THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEALS NOS. 0169, 0222 AND 0226 OF 2017

1. **KYEYUNE JOEL**
2. **KINTU ASHRAF**
3. **KAJUBI ROBERT**
4. **NALUGYA BETTY::APPELLANTS**

VERSUS

UGANDA::RESPONDENT

(Arising from the decision of the High Court of Uganda at Entebbe before Murangira, J. dated 5th May, 2017 and 22nd June, 2017 in Criminal Session Case No. 0969 of 2016)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. LADY JUSTICE EVA K. LUSWATA, JA

JUDGMENT OF THE COURT

On 19th April, 2017, each of the appellants appeared before the High Court (Murangira, J.) on charges of Aggravated Robbery contrary to **Sections 285** and **286 (2) of the Penal Code Act, Cap. 120**. They all pleaded not guilty and trial of the matter commenced. On 27th April, 2017. The trial Court heard the evidence of one witness and adjourned the matter for further hearing. On 5th May, 2017, when the matter came up for further hearing, the 1st and 2nd appellants changed their minds and pleaded guilty, whereupon they were convicted as charged. The trial proceeded and the Court heard further prosecution evidence against the 3rd and 4th appellants. On 22nd May, 2017, they too were convicted as charged, and were, each, subsequently sentenced to 16 years imprisonment.

The case against the appellants was that they had, on the 11th day of July, 2013 at Bweya Central Zone in Wakiso District, robbed Dr. Kintu Abubakar of a flat screen television L.G type, a wallet, a laptop, Home Theatre system, a pair of shoes, and a camera, all valued at Ug. Shs. 7,000,000/= (seven

million shillings only) and cash worth Ug. Shs. 500,000/= (five hundred thousand shillings), and at or immediately before or immediately after the said robbery threatened to use dangerous weapons, to wit, a panga and a knife on the victim.

The facts as accepted by the learned trial Judge are that at around 3.00 a.m, in the wee hours of 11th July, 2013, a group of intruders forced their way into the victim's home in Bweya Central Zone, Bweya Ward, Kajjansi Town Council in Entebbe. They accessed the home through the sitting room. Moments later, the victim, who was sleeping in the bedroom with his wife was awakened by noise generated by the intruders. The victim called out to the intruders which caught their attention and they attempted to access the bedroom where the victim was sleeping, but were unsuccessful because the victim and his wife made alarms that scared them off. The intruders subsequently left the house but made off with various pieces of property belonging to the victim, including a television, wallet, shoes, camera and money.

Immediately after the intruders had left, the victim drove to the nearby Kajjansi Police Station and asked the Police Officers to check the area for the intruders. The police officers agreed. Thereafter, the police officers got on their patrol car and followed the victim's vehicle and the party drove towards the victim's home. Along the way, they came across a vehicle moving from the direction of the victim's home. The police officers asked the driver of the vehicle to stop and he obliged. Suddenly, one of the occupants of the vehicle got out and ran into the nearby bush. The police officers and the victim searched the vehicle and found some of the property that was stolen from the victim's vehicle. The vehicle was thereafter driven to Kajjansi Police Station. It later came to light that the 3rd appellant was the driver of that vehicle, while the 1st and 2nd appellants were some of the passengers. In the course of investigations, the police officers got information that the 4th appellant had participated in the robbery and upon searching her place, they found the victim's wallet in her hand bag. On the basis of the above facts, the learned trial Judge found that the 3rd and 4th appellants had participated

in the robbery at the victim's home, and convicted them as charged. The 1st and 2nd appellants pleaded guilty, thereby admitting to having participated in the robbery, and were accordingly convicted as charged.

Being dissatisfied with the decision of the learned trial Judge, the 1st and 2nd appellants, with leave of the Court, each appeal against sentence only. The 3rd and 4th appellants appealed against both conviction and sentence. The 1st and 2nd appellant's joint appeal was registered as No. 169 of 2017, the 3rd appellant's appeal was registered as No. 226 of 2017, and the 4th appellant's appeal was registered as No. 222 of 2017. All the appeals are addressed in this judgment. The 1st, 2nd, 3rd and 4th appellants filed a joint memorandum of appeal setting out the following grounds:

> "1. **That the learned trial Judge erred in law and fact when he found that the 3rd and 4th appellants had participated in the commission of the said offence, whereas not.**
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> 2. **(With leave for the 1st and 2nd appellant) that the learned trial Judge erred in law and fact when he meted out manifestly harsh and excessive sentences against the appellants."**

The respondent conceded to the 3rd and 4th respondent's appeals but opposed the 1st and 2nd appellant's appeal.

Representation

At the hearing, Mr. Henry Kunya, learned counsel, appeared for the appellants on State Brief. The appellants followed the hearing via video link from the prison facilities. Ms. Caroline Marion Acio, learned Chief State Attorney in the Office of the Director Public Prosecutions appeared for the respondent.

With leave of Court, the parties argued their respective cases by way of written submissions.

3rd and 4th appellant's appeals

We shall begin by considering the 3rd and 4th appellant's appeals against conviction, which are covered in ground 1 of the appeal.

3rd and 4th appellant's submissions on ground 1

Counsel submitted that it was erroneous for the learned trial Judge to convict the 3rd and 4th appellants as none of them were placed at the scene of crime. He further submitted that the prosecution evidence, in several respects, exonerated the 3rd and 4th appellants. Counsel referred to the evidence of the 1st and 2nd appellants, testifying as prosecution witnesses, which was that the 3rd appellant was merely hired by the actual intruders to offer transport services and had no hand in the commission of the offence.

With regard to the 4th appellant, counsel submitted that her participation in the commission of the offence was ruled out because, while she is a woman, the evidence of the victim was that all the intruders who went to his house were men. Counsel noted that the prosecution attempted to link the 4th appellant to the commission of the offence through circumstantial evidence alleging that the police officers, upon conducting a search at the 4th appellant's home, found a wallet stolen from the victim's house in the 4th appellant's bag. However, it was counsel's submission that the details of the search at the 4th appellant's home and items recovered from there were not well-documented, which affected the credibility of the evidence on that issue.

Counsel further noted that the prosecution also attempted to link the 4th appellant to the commission of the offence by adducing call data evidence suggesting that she had been in communication with the actual intruders on the fateful day. He submitted that the prosecution did not adduce the relevant phone print outs and requisite call data in evidence and this affected the credibility of the evidence in issue.

Further still, counsel submitted that the learned trial Judge erred in basing on the alleged previous bad character of the 4th appellant as a person against whom several cases at Old Kampala Police Station had been instituted, as

per the evidence of PW5 Detective Corporal Oyet Din. Counsel submitted that the prosecution failed to support PW5's allegation with credible evidence like the police reference numbers of the case against the 4th appellant.

Counsel further faulted the learned trial Judge for convicting the 3rd and 4th appellants due to their failure to give evidence in their defence, and submitted that the appellants had a constitutional right not to give evidence in their defence, and that failure could not be used against them.

For the above submissions, counsel concluded by submitting that there was no evidence proving that the 3rd and 4th appellants participated in the commission of the offence in issue. He prayed this Court to allow ground 1.

Respondent's submissions on ground 1

Counsel for the respondent conceded to the 3rd and 4th appellant's appeals as in her view, there was insufficient evidence to implicate the two appellants in the commission of the offence. With regard to the 3rd appellant, counsel conceded to the submission of her colleague for the appellants that the evidence of the 1st and 2nd appellants testifying as PW1 and PW2 was that the 3rd appellant was hired by one of the assailants identified as Kiseka to offer transport services, and that the 3rd appellant was not aware that the persons he was carrying were robbers.

With regard to the 4th appellant, counsel conceded to the submission of counsel for the appellants that the 4th appellant's participation in the commission of the offence was ruled out since she is a woman and yet the victim testified that all the intruders who went to his home were men. Counsel further concurred with the 4th appellant's submission that the circumstantial evidence based on by the learned trial Judge to convict the 4th appellant was insufficient. This circumstantial evidence consisted of evidence that a wallet stolen from the victim was recovered in the 4th appellant's hand bag. Counsel submitted that the prosecution ought to have called one Afande Sayiga who was said to have recovered the wallet to testify

and that failure to call him without giving a good explanation should have resulted in the acquittal of the 4th appellant.

Counsel submitted that ground 1 should succeed.

Resolution of the 3rd and 4th appellants' appeals

We have carefully studied the record and considered the submissions of counsel for both sides and the law and authorities cited. We have also considered other applicable laws that were not cited.

This 3rd and 4th appellants' respective appeals are first appeals. We are alive to the applicable principles on the role and duty of the of this Court when considering first appeals. Under **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**, on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may reappraise the evidence and make inferences of fact. Further, in **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**, it was held that the 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 bear the above principles in mind as we proceed to resolve the grounds of appeal.

The 3rd and 4th appellants alleged in ground 1 of the appellant's joint memorandum of appeal that the learned trial Judge erred in finding that the two appellants participated in the commission of the offence yet there was insufficient evidence confirming their participation. The respondent conceded that there was insufficient evidence to support the learned trial Judge's decision to convict the 3rd and 4th appellant.

We accept the submissions of the respective counsel with regard to ground 1. We have upon re-evaluation of the evidence noted that the victim was unable to identify the intruders during the attack on his home. However, the victim, shortly after the incident reported the attack to the nearby Kajjansi

Police Station which dispatched a patrol car to escort the victim to his home and check the nearby area for the intruders. On the way to the victim's home, they found a vehicle being driven by the 3rd appellant and carrying several passengers, moving from the direction of the victim's home. The 1st and 2nd appellant as well as one Kiseka Aggrey (who died during trial), Frank Tumusiime (who fled from the scene of crime) and Kibanda Idi (who was convicted for participating in the commission of the offence in a plea bargain) were the passengers in the 3rd appellant's car.

The prosecution evidence given by the 1st and 2nd appellants testifying as prosecution witnesses was that the 3rd appellant was a taxi driver who was hired to transport the intruders and that he had no knowledge of the commission of the crime. There was no other evidence suggesting that the 3rd appellant knew about the commission of the crime. We therefore find that counsel for the appellants rightly submitted and counsel for the respondents rightly conceded that there was no evidence implicating the 3rd appellant in the commission of the crime.

With regard to the 4th appellant, we note that the respective counsel for both sides rightly submitted that the victim's evidence was that all the intruders who went to his home were men. We noted that the prosecution attempted to link the 4th appellant a woman to the commission of the offence by evidence suggesting that she was in contact with Frank Tumusiime, one of the intruders, who escaped and was never apprehended. However, as rightly submitted by counsel for the appellants, the prosecution did not adduce evidence of call data proving the interaction between Tumusiime and the 4th appellant.

We also note that the learned trial Judge found that property stolen from the victim's home including a wallet and ATM cards was recovered from the 4th appellant's home during a search conducted by one Afande Sayiga. However, as the respective counsel for both sides rightly submitted, the prosecution failed to call Sayiga as a witness to give further evidence about the search conducted at the 4th appellant's home. We agree that the attempt

to give evidence about the search at the 4th appellant's home through PW5 Detective Corporal Oyet Din who was not present during the search amounted to inadmissible evidence. We find that the learned trial Judge erred when he relied on that evidence.

We also accept the submission of counsel for the appellants that the learned trial Judge erred in placing weight on the fact that 3rd and 4th appellant opted to keep quiet when called upon to give their defence. As counsel for the appellants correctly submitted, an accused person is entitled to keep quiet when called upon to give his/her defence and that fact alone cannot be used against him/her.

For the above reasons, we find that there was insufficient evidence to implicate the 3rd and 4th appellants as having participated in the commission of the offence against the victim, and thus the learned trial Judge erred when he convicted them. We find that ground 1 must succeed.

1st and 2nd appellant's appeals

The 1st and 2nd appellants, in ground 2, appeal against sentence only.

Ground 2

Counsel for the appellants began by setting out the guiding principles when this Court is determining an appeal against a sentence imposed by the trial Court as set out in **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported)** cited with approval in **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported),** as follows:

> **"It is now settled law that the appellate Court is not to interfere with sentence imposed by the trial Court which has exercised its discretion on sentence unless the exercise of the discretion is such that the trial Court ignored to consider an important matter or circumstance which ought to have been considered when passing the sentence."**

Counsel submitted that the sentences imposed against the 1st and 2nd appellants were harsh and manifestly excessive in their circumstances, considering that they had pleaded guilty and save Court's times, and also the fact that they were at a young age at the time of commission of the offences. Counsel urged this Court to set aside the sentences imposed on the 1st and 2nd appellants and substitute shorter sentences.

Respondent's submissions

Counsel for the respondent supported the sentence of 16 years imprisonment imposed on each of the 1st and 2nd appellants. She referred to the case of **Kakooza vs. Uganda, Supreme Court Criminal Appeal No. 17 of 1993 (unreported)**, for the principle that an appellate Court may only interfere with a sentence imposed by the trial Court where it is evident that in sentencing, the trial Court acted on a wrong principle or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case. Counsel noted that the 1st and 2nd appellants challenge their respective sentences on grounds that the same were harsh and manifestly excessive, but disagreed with that assertion. She submitted that in assessing whether the sentences against the 1st and 2nd appellants were harsh and manifestly excessive, this Court has to consider that the maximum sentence for the relevant offences, under the **Penal Code Act, Cap. 120** is death, and that the starting point for sentencing under the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice Directions), 2013** is 35 years imprisonment, and that the sentence of 16 years imposed on the 1st and 2nd appellants was below the highlighted thresholds.

Counsel further submitted that a sentence of 16 years imprisonment for aggravated robbery is within the range of sentences imposed in similar previously decided cases. She referred to the cases of **Bogere vs. Uganda, Supreme Court Criminal Appeal No. 39 of 2016**; **Bakubye and Another vs. Uganda, Supreme Court Criminal Appeal No. 56 of 2015**; and **Assimwe vs. Uganda, Court of Appeal No. 272 of 2015**, in

which sentences of 20 years, 30 years and 36 years imprisonment, respectively, were upheld for aggravated robbery.

With regard to the 1st and 2nd appellant's submission that the trial Court omitted to consider several material factors, such as the fact that they had pleaded guilty and the fact that they were youthful offenders, counsel noted that the learned trial Judge's sentencing ruling in respect of the 1st and 2nd appellants was missing from the record, and therefore it was difficult to assess the appellant's submission in this regard. Counsel urged this Court to invoke its powers under **Rule 32** of the Rules of this Court to do justice in the circumstances by either; 1) proceeding to consider the aggravating and mitigating factors and sentence the appellant; 2) remitting the proceedings to the High Court to sentence the 1st and 2nd appellants afresh; or 3) referring the 1st and 2nd appellant's appeal to the next session to give this Court an opportunity to trace the missing part of the record.

Counsel submitted the following aggravating factors should this Court opt to sentence the 1st and 2nd appellants. First, the offence of aggravated robbery for which they were convicted is a serious offence which attracts a maximum of the death sentence. Secondly, the robbery was committed in premeditated fashion, using deadly weapons like pangas and knives. Thirdly, the offence of aggravated robbery is on the rise and there is need to pass a deterrent sentence against the appellants. Fourthly, most of the property stolen from the victim was not recovered. Fifthly, some of the appellants were habitual offenders. Sixthly, the appellants were part of a gang that carried out organized aggravated robbery. Counsel submitted that in view of the above aggravating factors, this Court should impose a sentence of 16 years imprisonment after deducting the period of 4 years that the 1st and 2nd appellants spent on remand.

Resolution of the 1st and 2nd appellant's appeals

We have carefully considered the submissions for and against the sentences imposed against the 1st and 2nd appellants. The principles that guide this Court in determining appeals against sentence are now well-established, and

were summarized in **Rwabugande vs. Uganda, Criminal Appeal No. 25 of 2014 (unreported)** where the Court discussed several relevant authorities as follows:

> **"In Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995, the principles upon which an appellate court should interfere with a sentence were considered. The Supreme Court referred to R vs. Haviland (1983) 5 Cr. App. R(s) 109 and held that:**
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> **An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. Mohamedali Jamal (1948) 15 E.A.C.A 126. (Emphasis ours)**
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> **We are also guided by another decision of this court, Kamya Johnson Wavamuno vs. Uganda Criminal Appeal No.16 of 2000, in which it was stated:**
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> **It is well settled that the Court of Appeal will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle was made. It is not sufficient that the members of the Court would have exercised their discretion differently. (Emphasis Ours)**
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> **In Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001 it was held:**
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> **The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence."**

Counsel for the appellants submitted that the learned trial Judge omitted to take into account the relevant mitigating factors for the 1st and 2nd appellants, namely, the fact that they had pleaded guilty and saved Court's

time and the fact that they were youthful offenders. However, we noted and as rightly submitted by the counsel for the appellants, the learned trial Judge's sentencing ruling is missing from the record and it is therefore impossible to ascertain whether the learned trial Judge considered the mitigating factors highlighted by counsel for the appellants. However, there is a commitment warrant on record indicating that the 1st and 2nd appellants were, each, upon conviction for aggravated robbery, sentenced to 16 years imprisonment.

However, we noted that the proceedings from the allocutus for the 1st and 2nd appellant are on record. We shall therefore not refer the file back to the High Court or adjourn the appeal to the next session. Instead, we consider that the most appropriate course is to reconsider the mitigating and aggravating factors in respect to the 1st and 2nd appellants as submitted at trial and come up with an appropriate sentence. We do so in exercise of the powers vested in this Court under **Section 11** of the **Judicature Act, Cap. 13** which provides:

> **"11. Court of Appeal to have powers of the court of original jurisdiction.**
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> **For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."**

The mitigating factors submitted for the appellants were as follows: 1) they were first offenders; 2) they had pleaded guilty and saved Court's time; and 3) they had reformed during the time they had spent on remand. The only material on record providing an idea about the appellant's age is the charge sheet prepared in 2013 which showed that each of the appellants were aged 18 years in 2013. Therefore, 4 years later in 2017, when they were sentenced, both the 1st and 2nd appellants were 22 years old. It can therefore be concluded that both the 1st and 2nd appellants were at a youthful age at the time of sentencing. We have also considered the fact that the appellants did not apply violence on the victim during the commission of the offence.

We also consider that the 1st and 2nd appellant's decision to plead guilty was born out of remorse and demonstrated that they had reformed.

The aggravating factors submitted against the appellants were as follows: 1) The offence for which each of the 1st and 2nd appellants were convicted was a serious offence attracting the death sentence as the maximum sentence. Other aggravating factors that were submitted by counsel for the respondent on appeal are that: 1) the appellants participated in the commission of a premeditated offence; 2) the offence committed by the appellants led to loss of the victim's property; 3) the circumstances indicated that the appellants were part of a gang that habitually committed aggravated robbery and terrorized their victims; 4) the appellants committed the relevant offence while armed with pangas and knives.

We have considered all relevant circumstances, including the mitigating and aggravating factors referred to earlier, and find that a sentence of 13 years imprisonment is appropriate. From that sentence we shall deduct the period of 3 years, 9 months and 3 days which each appellant spent on remand from the date of their arrest on 11th July, 2013, to the date of sentencing on 9th May, 2017. The appellants shall serve a sentence of 9 years, 2 months and 3 days imprisonment from the date of their respective convictions on 5th May, 2017.

We therefore allow ground 2 of the appeal.

In conclusion, for the reasons given above, we make the following orders:

1. The 3rd and 4th appellants' respective appeals are allowed and their respective convictions for the offence of **Aggravated Robbery** contrary to **Sections 285 and 286 (2)** of the **Penal Code Act, Cap. 120** are quashed. We order that the 3rd and 4th appellants be immediately set free unless they are otherwise held on other lawful charges.

2. The 1st and 2nd appellants' respective appeals are also allowed and their respective sentences are set aside and substituted with the sentences indicated in this judgment.

We so order.

Dated at Kampala this ..... 7th ..... day of ..... February ..... 2023.

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Elizabeth Musoke

Justice of Appeal

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Christopher Gashirabake

Justice of Appeal

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Eva K. Luswata

Justice of Appeal