THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MBARARA

(Coram: Buteera DCJ, Gashirabake, & Kihika, JJA)

CRIMINAL APPEAL NO. 0538 OF 2015

AKANDINDA HILLARY::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court of Uganda held at Kabale before Hon. Mr. Justice Micheal Elubu delivered on 5th August, 2014 in Criminal Session Case No. 74 of 2013)

JUDGMENT OF COURT

BACKGROUND

The facts as can be ascertained from the record of the lower Court are that on the night of the 22nd day of June 2012 at about 1:00 am the victim, Turyakira Medius alighted from a bus at Nyakijumba, Southern Division in Kabale District near the first petrol station. As soon as she started walking, a motorcycle riding in the direction of Kabale came towards her. The motorcycle turned and rode back in the Mbarara direction. She saw the motorcycle disappear into a gate opposite the second petrol station.

The victim continued walking and as she approached the second petrol station a man attacked her and hit her on the forehead with a hammer. She was robbed of her bag that contained a mobile phone, fifty thousand shillings (UGX 50,000/=), bible and identity card.

She ran to the shop of Family Wilson (PW2) for help. PW 2 called Sebatwere Mabel (PW3) who was an LC official and together they went with the victim to the compound in which the motorcycle had entered. The motorcycle was found but the appellant was not there. He emerged moments later and claimed he had gone to the back of the house to ease himself. His explanation was unsatisfactory which led to his arrest.

The appellant was indicted, tried and convicted on one count of aggravated robbery contrary to Sections 285 and 286(2) of the Penal Code Act (Cap 120). He was sentenced to 18 years' imprisonment after deducting the 2 years he had spent on remand.

Ground of Appeal

> **That the learned trial judge erred in law and fact when he dispensed a harsh and excessive sentence to the appellant of 18 years' imprisonment without extensively weighing the mitigating factors hence occasioning a miscarriage of Justice.**

The respondent opposed the appeal.

REPRESENTATION

At the hearing of the appeal, the appellant was represented by Mr. Chan Geoffrey Masereka on state brief. The respondent was represented by Mr. Kyomuhendo Joseph, Chief State Attorney.

Counsel for appellant and the respondent who had filed written submissions prayed to Court to have them adopted as their final submissions. The prayer was allowed.

Counsel for the appellant sought leave of Court to appeal against sentence only under Rule 43(3)(a) of the Judicature (Court of Appeal) Rules and Section 132 of the Trial on Indictments Act. Leave was granted.

APPELLANT'S SUBMISSIONS

Counsel for the appellant submitted that according to **Kifamunte Henry V Uganda, (Supreme Court Criminal Appeal No. 10 of 1997),** the first appellate Court is required to re-appraise the evidence and make its inferences on issues of law and fact.

Counsel cited Section 34(1)(e) of the Criminal Procedure Code Act (Cap 116) to the effect that the Court of appeal has powers to reduce sentence.

Counsel for the appellant cited Section 132(1)(a) of the Trial on Indictments Act (Cap 23) which provides that an accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction as of right on matter of law, fact or mixed law and fact.

Counsel submitted that the trial Court must exercise its sentencing discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the Constitution, statutes and practice directions together with general principles as guided by case law.

Counsel referred to the case of **Abaasa Johnson Vs Uganda, (Court of Appeal Criminal Appeal No. 33 of 2010),** where it was stated that an appellate Court may set aside the sentence imposed by the trial Court, on grounds inter alia that, the sentence imposed by the trial Court was manifestly excessive in the circumstances.

Counsel referred to **Ouke Sam Vs Uganda, (Court of Appeal Criminal Appeal No. 251 of 2002),** where this Court confirmed a 9-year sentence for aggravated robbery.

Counsel relied on the case of **Pte Kusemererwa & Anor Vs Uganda, (Court of Appeal Criminal Appeal No. 83 of 2010),** in which this Court reduced the sentence for the 1st appellant from 20 years to 13years imprisonment. The sentence for the 2nd appellant was reduced from 20 years to 12 years' imprisonment.

Counsel further cited the case of **Aharikundira Yustina Vs. Uganda, SCCA No.27 of 2015** where it was noted that since the trial Judge did not weigh the mitigating factors as against the aggravating factors this automatically placed a duty on the Court of Appeal to weigh the factors raised. That it is the duty of this Court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation.

Counsel for the appellant submitted that the appellant was sentenced to 18 years' imprisonment. He prayed that the appellant be granted a lenient sentence taking into account the aggravating factors and the mitigating factors to wit; the appellant is a first offender, he is a young man capable of reform and he is remorseful.

Counsel submitted that the trial Judge did not consider the mitigating factors because he was more concerned with the number of offences of a violent capital nature that constituted the bulk of the session statistics hence the determination to punish the perpetrators.

Counsel prayed that the aforementioned mitigating factors are considered and the appellant be given a lenient sentence to enable his earlier integration into society.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent agreed with counsel for the appellant's submissions on the principles laid down in the Abaasa case (Supra) as to when an appellate Court can interfere with the sentence imposed by a lower Court. He submitted that the sentence of 20 years' imprisonment before deducting the two years spent on remand is not harsh and excessive.

Counsel for the respondent submitted that the trial Judge considered all the aggravating and mitigating factors and elected to impose a sentence of 20 years. That the trial Judge considered the fact that the convict was as a first-time offender, the period of two years spent on remand as well as his marital status and his age.

Counsel submitted that in the case of **Yustina Aharikundira (Supra),** the Supreme Court citing **Kyalimpa Edward Vs. Uganda, (Criminal Appeal No.10/1995)** and **R V De Havilland (1983) 5 Criminal Appeal 109** stated that an appropriate sentence is a matter for discretion of the sentencing judge. Each case presents its own facts upon which the judge exercises his discretion.

Counsel relied on the case **of Kiwalabye Benard Vs. Uganda, SCCA No. 143/2001** where Court held that the appellate Court is not to interfere with the sentence imposed by the trial Court where the trial Court exercised its discretion on sentence, unless the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice or where the trial Court ignores to consider an important matter or circumstance which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle. Counsel for the respondent cited **Mujuni Vs. Uganda, (Criminal Appeal No. 203 of 2016)** where Court found that a sentence of 15 years' imprisonment was neither harsh nor manifestly excessive in the circumstances. The appellate Court was not prepared to interfere with the sentence imposed by the trial Court.

Counsel submitted that the appellant was armed with a harmer which he used to cause actual violence. That the maximum sentence for offence of aggravated robbery is death according to Section 286(2) of the Penal Code Act (Cap 120).

Counsel prayed that the sentence be confirmed and the appeal dismissed.

RESOLUTION BY COURT

Rule 30 (1)(a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10 provides for the duty of this Court as a first appellate Court. It states;

"30 (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) reappraise the evidence and draw inferences of fact;"

In Kifamunte Henry Vs. Uganda (Supreme Court Criminal Appeal No. 10 of 1997), Court held;-

"We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own

decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it"

We have perused the record of the lower Court, the submissions of counsel for the appellant and the respondent, authorities cited to us and other relevant authorities as well as the law.

This appeal is premised on the assertion that the appellant's sentence was harsh and excessive because the sentencing Judge did not weigh the mitigating factors in favour of the appellant.

The principles upon which an appellate Court can interfere with the sentence imposed by the trial Court have been discussed before. In **Kiwalabye Benard Vs Uganda, (Criminal Appeal No. 143 Of 2001)** Court held: -

"The appellate court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence 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 or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."

The learned trial Judge in sentencing the appellant considered that the appellant was a first offender, the period he had spent on remand, the appellant's marital status and roles and his age. These were weighed against the aggravating factors. The trial Judge formed the opinion that a sentence of 20 years' imprisonment before deducting the 2 years the appellant had spent on remand would be appropriate to meet the ends of justice.

We are alive to the need for consistency in sentencing for offences of a similar nature. The Supreme Court and this Court have had opportunity to consider cases similar in nature to the instant appeal. In **Lule Akim versus Uganda, Criminal Appeal No. 274 of 2015,** this Court upheld a sentence of 20 years' imprisonment for aggravated robbery which was considered as neither harsh nor excessive.

In **Birungi Ben & Anor versus Uganda, Criminal Appeal No. 534 of 2014** this Court confirmed a sentence of 20 years' imprisonment for the same offence and deducted the remand period as required by law.

In **Ziraba Mohammed versus Uganda, Criminal Appeal No. 215 of 2020** this Court confirmed a sentence of 20 years' imprisonment for aggravated robbery and deducted the period the appellant had spent on remand.

In **Kibuuka John and Anor versus Uganda, Criminal Appeal No. 0016 of 2018** this Court upheld sentences of 20 years and 4 months and 22 years and 4 months respectively against the first and second appellants for the offence of aggravated robbery.

In **Nakalyaka Fabiano versus Uganda, Criminal Appeal No. 141 of 2018** this Court substituted a sentence of 35 years' imprisonment with a sentence of 30 years' imprisonment for the offence of aggravated robbery and deducted the period the appellant had spent on remand.

We have considered the sentences that have been handed down for the offence of aggravated robbery in the criminal appeal cases above quoted and the circumstances of this particular appeal. The appellant waylaid a lonely lady walking at night. He planned the offence. The appellant used a hammer on her head in the commission of the offence and the victim was injured.

Paragraph 31 (d) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions is to the effect that the nature of weapon used in a robbery is an aggravating factor.

The starting point for sentences in the offence of aggravated robbery is 35 years' imprisonment up to death.

In the instant case the trial Judge considered the aggravating and mitigating factors and sentenced the appellant to 20 years' imprisonment. We do find that the sentence imposed on the appellant was neither harsh nor excessive. The learned trial Judge considered both the aggravating and mitigating factors before imposing the sentence that he meted out to the appellant.

The submission of counsel for the appellant that the trial Judge was more concerned with the number of offences of a violent capital nature making the bulk of the session statistics is not a justified criticism.

We find that the trial Judge duly considered the relevant legal principles and applied them correctly. We find no reason to fault the trial judge.

This appeal lacks merit and it is accordingly dismissed.

We so order.

Dated at Mbarara this.....16th.....day of.....Jan.....2024

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RICHARD BUTEERA

DEPUTY CHIEF JUSTICE

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL