THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: Bamugemereire, Gashirabake, Kihika, JJA.)

CRIMINAL APPEAL NO. 0477 OF 2020 & 067 OF 2021

1. **GIDUDU ROBERT**
2. **DAADA SWALIKI::APPELLANTS**

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda before Byaruhanga, J. in Criminal Session Case No. 038 of 2017 delivered on 18/12/2020 at Tororo)

JUDGMENT OF THE COURT

Introduction

DAADA SWALIKI who appears here as the 2nd appellant and a one GIDUDU ROBERT who is erroneously stated to be the 1st appellant, were jointly indicted for the offence of Aggravated Robbery contrary to sections **285 and 286 (2)(3)(a) & (4)** of the Penal Code Act.

The particulars of the offence were that Daada Swaliki, Gidudu Robert and others still at large on the 9th of August, 2016 at

Namakwekwe Cell, Northern Division, in Mbale District stole a 42 inch flat screen TV, an HP laptop, an IPhone with its sim card and charger, a Victoria Beckham handbag containing 5,050,000/=, 2 Africell modems, a radio, a subwoofer with two speakers, a solar flash light, a flat iron, all valued at approximately 16,750,000/= the property of Akello Irene and, at the time of the robbery were in possession of a deadly weapon to wit a knife.

The duo was tried by the High Court (Byaruhanga, J.) and whereas Daada Swaliki was convicted of the offence of Aggravated Robbery contrary to sections 285 and 286 (2)(3)(a) & (4) of the Penal Code Act on the 18/12/2020. Robert Gidudu was acquitted of the offence while Daada Swaliki was consequently sentenced to 15 years and 9 months' imprisonment. Aggrieved by the decision of the trial court, Daada Swaliki lodged two notices of appeal, one dated 23rd December 2020 which was registered as Court of Appeal Criminal Appeal No. 477 of 2020 and another on 14th January 2021 that was registered as Court of Appeal Criminal Appeal No. 067 of 2021.

The respondent filed a notice of appeal against the acquittal of Gidudu Robert vide Court of Appeal Criminal Appeal No. 478 of 2020. The Criminal Appeals, No. 0477 and 067 of 2020 filed by Daada Swaliki and the Respondent were consolidated. This court notes that there is only one appellant, Daada Swaliki. Robert Gidudu was erroneously stated to be the 1st appellant when he is not party to this appeal. Meantime, the cross appeal pertaining to Gidudu was dismissed upon withdrawal. We shall therefore

henceforth disregard Robert Gidudu and refer to Daada Swaliki as the only appellant in this appeal.

Background

The brief facts of this case as ascertained from the record were that on the 7th of August, 2016, the victim, with the help of a one Ajok Beatrice and another went to Gidudu Robert's furniture workshop looking for chairs to purchase. She identified a sofa set, negotiated and agreed on a price but because she did not readily have all the amount, the transaction deferred to another day. While the victim was in the workshop, Gidudu Robert introduced the appellant to her as his son with whom he worked at the workshop and who would be able to help her in case he (Gidudu) was not available.

The following day, the 8th of August, 2016 at around 10:00am, the victim called Robert Gidudu on the number he had provided to alert him that she had got the money for the sofa set and would be available in the evening to pay and collect it, but he never received the call. He later returned her call and at around 04:00pm, the victim went to Gidudu's furniture workshop in the company of one Ajok Beatrice (PW2) and paid for the sofa set but she was told to wait as some finishing touches were done on the cushions. As they waited, Gidudu asked the victim a number of questions including where she was residing, whether she was guarded or married to a police officer or prison officer and whether she was willing to accept his offer to transport the sofa set to her place. The victim answered all the questions save for the one on whether she was guarded or

married to a security man. She also rejected the offer of transport because she had already made arrangements for a pick up. On that day the victim did not see appellant at the workshop.

Gidudu left the workshop as the sofa set was being loaded onto the pickup by the people he had assigned the task. When the victim left the workshop for Namakwekwe where she lived, she by passed Gidudu and his other colleagues around the stadium as they walked towards the same direction. After a few minutes, the victim saw two people who worked in Gidudu's workshop following them on motorcycles but she ignored it. When the victim reached her residence the sofa set was offloaded and put in the house. At around 8:00pm, the victim securely locked the door of her house and settled down to work on the laptop. At around midnight, her phone rang and she saw that it was Gidudu calling her and she wondered why he was calling her at that time. She ignored the call and continued with her work. However, after a while she was surprised to see the appellant open her bedroom door and enter while aiming a knife at her. He was shouting in various languages which she could not understand but all she could hear was "money", "money". The victim shouted for help but instead she saw another assailant enter her room and began to pick her properties including her handbag that had Shs. 5,050,000/= and some documents which were related to her work.

The victim struggled with the appellant who was aiming a knife to stab her but she dodged and he ended up tearing the mosquito net

on the bed and the mattress. She was able to identify the appellant since there was light in her bedroom. She saw the appellant carry her 42-inch TV LG brand outside as the other unidentified assailant picked the other items like the laptop with its accessories and the flat iron which were all given to the appellant and he took them outside. In the process, the victim managed to push the appellant through the bedroom door and he fell at the door near the corridor whereupon the victim used the door to push him out of her bedroom and locked the door. It was then that she realised that her shoulders were injured and there were cut wounds on her palms. She used her Nokia phone that had survived to call the mobile patrol police which responded immediately but after the assailants had left. The victim discovered that her radio hoofer, solar torch, 2 Africell modems and iPhone had all been stolen. She told the patrol police that the suspects were Gidudu and his group whereupon she gave the police Gidudu's telephone number which they rang and the call was received by a lady who said she was his wife. The victim also informed a one David who is the caretaker of the premises she resided in that the assailants were the very people who had sold her the sofa set.

The patrol police maintained their presence at the victim's home until morning when the victim went to police and made a statement. At around 11:00am, the victim went with the police to Gidudu's workshop and he was arrested. He later led the police to his house but nothing important to the case was recovered.

Meanwhile the appellant who came to see Gidudu at police was also identified by the victim and he was arrested. Police went to his place but recovered nothing, even the short sleeved blue shirt the victim had identified and stated to have been worn by the appellant on the fateful night was not found.

As stated in the introduction, the appellant was jointly indicted with Gidudu Robert, tried and whereas the said Gidudu Robert was acquitted as aforementioned, the appellant was convicted and sentenced to 15 years and 9 months' imprisonment. Aggrieved by the decision of the trial court, the appellant appealed to this Court and his appeal proceeded on the following five grounds that were contained in the 1st memorandum of appeal;

1. ***That the learned trial Judge erred in law and fact when he pronounced a sentence of 20 years to the appellant which was harsh and manifestly excessive in the obtaining circumstances of the case hence causing a miscarriage of justice.***
2. ***That the learned trial Judge erred in law and fact to convict and pass a hash and excessive sentence against the appellant without putting into account his mitigating factors leading to a miscarriage of justice.***
3. ***That the learned trial Judge erred in law and fact when he convicted the appellant on circumstantial evidence.***

4. ***That the learned trial Judge erred in law and fact when he failed to properly evaluate the material evidence adduced in court which was characterised by contradictions and gaps, a decision which occasioned a miscarriage of justice.***
5. ***That the learned trial Judge erred in law and fact when he passed a sentence of 20 years which was harsh and excessive in the circumstances.***

Representation

At the hearing, Mr. Allan Mooli represented the appellant on State Brief while Mr. Aliwali Kizito, Chief State Attorney from the Office of the DPP represented the respondent. The appellant was present in Court. Counsel for the appellant sought for extension of time within which to appeal and prayed for validation of the notice of appeal and memorandum of appeal that were on record. There being no objection from counsel for the respondent, the prayers were granted and accordingly, the time was extended and both the notice of appeal as well as the memorandum of appeal on record were validated. Counsel for the respondent on his part sought leave of court to withdraw the appeal the respondent had filed against Gidudu and since there was no objection, leave was granted and the appeal was withdrawn.

Counsel for each party filed written submissions which were adopted as their respective arguments in the appeal and have been considered in this judgment.

Appellants' Submissions

Counsel for the appellant argued the appeal on the basis of the 1st memorandum of appeal filed on 30/12/2020. He argued grounds 3 and 4 of the appeal jointly reasoning that they both relate to evaluation of evidence. He also argued grounds 1, 2 and 5 jointly as they relate to the sentence being considered harsh in the circumstances. However, we must observe that all these 3 grounds on sentence basically challenge the sentence for being harsh and excessive so it was absolutely not necessary to break it down into 3 grounds. We appreciate the fact that the memorandum of appeal was drawn and filed by the appellant himself without any professional guidance but we hasten to add that counsel had the opportunity to seek leave to amend the same when he took instructions, if indeed he had paid close attention to the grounds set out therein. We appeal to counsel who appear on State Brief to ensure that they give quality representation to the clients assigned to them given that their fees have now been enhanced under the **Judicature (Legal Representation at the Expense of the State) Rules S.I No. 55 of 2022, Schedule 3** thereof.

For the above reasons, we will strike out grounds 1 and 5 of the appeal for being repetitive of what is covered under ground 2.

Grounds No.3 and No.4 of the appeal.

That the learned trial Judge erred in law and fact when he convicted the appellant on circumstantial evidence.

That the learned trial Judge erred in law and fact when he failed to properly evaluate the material evidence adduced in court which was characterised by contradictions and gaps, a decision which occasioned a miscarriage of justice.

Counsel for the appellant pointed out the four ingredients of the offence of aggravated robbery the prosecution bears the burden to prove beyond reasonable doubt throughout the trial in order to sustain a conviction, namely;

1. Theft of property belonging to the victim
2. That the theft was accompanied by use of violence or threat of use of violence
3. Possession of a deadly weapon during the theft
4. Participation of the accused person in the commission of the offence.

He then submitted that it is trite law that the accused person does not bear the burden to prove his innocence. Counsel conceded that the learned trial Judge rightly evaluated the evidence regarding the first three ingredients of the offence and only contested the fourth ingredient regarding participation of the appellant. He

contended that the learned trial Judge failed to evaluate the evidence on record when he arrived at a conclusion that the prosecution had proved participation of the appellant in the commission of the offence. He pointed out that this is a case that hinges on a single identifying witness PW1 who is the victim. Counsel alluded to the evidence of the victim regarding her interactions with the appellant and Gidudu Robert prior to the incident and submitted that court should be very cautious to rely on the evidence of a single identifying witness given that the offence took place just a day after the victim had met the appellant at the workshop when she went to purchase furniture. Furthermore, that the evidence of the victim that he saw Gududu and some of the people who worked in his workshop walking towards Namakwekwe where her residence was would not lead to the inference that possibly they were trailing her because those people could have been walking towards their own respective homes since it was already late in the evening.

He further submitted that it is trite law as was held in the case of **Walakira Abas, Sgt Kizito Joseph and Munakanira John v Uganda, Supreme Court Criminal Appeal No. 25 of 2020,** that the court must evaluate not only the materials that support the accuracy of identification but also material that tend to raise doubt on it. Counsel argued that the failure by the victim to mention the appellant as the perpetrator in her first plain statement at police yet she claimed to have identified him as one of the assailants raises

some doubt considering that she only mentioned his name later in the additional statement. He contended that it is clear that the victim did not identify her assailants as including the appellant or people who were at the workshop.

It was asserted for the appellant that the circumstantial evidence surrounding his arrest raises doubt as to whether he indeed participated in the offence. Counsel relied on **Rex v Tubere s/o Ochen (1945) 12 EACA 63** for the position that the conduct of an accused person before or after the offence in question might sometimes give an insight into whether he or she participated in the crime. He submitted that in this case the appellant was arrested when he went to the police station after the arrest of Gidudu and that conduct was inconsistent with a guilty mind and clearly points to his innocence.

Counsel also contended that this is a case that required the police to conduct an identification parade to rule out possibility of mistaken identity but this was not done. He argued that there is no other evidence that connects the appellant to the crime apart from the evidence of the victim who was a single identifying witness and the identification was done in questionable circumstances. Counsel concluded that the failure to conduct an identification parade was fatal and prayed that this Court re-evaluates the evidence in regard to participation of the appellant and finds that prosecution did not prove this ingredient beyond reasonable doubt.

Ground 2 of the Appeal

That the learned trial Judge erred in law and fact to convict the and pass a hash and excessive sentence against the appellant without putting into account his mitigating factors leading to a miscarriage of justice.

Counsel for the appellant submitted that the sentence imposed on the appellant was harsh and excessive in the circumstances. He argued that had the learned trial Judge properly considered the mitigating factors, he would have arrived at a lesser sentence than the 20 years that the appellant was given. He relied on **Adama Jino v Uganda, Court of Appeal Criminal Appeal No. 50 of 2006**, where this Court reduced the sentence of the appellant who was charged with 3 counts of aggravated robbery from life imprisonment to 15 years' imprisonment. The Court took into account the fact that though gun shots were fired at the time of the robbery, no life was lost. Turning to this appeal, counsel contended that the sentence of 20 years was harsh in the circumstances taking into account the mitigating factors. He then urged this Court to allow the appeal, quash the conviction and set aside the sentence and, in the alternative, reduce the sentence from 20 years to 15 years which would be appropriate in the circumstances.

Submissions for the Respondents

Counsel opposed the appeal and supported the findings of the learned trial Judge in regard to conviction and sentence as being appropriate in the circumstances. He argued the grounds in the manner the appellant's counsel argued his.

Grounds No.3 and No.4 of the appeal.

> ***That the learned trial Judge erred in law and fact when he convicted the appellant on circumstantial evidence.***
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> ***That the learned trial Judge erred in law and fact when he failed to properly evaluate the material evidence adduced in court which was characterized by contradictions and gaps, a decision which occasioned a miscarriage of justice.***

It was submitted for the respondent that this being a case of identification by a single identifying witness, the learned trial Judge properly evaluated the evidence and found that there was sufficient light in the bedroom that favoured proper identification. Counsel contended that the victim had known the appellant before the offence was committed, he having been introduced to her by Gidudu at the workshop during broad day light. He added that the encounter and struggle the victim had with the appellant during

the attack lasted for a reasonable time and it was in a well-lit place which aided proper identification of the appellant. On the contention the victim did not mention the appellant in her first statement as one of the assailants, counsel submitted the learned trial Judge extensively considered it in his judgment and was satisfied with the explanation of the victim that the police officer who recorded the statement was a 'Gishu' and so she feared that if she mentioned the names of the assailants they would be tipped off. Furthermore, that the learned trial Judge came to that decision after he had perused the additional statement recorded two hours later by a non 'Gishu' police officer and established that the appellant was named as one of the assailants who attacked the victim with a knife during the struggle. Counsel therefore concluded that the contradictions in the two statements was properly explained by the victim whom the learned trial Judge found to be truthful.

Counsel further submitted that these were minor contradictions and inconsistencies, which were explained away and did not go to the root of the case nor point to deliberate untruthfulness. He relied on **Alfred Tajar v Uganda (1969) EACA Criminal Appeal No. 167 of 1969** cited with approval in **Obwalatum Francis v Uganda SCCA No. 30 of 2015,** where it was held that minor inconsistencies unless the trial Judge thinks it points to deliberate untruthfulness does not result in evidence being rejected.

Counsel asserted that neither the manner in which the appellant was arrested nor the contention that no identification parade was conducted could weaken the cogent prosecution evidence that squarely placed the appellant at the scene of crime.

Ground No.2 of the Appeal

That the learned trial Judge erred in law and fact to convict the and pass a hash and excessive sentence against the appellant without putting into account his mitigating factors leading to a miscarriage of justice.

Counsel for the respondent submitted that it is settled law that sentence is a discretion of the trial Judge 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 of law or overlooked some material fact or if the sentence is manifestly harsh and excessive in view of the circumstances of the case as was held in **Kiwalabye Benard v Uganda SCCA No. 143 of 2001** which was cited with approval in **Livingstone Kakooza v Uganda SCCA No. 17 of 1993.**

It was further submitted that the learned trial Judge considered the aggravating and mitigating factors as submitted by the parties and went ahead to sentence the appellant giving reasons for the same. Counsel pointed out that the learned trial Judge clearly took into consideration the fact that the appellant was a first offender

and aged 36 years with a young family before arriving at a sentence of 20 years. Upon deducting the 4 years and 3 months' period spent on remand, he sentenced the appellant to 15 years and 9 months' imprisonment which is appropriate in the circumstances. Counsel therefore argued that there was neither illegality nor wrong principle of law applied nor material fact overlooked by the trial Judge to warrant interference by this Court. He contended that the sentence meted out by the trial court was within the range of sentences deemed appropriate for the offence of aggravated robbery by this Court and the Supreme Court. He urged this Court not to interfere with the discretion of the learned trial Judge and prayed that the conviction and the sentence against the appellant be upheld and the appeal dismissed.

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. 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 **Father Narsensio Begumisa & 3 Others v Eric Tibebaga [2004] KALR 236, Supreme Court.**

We shall resolve the grounds of appeal as argued by both counsel save for grounds 1 and 5 of appeal which we have struck out.

Grounds No.3 and No.4 of the Appeal.

That the learned trial Judge erred in law and fact when he convicted the appellant on circumstantial evidence.

That the learned trial Judge erred in law and fact when he failed to properly evaluate the material evidence adduced in court which was characterized by contradictions and gaps, a decision which occasioned a miscarriage of justice.

We have considered the arguments for both parties on the identification of the appellant by the victim who was a single identifying witness. The principles that guide courts in matters where identification was done by a single identifying witness was well laid down in **Abdullah Bin Wendo v R [1953] EACA 166** where it was stated as follows:

"where the case against the accused depends wholly or substantially on the correctness or one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity

of the witness with the accused. All these factors go to the quality of identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality, the greater the danger."

In the instant case, it is our finding that the learned trial Judge warned himself and the assessors of the special need for caution before convicting the appellant in reliance on the correctness of identification. Our re-appraisal of the evidence also leaves us with no doubt that there were favourable conditions for proper identification. The victim had met the appellant at the furniture workshop two days before the robbery, the bedroom where the attack and scuffle between the appellant and the victim took place was well lit by an electric bulb and the attack as described by the victim lasted for some good time while they faced each other. All these factors aided proper identification and ruled out any possibility of mistaken identity. We therefore agree with the learned trial Judge who evaluated the evidence on identification of the appellant and found as follows:

"As regards A2, there was sufficient light in the bedroom for proper identification. The victim had known A2 before the alleged commission of the offence because A1 had shown and introduced him to the victim in broad day light at the workshop where the victim was to later purchase the sofa set. The encounter and struggle during the attack took a long reasonable time. A2 hoped to switch off the light to avoid being identified but he was unable to be very

fast and easily locate the switch of the electric light. The scuffle between the victim and A2 ensued in the presence of the electric light and the victim had ample time to confirm her identification of the assailant as A2. The victim mentioned that the assailant who was armed with a knife was putting on a blue shirt. Both A2 and his wife Nabulo Janet(A2/DW3) conceded that indeed on the eve of the robbery, that is the shirt A2 was putting on. Surprisingly when the police and the victim went to search A2's house, this shirt which was on the agenda for recovery, it could not be found. No explanation from the defence as to where this shirt disappeared to. It should be recalled that on the 08th August 2016, A2 never appeared at all at the workshop. This means that the victim did not have any opportunity to see him and be able to know how he was dressed. But as conceded by A2 and his wife, that is the shirt he wore that day. It follows therefore that the victim was truthful in the description of the assailant she saw during the robbery."

We only wish to correct a few errors that we note in the learned trial Judge's evaluation of the evidence. First of all, whereas the victim testified that the appellant was putting on a short sleeved blue shirt on the night of the attack, the appellant stated that on 8th August 2016 he was putting on a long sleeve light blue shirt with a strip which had the word "original" and his wife also gave the same description of the shirt. There is a difference between a long sleeve shirt and a short sleeve shirt even though the colour may be the same. We therefore find that the learned trial Judge erred by

stating that the appellant and his wife conceded that he was putting on the shirt described by the victim. In addition, the emphasis by the learned trial Judge that the agenda for the search of the appellant's house was to recover the shirt was also a misdirection in our view. The appellant's wife did testify that the shirt the appellant was putting on in the court on the day she gave her testimony was the very one he was dressed in on the day of his arrest and the day before the robbery.

Secondly, we note is the statement of the learned trial Judge that on the 08th August, 2016 the appellant never appeared at all at the workshop yet there was no evidence on record to support the same. All that the victim stated in her evidence during cross-examination was that at the time of loading the sofa set onto the pickup the appellant was absent. We believe the learned trial Judge could have been referring to that evidence but, with all due respect, he got it wrong.

In addition to the errors pointed out above, we must observe that although the victim stated in her plain statement and later testified that on the fateful night Gidudu called her at around midnight and that she ignored his call, the call data from MTN that was admitted in evidence as P. Exhibit V does not support that evidence. The only call indicated in the call data that night was that of the victim to Gidudu at 2.48. 26 am. PW3 confirmed this in his evidence when he stated that according to the call data, the victim called Gidudu during the night of the incident towards dawn. Much as this

evidence does not relate to the appellant, in our view, it points to some untruthfulness of part of the victim's evidence and calls for a cautious evaluation of her evidence, which unfortunately, the trial court did not do. He wholly believed the victim's evidence and concluded that she was a truthful witness. We also found doubtful the evidence of the victim that as she struggled with the appellant in her bedroom, she was able to observe how the other assailant who entered her bedroom was picking the things from her bedroom and handing them over to Gidudu who was in the sitting room and he in turn took them outside. Much as she stated that she saw this as the appellant moved towards the sitting room as she struggled with him, her evidence that she managed to throw the appellant outside her bedroom door and he fell on the door in the corridor and she closed the door by pushing him into the sitting room implies that the struggles took place in her bedroom. This is confirmed by her evidence that she managed to push him out of the bedroom and lock the door.

We have had opportunity to carefully study the sketch map of the scene of crime that was admitted in evidence as P. Exhibit III which gives a picture of the setup of the victim's one bedroomed house which was separated from the sitting room by corridor. The bathroom door was on the left side of the corridor towards the bedroom. There was no way the victim could have observed what was happening in the sitting room from the bedroom and moreover when she was under the distress of struggling with an assailant

who wanted to stab her with a knife. It is possible that she saw the other assailant removing her property from her bedroom, but we are not persuaded that she observed what took place in the sitting room. We are however persuaded that this inconsistency does not point at deliberate untruthfulness on the part of the witness.

In conclusion, we find that the learned trial Judge properly evaluated evidence regarding a single identification witness in light of the favourable circumstances for a correct identification as clearly seen in the above quotation.

Grounds No.3 and No.4 are answered in the negative.

Ground No.2 of the Appeal

> **That the learned trial Judge erred in law and fact to convict the and pass a hash and excessive sentence against the appellant without putting into account his mitigating factors leading to a miscarriage of justice.**

Counsel for the appellant submitted that had the learned trial Judge properly considered the mitigating factors, he would have arrived at a sentence lesser than that of 20 years' imprisonment against the appellant.

He cited the case of **Adama Jino v Uganda (Supra),** where this Court reduced the sentence of an appellant who charged with 3 counts of aggravated robbery from life imprisonment to 15 years' imprisonment and that court considered the fact that though gunshots were fired, no life was lost.

On the other hand, counsel for the respondent submitted that the learned trial Judge captured both aggravating and mitigating factors as submitted by the parties and went ahead to sentence the appellant giving reasons for the same and clearly taking into consideration the mitigating and aggravating factors.

It is settled that sentence is a discretion of the trial Judge 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 if the sentence is manifestly harsh and excessive in view of the circumstances of the case. **See Kiwalabye Benard v Uganda SCCA No. 143 of 2001 which was cited with approval in Livingstone Kakooza v Uganda SCCA No. 17 of 1993.**

In resolving these grounds, this Court is required to inquire into whether the learned trial Judge considered both the aggravating and mitigating factors, whether the sentence of 15 years and 9 months' imprisonment was harsh and excessive in the circumstances and whether this court can interfere with the sentence meted out by the learned trial Judge.

In doing so, we examine the sentencing proceedings before the learned trial Judge here below:

> ***"State**: This is a grave offence carrying a maximum sentence of death. The victim suffered grievous harm and lost valuable property all valued at Shs. 16,750,000/= and this offence is rampant in this area. I pray for a deterrent sentence of 25 years. I also pray for compensation under S. 286(4) of the*

Penal Code Act for the victim of the money and property stolen. That is all.

Ms. Luchivya

The convict is a first offender. He is aged 36 years, carpenter and capable of making use of his life outside prison. The convict has a wife and two young children who need care of a father. He has also been on remand since September 2016, approximately five years. The 5 years have been good enough for the convict to reform. I pray that it be put into consideration. I object to the prayer for compensation because there is no way he can pay it while in prison. We therefore pray for a lenient sentence.

Court:

The accused is a 1st offender aged 36 years and who has been on remand pending trial since 07th September 2016. It is evident that he has a young family. On the other hand, I find it extremely out of order for the accused of his age with work to do a carpenter, follows up his customers and does what he did! The offence of aggravated robbery is a grave one carrying a death sentence as the maximum. The offence is rampant in this area. Surely the aggravating factors in this case outweigh the mitigating factors. This Court nevertheless has to be considerate of the accused's situation. In the circumstances after considering all the above, I do sentence the accused to 20 years' imprisonment. However, since he has been on remand since 07 September 2016, he is to serve a sentence of 15 years and 9 months.

As required by Section 286(4) of the Penal Code Act, this Court is mandated to award compensation to the victim of the robbery who suffered loss as a result of the robbery. The value of the items stolen during commission of the offence was not contested. In the premises the convict upon expiry of the sentence, he is to pay a sum of 16,750,000/= to the victim. Akello Irene. In addition to the foregoing, the convict shall be subject to Police supervision as required by section 124(1)(5)(a) Trial on Indictment Act for a period of a year whereby he shall report to Mbale Police Station once a month. Order Accordingly. Right of Appeal explained.

Byaruhanga Jesse Rugyema.
JUDGE"

We have opportunity to consider the sentencing proceedings of the trial court as recapped above and found that the learned trial Judge considered the aggravating and mitigating factors. He also took into consideration the period spent on remand and deducted it from the sentence of 20 years' imprisonment. He thus sentenced the appellant to a sentence of 15 years and 9 months' imprisonment.

As to whether the sentence is harsh or excessive, we shall consider the range of sentences in similar offences and circumstances. In sentencing there must be consistency of sentences in offences of a similar nature in similar circumstances as was observed by the Supreme Court in **Aharikundira Yusitina v Uganda SCCA No. 27 of 2015**.

In **Adama Jino v Uganda, (Surpra),** this Court reduced the sentence of the appellant who was charged with 3 counts of aggravated robbery from life imprisonment to 15 years' imprisonment. In that case, the court took into account that though gun shots were fired at the time of the robbery, no life was lost.

In Okoth Julius and 2 others v Uganda, Court of Appeal Criminal Appeal No.015 of 2014, this Court upheld the conviction and confirmed a sentence of 17 years' imprisonment against the 3rd appellant for the offence of aggravated robbery. In that case, the 3rd appellant and others at large broke into shops and

fired a gun to scare residents and 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 **Basikule Abdu v Uganda CACA No. 156 of 2017** in which the trial Court meted out a sentence of 20 years' imprisonment in a case of aggravated robbery in which the victim was robbed of 200,000/= shillings and his clothes, this honourable Court while upholding the sentence of 20 years' imprisonment found it not to be harsh as contended by the appellant.

In **Guloba Rogers v Uganda CACA No. 57 of 2013,** this honourable Court considered a sentence of 35 years on a count of Aggravated Robbery as appropriate from which it deducted 1 year and 5 months spent on remand thus arriving at a sentence of 33 years and 7 months' imprisonment.

From the above decisions in which the circumstances were more or less similar to the ones in the instant case, we see that the sentences range from 15 years to 35 years. However, we are aware that there may be other cases with similar circumstances where the sentences are lower than 15 years depending on the mitigating factors while there could be others with higher sentences than 35 years because of the aggravating factors.

In the instant case, the aggravating factors that were presented by the prosecution were that the victim suffered grievous harm and

lost valuable property amounting to 16,750,000/= and that the offence was rampant.

Meanwhile the mitigating factors presented on behalf of the appellant were that he was a first-time offender aged 36 years old and capable of making use of life outside prison. The convict has a wife and 2 young children who need care of a father, he has been on remand since September 2016, approximately 5 years, the 5 years have been good enough for the convict to reform.

Considering the aggravating and mitigating factors and being guided by the above cases which give the sentencing range for aggravated robbery cases with circumstances similar to those in the instant one, we find the sentence of 15 years and 9 months' imprisonment imposed by the learned trial Judge not harsh and excessive. We therefore find no reason to interfere with the discretion exercised by the trial court.

In the premises, the sentence of 15 years and 9 months' imprisonment imposed by the trial court is upheld. The appeal is dismissed for lack of merit.

Dated at Kampala this.....day of.....2023.

Catherine Bamugemereire
JUSTICE OF APPEAL

Christopher Gashirabake
JUSTICE OF APPEAL

Oscar Kihika
JUSTICE OF APPEAL