THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

CRIMINAL APPEAL NO. 0874 OF 2014

(Coram: Obura, Bamugemereire & Madrama, JJA)

1. WOTOBA ALEX}
2. GIDUDU ROBERT}
3. KATAMBA JAMES}
4. MUGESI HAKAMADA} ..... APPELLANTS

VERSUS

UGANDA} ..... RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale before the Hon. Gidudu, J dated 31st of October 2014 in Criminal Session Case No 0026 of 2011)

JUDGMENT OF COURT

The appellants were indicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) (3) (a), (4) of the Penal Code Act and tried by the High Court at Mbale.

The facts alleged in the charge sheet are that the appellant and others at large on 13th of March 2010 at Bumasobo in Sironko district robbed Number 7522 SPC Gimei Patrick of rifle Number 592902482087 POL G 0024 and at or immediately before or immediately after the said robbery used a deadly weapon to wit a panga on the said Number 7522 SPC Gimei Patrick.

The appellants were tried and convicted of aggravated robbery and sentenced to 16 years' imprisonment by Lawrence Gidudu, J in a judgment dated 31st October 2014.

The appellants sought leave of court which was granted and appealed against sentence only on the sole ground that:

1. The learned trial judge erred in law and fact when he sentenced the appellants to 16 years' imprisonment which sentence is harsh and excessive in the circumstances.

At the hearing of the appeal, learned counsel Allan Mooli represented the appellants on state brief while the learned Senior State Attorney Ms Ariong Josephine, represented the respondent. Three of the appellants appeared in court while the 3rd Appellant appeared through counsel with his consent for the appeal to proceed in his absence. The court was addressed in written submissions and judgment reserved on notice.

The appellants counsel submitted that he was mindful of the gravity of the offence and that the maximum penalty is death. Secondly there was need to have uniformity in sentencing and submitted that if the learned trial judge properly considered the mitigating factors, he would have arrived at a lesser sentence other than the sentence of 20 years' imprisonment from which he deducted the four years the appellant had spent on remand. He relied on **Adama Jino Vs Uganda; Court of Appeal Criminal Appeal No 50 of 2006** where the Court of Appeal reduced the sentence of the appellant who was charged with three counts of aggravated robbery from life imprisonment to 15 years' imprisonment. The court took into account the fact that though the gun shots were fired at the time of the robbery, no life was lost. The appellant's counsel submitted that in the present matter, although violence was used on the victim, no life-threatening injuries were inflicted on the victim. In the premises he submitted that a sentence of 15 years' imprisonment less the time spent on remand would be appropriate in the circumstances given the fact that the accused persons were first time offenders and no life was lost in the process. He prayed that this court allows the appeal and reduces the sentence accordingly.

In reply, the respondents counsel opposed the appeal against sentence and submitted that the imposition of sentences was at the discretion of the trial judge. Secondly it is settled law that a sentence may only be interfered with by an appellate court where it is evident that the trial court acted on a wrong principle or overlooked some material fact or if the sentence is manifestly harsh and excessive in light of the circumstances of the case as was held in **Kiwalabye Bernard Vs Uganda;**

SCCA No 143 of 2001 and in **Kyalimpa Edward Vs Uganda; SCCA No 10 of 1995**. It has consistently been held that an appropriate sentence is a matter of discretion for the sentencing judge. That each case presents its own facts upon which judge exercises his discretion. An appellate court will normally not interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence by the trial judge was manifestly so excessive as to amount to an injustice. Further, appellate court will not interfere with a sentence imposed by a trial court on the ground that it would have imposed a different sentence.

The respondent's counsel submitted that the record discloses that the learned trial judge captured the aggravating and mitigating factors given by all the parties and sentenced the appellant to 20 years' imprisonment from which he deducted the four years he spent on remand and ordered that the appellants serves 16 years' imprisonment.

Further, the respondents counsel submitted that the maximum penalty for the offence of aggravated robbery under section 286 (2) of the Penal Code Act is death and a sentence of 20 years' imprisonment is within the range of sentences the High Court may impose. Further the Supreme Court in previous sentences seem to have found such a sentence as appropriate for purposes of aggravated robbery. In **Ojangole Peter Vs Uganda; SCCA No. 34 of 2017**, the Supreme Court found that a sentence of 32 years' imprisonment imposed by the Court of Appeal on a convict of aggravated robbery was a legal and an appropriate sentence. In **Guloba Rogers Vs Uganda; CACA 57 of 2013**, the Court of Appeal considered the sentence of 35 years on account of aggravated robbery as appropriate from which it deducted the one year and five months the appellant had spent on remand and arrived at a sentence of 33 years seven months' imprisonment. In **Basikute Abdu Vs Uganda; CACA No 16 of 2017**, the trial court imposed a sentence of 20 years' imprisonment in the case of aggravated robbery in which the victim was robbed of Uganda shillings 200,000/= and the Court of Appeal while upholding the sentence of 20 years' imprisonment found that it was not a harsh and excessive sentence.

In the premises, the respondent's counsel urged the court not to interfere with the discretionary sentence of the trial judge and dismiss the appeal and uphold the sentence.

Consideration of Appeal.

We have carefully considered the appellant's appeal which is only on the ground of sentence with the leave of court under section 132 (1) (b) of the Trial on Indictment Act, cap 23 laws of Uganda 2000.

The duty of this court as a first appellate court in an appeal from the decision of the High Court issued in the exercise of its original jurisdiction is to reappraise the evidence on the record by subjecting it to fresh scrutiny and making its own inferences of fact. In reappraisal of evidence a first appellate court should warn itself of the shortcoming of not having heard and seen the witnesses testify and to treat with deference the observations of the trial judge on matters of credibility of witnesses whenever it is in issue (See **Pandya v R [1957] EA 336, Selle and Another v Associated Motor Boat Company [1968] EA 123,** on the duty of a first appellate court by the East African Court of Appeal and the decision of the Supreme Court of Uganda in **Kifamunte Henry v Uganda; SCCA No. 10 of 1997**). The duty of court is enabled by rule 30 (1) (a) of the **Judicature (Court of Appeal Rules) Directions, S.I No. 13-10**, which provides that on appeal from the decision of the High Court in the exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of fact.

Secondly, apart from reappraisal of material facts, the second set of principles concern the power of court to set aside a sentence of the trial court. The basis for setting aside a sentence imposed by a trial court were generally set out by the East African Court of Appeal in **Ogalo s/o Owoura v R (1954) 21 EACA 270.** In the appeal, the appellant appealed against a sentence of 10 years' imprisonment with hard labour which had been imposed for the offence of manslaughter. On the relevant principles to interfere with sentence, the East African Court of Appeal held that:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the court had been

> trying the Appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. R*, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case

An appropriate sentence should be proportionate to the offence with the gravest offences attracting the maximum penalty and proportionately, the slightly less grave would attract a lesser penalty. That means from death penalty one descends to life imprisonment and then lower depending on the degree of gravity in terms of aggravating factors and weighing it with mitigating factors.

In **Abelle Asuman v Uganda Supreme Court; Criminal Appeal No 66 of 2016** the Appellant had been convicted of the offence of aggravated robbery and was sentenced to life imprisonment by the High Court. The court of appeal reduced the sentence of life imprisonment to a sentence of 18 years' imprisonment. On further appeal to the Supreme Court on the ground that the sentence of 18 years' imprisonment was a harsh and excessive sentence, the Supreme Court upheld the 18 years' imprisonment imposed by the Court of Appeal.

In **Naturinda Tamson v Uganda; Supreme Court Criminal Appeal No 025 of 2015 [2017] UGSC 64 (26th April 2017)**, the Appellant lodged a second appeal from the decision of the Court of Appeal which had imposed a sentence of 16 years' imprisonment for aggravated robbery. The Appellant had been convicted by the High Court of the offences of rape, defilement and aggravated robbery and was sentenced to 18 years' imprisonment on each of the counts which sentences were to run concurrently. The Court of Appeal reduced the sentence to 16 years' imprisonment and the second appeal to the Supreme Court against sentence was dismissed.

In **Bogere Asiimwe Moses and Senyonga Sunday v Uganda; Supreme Court Criminal Appeal No 39 of 2016 [2018] UGSC (19th April 2018)** the Supreme Court upheld a sentence of 20 years' imprisonment imposed for aggravated robbery. The Appellants were 22 and 23 years old respectively and court noted that there was no violence, no death occurred and some property was recovered.

Further in **Tukamuhebwa David Junior and Mulodo Yubu v Uganda Supreme Court; Criminal Appeal No 59 of 2016 [2018] UGSC 7 (9th April 2018)**, on appeal, a sentence of 18 years' imprisonment for aggravated robbery was set aside for contravention of Article 23 (8) of the Constitution, but the Supreme Court held that a sentence of 20 years' imprisonment was appropriate in respect of the aggravated robbery and took into account the 3 years and 7 months the Appellant had spent in lawful custody. The final sentence imposed was 16 years and five months' imprisonment from the date of conviction by the High Court. The offences were aggravated robbery coupled with rape.

In **Muchunguzi Benon and Muchunguzi Thomas J v Uganda; Court of Appeal Criminal Appeal No 008 of 2008 [2016] UGCA 54 (26th October 2016)**, the Appellants were convicted of aggravated robbery and sentenced to 15 years' imprisonment by the High Court. On appeal to the Court of Appeal, the sentence was upheld. The robbery involved violence in that the victim of the offence had been hacked with a cutlass and sustained several injuries on her body.

In the above appeals the period spent on remand had been deducted.

In this appeal, the first appellant was a Policeman and ought not to have involved himself in a robbery. He reneged his duty, becoming a rogue policeman. The facts of the appeal are briefly that the PW1 No. 7522 SPC Gimei Patrick was attacked by the assailants with the aim of robbing his gun. One of the assailants tried to cut him on the head with a panga (cutlass) and he shielded his head with his hand which was cut. He was further cut on other parts of the body and his testimony shows that the appellants tried to kill him because he had identified them. He managed to wrestle free the panga (cutlass) which was being used by one of the assailants whereupon he cut the assailant in self-defence and the assailant ran away and he also escaped and ran to a police post. These facts are reflected in the sentencing notes of the learned trial judge which I will reproduce below:

> All convicts are first offenders. They robbed a gun from a police officer who was on duty. They planned that attack perhaps with the aid of their O/C of Salalira police post. These factors aggravated the situation. I take a serious view of this.

They have each been on remand for 4 years. They are first offenders. They are young people in their 30's. These factors are in their favour. They each have families and dependents. I take a sympathetic view.

The gun was robbed and has never been removed (recovered). The injuries inflicted on the victim were so serious and were aimed on his head. The blows could have caused the victim's death.

The maximum sentence provided for is death. The starting period is 35 years going down to 30 years up to death. For whatever reason, it was not necessary to do what they did.

I will not impose the maximum sentence but will impose one that reflects the sentences of the crime. I cannot just let them go back home as if robbing a gun from a security officer is a small matter.

Moreover, that gun is not covered (sic) while itself is a security threat to the area. I would have sentenced the convicts to 20 years' imprisonment each. But because they have been on remand for 4 years each, I deduct this from the final sentence. After considering all factors for and against, I sentence each of the convicts to 16 years (sixteen years) imprisonment. Each of the accused/convict has a right of appeal against conviction and sentence within 14 days.

Under section 286 (4) Penal Code Act, I am required to order compensation. I have difficulty in that I do not know the price of a gun. Besides, I do not think these guns are traded in a manner that a compensation order would atone. I make no order as to compensation.

In the judgment of the learned trial judge, the brief facts were that there was use of violence. The evidence of PW1 shows that the gun was taken after a valid fight in which he was severely cut and injured. The doctor classified the injuries as grievous harm. PW1 sustained injuries on the fingers, elbow, head and neck. The attack lasted about 40 minutes and took place in an area of 20 metres. The learned trial judge found that PW 1 suffered a violent attack and this was proved by the prosecution beyond reasonable doubt.

It follows that there was robbery with violence which was proved and the appellants only appealed against sentence. The precedents on the robbery cases show that any robbery coupled with the injury meted on the victim's is a further aggravation in addition to the use of a lethal weapon. Secondly, it is a further aggravating circumstance that the

person who was attacked is a policeman. The range of sentences for aggravated robbery where the convict is spared the maximum penalty of death or the second severest penalty of life imprisonment is demonstrated in the precedents we have considered above. These precedents demonstrate that the sentences from the time of conviction and after taking into account the period spent on remand prior to conviction under article 23 (8) of the Constitution is between 15 years and 20 years.

The learned trial judge considered the fact that the appellants were first time offenders with no previous record. All the appellants had families and were young men in the range of 30 years of age.

In the circumstances, there is no basis for interference with the sentence imposed by the court as the trial judge took into account all the relevant factors.

We find no merit in the appeal which we hereby dismiss.

Dated at Mbale the 1st day of March 2023

Hellen Obura

Justice of Appeal

Catherine Bamugemereire

Justice of Appeal

Christopher Madrama

Justice of Appeal