THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KABALE

[Coram: M.M. Kibeedi, C. Gashirabake, O. Kihika, JJA]

CRIMINAL APPEAL No 182 OF 2015

GUMISIRIZA NASUR alias RWAMUKYANDARA..... APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal from the Judgment of Hon. Justice Duncan Gaswaga in Criminal Session Case No. HCT-00-CR-AA-0115-2013 of the High Court of Uganda Holden at Bushenyi delivered on the 20th of May 2015)

JUDGMENT OF THE COURT

Introduction

1] The facts of the case which were admitted by the Appellant before the trial Judge are that on the 15th day of October 2013, the victims, Namanya Phionah, Kyobutungi Emily, Nareeba Jackline, and Katushabe Bibianah were at Atlas Bar and Lodge at Liberation Road within Bushenyi Town Council. The victims were all employed in the said bar as attendants/ patrons'. During the night of 15th October 2013 at about 3:00 a.m., the victims were suddenly woken up from sleep by a stranger who was standing next to the bed on which Kyobutungi Emily and Katushabe were sleeping. The assailant was holding a torch which he flashed at the victims. The assailant started hitting Kyobutungi Emily using a big stick while demanding money. The victim, Kyobutungi Emily, raised an alarm. The other victims also raised an alarm; One Ngabirano Gerald, the owner of the said bar woke up on hearing the alarm. The said Ngabirano tried to open the door of his bedroom connecting to the room where the alarm was being raised. He found it locked from the outside. The assailant turned his wrath on Katushabe beating her several times all over the body

2] The assailant further attacked Nareeba Jackline whom he hit on the head using a stick while demanding money. The assailant also beat Namanya Phionah while demanding money in Kiswahili "1eta pesa." During the ordeal, Namanya looked at the assailant and observed him then pulled out Ugx. 40,000 /= and gave it to the assailant. The assailant then left Namanya. Kengabiralo Dinah, the wife of Ngabirano, who was in the room during the attack recognized the voice of the assailant as that of the appellant, Gumisiriza Nasur alias Rwamucandara, who used to be the tenant behind the said bar for a long time.

3] During the attack, Ngabirano used the outer door and rushed to Bushenyi Police Station. Police officers rushed to the scene. The assailant also escaped during that process. The victims who had sustained serious injuries were then rushed to Kyeizooba Farmers Clinic for treatment. The victim Namanya who had been critically injured was transferred to KIU Hospital and later to Mbarara Hospital where she was admitted. Investigations commenced.

4] The Appellant was arrested and an identification parade was conducted at Bushenyi Police Station. Namanya Phionah identified the Appellant as the assailant who attacked, robbed, and injured her. The Appellant was indicted, tried, convicted on his own plea of guilty, and sentenced.

5] The Appellant being aggrieved with the decision of the High Court appealed to this Court. The appeal is premised on two grounds set out in the Memorandum of Appeal as follows:

1. *The learned Judge erred in law when he exercised powers injudiciously in entering a plea of guilty without adequately explaining the ingredients of the offence before convicting the Appellant of aggravated Robbery count I, attempted murder count II, III, IV and V occasioning a miscarriage of justice.*

2. *The learned trial Judge erred in law and fact when he ignored the circumstances of the case and discriminatingly imposed upon the Appellant a total of 115 years harsh excessive sentence.*

Legal Representation

6] At the hearing the Appellant was represented by Mr. Seth Rukundo. The Respondent was represented by Mr. Joseph Kyomuhendo Chief State Attorney.

Submissions for the Appellant

7] Counsel for the Appellant submitted that the Judge did not consider the ingredients of the offences of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code and attempted murder contrary to section 204 of the Penal Code. See the case of **Younghusband Vs. Luftig (1949)2 ALL E.R 72**. Counsel argued that the trial Judge did not consider the essential steps basis upon which a plea of guilty can be entered.

8] Counsel further argued that there is nothing on the record to show whether the services of the interpreter were employed. There was no note from the trial Judge showing that the facts narrated by the prosecution together with the indictment were read over and explained to the Appellant in the language he understood. Counsel cited the cases of **Desai Vs. R, 1971 EA 416** and **Adan Vs. R 1973 EA 445.**

9] Counsel argued that there were no plea bargain forms of agreement on record. The plea of guilty should be unambiguous, clear, unequivocal, and positive. Counsel argued that this procedural irregularity occasioned a miscarriage of justice. Counsel cited the case of **Adukule Natal Vs. Uganda, CACA No. 10 of 2000.**

10] Counsel also faulted the trial for the absence of Assessors. Counsel argued that this was contrary to section 67 of the Trial on Indictments Act Cap 23. Counsel cited **Fatehali Manji Vs. R, 1966 E.A 344.**

11] On ground two counsel submitted that the Appellate Court can interfere with the discretion of the sentencing Judge if the Judge did not consider the material factors of the case. Counsel cited **Ssekitoleko Yuda Tadeo and others Vs. Uganda, SCCA No. 33 of 2014.**

12] Counsel referred to the mitigating factors that the trial Judge ought to have considered like the Appellant being the first time offender and having been on remand for 1 year and 8 months, he was able to get closer to God while in prison. Counsel argued that as a first offender, a custodial sentence would not offer him community reconciliation.

13] Counsel argued that the court should consider the issue of consistency. He cited the case of **Suzan Kigula Vs. Uganda, Appeal No.03 of 2006** who was sentenced to 20 years for murder. **Akbar Hussein Godi Vs. Uganda, SCCA No. 03 of 2013,** where a sentence of 20 years was upheld.

Submissions for the Respondent

14] Counsel for the Respondent submitted on ground one that the Appeal was misconceived and ought to be dismissed. He argued that the trial Judge considered the proper procedure and correctly convicted the Appellant. Counsel conceded to the position of the case of **Adan Vs. Republic, 1973 EA. 445** as cited by the Appellant's counsel.

15] Counsel acknowledged that the learned trial Judge omitted to record the name of the interpreter on record but argued that this was not fatal and did not lead to a miscarriage of justice. Counsel argued that this could be cured by article 126(2) (e) and section 139 of the Trial on Indictments Act which implores the Court not to overturn a decision because of an error unless it occasions a miscarriage of justice. Counsel

cited the case of **Ndaula Vs. Uganda, (2002) 1 EA 214**, where the court held that there was no miscarriage of justice if the assessors did not take oath at trial.

16] On ground two counsel cited the case of **Kiwalabye Bernard Vs. Uganda, Criminal Appeal No. 143 of 2001,** where the Court held that the Appellate Court should not interfere with the discretion of the sentencing judge unless the sentence imposed is manifestly low or high, to amount to a miscarriage or the trial Court ignored an important matter in the circumstances of the case.

17] Counsel argued that a sentence of 25 years' imprisonment for attempted murder was not harsh or excessive given the circumstances of the case. Counsel argued that the trial Judge considered both the mitigating and aggravating factors in handing down the sentence.

18] Counsel prayed that this court should confirm the sentence.

Consideration of Court.

19] This is a first appeal. As a first Appellate Court, this Court must re-evaluate the evidence, weighing conflicting evidence, and reach its conclusion on the evidence, bearing in mind that it did not see and hear the witnesses. This is according to Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.

20] In the case of **Kifamunte Vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997**, the Court stated that:

> *"We agree that on the first appeal, from a conviction by a Judge, the Appellant is entitled to have the Appellate Court's consideration and views of the evidence as a whole and its own decision thereon. The first Appellate Court must 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."* ***See also***

the cases of Pandya Vs. R [1957] EA 336, Bogere Moses Vs. Uganda SCCA No.1 of 1997

21] In all criminal matters, the accused person can only be convicted by the Court on the strength of the prosecution case and not the weakness of the defence case. This is premised on the Criminal principles of, the burden of proof, standard of proof, and the presumption of innocence enunciated in article 28(3) of the Constitution of the Republic of Uganda 1995.

22] The law on Plea taking is provided for under sections 60 and 63 of the Trial on Indictments Act which provide thus:

> ***60. Pleading to indictment.***
>
> *The accused person to be tried before the High Court shall be placed at the bar unfettered, unless the court shall cause otherwise to order, and the indictment shall be read over to him or her by the chief registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court; and the accused person shall be required to plead instantly to the indictment, unless, where the accused person is entitled to service of a copy of the indictment, he or she shall object to the want of such service, and the court shall find that he or she has not been duly served with a copy.*

And

> ***63. Plea of guilty***
>
> *If the accused pleads guilty, the plea shall be recorded and he or she may be convicted on it.*

23] The procedure was well explained in the case of **Adan Vs. R,** (supra)where the Court held that:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused*

person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or add any relevant facts, if the accused does not agree with the statement of facts or assert additional facts which, if the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to not guilty and proceed to hold a trial."

24] According to the record of appeal, the Appellant pleaded guilty to all five counts against him. The Court went ahead and read the brief facts to the Appellant in Runyankole, the language he understood. The essence of reading the brief facts to the Appellant is to secure the unequivocal plea of the Appellant after ascertaining that he has understood what he is pleading to. See the case of **Dhewume Abdallah Vs. Uganda, Court of Appeal, Criminal Appeal No. 0141 of 2016**.

25] We acknowledge that the elements of the offences alleged against the Appellant were explained to the Appellant. The law under section 139 of the Trial on Indictments Act implores the Court not to set aside a decision of the Court merely on grounds of an error unless it is demonstrated that the error occasioned a miscarriage of justice. The section provides thus:

*"**139. Reversability or alteration of finding, sentence, or order by reason of error, etc.***

(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity, or misdirection in the summons, warrant, indictment, order, judgment

or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice."

26] Counsel for the Appellant did not explain how the omission of explaining each ingredient of the alleged offences caused a failure of justice to the Appellant to necessitate quashing the conviction and setting aside the sentence. Gathering from the record, when the facts were read to the Appellant, he understood everything and admitted to the said facts without demonstrating that he did understand any part of the facts. It is our observation that the failure to explain the essential elements of the offence did not in any way occasion a miscarriage of justice.

27] This ground therefore fails.

28] Counsel for the Appellant raised an issue of Assessors in his submissions. He submitted that according to the record, they were not sworn in, and therefore it was fatal. This was not one of the grounds of appeal in the Memorandum of Appeal. This court cannot entertain this issue because it offends Rule 102 (a) of the Court of Appeal Rules, which forbids any Appellant from arguing any ground that was not in the Memorandum of Appeal.

29] The Supreme Court has laid down the principles upon which an appellate Court should interfere with the discretion of the sentencing Judge. In the case of **Kyalimpa Edward Vs. Uganda, SCCA No. 10 of 1995** the Court relied on **RVs. Haviland (1983) 5 Cr. App R(s) 109** and held that:

"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 the Court is satisfied that the sentence imposed by the trial Judge was manifestly

so excessive as to amount to an injustice: Ogalo s/o Owuora Vs. R (1954) 21 E.A.C.A 126, R Vs. Mohammedali Jamal (1948) 15 E.A.C.A 126"

30] It is the duty of the Appellant to demonstrate to the Court that there is cause for it to interfere with the sentencing discretion of the sentencing Judge, otherwise, the appellate Court will always uphold the trial Court's sentence even if it thought that it would have handed down a different sentence. The Supreme Court in the case of **Aharikundira Yustina Vs. Uganda, Criminal Appeal No. 104 of 2009,** held that:

"Interfering with sentence is not a matter of emotions but rather one of law. Unless it can be proved that the trial Judge flouted any of the principles in sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been the ones trying the Appellant. In the instant case, the trial Judge had the opportunity to hear the case and watch the appellant and all the witnesses testifying. in his wisdom, he found that the most appropriate sentence was death. Without proof that this discretion was biased or unlawful, this Court would have lawful means of interfering with the same."

31] Counsel for the Appellant faulted the Judge for not considering the mitigating factors, alleging that a custodial sentence was not befitting for a first time offender of the Appellant's age. Counsel alleged that this could not promote reconciliation with the community as one of the principles promoted by the Constitution. The sentencing proceedings at the lower Court were as follows:

"The convict Gumisiriza Nasur alias Rwamukyandara had been convicted of four different counts of attempted murder and one count of aggravated robbery. According to the admitted facts, Rwamukyandara had on the night of 15/10/13 at Atlas Bar and Lodge a long Liberation road in Bushenyi District attempted to cause the death of Namanya Phionah, Kyobutungi Emily, Nareeba Jackline, and Katushabe Bibiana. During the same attack,

Rwamukyandara also robbed 40,000/ from Namanya Phionah and used a deadly weapon to wit a piece of timber to beat up and cause grievous harm to all four victims. On the said date, Rwamukyandara had gained entry to the room where all four victims were sleeping at 3:00 a.m. He then started beating them up on the head and all over the body with a piece of timber while demanding money in Kiswahili "leta Pesa". When the beating intensified, Namanya gave Rwamukyandara 40,000/= and he escaped before the police arrived. He was however pointed out from the identification parade while another victim recognized his voice since he had been their tenant residing right behind their bar.

The victims sustained severe injuries as a result of the beatings and were rushed to Kyeizooba farmers' Clinic for treatment. Namanya, who was critically injured was transferred to KIU Hospital in Ishaka and later to Mbarara Regional Hospital where she was admitted for some time.

Among other injuries, she sustained a deep cut wound on the head classified as "dangerous harm". All the other victims also sustained deep-cut wounds on the head. Other parts of the body too were injured. It should be noted that offences of this nature are on the increase. The victims nearly lost their lives at the hands of the convict. Rwamukyandara's actions have caused a lot of suffering to the victims, their Families, and the entire community. Everything has an end. Time has come for Rwarnukyandara to be removed from society for a considerable period so that the people of Bushenyi can feel safe. The period he will spend in incarceration should enable him to reflect on his past life and reclaim and have respect for human life and other people's property. It is hoped that by the time he rejoins society, he will be a good and honest child.

On the other side, however. Rwamukyandara has promised to reform. He asked for a lenient sentence stating that he had already changed during the time he had been on remand and had come

closer to God and strengthened his faith. He pleaded guilty and saved the court's time. He also saved the victims from the pain of having to confront their assailant in court and relate their ordeal fresh. The court has also noted the period of 1 year and 8 months which he spent on remand and the fact that he is HIV positive and receiving treatment. The first count carries a maximum sentence of death while all the others carry a maximum of life imprisonment. In the circumstances, I shall impose the following sentence: -

Count 1 of Aggravated Robbery 15 years

Count 2 of Attempted Murder of Namanya a Phionah, 25 years

Count 3 of Attempted Murder of Kyobutungi Emilly, 25 years.

Count 4 of Attempted Murder of Nareeba Jackline, 25 years

Count 5 of Attempted Murder of Katushabe Lillian, 25 years."

32] From the record of appeal, it is evident, that the trial Court considered the aggravating factors but did not consider some of the mitigating factors. In the case of **Aharikundira Yusitina Vs. Uganda, SCCA No. 27 of 2015,** the Court held that,

"Before a convict can be sentenced, the trial Court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in the constitution, statutes, prosecution directions together with general principles of sentencing as guided by case law"

33] We note that the trial Court did not consider the fact that the Appellant was a first-timer offender, and this offends Principle 6(h) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions) 2013. It provides:

"6(h) Every court shall when sentencing an offender take into account—
any previous convictions of the offender"

34] Pursuant to section 11 of the Judicature Act, we proceed to exercise the powers of the trial Court to re-sentence the Appellant by imposing a sentence we think is appropriate in the circumstances. In

arriving at the most appropriate sentence, we consider the mitigating and aggravating factors. It was submitted that the Appellant was a first time offender, spent 1 year and 8 months on remand, was HIV positive, had two children pleaded guilty, and saved Court's time

35] Guided by the principle of consistency provided for under principle 6(c) of the sentencing guidelines, this Court upheld the sentence of 17 years for an offence of aggravated robbery in the case of **Businge Paul and Another Vs. Uganda, Criminal Appeal No. 0048 of 2019 and 0056 of 2019 and** in the case of **Rutabingwa James Vs. Uganda, Court of Appeal Criminal Appeal No. 57 of 2011**, this Court confirmed an 18 year sentence for aggravated Robbery. We find the sentence of 15 years appropriate for Robbery. For attempted murder, we sentence the Appellant to 20 years for counts 2, 3, and 4 after deduction of the 1 year and 8 months spent on remand.

Decision.

1. This appeal partially succeeds.
2. The Appellant will serve the sentence concurrently as follows:
   a. Count 1, 15 years.
   b. Count 2, 20 years.
   c. Count 3, 20 years.
   d. Count 4, 20 years.
   e. Count 5, 20 years.

We so Order

Dated, signed and delivered at ..... **this** ..... **day of 2024.**

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MUZAMIRU MUTANGULA KIBEEDI

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL