THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0187 OF 2017

NSIMBI PAUL::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mpigi before Musalu-Musene, J. delivered on 26th May, 2017 in Criminal Session Case No. 075 of 2016)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF THE COURT

Background

On 26th May, 2017, the High Court (Masalu-Musene, J.) convicted the appellant of the offence of **Aggravated Robbery** contrary to **Sections 285 and 286 (2)** of the **Penal Code Act, Cap. 120**. The appellant was, upon that conviction, sentenced to 18 years imprisonment.

The High Court's decision followed the trial of the appellant on an indictment that alleged that he had, on the 4th day of August, 2014 at Kalagala-Kikutuzi Village in Mpigi District robbed Kirigwajjo Richard (the victim) of a Motorcycle Reg. UEC 570N, valued at Three Million, Three Hundred Thousand Shillings (Ug. Shs. 3,300,000/=) and at or immediately after the said robbery, used a deadly weapon, to wit, a hammer on the said victim.

The facts of the case, as can be ascertained from the record are briefly as follows:

The victim was a boda boda rider who lived in Kayabwe in Mpigi District. The appellant lived at the neighbouring Nabusanke Village. On 4th August, 2014, the appellant approached the victim and requested to be transported from Kayabwe to Nabusanke, and after agreeing on a fare, the two embarked on their journey. When they reached an isolated place in Nabusanke, the appellant attacked the victim with a hammer and struck heavy blows on the

victim's head which resulted in the victim losing consciousness. The appellant thereafter made off with the victim's motorcycle. Another unidentified man was present during the attack on the victim and, as the appellant left the scene, he carried the man on the motorcycle. The victim, who had been left for dead at the scene, was luckily discovered by good Samaritans and taken to Mulago Hospital for medical attention, which saved his life. However, the victim suffered grievous injuries that resulted in disability. He now talks and walks with difficulty and is unable to work.

The learned trial Judge accepted the above facts and convicted the appellant as charged, despite him denying the offence. The appellant was thereafter sentenced as mentioned earlier. The appellant does not wish to contest his conviction. However, he was dissatisfied with the sentence imposed by the learned trial Judge, and with leave of this Court, now appeals against sentence only. We note that counsel for the appellant did not apply for leave to appeal against sentence as required under **Section 132 (1) (b)** of the **Trial on Indictments Act, Cap. 23**. However, in the interest of justice, we do hereby grant that leave and shall proceed to determine the sole ground of his appeal, which is that:

> **"The learned trial Judge erred in law and fact by imposing a manifestly harsh sentence on the appellant."**

The respondent opposed the appeal.

Representation

At the hearing, Ms. Sarah Awelo, learned counsel, appeared for the appellant on State Brief. Ms. Fatinah Nakafeero, learned Chief State Attorney in the Office of the Director Public Prosecutions appeared for the respondent. The appellant followed the hearing via video link from the prison where he was incarcerated.

The parties, with leave of the Court, argued their respective cases by means of written submissions.

Appellant's submissions

Counsel for the appellant began by referring to the cases of **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001** and

Abaasa vs. Uganda, Court of Appeal Criminal Appeal No. 33 of 2010 (both unreported) which set out the guiding principles in appeals against sentences imposed by the trial Court. In the **Abaasa case (supra)**, it was stated as follows:

> **"It is now a well-settled position in law, that this Court will only interfere with a sentence imposed by a trial Court in a situation where the sentence is either illegal or founded upon a wrong principle of law. It will equally interfere with the sentence where the trial Court has not considered a material factor in the case, or has imposed a sentenced which is harsh and manifestly excessive in the circumstances."**

Counsel submitted that the sentence of 18 years imprisonment imposed on the appellant was harsh and manifestly excessive and the learned trial Judge likely imposed it without considering the fact that the appellant was a first offender with a large family to look after.

It was further submitted that the trial Court, while sentencing, failed to consider that the appellant was aged 36 years at the time of commission of the offence. Counsel cited that case of **Kabatera vs. Uganda, Court of Appeal Criminal Appeal No. 123 of 2001 (unreported)** where it was held that the age of an accused person is a material factor that should always be considered in sentencing. Counsel urged this to find that the trial Court failed to take into account the appellant's age and that the said omission justifies this Court to interfere with the sentence imposed on the appellant.

Counsel also submitted that this Court has in previously decided cases, imposed shorter sentences for aggravated robbery. He cited the case of **Twinomujuni vs. Uganda, Criminal Appeal No. 24 of 2001 (unreported)**, where this Court set aside a sentence of 30 years imprisonment for aggravated robbery and substituted it with one of 10 years imprisonment.

For the above submissions, counsel urged this Court to interfere and reduce the sentence imposed on the appellant from 18 years to 10 years imprisonment.

Respondent's submissions

In reply, counsel for the respondent supported the sentence of 18 years imprisonment that the trial Court imposed on the appellant, and submitted that there was no reason justifying this Court to interfere with the sentence. She cited the case of **Kamya vs. Uganda, Court of Appeal Criminal Appeal No. 16 of 2000 (unreported)** for the applicable principles in appeals against sentence of the trial Court. In that case it was held:

> **"The appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion, unless the exercise of the discretion is such that it results in the sentence being imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter of circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."**

Counsel also cited the cases of **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001** and **Kyalimpa vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1995**, which espoused similar principles. Counsel then submitted that the trial Court arrived at the sentence after considering all the mitigating factors and aggravating factors. The learned trial Judge also considered the nature of the offence, the circumstances in which it was committed, and the fact that the appellant inflicted grievous injuries on the victim.

With regard to counsel for the appellant's submission that the learned trial Judge failed to consider the appellant's age. Counsel, while conceding that the learned trial Judge did not explicitly state that he had considered the age of the appellant, submitted that it could be implied from the learned trial Judge's statement that he had considered all mitigating factors, including the one on the appellant's age.

On the appellant's submission that this Court has imposed shorter sentences in previously decided aggravated robbery cases, counsel submitted that while that may be true, this Court has also imposed longer sentences in other decided cases. For example, in **Kamukama vs. Uganda, Criminal Appeal No. 52 of 2002 (unreported)**, this Court upheld a sentence of life imprisonment as appropriate for aggravated robbery. In **Kigozi vs Uganda,**

Criminal Appeal No. 365 of 2016 (unreported), this Court imposed a sentence of 18 years imprisonment as appropriate for aggravated robbery.

In view of her submissions, counsel urged this Court not to interfere with the sentence imposed on the appellant.

Resolution of the Appeal

We have carefully studied the record and considered the submissions of counsel for both sides as well as the law and authorities cited. We have also considered other laws that were not cited. As this is a first appeal, we shall begin by recalling the following principles on the role and duty of this Court when handling 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 **Uganda vs. Ssimbwa, Supreme Court Criminal Appeal No. 37 of 1993 (unreported)**, it was held that it is the duty of a first appellate Court to give the evidence on the record, as a whole, that fresh and exhaustive scrutiny which the appellant is entitled to expect and draw its own conclusions of fact. However, as the first appellate Court never saw or heard the witnesses give evidence, it must make due allowance in that respect.

We also reiterate the applicable principles in relation to appeals against the sentence imposed by the trial Court. The relevant case law was summarized in the case of **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported),** 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)**

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:

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)

In Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001 it was held:

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."

An appellate Court may interfere, interalia, 1) where the sentence imposed by the trial Court was harsh and manifestly excessive or 2) where the trial Court, during sentencing, omitted to take into account a material factor.

The appellant contended that the sentence imposed on him was harsh and manifestly excessive in light of the circumstances of the case. We reject this contention. As submitted by counsel for the respondent, an appropriate sentence is arrived at by considering the nature of the offence and the circumstances under which it was committed. In the present case, the appellant assaulted the victim with a hammer, and the victim suffered grievous injuries including a depression on the head. The attack also left the victim unable to walk or talk properly, which affected the quality of his life.

As counsel for the appellant submitted, several mitigating factors were presented for the appellant, namely; 1) that he was a first offender; and 2) that he was responsible for caring for his family consisting of two wives and eight children. We note that counsel for the appellant has, on this appeal, argued that there was a further mitigating factor of the young age of the appellant. We observe that the appellant was 36 years old when he attacked the victim, and was therefore not a youngster. He was at an age where he should have appreciated that attacking the victim was not only unlawful and morally culpable, but would also result in serious injury for the victim. We

therefore find that the appellant was not a young man for purposes of sentencing.

We have also considered the submission that the sentence of 18 years imprisonment that was imposed on the appellant is harsh and manifestly excessive because it is longer than sentences imposed by this Court in previously decided aggravated robbery cases. We reject this submission, too. While it is true that in some previously decided cases, shorter sentences have been imposed for aggravated robbery, we note that in other cases similar or longer sentences have been imposed. In the case of **Kamukama vs. Uganda, Criminal Appeal No. 52 of 2002 (unreported)** where lesser violence was meted on the victim during the robbery, this Court imposed a sentence of life imprisonment. In that case, the assailants who included the appellant, had tied up and beaten the victims before stealing their money to the tune of Ug. Shs. 75,000/=. In **Mudhasi vs. Uganda, Criminal Appeal No. 267 of 2015 (unreported)**, this Court upheld a sentence of 27 years imprisonment for aggravated robbery. One of the victims in that case had suffered grievous injuries after the assailants who included the appellant struck his head with a metallic object, resulting in the victim suffering permanent head injuries, and chronic migraines. It is therefore clear that whereas shorter sentences of the nature proposed by counsel for the appellant may be imposed for aggravated robbery, such sentences will be justified in exceptional cases. This case does not, in our view, justify imposition of a shorter sentence considering the level of violence the appellant meted on the victim.

Finally, we reject counsel for the appellant's submission that the trial Court omitted to consider the fact that the appellant was a first offender with responsibility for a family of two wives and eight children. We shall reproduce the relevant passage from the learned trial Judge's sentencing remarks:

> **"The complainant, Kirigwajjo Richard was physically seen in this Court with a deformed head and had difficulty in talking. I therefore agree with the learned counsels for state that a deterrent sentence is called for to serve as a lesson to members of the general public not to take the law in their hands. <u>Much as it has been stated in mitigation that the convict is a first offender with a large family</u>, Court notes that the complainant was equally hardworking man who has now become incapacitated. So I shall only consider mitigating factors such as [the appellant being**

responsible] for a large family by sparing the convict the death sentence. All in all, and in circumstances, instead of 21 years imprisonment, I subtract 3 years of remand. I do hereby sentence convict to serve 18 years imprisonment.

It is clear from the above passage, that the learned trial Judge considered the fact that the appellant was a first offender, and that he was responsible for caring for his large family. We therefore reject the submission of counsel for the appellant that he did not do so.

All in all, we accept the submission of counsel for the respondent that the learned trial Judge considered all the relevant factors, namely, the nature of the offence, the circumstances under which it was committed and the aggravating and mitigating factors. We therefore find no reason justifying this Court to interfere with the sentence imposed by the learned trial Judge, and we therefore uphold it. The sole ground of appeal must therefore fail.

In conclusion, we find no merit in the appeal and we dismiss it.

We so order.

Dated at Kampala this ..13th.. day of ..Jan.. 2023.

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Elizabeth Musoke

Justice of Appeal

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Catherine Bamugemereire

Justice of Appeal

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Stephen Musota

Justice of Appeal