

**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA**

CRIMINAL APPEAL NO.39 of 2016

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**[CORAM: ARACH-AMOKO, MWANGUSYA, BUTEERA, NSHIMYE,
TUMWESIGYE, JJSC]**

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BETWEEN

- 1. BOGERE ASSIMWE MOSES**
- 2. SENYONGA SUNDAY.....APPELLANTS**

15

V E R S U S

UGANDARESPONDENT

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(An Appeal originating from the decision of the Court of Appeal of Uganda at Kampala in Criminal Appeal No.101 of 2013 decided by Remmy Kasule, Solomy Balungi Bossa, Hellen Obura, JJA on 1st December 2016.)

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JUDGMENT OF THE COURT

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This is a second appeal arising from a decision of the High Court delivered by Hon. Rugadya Atwooki, J at Kampala on 5th July 2001 in HCT-CR-SS-0254-2012.

The background facts.

The two appellants were tried and convicted by the High Court of Aggravated Robbery contrary to Section 285 and 286(2) of the Penal Code Act. They were each sentenced to imprisonment of 20 years.

5 The appellants with the leave of the Court appealed to the Court of Appeal against sentence only.

The Court of Appeal dismissed the appeal and ordered each appellant to continue serving the 20 years sentence of imprisonment. Dissatisfied with the Court of Appeal decision, the appellants have appealed to this Court.

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At the hearing of the appeal the appellants were represented by learned counsel, Mr. Rukundo Henry Seith on State brief.

Ms. Masinde Barbra, a Senior State Attorney represented the State/respondent.

15 Both counsel filed and adopted their written submissions which we have studied together with the lower Courts records, Judgments and relevant authorities to this appeal, all of which we shall use in resolution of the appeal.

20 On 11th January 2018 Rukundo Seth and Co. Advocates filed a Memorandum of Appeal for the appellants. They filed it together with their written submissions on the same day.

In the body of the appellants counsel's written submissions he sought the leave of this Court to introduce a new ground of appeal.

25 At the hearing of the appeal counsel for the appellants adopted his written submissions and closed without obtaining the leave of Court for filing the new ground of appeal that he introduced within the body of his written submissions.

This is not the procedure for amending pleadings.

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Where counsel finds it necessary, as appears to have been the case here, to introduce a new ground of appeal for whatever reason, then counsel should have proceeded under Rule 17 of the Rules of this Court to effect the necessary amendment of Memorandum of Appeal.

Rules 17 provides:

“Form of amendments

(1) Where any person obtains leave to amend any document, the document itself may be amended or, if it is more convenient, an amended version of the document may be lodged.

(2) Where any person lodges an amended version of a document, he or she shall show clearly-

(a) Any words or figures deleted from the original, by including those words or figures and striking them through with red ink, so that what was written remains legible; and

(b) Any words or figures added to the original, by writing them in red ink or underlining them in red ink.

(3) Where any record of appeal includes any amended document, the amendments shall similarly be shown in each copy of the record of appeal.”

Counsel failed to follow the procedure for amendment of the Memorandum of Appeal and instead embodied his amendment in his written submissions. This was irregular.

At the hearing of the appeal counsel simply adopted his written submissions and never sought for the leave of Court that he had applied for. He proceeded without obtaining the leave of Court.

It is always necessary for counsel both on State brief and on private brief to comply with the Rules of this Court in their pleadings. We have pointed out the errors above and we warn counsel to improve on their standards of Advocacy.

The appellants expressed their desire to appeal. They had counsel who has not complied with the Rules of this Court. For that matter we would not fault the appellants who lay people and may not be aware of the errors that concern us. Consequently, we have chosen to ignore the errors in the pleadings in the interest of justice and have proceeded with the appeal on its merits rather than dismiss it on technicalities: See **Article 126(2) of the Constitution** and **Rule 2(2)** of the Rules of this Court.

We shall proceed as if counsel had filed an amended Memorandum of Appeal for which he had obtained the leave of Court to proceed. We shall consider the two grounds of appeal indicated below:-

5 **“(1) The learned Justices of the Court of Appeal erred in law by upholding decision (Judgment) against the appellants upon insufficient evidence to prove aggravated robbery thereby in the MOA of 11/1/18 erroneously confirmed sentence of 20 years imprisonment based on wrong principles (sic).**

10 **(2) The learned Justices of the Court of Appeal erred in Law by upholding a conviction against appellants based on insufficient evidence to prove aggravated robbery thereby erroneously confirmed the sentence of 20 years imprisonment upon wrong principles.”**

15 The appellants prayed this Court that:

**“(a) The conviction be quashed and sentence set aside,
(b) in the alternative the order against the appellants to serve 20 years imprisonment be reduced.**

20 **Submissions of counsel for the appellants.**

Counsel submitted that the appellants were innocent and should never have been convicted as there was insufficient evidence before the trial Court. According to counsel, the Court of Appeal failed in its duty and did not re-evaluate the evidence.

25 Counsel submitted further that the 20 years imprisonment that was confirmed by the Court of Appeal arose out of a wrong conviction for the offence of Aggravated Robbery based on wrong principles and was based on insufficient evidence.

30 Counsel contended that the period of one year and 6 months that the appellants spent on remand was not considered by the Justices of Appeal and that period should have been deducted from the sentence of 20 years imprisonment and it was in error that the Court of Appeal did not make the deduction of the period following the Supreme Court decision in **Rwabugande Moses vs. Uganda, Criminal Appeal No.25 of 2014.**

Submissions of counsel for the respondent.

Counsel raised a preliminary point of objection. He objected to the inclusion of ground one on insufficiency of evidence as a ground of appeal.

5 According to counsel, the appellant had only appealed sentence in the Court of Appeal. He should not be allowed to raise the ground of sufficiency of evidence in this Court when that was never raised and was therefore not considered at the Court of Appeal. He added the appellants should not be allowed to criticize the Justices of the Court of Appeal on a matter that the Justices never had opportunity to consider since the issue never arose before the
10 Court.

Counsel for the respondent submitted that ground one of the Appeal should be dismissed on that preliminary point.

15 Counsel submitted further that the appeal should in any case be dismissed on ground one as there was sufficient evidence for appellant's conviction. There was sufficient evidence that the appellants committed the offence with violence. There was evidence that some of the properties stolen by the appellants were recovered from them and were exhibited. There was also evidence that the appellants were properly identified as having participated in the
20 commission of the offence.

Counsel contended that the record is clear that the Justices of the Court of Appeal properly re-evaluated the evidence that was presented before the trial Court.

25 On sentence, counsel for the respondents submitted that the Court of Appeal had made a finding as a first appellate court that the trial Judge had taken into consideration the period of 1 year and 6 months that the appellants spent on remand when sentencing the appellants. Counsel submitted that the Justices of Appeal upheld the sentence of 20 years as a lawful sentence and they were justified.

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Counsel added that the Court of Appeal Justices should not be criticized for failure to deduct the remand period that the appellants spent in prison from their 20 year sentence of imprisonment following the authority of **Rwabugande Moses vs. Uganda** (supra) which was

decided on 3rd March 2017. The instant appeal was determined by the Court of Appeal on 1st December 2016. They could not have followed a case determined after their decision.

He prayed that the 20 years sentence of imprisonment imposed by the Court of Appeal was
5 lawful and should be upheld by this Court.

The decision of Court.

The preliminary objection by counsel for the respondent on the first ground was basically that
10 the Court of Appeal entertained an appeal by the appellants based only on sentence. The appellants never raised the issue of their conviction before the Justices of the Court of Appeal. The Justices of Appeal should not be criticized therefore over what they had no opportunity to handle.

15 This Court has had occasion to consider the issue of a ground of appeal being raised before this Court when the issue had not been raised before the Court of Appeal in **Criminal Appeal No.35 of 2002, Twinomugisha Alex Alias Twine Patrick Kwezi & John Sanyu Katuramu vs. Uganda**. This Court held as follows:

20 **“With respect, we think that this ground is not maintainable, because it was not raised before the Court of Appeal and considered by the Justices of Appeal. Therefore, it is erroneous to criticise the learned Justices of Appeal as having erred when the complaint was not raised before them for consideration”**

The Court of Appeal Justices may be faulted on matters they handled and not what was never
25 before them. Counsel for the appellants attempted to rely on **Criminal Appeal No.32 of 2010 Teddy Szezi Cheeye vs. Uganda**.

We find, however, that the **Teddy Szezi Cheeye** (supra) case is distinguishable from the
30 current appeal.

In the **Teddy Szezi Cheeye** case this Court found as a fact that the three grounds of appeal the respondents were objecting to had in fact been handled by the first appellate Court and held:-

“We were satisfied that the three grounds arise from matters upon which the Court of Appeal had pronounced itself. It was because of these reasons that we overruled the objection to the three grounds.”

5 In the instant appeal, the Court of Appeal Justices never had opportunity to handle the issue of conviction that the appellants are now raising when they handled this matter in the appeal before them. We cannot therefore fault the Court of Appeal on a matter which was never raised before them on appeal.

10 We, therefore, uphold the preliminary objection by counsel for the respondent and dismiss ground one of this appeal.

We would only wish to add that we perused the records of the trial Court and the Court of Appeal since both were before us. We noted that the Justices of the Court of Appeal did in fact properly re-evaluate the evidence that was before the trial Court in their consideration of the appeal and we would find no reason for interfering with the concurrent finding of both the High Court and Court of Appeal that both appellants committed the robbery.

The second ground of appeal was on sentence and specifically that the period the appellants spent on remand was not considered by the Court of Appeal. We have studied the Judgment of the High and that of the Court of Appeal. We find that both the trial Judge and the Justices of Appeal considered the issue of the period the appellants had spent on remand. The trial Judge in the sentencing process considered the mitigating factors.

25 The mitigating factors he considered were listed on page 259 of the trial Court record as below:-

“Mitigating factors

- **Age 22 and 23 years**
- **Family responsibilities**
- 30 - **Remand period 1 year and 6 months**
- **Violence at time of offence not seen**
- **No death**
- **Some property recovered.”**

On appeal the Justices of Appeal considered the period the appellants spent on remand as this was actually the main issue of the appeal.

They discussed it extensively and eventually concluded it as follows:-

5 **“In the appeal before us the learned trial Judge considered the remand period of each appellant in the process of imposing a sentence of 20 years imprisonment on each appellant and we find that he properly dealt with the issue.”**

We agree with the above conclusion by the Justices of the Court of Appeal.

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Lastly, we agree with counsel for the respondent that the Justices of the Court of Appeal could not have followed this Court’s decision in **Rwabugande Moses vs.Uganda** (supra) since it was determined later. (See **Supreme Court Criminal appeal No.66 of 2016 Abelle Asuman vs. Uganda.**)

15 In the result, we find no fault with the decision of the Justices of the Court of Appeal. We uphold the same. We dismiss the whole Appeal. The appellants should continue to serve the sentence of 20 years imposed upon them.

Dated at this day.....19thofApril.....2018.

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Hon. Lady Justice S. Arach-Amoko
JUSTICE OF THE SUPREME COURT

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Hon. Justice Eldad Mwangusya
30 **JUSTICE OF THE SUPREME COURT**

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Hon. Justice Richard Buteera
JUSTICE OF THE SUPREME COURT

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Hon. Justice A.N.S. Nshimye
AG. JUSTICE OF THE SUPREME COURT

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Hon. Justice J. Tumwesigye
AG. JUSTICE OF THE SUPREME COURT