

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT MBALE

[Coram.: Egonda-Ntende, Gashirabake, . Kihika, JJA]

CRIMINAL APPEAL NO.468 OF 2015

VERSUS

(Appeal against the Judgment of the High Court [Stephen Musota ,J.] at the High Court Mbale, delivered on the 14th of March 2015)

JUDGMENT OF THE COURT

1] This is an appeal, with the leave of this court, against sentence only. The Appellant was arrested on the 07th of May 2009 and indicted for the charge of aggravated robbery contrary to Sections 285 and 285(2) of the Penal Code Act. He was later convicted and sentenced to 25 years' imprisonment and compensation to the victim with Ugx 2,500,000/= (Two million five hundred thousand shillings only).

2] Being dissatisfied with the decision of the trial Court, he appealed against the sentence only, on the following ground;

That the learned Trial Judge erred in law and fact in imposing a harsh and excessive sentence when he acted in disregard of remission and period spent on remand by the convict hence occasioning a miscarriage of justice.

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5 3] The respondent opposed the appeal.

The Brief facts of the case were that the appellant on the 7th day November 2007 at Okisiran central village, Kameka sub county in Pallisa district robbed one Opale Simon of a cash sum of 1,300,000/= and at the time of the said robbery used a deadly weapon to wit a panga on the said Opale Simon.

10 At the trial, the appellant denied the offence but was convicted upon full trial and sentenced to 25 years' imprisonment and in addition ordered to compensate the victim with Ugx. 2,500,000/= (Two million five hundred thousand only)

Representation

15 4] The Appellant was represented by Ms. Kanyago Agnes on state brief. The Respondent was represented by Ms. Immaculate Angutoko, Chief State Attorney, and Mr. Okello Paul, State Attorney.

Submissions by counsel for the Appellant.

20 5] Counsel for the Appellant submitted that the appellate Court can only interfere with a sentence imposed by the trial Court if the sentence is either illegal or founded upon a wrong principle of law. She cited **Abassa Johnson and Another v Uganda, [2016] UGCA 71.**

25 6] Counsel faulted the trial Court for failure to take into consideration the time the Appellant spent on lawful remand while sentencing as required under Article 23(8) of the Constitution of the Republic of Uganda. Counsel relied on **Baluku Fred v Uganda, [2020] UGSC 41.**

7] Counsel submitted that the Warrant of Commitment shows that the Appellant is to serve a period of 25 years, which is illegal according to Article 23 (8) of

5 the 1995 Uganda Constitution, Guideline 15 of the Constitution (Sentencing
Guidelines of Courts of Judicature) (Practice) Directions, 2013. Furthermore,
counsel stated that Guideline 32 of the Constitutional Sentencing Guidelines
for Courts of Judicature) (Practice) Directions, 2013 provides for mitigating
factors to the offence of robbery that, in considering a sentence for robbery,
10 the court shall take into account, whether the offender is a first time offender
with no previous conviction or no relevant or recent conviction and
remorsefulness of the offender.

8] It was submitted for the Appellant that according to the record the Resident
State Attorney acknowledged the fact that the convict had no criminal record
15 as he was a first time offender. He was remorseful and at the time of the
offence, he was aged 25 years of age. Both the victim and convict are
youthful. Counsel argued that the trial Judge, however, acted in disregard of
such facts and imposed a harsh sentence upon the convict.

9] Counsel prayed that this Court invokes its power under Section 11 of the
20 Judicature Act Cap 13 and re-sentence the Appellant.

Submissions by Counsel for the Respondent

10] Before making his submissions, counsel raised two preliminary objections.
One, counsel objected to the fact that the appeal was lodged out of time
contrary to Section 28(1) of the Criminal Procedure Code Act. Secondly, the
25 Appellant did not seek leave to appeal as required under section 132 (1) (b) of
the Trial on Indictment Act.

11] Turning to the merits of the appeal counsel agreed with the position of the law
regarding interference with the discretion of the sentencing Judge as cited by
Counsel for the Appellant. Counsel cited **Kiwalabye Bernard v. Uganda** ,

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5 **SCCA No. 143 of 2001, Karisa Moses v. Uganda, SCCA No. 23 of 2016,**
and **Kyalimpa Edward V. Uganda, SCCA No. 10 of 1995.**

12] Counsel for the Respondent took cognizance of the provisions of Article
23(8) of the Constitution but contended that the Appellant was sentenced on
4th March 2015 as per the commitment warrant. This was before the position
10 of the law in **Rwabugande Moses V. Uganda, SCCA No. 25 of 2015** which
requires an arithmetic deduction of the period spent on remand. Counsel
argued that the legal regime was stated in **Kizito Senkulu V. Uganda, SCCA**
No. 24 of 2011, where taking into account the time spent on remand did not
require arithmetic deductions.

15 13] Counsel argued that the trial Judge took note of both mitigating and
aggravating factors and the period spent on remand. Counsel contended that
there exists no justification warranting this honorable court's interference
with the sentence of the trial Court.

14] Counsel argued that the sentence of 25 years' imprisonment is consistent with
20 sentences meted out by the Supreme Court and this honourable court in
similar cases. Counsel cited **Bakubuye Muzamiru & Anor Vs. Uganda,**
SCCA NO. 56 of 2015 in which the Appellants were convicted of murder and
aggravated robbery and sentenced to 30 years' imprisonment on account of
aggravated robbery. This Court upheld the sentence. In **Guloba Rogers v.**
25 **Uganda, CACA No. 57 of 2013** this honourable court considered a sentence
of 35 years on account 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. Furthermore, in **Kavuma George & 2**
others v. Uganda, CACA No. 312 of 2015 which the Appellants were



5 indicted and convicted for murder and aggravated robbery and sentenced to 41 years, 36 years, and 31 years' imprisonment respectively on each count. This honourable court upheld the respective sentences.

Duty of the First Appellate Court

10 15] This Honourable Court is the first Appellate Court in this matter. Its duty is stated under Rule 30(1)(a) of the Court of Appeal Rules. Furthermore, in **Kifamunte Henry Vs. Uganda, SCCA No 10 of 1997**, Court held that:

15 *"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."*

16] In **Father Narsensio Begumisa and three others Vs. Eric Tibebaga, SCCA 170 of 2000[2004 KALR 236**, the Court stated as follows:

20 *"This being a first appeal, this Court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraise before coming to its own conclusion."*

17] we shall consider the same as we determine this appeal.

25 18] For this court, as a first appellate court, to interfere with the sentence imposed by the trial court, it must be shown that the sentence is illegal, or founded upon a wrong principle of the law, or that the trial Court failed to take into account an important matter or circumstance, or made an error in principle or imposed a sentence which is harsh and manifestly excessive in the circumstances. See **Kiwalabye Bernard Vs. Uganda, Supreme Court**

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5 **Criminal Appeal No. 143 of 2001, Rwabugande Moses Vs. Uganda,
Supreme Court Criminal Appeal No. 25 of 2014 and Livingstone
Kakooza Vs. Uganda, SC Criminal Appeal No. 17 of 1993.**

19] It is worth noting that the preliminary objections were considered during the hearing.

10 20] The contention in this appeal was that the trial Judge never considered the period spent on remand. While sentencing the Judge held that:

SENTENCE AND REASONS

15 *The convict is a first offender but he committed a grave offence. He is an energetic young man who could work for himself instead of romping and endangering others. The convict viciously committed the offence using a panga to cut the victim on the neck. It appears the intent was to take life. Luckily enough the victim survived but with a generous injury. Although I will consider the time that convict has spent in prison but may aid him as a danger to society who should be kept away for some time.*

20 *Consequently, Erisa Ben is sentenced to 25 years' imprisonment.*

Order: Erisa Ben will compensate the victim with 2.5 million shillings (Two million five hundred thousand shillings) only.

21] It is a mandatory requirement under Article 23 (8) of the 1995 Constitution that the sentencing Judge ought to deduct the time spent on lawful remand.

25 The Article provides thus:

30 *"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."*

- 5 22] The extract from the record is not clear whether the sentencing Judge deducted the time spent on remand. The Judge stated, *"I will consider the time that the convict has spent in prison but may aid him as a danger to society who should kept away from society."* While concluding, the Judge did not demonstrate that he had deducted the years spent on remand. The learned trial judge did not consider it necessary to first identify the exact period the appellant had spent in pre trial custody. He could not take into account that which he had not identified. Secondly reference to the period is made in a manner that suggests that the learned trial judge considered that taking that period into account would aid the appellant to be a danger to society. By necessary implication it was to be disregarded to achieve the learned judge's sentencing objective of keeping away the appellant from society. Failure to fulfill the mandatory requirement under Article 23(8), made the sentence illegal. We therefore invoke section 11 of the Judicature Act Cap 13, to sentence the Appellant a fresh.
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- 20 23] Guided by both the mitigating and aggravating factors we will proceed to sentence the Appellant. In mitigation for the Appellant was that the Appellant is a first time offender. He was remorseful. He was immune to this life and a long sentence would deny this country the benefit of his contribution in light of the time he had spent in prison.
- 25 24] The aggravating factors were that the offence the Appellant committed was grave attracting the death penalty. The Appellant was 25 years old when he committed the offence. The victim was 30 years old at the time of the offence. Both would work for themselves. But the Appellant chose to gain wealth through wrongful means. The Appellant used a very harmful weapon which is the panga and he cut the victim in the neck.
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- 5 25] We are mindful of the principle of consistency provided for under principle 6
(c) of the Constitution (Sentencing Guidelines for (Courts of Judicature)
(Practice) Directions, 2013. This principle was well articulated in
Aharikundira Yustina Vs. Uganda, SCCA No 27 of 2015 where the court
noted that when dealing with appeals concerning sentencing, an appellate
10 Court must ensure that it imposes a sentence that is consistent with the
sentences imposed in previously decided cases with similar facts.
- 26] In similar cases, the Court in **Mutebi Ronald and Another Vs. Uganda,
Criminal Appeal No. 259 of 2019**, the Court upheld the sentence of 30 years.
In the case of **Otim Moses Vs. Uganda, Supreme Court Criminal Appeal
15 No. 06 of 2019**, the Court upheld a sentence of life imprisonment for the
offence of aggravated robbery. In **Ojangole Vs. Uganda, Supreme Court
Criminal Appeal No. 20 of 2019**, the Supreme Court confirmed a sentence of
32 years' imprisonment for aggravated robbery.
- 27] Considering the sentencing range set out in the Penal Code, the Constitutional
20 Sentencing Guidelines (supra), both mitigating and aggravating factors and
the similar cases cited above, we find that a sentence of 20 years is
appropriate.
- 28] The Appellant was arrested on the 7th day of May 2009, and the conviction
was on the 4th March of 2015. This means he spent 4 years and 11 months on
25 remand. Having sentenced the Appellant to 20 years' imprisonment, we
deduct 4 years and 11 months spent in lawful custody. The Appellant will
serve 15 years and 1 month from the date of conviction which is 4th March
2015.



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Signed, Dated and delivered at Kampala this day of
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