THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CRIMINAL APPEAL No. 199 OF 2013

GENSI JACKSON:: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala before His Lordship Mr. Justice Paul K. Mugamba in High Court Criminal Session case No. 241 of 2013 delivered on 9th December, 2013)

CORAM: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

This is an appeal from the sentence of 38 years' imprisonment imposed on the appellant by Mugamba, J (as he then was) in High Court Criminal Session Case No. 241 of 2013 at Kampala.

Background to the appeal

On 2nd October, 1998, the appellant and others laid an ambush at Kakigani on the Mbarara - Ntungamo road at about 2:00pm. They were armed. They fired shots and shattered the windscreen of a van belonging to a tobacco company. The shots deflated its tyres and they proceeded to disarm the security guard on the van. They took away his gun before stealing shs 8,000,000/= which was in the van. They were later arrested.

The appellant was convicted of three counts of Aggravated Robbery on 1st November 2003, in *High Court Criminal Session Case No. 001 of 2002*, at Mbarara contrary to Sections 285 and 286 of the Penal Code

Act Cap 120 and was sentenced to suffer death. At the time of sentencing, the death penalty was the only sentence prescribed by the law for a person convicted of aggravated robbery.

Following the decision of **Suzan Kigula and Others versus Attorney General, Constitutional Appeal No. 003 of 2006**, the Supreme Court annulled the mandatory death penalty and ordered that the case files of all persons who had, before then, been convicted of capital offences and sentenced to the then mandatory death penalty be returned to the High Court for mitigation proceedings and re-sentencing.

The matter was subsequently sent back to the High Court for reconsideration of sentence. On 9th December 2013, Mugamba, J (as he then was) upon hearing the parties on mitigation, re-sentenced the appellant to 23 years imprisonment.

The appellant with leave of Court under Section 132(b) of the Trial on Indictments Act Cap 23 appeals against sentence only. The appellant sets forth two grounds of appeal as follows:-

1. ***The learned trial Judge erred in law and fact when he arrived at an unjust decision when he failed to consider the mitigating factors raised by the appellant.***
2. ***The learned trial Judge erred in law and fact when he sentenced the appellant to 23 years imprisonment on each count which was manifestly excessive and harsh in the circumstances.***

Appearances:

At the hearing of this appeal, Ms. Kamugisha Mclean, learned Counsel appeared for the appellant on State Brief, while Mr. David Ndamurani Ateenyi, Senior Assistant Director of Public Prosecutions represented the respondent. The appellant was present.

Case for the appellant:

Counsel for the appellant submitted that the appellant was aggrieved by the harshness occasioned by the non-clarity of the re-sentencing Judge where he did not state clearly when the 23 years imprisonment term imposed on the appellant would commence. Further, that considering that the appellant had already served 15 years in prison at the time of re-sentencing, imprisonment for 23 years meant that he would serve 38 years in prison which was harsh and excessive considering the facts of the case. Further still, that the appellant was a first offender, no life was lost during the robbery, and he was a family man with eight (8) children which mitigating factors would have attracted a lesser sentence compared to the 38 years imposed on the appellant.

Counsel referred Court to **Abelle Asuman vs. Uganda, Supreme Court Criminal Case No....of 2014** where the Supreme Court imposed a term of 18 years imprisonment inclusive of the time that had been spent on remand.

Counsel invited Court to invoke its powers under Section 11 of the Judicature Act, Cap 13 to impose an appropriate sentence be imposed.

Case for the respondent:

Counsel submitted in reply that the sentence of 23 years' imprisonment which was handed down by the learned re-sentencing Judge was appropriate in the circumstances. The learned trial Judge took into account the period that the appellant had been spent on remand and thereby handed down 23 years that the appellant had to serve.

Counsel referred Court to **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001,** for the proposition that the appellate court is not to interfere with a sentence imposed by a trial

court which has exercised its discretion on sentence unless the exercise of such results in the sentence imposed being manifestly excessive or so low to amount to a miscarriage of justice.

Counsel concluded that the sentence handed down was not harsh and excessive and prayed that this Court upholds the sentence and conviction.

Decision of the Court

We have carefully listened to the submissions of Counsel on either side, and carefully perused the Court record and the law and authorities cited to us.

We are alive to the requirement that as a first appellate court we must re-appraise all the evidence before court and make our own inferences on all issues of law and fact. **See Rule 30(1) of the Rules of this Court,** and **Kifamunte Henry versus Uganda: Supreme Court Criminal Appeal No. 10 of 1997.**

Ms. Kamugisha, learned Counsel for the appellant submitted that the sentence of 23 years imprisonment imposed was harsh and excessive yet the appellant in this case had already spent 15 years in prison. In essence he would be serving a term of 38 years. On the other hand learned, counsel for the State submitted that there was material evidence to justify the imposition of the 23 years' imprisonment.

We note that this court can only interfere with the sentence of the trial Court if that sentence is illegal or is based on a wrong principle or the Court has overlooked a material factor, or where the sentence is manifestly excessive or so low as to amount to a miscarriage of Justice. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration. **See Kizito Senkula**

vs. Uganda, Supreme Court Criminal Appeal No. 24/2001 and Ogalo s/o Owuora versus R [1954] 21 EACA 270.

In this case, the legality of the sentence is not in issue. What is contested is the severity of the sentence. While coming to decision, the learned trial Judge had this to say:-

> ***"For the convicts, it was submitted that both were first offenders and they have been on remand for 15 years. The age of Gensi was given as 42 years while Rwinoga was said to be 40 years old, it was submitted that Gensi is remorseful and has participated in a course of peace making. Further he is disciplined and hardworking after he took the various rehabilitation courses. He participates in art and crafts. It was added that he suffers from hypertension and stomach ulcers. It was sought that a more lenient sentence be passed.***
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> ***I have considered the submissions presented. The offenses committed by Gensi and others were serious but having considered the report concerning his efforts to be rehabilitated, a custodial rather than the death sentence better meets his circumstances. I deduct the period he has been in prison for the sentence I would otherwise have handed down. He is sentenced to 23 years imprisonment on each of the counts 1, 2 and 3. The sentences are to run concurrently.***
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> ***In addition, he is to refund half of the sums stolen in the course of the robbery."***

We note that the maximum sentence for the offence of Aggravated Robbery is death. Further the learned trial Judge considered a term of 15 years which the appellant spent in prison as the time spent on remand and yet the period spent on remand refers to the period spent during pre-trial detention. In this case, the appellant and others were arrested in October 1998. They were charged and convicted on 1st November, 2003. They had spent a period of 5 years on remand. The

learned resentencing Judge did not also consider all the mitigating factors pleaded such as the fact that the appellant was a family man with two wives and 8 children. Had he considered all the factors, he would have come to a different conclusion.

In this respect, the court is enjoined to take into account not only the remand period but also the aggravating and mitigating factors, and in so doing we take into account the gravity of the offence so as to pass the appropriate sentence.

We note that the Sentencing Guidelines were issued to assist courts to develop a uniform approach to sentencing. However, the ultimate responsibility to determine the appropriate sentence lies with the Court after weighing all relevant factors and then exercising its discretion judiciously.

In **Aliganyira Richard versus Uganda, Court of Appeal Criminal Appeal No. 019 of 2005**, the appellant was convicted of aggravated robbery and sentenced to suffer death. On appeal this Court reduced the sentence to 15 years imprisonment.

In another case of **Oyet Twol versus Uganda, Court of Appeal Criminal Appeal No. 115 of 2013**, the appellant was convicted of aggravated robbery and sentenced to 40 years imprisonment. On appeal this court reduced the sentence to 15 years and after deducting the 1 year and 9 months spent in pre-trial detention, he was ordered to serve 13 years and 3 months in prison.

In view of the foregoing and considering that the appellant was on remand for a period of 5 years before conviction, we deem a term of 18 years' imprisonment to be an appropriate sentence from which we deduct the 5 years spent in pre-trial detention. The appellant will therefore, serve a sentence of 15 years in prison.

The appellant has been in prison since 10th October, 1998. He has spent a period of 20 years and 10 months in prison; which is in excess of the sentence of 18 years which we have sentenced him to serve in detention. In the event we find that the appellant has already served the punishment that he should have been subjected to; and accordingly, we are left with no other option but to set him free. For the foregoing reasons, the appeal against sentence is allowed.

He should therefore be released forthwith; unless he is being held on some other lawful orders.

We so order.

Dated at **Mbarara** this 2nd day of October 2018

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Hon. Lady Justice Elizabeth Musoke
JUSTICE OF APPEAL

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Hon. Mr. Justice Cheborion Barishaki
JUSTICE OF APPEAL

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Hon. Mr. Justice Christopher Madrama
JUSTICE OF APPEAL