THE REPUBIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

[CORAM: Egonda-Ntende, Obura &Musota JJA]

CRIMINAL APPEAL No. 358 of 2014

(Arising from High Court Criminal Session Case No.1o4 of 2009 at Masaka)

BETWEEN

SSEBUSHUMBA AUGUSTINE==========APPELLANT NO.1

MUGURA JOHNSON==========APPELLANT NO.2

HAVUGA BENON==========APPELLANT NO.3

AND

UGANDA==========RESPONDENT

(*An appeal from the judgement of the High Court of Uganda [J. Chibita, J.,] delivered on 28th April 2011*)

REASONS FOR JUDGEMENT OF THE COURT

Introduction

1. After hearing this appeal, we allowed it, quashed the conviction and set aside the sentence imposed upon the appellants. We promised to provide our reasons later and we now do so.

2. The appellants were jointly indicted and convicted of two counts of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. The particulars of the offences were that on the 22nd of March

2009, at Keishango Village, Mpumudde sub-county in Lyantonde District, the appellants being armed with a panga and a piece of timber robbed Anyijukaire Joy of a Nokia mobile phone model 1200 serial No.35195803153093, robbed Bagategye Wilson of cash amounting to UGX 110,000 and robbed Ahimbisibwe Winnie of a Nokia mobile phone model 6085 serial no. 359825014670803 and cash amounting to a sum of UGX 60,000. On 28th April 2011 the learned trial judge sentenced the appellants to serve a period of fourteen years' imprisonment.

3. Dissatisfied with the decision of the learned trial judge the appellants appeal against both conviction and sentence on the following grounds;

> '(1) The learned trial judge erred both in law and fact to convict and sentence the appellants basing on defective pleadings which occasioned a miscarriage of justice.
>
> (2) The learned trial judge erred both in law and fact to convict the appellants of the offence of aggravated robbery when all the ingredients of the offence were not proven by the prosecution.
>
> (3)The learned trial judge erred in law and fact to convict and sentence the appellants basing on the evidence of recovered phones which phones were not tendered in as exhibits.
>
> (4) The learned trial judge erred both in law and fact to convict and sentence the

appellants basing on retracted and repudiated charge and caution statements which occasioned a miscarriage of justice.'

4. The respondent opposed the appeal.

Submission of Counsel

5. At the hearing of the appeal, the appellants were represented by Ms Kentaro Specioza and the respondent by Ms Okui Jacquelyn, Senior State Attorney in the Office of the Director, Public Prosecutions. Ms Kentaro Specioza submitted that the record of proceedings in the trial court is incomplete. She prayed for a retrial. Ms Okui Jacquelyn in reply prayed for a special search for the missing part of the record be ordered and the appeal be abated. She relied on Section 43 (2) of the Criminal Procedure Code Act

Analysis

6. We are mindful of the duty of this court as a first appellate court as set out in Rule 30(1) of the Rules of this court and as it was held by the Supreme Court in Kifumante Henry V Uganda, SC Criminal Appeal N0. 10 of 1997 (unreported) and Bogere Moses V Uganda, SC Criminal Appeal No. 1 of 1997 (unreported). We are required to re-evaluate all the evidence that was adduced at the trial and come to our own conclusions on all issues of law and fact. We shall proceed to do so.

7. The facts of this case are that on the night of 22nd day of March 2009, Katooro Jogina, with her two daughters Anyunjukaire Joy and

Kembabazi were in their house sleeping when unidentified assailants armed with pangas banged their door and gained entry. They demanded for money and assaulted the victims. For fear of their lives, the victims handed over their property to the assailants which included mobile phones and money to the assailants who fled. The matter was reported to police who recovered one of the phones. The recovered phone was tracked back to appellant no.2 who in turn implicated the other two. The appellants were consequently arrested and charged with three counts of aggravated robbery. All the three appellants denied the offence.

8. PWI, Dr Samuel Kanabi from Safeka Nursing Home in Lyantonde testified that he examined one of the victims and found a cut wound on her skull measuring 6 cms. PWII was the chairman LC1of the area who testified that he was awoken at 3:00 am and informed that the victims had been attacked by thugs, cut and robbed. He rushed to the victims' home and confirmed the allegations. He took the victims to the hospital.

9. PW III, Katooro Jogina aged 80 years was one of the victims. She testified that she could not fully recall what happened on that fateful night but they were attacked before the cock crowed. She was sleeping at night when she heard a bang on the front door. The assailants entered her house and cut her while demanding for money. Her daughter Joy was also cut while Winnie was locked in a room. She did not have money so they searched in the daughters' handbags.

10. PW IV, Anyijukaire Joy also testified that at around 1:00am, two assailants flashed a torch after banging the door and attacked them. They

demanded for money and she told them they did not have any. Whereupon they cut her with a panga and she fell down. They stole her phone which she apparently identified in court. She stated that there was no lighting during the attack and she was unable to identify any of the attackers

11. PW V, Ahimbisibwe Winnie, the third victim testified that the assailants robbed her phone and UGX 60,000. She did not recognise the assailants. She identified her stolen phone in court and it was admitted into evidence as Exhibit PID II. PW VII testified the assailants attempted to break into his house but failed. He threw them UGX 110,000 and thereafter heard his mother being attacked.

12. PW VI, Ntamba Hamdani stated that he knew the first appellant and that he bought land from PWIII and was supposed to have brought her UGX 4,100,000/= the day before and that the first appellant knew about it. PW9, Ssekaalo Paul who was found in possession of one of the stolen phones stated that it was the second appellant who had sold to him the phone. PW10 Corporal Omoding testified that he tracked down the phones and he recovered them from people who were connected to the appellants. That the stolen phones were tracked down to the second appellant who in turn stated that he was recruited by the third appellant who was also recruited by the second appellant.

13. From this evidence it is clear that there was an attack on the victims who were robbed of some items on the night of 22nd March 2009. It is also evident that none of the victims were able to identify their attackers. In

order to sustain a conviction of aggravated robbery against the appellants, the prosecution had to prove participation of the appellants in the crime. To that end the prosecution relied on the charge and caution statements of the appellants.

14. All the appellants objected to the admission of the charge and caution statements in the evidence on the ground that they were involuntarily taken. This prompted the trial judge to conduct a trial within a trial to establish the propriety of the charge and caution statements. The learned trial judge admitted all the three charge and caution statements in evidence without determining if they had been voluntarily obtained. The statements gave a detailed account of the appellant's participation in the crime.

15. The learned trial judge, relying on the charge and caution statements to prove the participation of the appellants in the commission of the offences in question, convicted the appellants as charged.

16. The Supreme Court in interpretation of section 24 of the Evidence Act that deals with the propriety of a confession stated in the case of Walugembe v Uganda, S C Criminal Appeal No 39 of 200, (unreported),

> Where an accused person objects to the admissibility of the confession on grounds that it was not made voluntarily, the court must hold a trial within a trial to determine if the confession was or was not caused by any violence, force, threat, inducement or promise calculated

> to cause an untrue confession to be made. In such trial within a trial, as in any criminal trial the onus of proof is on the prosecution to prove that the confession was made voluntarily. The burden is not on the accused to prove that it was caused by any of the factors set out in Section 24 of the Evidence Act.'

17. The admission of the charge and caution statements in the evidence in this case was most unsatisfactory for multiple reasons. PW8 recorded the charge and caution statements of the three appellants in which they admitted to having committed the offences. According to PW1 Detective / Sgt Mwebaze Alex, (in the trial with a trial), at page 7 of the record, the charge and caution statement of the appellant no.1 was recorded by Detective / Inspector Biira Mariam on 5th May 2009 at 8:00 am. The same police officer recorded the charge and caution statement of the appellant no.2 on 4th May 2009 and that of the appellant no.3 on 5th may 2009 at 12:00am at Lyantonde Police station.

18. It is irregular for one police officer to record alleged confession statements from three suspects charged with the same offence arising from the same incident. Two of the statements were recorded on the same day while the other one was recorded on the following day. We cannot rule out the possibility that the police officer could have memorized the facts of the case in a bid to fabricate evidence as was held in Sewankambo Francis and Ors v Uganda, S C Criminal Appeal No. 33 of 2001 (unreported). The Supreme Court noted,

> 'First, we think that it is irregular for one Police Officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. The temptation on the part of the policeman to use contents of statement to record a subsequent statement cannot be ruled out.'

19. At page 14 of the record, Biira Mariam, the recording officer stated that she could have handled the file before taking the statements. As the Officer in Charge of CID at the station she was the one directing the investigations in this case. In RA 780664 CPL Wasswa & Ninsiima Dan vs Uganda, Supreme Court Criminal Appeals No. 48 and 49 of 1997 (unreported) the Supreme Court held that the investigating officer in a case should not participate in recording a charge and confession statement from the accused. In that case, a police constable who had participated in the investigation of the case acted as an interpreter for the officer who recorded the charge and caution statement. The confession statement was held to be inadmissible in evidence.

20. In the case of RA 780664 CPL Wasswa & Ninsiima Dan vs Uganda, (supra) the Supreme Court disapproved of the unexplained delay by the police to record a charge and caution statement from the appellant who had admitted the offence and was already in custody. In that case the delay was for two days as the appellant was arrested on 7/12/1993 and the statement was recorded on 9/12/1993. In the appeal before us the second appellant was arrested on 24th April 2009. However, the charge and caution statement was not recorded until 4th May 2009. This was a

delay of eleven days for which no explanation is given. This violated article 23 (4) (b) of the Constitution which compels a suspect to be brought before a court of law within not more than 48 hours from the time of his arrest.

21. By the time the statements in question were recorded the appellants were in illegal detention. We cannot exclude the possibility that the transgression of their rights was intended to yield confession statements from them. The state cannot be allowed to benefit from the unlawful actions of its officers. It is contrary to the tenets for the right to a fair hearing which is available to all under article 28 (1) of the Constitution.

22. It should be noted that all the appellants claimed that they were assaulted by the police before they were made to sign or thumb-print the alleged confessions. The appellant no.1 claimed that he was badly beaten on the morning of the recording of the statement. He did not understand what he was being asked as he had lost his senses. The appellant no.2 claimed that he was threatened by a one Mugisha (interpreter PWII) to plead guilty otherwise he would be the second one to die. That during the recording of the statement, he was beaten on his knees and cheeks with batons. The appellant no.3 was also assaulted before and during the recording of his statement. He was taken to Lyantonde and given treatment. Strangely enough, the prosecution did not adduce any evidence of medical examination in respect of all the appellants. No explanation was given.

23. On the first trial with in a trial we set out the decision of the learned trial judge below.

> 'COURT: after listening to the three witnesses, court has decided that it will avail itself of the statement in question by admitting it in evidence. Exh PE 11'

24. No reasons were provided why the charge and caution statement were admitted in evidence. The learned trial judge did not rule on whether the statements had been made voluntarily or not. This was fatal.

25. Upon conducting the second trial within a trial to determine the admissibility of the charge and caution statement of the appellant no.2, at page 13 of the record, the learned trial judge reserved his ruling to be delivered later with the ruling on the third trial within a trial. At the end of the third trial within a trial, the learned trial judge stated;

> 'COURT: I have listened to the three witnesses in the case of Mugura Johnson and decided to believe the two Police Officers. I have noted the allegations of torture and signing under duress. The statement will therefore be admitted in evidence. Admitted as Exhibit PE III.
>
> I have also listened to the three witnesses in the case of Havuga Benon's statement and believe that the Police Officers followed procedure and will

> therefore admit the statement in evidence. The allegations of torture have been noted nevertheless. Admitted as Exhibit PE IV'

26. From the foregoing decisions the learned trial judge failed to evaluate the evidence adduced and come to a conclusion as to whether the charge and caution statements were voluntarily obtained. The learned trial judge failed to give reasons for his ruling. A ruling without reasons for the decision is a nullity. The learned trial judge should not have relied upon all the charge and caution statements tendered in evidence in this case to convict the appellants. In the result there is no evidence that ties the appellants to the commission of the offences with which they are charged.

27. The second and fourth grounds of appeal must succeed. The success of these grounds disposes of the appeal. It is not necessary to consider the remaining grounds of appeal save for one other matter that would also independently have rendered the conviction untenable.

28. We note that the record of the trial does not contain the summing up notes to the assessors and assessors' opinion of the case. The learned trial judge does state in his judgment that he agreed with the assessors to convict the appellants. As was noted by the Supreme Court in Omiat Joseph v Uganda, Supreme Court Criminal Appeal No. 10 of 2001, (unreported),

> 'An appellant is entitled to have at his or her disposal, the entire record of

proceedings under which his or her conviction is founded. Only on this basis is the appellant availed all the opportunities to challenge every step and aspect leading to his or her conviction and sentence.'

29. The incomplete nature of the record rendered the conviction and sentence untenable as it was not possible for this court to fully evaluate the proceedings in the court below.

30. It is for those reasons that we allowed the appeal, quashed the conviction of the appellants, set aside the sentences imposed upon them and set them free.

Signed, dated and delivered at Masaka this 30th day of July 2018.

Fredrick Egonda-Ntende
Justice of Appeal

Hellen Obura
Justice of Appeal

Stephen Musota
Justice of Appeal