

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO 05 OF 2011**

**( Coram: Tumwesigye, Kisaakye, Arach-Amoko,Tsekooko and  
Okello, JJSC)**

**CAPT. MUNYANGONDO CHRIS.....APPELLANT**

**VERSUS**

**UGANDA.....RESPONDENT**

*[Appeal from the judgment of the Court of Appeal, at Kampala (Mukasa-Kikonyogo, DCJ, Byamugisha and Kavuma, JJA) dated 1<sup>st</sup> March, 2011 in Criminal Appeal No. 135 of2009].*

**JUDGMENT OF THE COURT**

This is a- second appeal. The High Court of Uganda (Owiny Dollo J), sitting in Fort Portal, convicted the appellant, Cpt. Munyangondo of simple robbery contrary to sections 285 and 286(1) of the Penal Code Act. He was sentenced to 10 years imprisonment. In addition, he was ordered to pay compensation of UGX 5.1 million and the equivalent of two Nokia phones to the victims of the crime. The Court of Appeal dismissed the appeal against conviction but reduced the sentence to 8 years imprisonment and maintained the compensation order. In addition, the Court ordered the appellant to be subjected to Police supervision for 3 years after release from prison.

**Background:**

The brief facts of the case are that on the 26<sup>th</sup> June, 2002, Mubiru Kiyaga(PWI), Kakoko Zedekia and Sunday William (PW5), all employees of Century Bottling Company Ltd, left Fort Portal for Kagadi to deliver Coca Cola products. They were driving motor vehicle registration number UAA 982A. They had sold the products and collected a sum of UGX 5.1 million which they put in a safe which was welded to the vehicle. On their way

back along Kagadi Kyejonjo Road, they noticed a small vehicle following them. It later overtook them. After a short distance, the occupants of the small vehicle who were armed with guns and a grenade got out, ordered the vehicle to stop. When the vehicle had stopped, the occupants of the small vehicle ordered the complainants out of their vehicle to lie down. The assailants entered the vehicle, broke the safe and took all the money.

While this was going on, another vehicle came and it was also stopped. The occupants were also ordered out of the vehicle and to lie down. They too, were robbed of money and phones. During the course of the robbery, the appellant was recognized by PW1 and PW5 who claimed that they knew him well and his name was Benz.

After the assailants had gone, the victims reported the incident to Kyenjojo Police Station. Inquiries were carried out and the appellant and his co-accused were arrested and charged with aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. However, at the close of the prosecution case, the DPP dropped the charges against the two co-accused thus leaving the appellant to face trial alone.

The appellant in his unsworn testimony, apart from admitting that Benz was his nickname, denied all allegations against him. He stated that PW1 and PW5 had lied to court and he set up an alibi to the effect that he never left Kasese town at all on the material day. He explained that PW1 and PW5 must have known him since he was a well-known personality in that area that had denounced rebellion, and had been involved in mobilizing ADF rebels to abandon rebellion.

The learned trial judge evaluated the evidence of the prosecution witnesses, in particular PW1 and PW5 and that of the appellant and came to the conclusion that the prosecution had not proved, beyond reasonable doubt, the offence of aggravated robbery against the appellant. He instead found that the evidence had established a minor and cognate offence of simple robbery contrary to sections 285 and 286(1) of the Penal Code Act and convicted him accordingly.

On appeal to the Court of Appeal, the Court made the decision set out at

the beginning of this judgment, with which the appellant is aggrieved.

### **Grounds;**

The appeal to this Court is based on three grounds, namely, that:

**1. The learned Justices of the Court of Appeal erred in law when they granted an order against the appellant to remain under Police supervision for a period of 3 years after serving his sentence.**

**2. The learned Justices of the Court of Appeal erred in law when they maintained intact the orders of compensation against the appellant to pay:**

- i) **Coca Cola U. Shs. 5.1 m/=**
- ii) **Mubiru Kiyaga - the equivalent of his Nokia phone.**
- iii) **Edward David - the equivalent of his Nokia phone.**

**3. The learned Justices of the Court Appeal erred in law when they failed in their duty to subject the evidence to a fresh scrutiny, exhaustive re-evaluation, occasioning a miscarriage of justice thereby wrongly dismissed the appellants appeal against conviction(sic).**

### **Representation**

At the hearing of this appeal, Mr. Henry Rukundo represented the appellant on state brief, while Mr. Badru Mulindwa, Principal State Attorney represented the respondent.

### **Order of Submissions**

Mr. Rukundo argued the three grounds in the order in which they were framed. Mr. Mulindwa adopted the same order in his response.

### **Consideration of the Grounds**

**Groun d 1: The learned Justices of the Court of Appeal erred in law when they granted an order against the appellant to remain under Police supervision for a period of 3 years after serving his sentence.**

The thrust of Mr. Rukundo's submission under this ground is that the

Justices of the Court of Appeal erred in law when they made the order for Police supervision because it was not among the orders given by the High Court, it was not applied for and it was unnecessary since the appellant would have reformed after serving his sentence. His contention was that, although Rule 2 (2) of the Court of Appeal Rules empowers that Court in exercise of its inherent powers to make such orders, the orders must be formally applied for, otherwise it would amount to an abuse of the court process since bodies such as the Police would start framing unnecessary charges against the appellant. He added that the provisions of section 124(1) and (5) of the Trial on Indictments Act apply to escaped convicts. The appellant did not escape, so the section does not apply to him.

Mr. Mulindwa supported the decision of the Court of Appeal. He contended that the order was rightfully made since it is mandatory under section 124(1) and (5) of the Trial on Indictments Act in such cases. He submitted further that the Court of Appeal also had power under section 11 of the Judicature Act to make the order, even if it had been left out by the High Court, so as to put the record right.

With due respect to counsel for the appellant, we find merit in Mr. Mulindwa's submission that the order for Police supervision is mandatory. Section 124 of the Trial on Indictments Act provides that in cases where the High Court convicts a person of the offence of robbery under section 285 of the Penal Code Act and where the offender is sentenced to a term of imprisonment of less than life, like the appellant, the court must, at the time of passing sentence, order that the offender be subject to Police supervision for any period not exceeding five years, from the expiration of the prison sentence. Section 124(1) of the Trial on Indictments Act reads:

***"124. Police Supervision***

- 1) Where any person to whom this section applies is sentenced to imprisonment for a term less than life, the High Court shall, at the time of passing sentence, order that he or she shall be subject to police supervision as hereinafter provided for a period not exceeding five years from the date of expiration of sentence***

Under Sub-section (5) (a):

**“ 5) This section applies to-**

**a) Any person convicted of robbery contrary to section 285 of the Penal Code Act;”**

It follows, therefore, that, having convicted and having sentenced the appellant as stated herein, the learned trial judge was under a duty, at the time of passing sentence, to order that the appellant be subject to Police supervision for a period not exceeding 5 years. This Court has pronounced itself on the issue before. For instance, in **Sula Kasira v Uganda SC Criminal Appeal No. 20 of 93** (*unreported*) the Court held that: **“Under Section 123 of the Trial on Indictments Decree, 1971, an order for Police supervision for a period not exceeding five years is mandatory against a person convicted of robbery under section 272 of the Penal Code and sentenced to a term of imprisonment less than life.**

***In the instant case, an order for police supervision for four years after completion of the sentence of imprisonment of ten years was made against the appellant. We think that the order was proper in the circumstances of this case.”***

Section 123 of the Trial on Indictments Decree is now Section 124 of the Trial on Indictments Act while the equivalent of section 272 of the Penal Code is now Section 285 of the Penal Code Act.( See also: **Benjamin Odoki: A Guide to Criminal Procedure in Uganda, 3<sup>rd</sup> edition, p.249**).

This takes us to the next question that is, whether, the learned Justices of the Court of Appeal had the power to make this order without being moved by the respondents by a formal application.

Section 11 of the Judicature Act, provides that:

***“11. The Court of Appeal to have powers of the court of original jurisdiction.***

***For the purpose of hearing and determining an appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the court from the***

***exercise of the original jurisdiction of which the appeal originally emanated.”***

The trial judge who had the original jurisdiction to make the order had omitted to do so. Consequently, the learned Justices of the Court of Appeal had the power under the above section to make the order to complete the record. Needless to say, there is no requirement for any application and the Court of Appeal has inherent powers under Rule 2(2) of the Rules of that Court to make such orders **“as may be necessary for achieving the ends of justice**

In any case, the Court of Appeal was actually asked to correct errors in sentencing, so, the Court acted properly.

In the result, ground 1 fails.

***Ground 2: The learned Justices of the Court of Appeal erred in law when they maintained intact the orders of compensation against the appellant to pay:***

- i) Coca Cola U. Shs. 5.1 m/=***
- ii) Mubiru Kiyaga - the equivalent of his Nokia phone.***
- iii) Edward David - the equivalent of his Nokia phone.***

The complaint in ground 2 concerns the order of compensation. Mr. Rukundo’s contention regarding the UGX 5.1million was that it was erroneously made because there was no proof of its existence at all, since even PW3 who investigated the case did not state that the lock was cut and money was lost, as alleged by the prosecution. He referred to count 1 of the indictment and submitted that in it, the prosecution alleged that the person who was robbed was Mubiru Kiyaga David, the order was therefore wrongly issued to Coca - Cola since it was not the complainant in the case. He further submitted that his research established that Coca- Cola is not even a legal entity; therefore the compensation was wrongly awarded to a nonentity. Lastly, counsel contended that Mubiru Kiyaga (PW1) in his evidence stated that he was working for Century Bottling Company, not Coca- Cola. The money did not belong to Co-Cola’s.

When the Court brought to his attention the immediately preceding

paragraph where PW3 had stated that **“...The robbers had taken all the money which was in the receptacle within the cabin.”**

Counsel contended that this information was hearsay and the court should disregard it.

Regarding the phones, Counsel contended that their value and serial numbers should have been given; otherwise the appellant would be made to pay millions of shillings. It was therefore an error for the Court of Appeal to uphold such an order.

He also contended that because the prosecuting State Attorney never prayed for the said orders, it was wrong for the Court to issue the orders. Counsel further contended erroneously that because the case was not a civil suit for compensation, the trial judge was wrong to constitute the court sitting in its criminal jurisdiction into a debt collection forum. The court had no jurisdiction to issue compensation orders for that reason.

Mr. Mulindwa supported the orders of compensation and submitted that the Court was right to make this order even if the prosecution had not asked for it, since it is mandatory under section 286(4) of the Penal Code Act. In respect of the UGX 5.1 million, he submitted that the prosecution evidence clearly established that the appellant had robbed UGX 5.1 million and the money was from the proceeds of the sale of Coca- Cola products or Century Bottling Company Ltd.

On the criticism that the Court was wrong to order that money should be paid to Coca- Cola, Mr. Mulindwa argued that the evidence on record showed that the money robbed was robbed from the employees of Century Bottling Company and it belonged to that company. That when one mentioned Coca- Cola, everybody knows what Coca- Cola refers to. He prayed, therefore, that the record be corrected and the word Coca- Cola be substituted with Century Bottling Company Ltd. In his view, the correction will not occasion any injustice to the appellant since the order will remain the same.

He further submitted that the reason why the items robbed were not found on the appellant was due to the fact that the appellant was not arrested at the scene of crime. He was arrested some time later, after he had hidden the money and the phones. That is why even the people who arrested him could not find it on him. What mattered most was the



fact that he had been identified by the prosecution witnesses as one of the robbers who had carried out the robbery at the scene of the robbery.

Regarding the Nokia Phones, Mr. Mulindwa's response was that the types of phones were clearly mentioned before the High Court as Nokia 5110 and 3313 respectively, at page 45 of the record of proceedings. That the trial judge then ordered compensation of the phones as they were.

Mr. Rukundo in his rejoinder advanced speculation that there is even a doubt as to whether such money existed, because companies usually do not pay cash, they pay by cheques or deposit money in the bank accounts given. He further submitted that there was even no report from Century Bottling Company Ltd adduced in Court that it had lost money as a company. He opposed the application to substitute the name of Coca- Cola with that of Century Bottling Company Ltd and argued that it should have been done before the trial court and not at this stage.

With respect to the phones, Mr. Rukundo insisted that a Nokia phone is not a sum of money, but it is an object. That the phones should have been valued, otherwise the appellant will be asked to pay millions. It was thus wrong for the trial judge to make such orders. In addition, Counsel repeated his argument that it was not proved that the appellant was found with the money or the phones. That to prove theft, the stolen item must be found with the accused. In conclusion, counsel prayed to this Court to quash the conviction and set aside the order to pay UGX 5.1 million and the equivalent of the two Nokia phones to the victims.

We have carefully considered the submissions of both learned counsel on this ground and perused the record. According to section 286(4) of the Penal Code Act, the award of compensation by a court is mandatory where the offender is convicted of robbery contrary to sections 285 and 286(1) of the Penal Code Act and is not sentenced to death, as the appellant. The compensation is payable to any person who has suffered loss or injury as a result of the robbery. The order is deemed to be a court

decree, which can be executed under the Civil Procedure Act. There is no limit to the amount of compensation which the court can award, but the sum has to be just, according to the circumstances of the case. **(See: Benjamin Odoki: A Guide to Criminal Procedure in Uganda at page 243-4).**

The sub-section reads as follows:

***“284.Punishment for robbery.***

***(1)...***

***(2)...***

***(3) ...***

***(4) Notwithstanding section 126 of the TIA, where a person is convicted of the felony of robbery the court shall, unless the offender is sentenced to death, order the person convicted to pay such sum by way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person, and any such order shall be deemed to be a decree and may be executed in the manner provided by the Civil Procedure Act”.***

In the circumstances, the learned Justices of the Court of Appeal, having upheld the decision of the trial court, had no option but to maintain the order for compensation pursuant to the mandatory

provisions of section 286 of the Penal Code Act. The Justices of the Court of Appeal cannot, in the premises be faulted for their decision.

However, Section 284 leaves it to the court's discretion to determine "**such sum**". The sum must therefore be ascertained so that the appellant should serve his sentence when he is fully aware of the extent of his liability and is not thereby prejudiced. In the instant case, the prosecution should have led evidence to prove the value of the phones and stated the monetary value in the order. In our view, this was an error because such a vague order would prejudice the appellant at the time of execution.

There is also the issue of Coca- Cola. We agree with Mr. Mulindwa's submission that it is common knowledge that Coca- Cola is a product of Century Bottling Company Ltd. It was therefore an error for the learned trial judge to order compensation to Coca- Cola, a non-entity. However, since the evidence established that the money was robbed from employees of Century Bottling Company Ltd which money was the proceeds of the sale of the company's products, and the two names were used inter-changeably throughout the trial, we think that the prayer by Mr. Mulindwa will not prejudice the appellant if the name is substituted with Century Bottling Company Ltd, which we order it should be done.

This ground succeeds partly.

***Ground 3: The learned Justices of the Court Appeal erred in law when they failed in their duty to subject the evidence to a fresh scrutiny, exhaustive re-evaluation, occasioning a miscarriage of justice thereby wrongly dismissed the appellant's appeal against conviction(sic).***

We understand this ground to be a general criticism of the evaluation by the learned justices of all the evidence in the case. In his submissions, however, learned counsel for the appellant zeroed on two specific areas, namely, the decision of the trial judge in respect of count 3 and the amendment of the indictment to include the use of a grenade as a deadly weapon during submissions.

Regarding count 3, counsel submitted that it was alleged in that count that one Nicholas Anthony was robbed of a Nokia Phone, but Nicholas never appeared in court to prove the theft of his phone. There was, in the premises, no evidence of theft of the said phone from Anthony Nicholas the complainant. The trial court should have, for that reason, acquitted the appellant on that count, instead of relying on the testimony of another witness to convict the appellant.

On the issue of amendment of the indictment, counsel submitted that the State Attorney applied to amend the indictment to include the use of a grenade as a deadly weapon after the prosecution had closed its case and after the defence had given evidence. There was thus no opportunity for the appellant to defend himself against that allegation. That it was an error for the Court of Appeal to confirm that mistake.

When the Court reminded him that the evidence in respect of the use of a grenade was immaterial since the appellant was eventually convicted of simple robbery, Mr. Rukundo insisted that this Court should rule on his submission for posterity.

In his reply, Mr. Mulindwa disagreed with Mr. Rukundo's submissions. He contended that, even without his testimony in court, there was ample evidence to prove the theft of the phone belonging to Nicholas Anthony in count 3. Regarding the amendment, the learned Principal State Attorney argued that, although the amendment was made at the stage of submissions, it did not occasion any injustice to the appellant since the use of a grenade had been mentioned throughout the trial and the trial judge clearly stated so in his judgment. He added that it was one of the reasons why the appellant was convicted of simple robbery instead.

Under Rule 30(1), of the Court of Appeal Rules, the Court of Appeal, as a first appellate court, has a duty, on any appeal from a decision of the High Court acting in its original jurisdiction, to consider and weigh the evidence, understand and evaluate the same and come to its own conclusions without disregarding the findings of the trial court that had the advantage to see or hear the witnesses testifying. Failure to do so amounts to an error of law. (See: **Pandya vs R (1957) EA 336;**

**Ruwala vs R (1957) EA 570 and Bogere Moses and Anor vs Uganda(SC) Cr. Appeal No. 1 of 1997( unreported).**

Further, this Court has held that except in the clearest of cases, it will not re-evaluate evidence in the same manner as a first appellate court is required to do. For that reason, this Court will interfere with the findings of the first appellate Court only where it is satisfied that a miscarriage of justice has occurred. (See: **Kifamunte Henry vs Uganda, Criminal Appeal No. 10 OF 1997 and Bogere Moses and Another vs Uganda (supra).**)

The question for determination on this ground is whether the Court of Appeal failed in its duty to re-evaluate the evidence before upholding the decision of the trial Court.

We have considered the submissions of both sides on this ground of appeal. With respect, the record shows that the complaint regarding the conviction of the appellant under count 3 in the absence of any evidence from Nicholas was never raised before the Court of Appeal by the appellant's counsel. It has now been raised for the first time before this Court. We think that it must have been the reason why the Court of Appeal Justices did not comment on it. We also find that this criticism of the Court of Appeal is, with respect, unjustified. Nonetheless, we are satisfied that the learned trial judge properly considered this matter at page 4 of his judgment where he stated as follows: ***"It is a little difficult to understand this line of argument by counsel. PW2 did not only personally witness the well-built man take the phone from the Sri Lankan; but actually had to translate to the Sri Lankan what the man demanded of the latter, as the assailants were using a western Ugandan vernacular and Kiswahili, both of which the Sri Lankan was not familiar with, and thus could not follow. Because of this, PW2's testimony regarding the third count was direct evidence; and was certainly more direct than whatever testimony the Sri Lankan would have given had he testified in Court, as he had not directly understood the orders that had preceded the taking of his phone"***.

With respect, we are also unable to agree with learned counsel's submissions regarding the amendment of the indictment. We are satisfied that the learned Justices of Appeal properly evaluated the evidence in the case as a whole and reached their own conclusions that the appellant had committed the offence of robbery and had been positively identified by PW1 and PW5. We are also satisfied that there was ample evidence to support the appellant's conviction and that the Court of Appeal rightly upheld the conviction. Most importantly, the amendment, as Mr. Mulindwa rightly put it, did not prejudice the appellant at all since the evidence was not relied on by the trial judge in his final decision and the Court of Appeal justices took cognizance of this fact in their judgment. This is consequently not one of those cases that justify the interference by this court with the concurrent findings of the two courts below.

That being the case, we are unable to agree with learned counsel's submissions on this ground, and in the result the ground must fail.

Lastly, although it was not one of the grounds of appeal in this Court, counsel for the appellant complained about the sentence as being harsh. Our perusal of the record established that the Court of Appeal actually arrived at the sentence after taking into account the 5 years spent on remand by the appellant. This is what the Court of Appeal held at page 12 of its judgment:

***“We consider failure by the judge to take into account the period of five years which the appellant spent on remand before passing sentence as having occasioned a miscarriage of justice. The appellant having spent five years on remand was a relevant consideration before the trial court imposed the sentence. We shall therefore interfere with the sentence imposed and substitute it with a sentence of eight years from the date of conviction- 12-06-09.”***

Most importantly, under section 5(3) of the Judicature Act this Court can only interfere with sentence on a matter of law, not severity of sentence. The section reads:

**“(3) In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of the sentence.”**

(Underlining provided for emphasis).

On that account, this prayer has no merit.

In the circumstances, we find no merit in the appeal. It is accordingly dismissed and the decision of the Court of Appeal is upheld.

In view of our finding on ground 2, however, we hereby vary the compensation order and:

(1) Discharge the appellant from payment of the equivalent of two Nokia Phones to Mubiru Kiyaga and Edward David.

(2) Order that the appellant pays UGX 5.1 million to Century Bottling Co. Ltd as compensation.

Dated at Kampala this 13<sup>th</sup> day of February 2015.

Tumwesigye, JSC

Dr. Kisaakye, JSC

Arach-Amoko, JSC

Tsekooko, AG. JSC

Okello, AG. JSC