THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT KAMPALA

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CORAM: HON. G.M. OKELLO, JA.
HON. A.E.MPAGI-BAHIGEINE, JA.
HON. J.P. BERKO, JA.

CRIMINAL APPEAL NO. 14 OF 2000

BETWEEN

SEWANKAMBO FRANCIS AND 2 OTHERS:::::::APPELLANTS

AND

UGANDA:::RESPONDENT

(Appeal from the decision of the High Court (Akiiki-Kiiza, J) dated 11/4/2000 at Masaka in Criminal Session Case No. 0028/99)

JUDGMENT OF THE COURT

The three appellants were convicted by High Court of simple robbery contrary to sections 272 and 273 (1) of the Penal Code Act and were each sentenced to ten years imprisonment. They were also ordered to suffer corporal punishment of ten strokes, to pay to the complainant compensation of Shs.50,000/= each and were each ordered to undergo police supervision for three years after completing their prison sentence.

The background facts to this case, are briefly that, the complainant, Semakula Hussein, (PW1) and another not named, were on 19/8/97 at 5.45 a.m. travelling in a Toyota Corolla DX No. 128 UAN from Lamuru fishing village when at Wakasanko they found the road blocked by trees that had been placed across it. When they stopped, some people flashed torch at them and ordered them to lie down which they did. Their attackers who had two guns demanded money from them and Semakula handed them Shs. 110,000. They tied Semakula's hands and that of his

companion behind their back. They then disappeared. Thereafter, Semakula and his companion managed to untie their hands but could not find their vehicle. In their said vehicle, were also bottles containing traditional medicine which they were selling. They walked to Nyeno Police Post and reported the incident.

In the meantime, the first and second appellants were arrested in the morning of that day with a toy gun. On interrogation, the two appellants named the third appellant. The police proceeded to his home but did not find him. They found his wife and searched the house. They recovered an SMG gun, a magazine containing 17 rounds of live ammunition and some bottles containing traditional medicine. Later, the third appellant was also arrested. Subsequently, each of the appellants made a change and caution statement in which each confessed participation in the robbery. Each gave detailed account of the part they played in the robbery. They were eventually indicted on five counts of aggravated robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

At the trial, their confessions were admitted in evidence without any objection. All the appellants were represented by a lawyer at the state's expense. In their sworn evidence in their defence, the appellants repudiated their confessions and set up defence of alibi which the trial Judge rejected. He convicted all the appellants of simple robbery as stated earlier in this judgment in count 2. He acquitted them of aggravated robbery in all the five counts. Following the conviction in count 2, the trial Judge made the consequential orders. Aggrieved by the conviction, the sentence of 10 years imprisonment and the consequential orders, the appellants appealed to this court on three grounds namely:-

(1) **the learned trial Judge erred in law and in fact in convicting the appellants of simple robbery when the ingredients of theft and violence had not been proved beyond reasonable doubt,**

(2) **the learned trial Judge erred in admitting in evidence and relying on the confessions (Exh. PE 1, PE II, and PE III) of the appellants without giving them an opportunity to respond to their admission in evidence, and,**

(3) **the sentence passed against the appellants was harsh and excessive in the circumstances.**

Mr. Kibanda, learned counsel for the appellants, argued those grounds separately. We propose to consider them also in that manner.

On ground 1, the learned counsel criticised the trial Judge for convicting the appellants of simple robbery when the ingredients of theft and violence had not been proved beyond reasonable doubt. He pointed out correctly in our view, that to constitute the offence of simple robbery, the following ingredients must exist:-

(1) that there was theft to the detriment of the complainant,

(2) that there was use of or threat to use violence in the course of the theft, and

(3) that the appellants participated in the above.

Counsel argued that in the instant case, while the indictment alleged that Shs. 112,500/= was stolen from Semakula, Semakula himself testified that only 110,000/= was stolen from him. Mr. Kibanda argued that the difference in that amount weakened the evidence of the prosecution and left the allegation of theft not proved beyond reasonable doubt.

We find that this argument is devoid of merit because theft of a part of the whole is still theft. Semakula testified that his shillings 110,000/= was stolen in the robbery and the trial Judge believed him and found that as proved. He was justified on the evidence to make that finding.

Mr. Kabanda contended that it was not proved beyond reasonable doubt that there was violence in the course of the robbery. When we pointed out to him the evidence of Semakula that they were ordered to lie down and that their hands were tied behind them, counsel replied that he would leave that question to us. In our view, that piece of evidence was clear evidence of violence committed on the complainant by his attackers in the course of the robbery. We find no merit in this ground and it fails.

On ground 2, Mr. Kibanda argued that the trial judge ought to have asked the appellants if they objected to the admissibility of their charge and caution statements before admitting and relying on them.

On the other hand Mr. Wagona, Senior State Attorney, who appeared for the State contended that the trial Judge was justified in admitting and relying on those confessions since counsel who represented the appellants at the trial did not object to their admissibility.

We agree. The appellants were represented at the trial by a lawyer. Since he did not object to the admissibility of the confessions in evidence, the trial Judge was justified in so admitting them. He did not have to inquire of the appellants if they had any objection to their admissibility. We can not fault the trial Judge in admitting those confessions in evidence.

As regards his relying on them, it is clear from their evidence that the appellants repudiated/retracted those confessions. The trial Judge therefore, had to treat them as such with the attendant requirement of a warning that such evidence must be received with a caution. Once that warning is made, the trial Judge does not even need to look for corroboration and can legally convict on the uncorroborated repudiated/retracted confessions provided that he is satisfied that in all the circumstances the confession is true. This was the point stated in ***Tuwamoi Vs Uganda [1967] EA 84 at 91*** which is still good law.

In the instant case, the trial Judge considered this point. As first appellate court, we reviewed the confessions and found them too detailed to be untrue. The trial Judge was therefore justified to rely on them. Because of the foregoing, this ground also fails.

Finally, ground 3 complained that the sentence of ten years imposed on each appellant is excessive. Counsel for the appellants cited ***Muboni and Another Vs Uganda, Criminal Appeal No. 78 – 9 of 1974 (High Court decision)*** where the appellant was convicted by a Magistrate's Court of simple robbery and was sentenced to 5 years imprisonment. On appeal, the High Court dismissed the appeal and commented that the trial Magistrate was justified in giving a long sentence.

Mr. Wagona replied that the sentence of ten years imprisonment imposed on each appellant was not excessive. He argued that the case of ***Muboni supra*** was distinguishable from the instant case because the former was tried by a Magistrate Grade 1 whose sentencing power was limited at the time to ten years. In those circumstances, 5 years imprisonment was a long period. In the instant case, the trial was by a Judge whose sentencing powers were as prescribed by law. In this offence, it is life imprisonment where ten years cannot be described as excessive.

We are not persuaded that ten years imprisonment is excessive in the circumstances of this case. The trial Judge gave reasons for the sentence. He considered the fact that the appellants were first offenders and the period they spent on remand against the gravity of the offence and decided that that was the appropriate sentence. This is a matter of discretion of the trial court. Appellate court can only interfere with the sentence imposed by a trial court if the trial court in assessing the sentence has acted on some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive. See ***Ogalo s/o Owoura Vs R [1954] 24 EACA 270***. It has not been shown that the instant case falls in either of the above categories. This ground also fails.

The trial Judge also ordered each appellant to suffer corporal punishment of ten strokes. Articles 24 and 44 (a) of the Constitution prohibit torture, cruel, inhuman, or degrading treatment or punishment. Article 2 (2) of the Constitution emphasises the supremacy of the Constitution over all other laws. It provides that other laws or customs that are inconsistent with any provision of the constitution shall to the extent of that inconsistency be void. Section 274 A of the Penal Code Act which

provides for the imposition of corporal punishment clearly contravenes articles 24 and 44 (a) of the Constitution. It is the duty of courts to obey and enforce the Constitution. That section being an existing law within the meaning of article 273 (2) of the Constitution must be construed to conform with the Constitution. That means that the Constitution must prevail to the extent of that inconsistency. When we called upon Mr. Kibanda to comment on this order, he replied that he would leave that to us. In our view, the order of corporal punishments in compliance with that section are unconstitutional. Acting under Article 50 (1) of the Constitution, we set aside the order.

In the result, we dismiss the appeal but vary the order to exclude the corporal punishments.

Dated at Kampala this 04th day of June 2001

G.M. OKELLO

JUSTICE OF APPEAL.

A.E. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

J.P. BERKO

JUSTICE OF APPEAL