THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 160 OF 2013

KENYANYA GODWILL .....APPELLANT

VERSUS

UGANDA .....RESPONDENT

(Appeal against judgment of the High Court at Kampala in Criminal Session case No. 0203 of 2012 dated 11/11/2013 before Hon. Lady Justice Alividza Elizabeth Jane)

Coram: Hon. Lady Justice Elizabeth Musoke, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

JUDGEMENT OF THE COURT

Introduction

The appellant herein was charged , tried and convicted of the offence of Aggravated Robbery contrary to Sections 285 and 286 (2) of the Penal Code Act and sentenced to 18 years imprisonment.

Brief Background

The facts of this case as accepted by the learned trial Judge are that the appellant and others at large on 15th day of February 2012 at 24 hours Parking Yard, Kabalagala Central, Makindye Division, Kampala, robbed Abaaho Simon of a motorcycle registration no. UDS 2982 Bajaj Boxer

red in colour and immediately before or after the said robbery, used actual violence with an iron bar on Kiggundu the guard. Consequently the appellant was arrested, tried and convicted as charged and sentenced to 18 years imprisonment. Being dissatisfied with the whole judgement of the trial court, the appellant appealed to this court on both conviction and sentence on four grounds set out in the supplementary memorandum of appeal as follows:-

1. ***That the learned trial judge erred in Law and fact when she failed to address the evidence in its entirety, ignoring inconsistences in the prosecution's case, thereby occasioning a miscarriage of justice.***
2. ***That the learned trial judge erred in law and fact in failing to afford the appellant a fair hearing thereby reaching a wrong inference of guilt and occasion a miscarriage of justice.***
3. ***That the learned trial judge erred in law and fact when she abdicated her duty of summing up Law and evidence to the assessors.***
4. ***That the sentence passed by the learned trial judge against the appellant was illegal as it contravened Article 23 (8) of the Constitution. In the alternative, the sentence was harsh and manifestly excessive in the circumstances.***

Representation

At the hearing of the appeal, the appellant was represented by Mr. Albert Mooli Sibuta, learned counsel, on State Brief while the respondent was represented by Ms. Joanita Tumwikirize, learned State Attorney, from the Office of the Director of Public Prosecutions. The appellant was present.

Submissions by the appellant

When this appeal came up for hearing, counsel for the appellant prayed court to amend the Memorandum of Appeal dated 15th February 2019

to read "Supplementary memorandum of appeal" which court granted as the respondent did not have any objection. Counsel also applied to adopt the submissions attached thereto and filed by the appellant, but court declined since they were neither dated nor signed. The parties were therefore ordered to file written submissions, which they did.

On ground one, counsel submitted that the particulars of the indictment contradicted the evidence adduced at the trial. He pointed out that the indictment read that the complainant reported the case to Police but in his evidence in court, PW3, stated that he did not report the case to police. Counsel relied on ***Oketcho Richard V. Uganda, Supreme Court Criminal Appeal No. 26 of 1995*** and ***Hassan Kasule V. Uganda, Supreme Court Criminal Appeal No. 10 of 1987*** and submitted that the trial court had the duty to rectify the inconsistencies in the evidence by calling relevant witnesses especially the arresting officer to address the inconsistencies in the indictment and the evidence in the prosecution case.

Counsel submitted further that the evidence of the key identifying witness PW4, was contradictory. He pointed out that PW4's Police statement contradicted her evidence in court, in that in her statement PW4 stated that she saw four persons dressed in civilian attire and later told court that she saw four persons and that the appellant had a swollen face which was not shown in PF24. Counsel relied on ***Okwanga Anthony V. Uganda, Supreme Court Criminal Appeal No. 20 of 2000*** and submitted that the inconsistencies in PW4's evidence should have affected her credibility as a witness.

Counsel further submitted that there was no sufficient evidence of identification. He submitted further that PW2 stated that she was

unable to identify the assailants because of fear yet court relied on her evidence to convict the appellant. Further, that an identification parade was not conducted for proper identification and the brown trousers were not tendered in court and none of the pieces of evidence connected the appellant in the commission of the offence. He relied on ***Stephen Mugume V. Uganda, Supreme Court Criminal Appeal No. 20 of 1995*** and ***Yowana Sserunkuma V. Uganda, Supreme Court Criminal Appeal No. 8 of 1989*** in support of his argument above.

Counsel further submitted that the learned trial Judge disregarded the appellant's defense of alibi. He argued that the appellant had already been admitted at Mulago Hospital on 14/2/2012 and he could not have committed the crime the following day, and as such the prosecution failed in its duty to place the appellant at the scene of crime.

Further, counsel argued that the prosecution did not prove the ingredient of use of actual violence beyond reasonable doubt as there was no medical report tendered in court to prove that PW1's injuries were sustained on the 14th day February 2012. He pointed out that no evidence was adduced in court to show that PW1 had been to any hospital or received any medical care to corroborate PW1's evidence.

Lastly on this ground, counsel submitted that no evidence on record proved ownership of the motor vehicle no. UDS 298U. That the log book tendered in court was never inspected by court and as such it is no evidence at all.

On ground two, counsel submitted that the appellant was never represented nor given time to defend himself. That court proceeded with the hearing when counsel had not fully received instructions from the appellant. Further that the appellant was compelled to proceed

with his case when the new counsel had neither been informed about the case nor had a copy of the proceedings and thus denied the appellant a fair hearing contrary to Article 28 (1) of the constitution.

As regards the third ground, counsel submitted that the learned trial judge failed to exercise her judicial duty of summing up the case and the evidence to the assessors as required under Section 39(1) of the Judicature Act Cap. 13. He relied on ***Twinomuhwezi Leuben V. Uganda, Supreme Court Criminal Appeal No. 40 of 1995*** and ***Wasswa Stephen & Anor V. Uganda Supreme Court Criminal Appeal No. 31 of 1995,*** and submitted that the learned trial Judge failed to perform her duty fairly and impartially and thus caused a miscarriage of justice to the prejudice of the appellant.

On ground four, counsel submitted that the sentence imposed by the learned trial Judge was illegal because it did not comply with Article 23 (8) of the Constitution. Further that the learned trial Judge did not consider all the mitigating factors in the circumstances. He relied on ***PTE Loporo Juma V. Uganda, Court of Appeal Criminal Appeal No. 759 of 2014*** and ***PC Amukun John Michael & Oruba Michael v Uganda, Court of Appeal Criminal Appeal No.67 of 2011*** to support his argument. He asked court to allow the appeal, quash the conviction and set aside the sentence and in the alternative in the event that the conviction is upheld, the sentence be reduced.

Submissions by the respondent

Learned counsel for the respondent submitted that court does not rely on the narration as per the indictment, but on the testimony of witnesses. That since witnesses take oath before they testify in court, their evidence takes precedence over the indictment. She further

submitted that the learned trial Judge evaluated the evidence of both parties as a whole and rightly found that the prosecution had proved the case against the appellant beyond reasonable doubt.

Counsel submitted that there were no contradictions in PW3's evidence as submitted by the counsel for the appellant. He pointed out that PW3 never stated that he found the appellant with the motorcycle at police. Further that the evidence of an arresting officer was not necessary because PW7 who picked the appellant handed him over to police that was handling the matter. He relied on ***Kakooza Godfrey V. Uganda, Supreme Court Criminal Appeal No. 3 of 2008*** where it was stated that the arresting officer not being able to testify was not detrimental to the prosecution case.

Counsel submitted further that PW4 was not a key witness in this case. Further, that the learned trial Judge relied on the evidence of PW3 and PW5 and the doctrine of recent possession and found that the appellant was guilty of the offence he was charged with. He argued that PW3 identified the appellant as the same person who he had met pushing a motorcycle registration No. UDS 298U red in colour, a Bajaj Boxer and that this was confirmed in cross examination.

Further that the ingredient of using actual violence was proved beyond reasonable doubt because of the injuries PW1 sustained which were still visible on his forehead. Further, that PW4 who attended to him while in hospital confirmed the same in his evidence.

On ground two, counsel submitted that the appellant was accorded legal counsel in the names of Joyce Nalunga, and that the appellant's counsel was in court and cross examined PWs 3, 4, 5 and 7. There was therefore no violation of Article 28 (3) of the Constitution because in

absence of his counsel, the appellant made it clear to court that he would represent/defend himself.

In reply to ground three counsel submitted that the learned trial Judge was alive to the provisions of Section 82 (1) of the Trial on Indictments Act and summed up to the assessors reminding them of the additional witnesses and also took all the evidence as a whole. Counsel argued that while summing up, the learned Judges are not supposed to appear biased and in this case, if the learned trial Judge had identified the contradictions, he would appear biased over the matter. He relied on ***Twehangane Alfred V. Uganda, Court of Appeal Criminal Appeal No. 139 of 2001*** where court ruled that even when the trial Judge did not highlight contradictions in prosecution evidence while summing up, it did not cause a miscarriage of justice.

In response to ground 4, counsel conceded to the first part of the ground that the period on remand was not considered by the learned trial Judge while sentencing and urged court to consider the same and deduct it accordingly. However, counsel submitted that the sentence of 18 years imprisonment was not harsh/excessive because the learned trial Judge was guided by the sentencing guidelines and considered all the mitigating factors and instead of 30 years he imposed 18 years.

Further that the offence of aggravated robbery attracts a maximum sentence of death. Counsel relied on ***Rutabingwa James V. Uganda, Court of Appeal Criminal Appeal No. 57 of 2011***, where this court confirmed a sentence of 18 years imprisonment considering the injuries inflicted upon the victim. He prayed court to find the sentence of 18 years appropriate in the circumstances.

Consideration by Court

We have carefully perused the record and considered the submissions of both counsel. We are alive to the fact that this court has a duty to re-appraise the evidence as the first appellate court and come up with its own conclusions. See: *Rule 30 (1) of the Rules of this court.* In ***Begumisa & Ors V. Tibebaga, Supreme Court Civil Appeal No. 17 of 2002***, the Supreme Court held that:-

> ***"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although In a case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inferences and conclusion."***

The appellant herein was charged with the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The prosecution has to prove beyond reasonable doubt all the ingredients of the offence against the accused. They include the following:-

1. **That there was theft**
2. **That there was use or threat to use a deadly weapon at, before or after the theft**
3. **That the accused person participated in commission of the offence.**

Ground one: ***"That the learned trial judge erred in Law and fact when she failed to address the evidence in it's entirely, ignoring inconsistences in the prosecution's case, thereby occasioning a miscarriage of justice."***

On this issue of ownership of the motorcycle, PW5 testified that the motorcycle UDS 298U was owned by his friend Ahimbisibwe John Bosco. The evidence on record is clear as to who owned the said

motorcycle. Ahimbisibwe John Bosco testified that the same was given to him by his brother Ampire Max to earn a living. We do not agree with the submission of counsel for the appellant that ownership was not proved.

Section 254 (2) of Penal Code Act provides: *"A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents:-*

(a)An intent to deprive the general or special owner of the thing of it;

(b).....

(c) .....

(d) .....

(e).....

*And **"special owner"** includes any person who has any right arising from or dependent upon holding possession of the thing in question."*

There is sufficient evidence on record to show that the motorcycle was in PW5's possession when it was stolen from him at 24 Hours Parking Yard. We find no merit in this argument and we agree with the finding of the learned trial Judge that there was theft of motorcycle UDS 298U that was in possession of PW5 at the time.

On the issue of identification of the appellant as a participant in the robbery of the motorcycle from 24 Hours Parking Yard, the trial court stated:-

> ***"Looking at the conditions under which PW4 and CW1 had to observe the accused, it made it very difficult to make a positive identification and thus***

the need for corroboration so as to rule out any mistake identity that could cause a miscarriage of justice.

PW3 testified that the accused was found red handed the next day with the stolen motorcycle. He is corroborated by the evidence of PW5. I believe the witnesses when they confirm that the accused was found with the motorcycle that had gone missing after a robbery the night before. Thus he was in possession of stolen property.

The accused on the other hand stated that he knew nothing of the offence. His evidence would have been credible but for the evidence of PW8 who rescued the accused from the road side, unconscious and took him to hospital."

The trial Court, in our view, properly evaluated the evidence and rightly found that the appellant participated in the commission of the offence. We find no reason to interfere with her findings because the appellant was identified by PW3 and PW5 in the morning at around 7:00 a.m. There was sufficient corroborative evidence to pin the appellant in the robbery. This issue disposes of the appellant's defence of alibi, as the appellant was placed at the scene of crime.

On the issue of proof of use of actual violence in the commission of the offence, the trial court relied on the evidence of CW1, the victim and PW4 who attended to him. As a first appellate court, we bear in mind that we did not have the opportunity to see the witnesses testify in court. The trial court had the opportunity to observe the injuries sustained by the victim and this was corroborated by PW4 who attended to him while in hospital. Actual violence can be proved by injuries sustained in the commission of the offence. We therefore find no reason to interfere with this finding. However, we wish to note that

the prosecution did not tender in court the weapon used to inflict the said injuries to the victim.

The particulars of offence in the indictment of the appellant stated as follows:-

> *"KENYANYA GODWILL and others still at large on the 15th day of February 2012 at 24 hours parking yard, Kabalagala Central, Makindye Division, Kampala robbed ABAHO SIMON of a motorcycle no. UDS 298U Bajaj Boxer red in colour and immediately before or after the said robbery used actual violence to wit an iron bar on said Kiggundu the guard."*

In an indictment of robbery with aggravation a deadly weapon is a key ingredient of the offence and it must be proved by the prosecution like any other ingredient of the offence, beyond reasonable doubt. In the instant case, the learned trial Judge, with due respect, did not address herself to this ingredient. Although it is stated that an iron bar was used in the indictment, during trial, the prosecution did not produce as an exhibit the iron bar which was allegedly used. They however led evidence of CW1 who stated the assailants cut him with a knife which he did not see. There is no evidence on record to prove the use of a deadly weapon. There is no medical report either classifying the injuries and the cause of the same.

Unless the weapon stated to have been used is produced in court or sufficient evidence is adduced in court to describe that weapon, reliance on such injury alone would in our view, not be sufficient evidence to prove ingredient of deadly weapon in an offence of aggravated robbery. See: ***Baguma Stephen & Anor v Uganda, Supreme Court Criminal Appeal No. 42 of 2001***. In the circumstances, the appellant's conviction for aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act is quashed. Instead the appellant is

convicted of robbery contrary to Section 285 and 286 (1) of the Penal Code Act which provides as follows:-

> ***285. Definition of robbery.***
>
> ***Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.***
>
> ***286. Punishment for robbery.***
>
> ***(1) Any person who commits the felony of robbery is liable—***
>
> ***(a) on conviction by a magistrate's court, to imprisonment for ten years;***
> ***(b) on conviction by the High Court, to imprisonment for life.***

This ground therefore succeeds in part to that extent.

Ground two: ***"That the learned trial judge erred in law and fact in failing to afford the appellant a fair hearing thereby reaching a wrong inference of guilt and occasioning a miscarriage of justice."***

On this issue that the appellant was not accorded a fair hearing, we note that at page 47 of the record of appeal, when court ruled that the prosecution had established a prima facie case against the appellant, it proceeded to explain to him all the options he had to defend himself as follows:-

> ***"You have three options of how to defend yourself. According to your lawyer you are very eager to be put on your defence. You have three options; you can keep quiet and silent and then court will use the evidence on record to establish whether the prosecution has proved its case beyond reasonable doubt.***

Then you can also give an unsworn statement. If you give unsworn statement, you stay where you are and you don't get the assistance of your lawyer and you just tell us what happened; your side of the story.

In case you decide to give a sworn statement, you cross to the witness stand and you will be examined in chief by your lawyer who will help you to put your case and then the prosecutor will cross examine you."

When the appellant was asked by court what type of defence he will give, he informed court that he will give an unsworn additional statement. The appellant was then led by his lawyer Mr. Senkezi to give his defence. We therefore find that the appellant was effectively represented and we find no merit in this ground and it is accordingly dismissed.

Ground three: ***"That the learned trial judge erred in law and fact when she abdicated her duty of summing up Law and evidence to the assessors."***

On this issue of summing up for assessors, counsel for the appellant submitted that this caused a miscarriage of justice because the learned trial Judge failed to perform a statutory duty. We have perused the record of proceedings at the trial. The learned trial Judge on pages 53 and 54 of the record of appeal took notes in relation to summing up for the assessors. She however did not go into so much detail as required by practice.

Summing us for assessors is a requirement of law under section 82 (1) of the Trial on Indictments Act, It states as follows:-

"82. Verdict and sentence.

(1) When the case on both sides is closed, the judge shall sum up the law and the evidence in the case to the assessors and shall require each of the assessors to state his or her opinion orally and shall record each such

opinion. The judge shall take a note of his or her summing up to the assessors."

In the above reproduced section of the Trial on Indictments Act, what is included in summing up for assessors is the law and evidence. It does not provide for a format in which summing up for assessors should be. In the instant case, the learned trial Judge listed the ingredients of the offence to the assessors and highlighted what the assessors should be looking for in the evidence adduced in court. We find no substantial miscarriage of justice occasioned to the appellant. Section 34(1) of the Criminal Procedure Code Act permits this court to ignore procedural errors and omissions if no substantial miscarriage of justice has been caused. It states as follow: -

"34. Powers of appellate court on appeals from convictions.

(1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

This ground therefore fails and we hereby dismiss it.

Ground four: ***"That the sentence passed by the learned trial judge against the appellant was illegal as it contravened Article 23 (8) of the Constitution. In the alternative, the sentence was harsh and manifestly excessive in the circumstances."***

On this ground, counsel for the appellant submitted that the learned trial Judge did not comply with Article 23(8) of the constitution. This Article provides as follows:-

> **"23. Protection of personal liberty.**
>
> ***(8) Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."***

While sentencing the appellant, the learned trial Judge noted as follows:-

> ***"The offence you are charged with carries a maximum sentence of death; however I will use the sentencing guidelines to get an appropriate sentence. I will start from the starting point of 30 years going upwards. I will however remove 10 years for the fact that the accused is young and there is still room for you to reform. However the offences of robbery are rampant and I agree that there is need for deterrent sentence to discourage the would be offenders.***
>
> ***Therefore I sentence the accused person to 18 years imprisonment; you have a right of appeal within 14 days."***

From the above it is clear that the learned trial Judge did not consider Article 23(8) of the constitution.

Because of the above omission alone, we agree with the submissions of counsel for the appellant and find that the sentence imposed by the learned trial Judge is a nullity as it contravenes Article 23 (8) of the Constitution. See: - ***Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014,*** where the Supreme Court was of the view that failure to take into consideration Article 23 (8) of the Constitution while sentencing render the sentence imposed illegal.

Having quashed the conviction for the offence of aggravated robbery and substituted it with one of simple robbery contrary to Sections 285 and 286 (1) (b) of the Penal Code Act, we invoke Section 11 of the Judicature Act to impose an appropriate sentence in respect of the offence of simple robbery.

The appellant was a first offender. He had spent 1 year and 9 months on remand. He was relatively young at the age of 30 years at the time and has a family to look after. The motorcycle was recovered.

The offence of simple robbery carries a maximum sentence of life imprisonment. The case involved violence and left the victim traumatized.

In ***Kyomuhendo David & Anor v Uganda, Court of Appeal Criminal Appeal No. 3 of 2003***, the appellants were charged with aggravated robbery and sentenced to death. On appeal, this court substituted the conviction of aggravated robbery with one of simple robbery and sentenced the appellants to 15 years imprisonment.

In ***Katuku Asirafu v Uganda, Court of Appeal Criminal Appeal No. 178 of 2014,*** this court reduced a sentence of 20 years imprisonment to 12 years imprisonment for simple robbery.

In ***Haruna Turyakira & 2 Ors v Uganda, Court of Appeal Criminal Appeal No. 146 of 2003***, the appellants were charged of aggravated robbery but were convicted of a lesser offence of simple robbery and were each sentenced to 14 years imprisonment. On appeal, this court dismissed the appellant's appeal both on conviction and sentence of 14 years imprisonment.

In ***Adam Owonda v Uganda, Supreme Court Criminal Appeal No. 8 of 1994,*** court confirmed a sentence of 8 years and 6 months imprisonment for the offence of simple robbery.

Taking into consideration all the aggravating and mitigating factors and the sentencing range of the offence of simple robbery in the above cited cases, we consider a sentence of 15 years imprisonment appropriate in the circumstances. We deduct 1 year and 9 months the appellant had spent on remand. He shall now serve 13 years and 3 months imprisonment. This sentence will run from 11/11/2013, the date he was convicted. We so order.

Dated at Kampala this ....19th....day of ....Nov....2019

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Elizabeth Musoke

Justice of Appeal

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Hellen Obura

Justice of Appeal

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Ezekiel Muhanguzi

Justice of Appeal