

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL PRISON

Criminal Appeal No.98 of 2014

(Arising from Buganda Road Criminal Case No. 359 of 2014)

LWANGA YUSUF :::APPELLANT

VERSUS

UGANDA::: RESPONDENT

JUDGMENT BY HON.MR.JUSTICE JOSEPH MURANGIRA

1. Introduction
1.1 Representation

The appellant, Lwanga Yusuf, is being represented by Mr. Senkeezi Stephen from M/S Senkeezi – Ssali Advocates & Legal Consultants, Kampala. Whereas, the respondent is being represented by M/S Kyomugisha Barbra, State Attorney with the Directorate of Public Prosecutions.

1.2 Facts of the appeal

The appellant, Lwanga Yusuf was charged with simple robbery Contrary to Sections 285 and 286 (1) of the Penal Code Act, Cap.120, Laws of Uganda. It was alleged that the accused/appellant and others still at large at Cairo Bank in Kampala District while armed with sticks robbed Mutambuze Farouk a bag containing a cheque book of housing Finance Bank and Cash 9,000,000/= belonging to Mutambuze Farouk and immediately before the robbery did use personal violence to the said Mutambuze Farouk.

The appellant was tried of the said offence, found guilty, convicted and sentenced. The appellant was aggrieved with the decision of His Worship Araali Kagoro Muhirwa, Magistrate Grade 1, at Buganda Road Court, delivered on 30th September, 2014. Hence this appeal.

3. **Grounds of Appeal**

The appellant appeals against the conviction and sentence of 4 years of the lower Court on the following grounds:-

- 1) **That the learned trial Magistrate erred in law and fact when he relied on the prosecution evidence to convict him of the offence of simple robbery.**
- 2) **That the learned trial Magistrate erred both in law and fact when he based on extraneous evidence to sentence him to 4 years imprisonment.**
- 3) **That the learned trial Magistrate erred both in law and fact when he did not deduct the period he had spent on remand from the sentence of 4 years that he handed the appellant.**
- 4) **That the learned trial Magistrate erred both in law and fact when he failed to properly evaluate the evidence on Court record and so reached a wrong decision in convicting and sentencing the appellant.**

4. **Resolution of this appeal by Court.**

4.1 The appellant, Lwanga Yusuf, asked Court for orders; that:-

- a) **The appeal be allowed.**
- b) **The conviction of the appellant for simple robbery be quashed.**
- c) **The sentence of 4 years imprisonment be quashed.**
- d) **Any other/further orders.**

4.2 Counsel for the appellant, Mr. Senkeezi Stephen, argued grounds 1 and 4 together, ground 2 and 3 separately.

4.3 On grounds:

1 – The learned trial Magistrate erred in law and fact when he relied on the prosecution evidence to convict him of the offence of simple robbery.

4 – The learned trial Magistrate erred both in law and fact when he failed to properly evaluate the evidence in Court and so reached a wrong decision in convicting and sentencing the appellant.

Counsel for appellant, Mr. Senkeenzi Stephen argued these two grounds in only one short paragraph, to wit:

“In this case, however, it is clear from last paragraph of the 3rd page of his unnumbered judgment, that the learned trial Magistrate only considered the prosecution evidence in this case and did not consider the evidence from the defence. This therefore caused to a failure in the evaluation of the evidence as a whole in this case. The judgment was therefore bound to be (as indeed it turned out to be) top sided.”

In reply to the appellant’s Counsel’s submissions on counts 1 and 4 of appeal, Counsel for the respondent Ms. Kyomugisha Barbra, State Attorney does not agree. In her submissions she supported the judgment at the trial Magistrate. In her submissions she supported the judgment of the trial Magistrate. In her submissions, she faulted the submissions by Counsel for the appellant on grounds 1 and 4 of appeal.

I have perused the record of Court of the lower Court; the judgment of the trial Magistrate, considered the submissions by both Counsel for the parties in this appeal.

It is settled law that in order for the prosecution to secure a conviction for robbery, it must prove beyond reasonable doubt that there was theft, that there was actual or threatened use of violence and that it was the accused who is responsible. See the case of Uganda –vs- Mawa alias Matua [1992 -93] HCB 65. It is equally important in this appeal to note that it is the duty of the 1st appellate Court to evaluate the evidence of both the prosecution and the defence on the Court as a whole and come to its own conclusion, bearing in mind that it never saw any witnesses testify in the matter. See the case Kifamunte Henry -vs-Uganda, Supreme Court Criminal appeal No. 10 of 1997.

In dealing with grounds 1 and 4 of appeal, Counsel for the appellant never evaluated the evidence of the prosecution and defence in his submissions. What he stated in his submissions, with due respect, to Mr. Senkeezi Stephen is a blanket submissions. The law requires Counsel for appellant in his/her submission to evaluate the evidence as a whole on the Court record before drawing conclusions in faulting the trial Magistrate in any case.

In this instant case, the prosecution adduced evidence through three witnesses; PW1 Mutambuze Farouk, the complainant's PW2, Dr. Barungi Tadeo, a Police Surgeon, and PW3, No. 24635 D/WPC Alice Nabirye, the Police Officer who investigated the case against the appellant. PW1 gave direct evidence against the accused/appellant. His evidence was never challenged by the accused/appellant. PW2 gave evidence on how he medically examined PW1 on 14/5/2014 after his assault and found out that he was assaulted on 6/5/2014. PW2 classified PW1's injuries as bodily harm. The PW1's medical report was allowed in evidence as exhibit P.Exb1. He was never cross-examined on his evidence.

PW3, the investigating Officer, gave evidence on how the offence was committed by the appellant and others still at large. This evidence was considered by the trial Magistrate in his judgment at the second, third papers and 1st paragraph of the 4th paper (the judgment is not numbered).

This trial Magistrate in his judgment applied and considered the factors that favour proper identification of the accused person. He correctly referred to the case of Uganda – Vs- G.W. Simbwa, Supreme Court Criminal appeal No. 37 of 1995, while resolving the issue of whether the appellant was properly identified by PW1 or not. The trial Magistrate answered that issue in the affirmative.

Again, the trial Magistrate in his judgment considered the criminal considered the Criminal Principle of the burden of proof and standard of proof in the 1st page of his judgment. As cardinal principle in criminal, the burden of proof lies on the prosecution.

The burden of proof does not shift to the accused to prove his innocence. The burden of proof always rests on the prosecution. See the case of Woolmington –vs- DPP [1935] AC 462. Also see Article 28 (3) (a) of the Constitution of the Republic of Uganda, 1995; and Section 101 of the Evidence act, Cap. 6, laws of Uganda.

From the Court judgment, it is clear that the trial Magistrate never considered the evidence of the defence. By law, the trial Magistrate was duty bound to evaluate both the prosecution and the defence evidence as a whole before coming to his conclusion. Equally it is the duty of the 1st appellate Court like this one to evaluate the evidence of the prosecution and the accused as a whole and draw its own conclusions in the case. Hereinabove, I looked at and considered the prosecution evidence.

The accused gave evidence on oath. His evidence is brief and it can be produced herebelow:-

“I was arrested on 2nd May 2014 at Clock tower and I was taken to police. We were arrested 15 of us. They demanded for our identification. I was arrested at 1:00p.m at Clock Towers Police they called CPS and I was told that there will be a screening and the complainant will identify the robbers. Five of us were identified two were released at Clock Towers. Three were brought to CPS. Others were brought on 4th May 2014. My colleagues bribed officers in room 55. They paid shs. 500,000/=. The investigating officer asked me to pay Shs. 500,000/=. My house was searched and nothing was recovered. The Flying squad people would take me to Villa Park and assault me. They told me to vomit the money. So because of being assaulted I told them I had shared Shs. 1, 5000,000/=.

I had already used Shs. 700,000/=, the shs. 800,000/= was with my wife. My mother came and told Police that my wife had run away from home when I was arrested. I made this admission because I was being assaulted, for me I did not steal any money. I did not commit the offence at all.”

In cross-examination by the state the appellant stated:-

“The complainant made a screening and picked the five people.

I was among the five whom the complainant identified.

Yes I told police that I had got a share of Sh. 1,500,000/= of the stolen money.

I do not have evidence that I was assaulted.”

Comparing the evidence of PW1 and the accused’s evidence, apart from denying the charge, his evidence does not negative the prosecution’s case. In his defence and in his cross-examination more or less, the appellant admitted the charge against him. PW1 positively identified the appellant as the very person among other robbers, who robbed him of shs. 9,000,000/=. The appellant was put at the scene of crime by the evidence of PW1 and PW3. It is settled law that once the accused person has been put at the scene of crime by the prosecution evidence, the accused’s claims that he was elsewhere at the time the offence was committed must fail. Therefore, in this instant case, the appellant’s defence had no water at all.

Accordingly therefore, I agree with the reasons the trial Magistrate advanced in his judgment in finding the appellant guilty and convicted as charged.

In the premises, grounds 1 and 4 of appeal must fail.

On ground 2 of appeal: The learned trial Magistrate erred both in law and fact when he based on extraneous evidence to sentence him to 49 years imprisonment.

It is the submissions by Counsel for the appellant that the trial Magistrate took into consideration the notoriety of the offence of robbery before he sentenced the appellant. That this greatly affected the sentence he handed him. In her submissions in reply to the submissions by Counsel for the appellant on ground 2, Counsel for the respondent does not agree with the submissions by Counsel for appellant.

At pages 8 last paragraph and 9 of the lower Court proceedings the trial Magistrate gave reasons for the sentence of 4 years imprisonment:

“Sentence:

Robbery with violence is on the increase in Kampala City. Several people have lost their property and have been injured. In this particular case, the victim was beaten up and sustained injuries which the doctor classified as harm. This Court takes cognizance of the fact that at the same sport another person was killed by a group of criminals who grabbed him to steal a laptop. The Court must be able to protect society from such criminals’ elements.”

It is my considered view and finding that what Counsel for the appellant called extraneous evidence is not at all connected to the offence that he was trying are just facts the trial Magistrate was entitled by law to take judicial notice of. Besides the trial Magistrate gave other reasons that support and justify the sentence of 4 years imprisonment he handed down to the appellant I do not see any merit in ground 2 of appeal. In the result, I answer this ground of appeal in the negative.

On ground 3 of appeal:

The learned trial Magistrate erred both in law and fact when he did not deduct the period he had spent on remand from the sentence of 4 years imprisonment he handed down to the appellant.

Counsel for the appellant submitted that the trial Magistrate never considered the period of 4 months the appellant had spent on remand and other mitigating factors in this case. In reply Counsel for the respondent does not agree with the submissions by Counsel for the appellant. She submitted that the trial Magistrate was mindful of the period the appellant had been on remand, when he passed a sentence of 4 years imprisonment on the appellant.

I have perused the lower Court’s record, at Page 91 paragraph 2 of the said Court proceedings, the trial Magistrate before passing the sentence of 4 years imprisonment against the accused stated:

“The accused has been on remand for 4 months. I have taken consideration of the sentencing guidelines and the accused period spent on remand in the circumstances. I sentence the accused person to (4) four years imprisonment.”

From the record of the lower Court as stated above, it is crystal clear that the trial Magistrate when passing the sentence of 4 (four) years imprisonment on to the appellant, took into account the period of 4 (four) months the convict (appellant) had spent on remand. It is also appreciated that the maximum sentence for the offence of simple robbery Contrary to Section 285 and 286 (1) of the Penal Code Act, Cap. 120 Laws of Uganda, is ten (10) years imprisonment. And considering the circumstances in which the offence was committed against the complainant, PW1, even a sentence of 4 (four) years imprisonment that was passed on the convict/appellant was on the lower side. In the result this ground 3 of appeal lacks merit. It also fails.

5. Conclusion

In closing and in consideration of the prosecution and defence evidence, the submissions by both Counsel for the parties and the law applicable to this case and my own evaluation and analysis of the entire Case, I find no reasons upon which to fault the trial Magistrate. There was a small error that was committed by the trial Magistrate of not evaluating the defence evidence together with the prosecution evidence. But that error does not go to the root of the prosecution case and the findings of the trial Magistrate in his judgment. On the whole the trial Magistrate wrote a good judgment.

In sum total, this appeal lacks merit. It is accordingly dismissed. The conviction and sentence of 4 (four) years imprisonment that was passed by the trial Magistrate on to the convict/appellant are confirmed and upheld by this Court.

Dated at Kampala this 27th day of June, 2016.

VERSUS

**UGANDA:.....
RESPONDENT**

REPRESENTAION

27/6/2016

Mr. Senkeezi Stephen for the appellant.

The appellant is not in Court, but he is in prison.

Ms. Kyomugisha Barbra, State Attorney for the respondent.

No.5931 Chief Warden, Odida Tom from Kampala Remand Prison: We served a Production Warrant on the Prison's Record's Clerk, but she did not tell us why the appellant is not to be produced.

Ms. Margaret Kakunguru the Clerk is in Court.

Court: Judgment is delivered in the presence of both Counsel for the parties.

Right of Appeal is explained.

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Joseph Murangira

Judge.

27/6/2016.