued that the learned trial judge did not properly take into account or properly weigh the mitigating factors in favour of the appellants. That as a result, he imposed sentences upon them that were harsh and excessive when he sentenced the 1st appellant to 25 and 10 years imprisonment, respectively, on the two counts for which he was indicted; and the second appellant to 23 years and 10 years' imprisonment, respectively, both of the sentences to run concurrently.

Counsel further submitted that the appellants were youthful, first-time offenders, did not waste courts' time since they pleaded guilty and were remorseful. She added that the prosecution failed prove that the convicts were on remand in respect of another case pending before the court. She invited this court to consider the sentences passed against the appellants as harsh and excessive

and substitute them with ones that were more fair and lenient, considering the time the appellants spent in lawful custody before they were convicted.

In reply, Ms. Nalwanga submitted that the sentences appealed against were not harsh and excessive considering the circumstances of the case. Further, that aggravated robbery carries a maximum sentence of death, while attempted murder carries a maximum sentence of life imprisonment. She relied on paragraph 19 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 wherein the starting point for attempted robbery is stated as 35 years' imprisonment. She contended that the sentences meted out were within the permissible range and not harsh or excessive. Counsel further submitted that the trial judge duly considered all the mitigating and the aggravating factors and acted on no wrong principle of the law.

She went on to rely on the decisions in **Karisa Moses v Uganda; SCCA No. 23 of 2016** and **Kobusheshe Karaveri v Uganda; CACA No. 110 of 2008** and submitted that the circumstance of this case called for a deterrent sentence. She emphasized that the trial judge took into account all mitigating and aggravating factors and left out no material factor. That therefore, the sentences of 25 years and 23 years, respectively, on Count 1 and the 10 years' imprisonment each on Count 2 were justified.

Counsel for the respondent further drew our attention to the decisions in **Ssimbwa Hassan Kisembo v Uganda; Criminal Appeal No. 71 of 2015** where this court found a sentence of 25 years' imprisonment appropriate for aggravated robbery and **Byamukama Jonas v Uganda; CACA No. 0381 of 2014** where a

sentence of 20 years imprisonment in respect of the same offence was confirmed, and **Wanja John v Uganda; CACA No. 0243 of 2015** where this court found the sentence of 15 years imprisonment appropriate for the offence of attempted murder. She then invited this court to find that the sentences that were imposed upon the appellants were neither harsh nor excessive. She prayed that this court upholds them and dismisses the appeal for lack of merit.

Analysis and determination

The principle that this court will only interfere with a sentence imposed by the trial court when it is illegal or founded on wrong principles of law has been settled for a long time. The court will also interfere with the sentence where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances of the case. [See **Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 143 of 2001 (unreported), Bashir Ssali v Uganda [2005] UGSC 21 and Livingstone Kakooza v Uganda [1994] UGSC 17**.] We took cognizance of these principles in disposing of this appeal.

We note that the appellants' sole complaint in this appeal is that the trial judge did not properly weigh the mitigating factors advanced in their favour and it is this that resulted in the sentences imposed being harsh and excessive in the circumstances of the case. It is not in dispute that the maximum sentence for the offence of aggravated robbery contrary to sections 188 and 189 of the Penal Code Act is death; while the maximum for attempted murder is life imprisonment. The appellants pleaded guilty to both offences and the court had to determine appropriate

sentences for each of them, given that fact. It is also not in dispute that the trial judge exercised his discretion not to impose the maximum for either of the offences on either of the appellants, and we believe it is because the appellants pleaded guilty early in the proceedings.

The power to hand down a lesser sentence than that which is prescribed by law for offences triable under the TIA flows from section 108 of the Act. It provides for the mitigation of penalties and it is stated therein that a person liable to imprisonment for life or any other person may be sentenced for a shorter term. Subsection (2) thereof provides that a person liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment. The provision does not state the factors that may result in a lower sentence being imposed, meaning that according to the law, the discretion as to sentence is left to the court.

The general principles for sentencing were summarised in the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions of 2013. Paragraph 6 thereof states that when sentencing an offender, the court shall take into account:

(a) the gravity of the offence, including the degree of culpability of the offender;
(b) the nature of the offence;
(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;
(d) any information provided to the court concerning the effect of the offence on the victim or the community, including victim impact statement or community impact statement;
(e) the offender's personal, family, community, or cultural background;

(f) any outcomes of restorative justice processes that have occurred, or are likely to occur, in relation to the particular case;

(g) the circumstances prevailing at the time the offence was committed up to the time of sentencing;

(h) any previous convictions of the offender; or any other circumstances court considers relevant.

In **Aharikundira Yustina v Uganda, Supreme Court Criminal Appeal No. 27 of 2015 [2018] UGSC 49,** the Supreme Court found fault with this court and the trial court for failing to take the mitigating factors that were advanced in favour of the appellant at her trial into account. The court found and held thus:

> *"The trial judge therefore ignored putting in consideration the mitigating factors raised by the appellant while passing the sentence.*
>
> *The same trend prevailed in the Court of Appeal when it failed in its duty to re-evaluate the mitigating factors. We disagree with the respondent's argument that the Court of Appeal does not have to handle mitigation and that (the) mitigation process is done only in the trial court as was done in the instant case.*
>
> *In the instant case, since the trial judge did not weigh the mitigating factors against the aggravated factors this automatically placed a duty on the Court of Appeal to weigh the raised factors (sic).*
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> ...
>
> *From the foregoing, we find that the Court of Appeal erred in law when it failed to re-evaluate and re-consider the mitigating factors before it came to its conclusion. This court as (a) second appellate court and court of last resort can interfere with a sentence where the sentencing judge and the first appellate court ignored circumstances to be considered while sentencing; See* ***Kyalimpa Versus Uganda (supra), Kiwalabye Benard Vs Ug*** *(supra).*

This renders taking the mitigating factors advanced for any offender into account far from discretionary; it is prudent to take all of them into account before sentencing, as the Supreme Court did in the case of **Aharikundira.**

We must point out that the typed record that was set before us was incomplete. We thus had to peruse the handwritten record in order to make sense out of this appeal. We carefully reviewed it in order to establish whether the judge considered the mitigating factors before he imposed sentences on the appellants. The handwritten record showed that while sentencing the appellants, the trial judge found and held thus:

> *"Aggravated robbery and attempted murder on which both convicts pleaded guilty are serious offences that may be punishable with death or life imprisonment respectively.*
>
> *Factors in aggravation of the sentence in the present case are the degree of injury occasioned on the victim, the fact that the abdomen was targeted together with the right thigh and a gun that has not been recovered to date was used twice on the victim. The sentence is further aggravated by the value of the money, airtime and phones robbed from the victim. Prosecution estimates that it was Shs.19, 500,000. The manner in which the robbery was executed shows pre-meditation and meticulous preparation. A gun was required, the victim monitored and transport to and from the scene arranged by the convicts who did not deem it wise to report the planned crime.*
>
> *The fact that the convicts however pleaded guilty and saved court's time works in their mitigation. They have shown remorse and have family responsibilities to take care of. I do not however consider their involvement in the commission of the crime any lesser than that of the other co-accused who are alleged to have attacked the victim.*
>
> *Considering all the above and the fact that A1 has expressed a desire to cooperate with the prosecution in the expeditious conclusion of the trial against A2, A3 and A5, I will sentence them as follows:*
>
> 1) *Kasanda Abdul Akimu (A1) is sentenced to 23 years on the count of aggravated robbery.*
> 2) *Kibuuka John (A4) is sentenced to 25 years on the count of aggravated robbery.*
> 3) *Kassanda Abdul Akimu (A1) is sentenced to 10 years on the count of attempted murder.*

4) *Kibuuka John (A4) is sentenced to 10 years on the count of attempted murder.*

The sentences in both counts shall run concurrently. I will deduct the 2 years and 8 months each of the convicts has spent on remand.

Kasanda Abdul will serve 20 years, 4 months in prison starting today.

Kibuuka John will serve 22 years, 4 months in prison starting today."

The excerpt above shows that the trial judge considered both the aggravating and mitigating factors, including the fact that the appellants pleaded guilty. However, he found that the aggravating factors outweighed the mitigating factors. He thus imposed the sentences stated in his ruling.

The record also shows that the trial judge intended to deduct the period spent on remand by the appellants from the proposed sentences. He accordingly deducted it from the sentences for aggravated robbery and pronounced them as 22 years and 4 months for the first appellant and 20 years and 4 months' imprisonment for the 2nd appellant. But he did not deduct the period spent on remand from the proposed sentence of 10 years for the offence of attempted murder.

The Commitment Warrants, at pages 189 and 190 of the record, showed the proposed sentences for both offences with the rider that they were *"less the years spent on remand, to run concurrently,"* yet the trial judge clearly pronounced the final sentences for aggravated robbery, as it is shown above. Apparently, the trial judge omitted to record the final sentences for the offence of attempted murder, which we deduce from the record to be 7 years and 8 months' imprisonment for each of the

appellants, to run concurrently with the sentences for aggravated robbery.

We therefore find that the trial judge observed all the principles that he was required to by law before arriving at appropriate sentences for the appellants. As a result, this court does not have the jurisdiction to disturb the sentences that he imposed. The appellants, Kasanda Abdul and Kibuuka John shall continue to serve the sentences of 20 years and 4 months and 22 years and 4 months, respectively, for the offence of aggravated robbery, and 7 years and 8 months each for the offence of attempted murder, to run concurrently, commencing on 16th January 2018.

This appeal has no merit at all and it is hereby dismissed.

Dated at Kampala this 25th Day of October 2023.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Monica K Mugenyi
JUSTICE OF APPEAL