THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NUMBER 0079 OF 2017

1. **ODONG DAVID LIVINGSTONE**
2. **LATIGO KENNETH**
3. **MAMINA FRED::APPELLANTS**

VERSUS

UGANDA:: RESPONDENT

(Arising from the judgment of Hon. Lady Justice Elizabeth Ibanda Nahamya in Criminal Session Case No. 137 of 2017 in the High Court at Gulu dated 01/03/2017)

CORAM:

HON. MR JUSTICE KENNETH KAKURU, JA

HON. MR JUSTICE EZEKIEL MUHANGUZI, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT

The appellants were charged with and convicted of the offence of aggravated robbery contrary to sections 285 and 286 of the Penal Code Act, Cap 120. The 1st appellant was sentenced to 31years and 4 months imprisonment, the 2nd appellant to 25 years imprisonment and the 3rd appellant to 21 years and 4 months imprisonment. The appellants were dissatisfied with the decision of the trial court and filed this appeal. Each of the three appellants filed a separate memorandum of appeal.

The 1st appellant, Odongo David Livingstone, filed his memorandum of appeal on the following grounds;

1. *The learned trial Judge erred in law and fact when she relied on uncorroborated evidence of an accomplice PW1 and wrongly convicted the appellant hence occasioning a miscarriage of justice.*
2. *In the alternative but without prejudice, the learned trial Judge erred in law when she sentenced the appellant to 31 years and 4 months which was manifestly harsh and excessive in the circumstances.*

The 2nd appellant filed his memorandum of appeal on the following grounds;

1. *The learned trial Judge erred in law and fact when she relied on uncorroborated accomplice evidence full of falsehoods and grave contradictions to convict the appellant.*
2. *The learned trial Judge erred in law and fact when she disregarded the defence raised by the appellant in regard to his participation.*
3. *The learned trial judge erred in law and fact when she passed the sentence of 25 years on the appellant for the offences of aggravated robbery deemed to be harsh and excessive in the circumstances of the case.*

The 3rd appellant filed his memorandum of appeal on the following grounds;

1. *The learned trial Judge erred in law and fact when she relied on unsatisfactory circumstantial evidence to convict the 3rd appellant.*
2. *The learned trial Judge erred in law and fact in her interpretation and application of the law relating to the doctrine of recent*

possession, admissions and hearsay evidence to the prejudice of the appellant.

3. *The learned trial Judge erred in law and fact when she imposed a manifestly harsh and excessive sentence against the appellant.*

Representation

At the hearing of the appeal, Mr. Paul Manzi appeared for the 1st appellant, Ms. Suzan Wakabala for the 2nd appellant and Mr. Henry Kunya for the 3rd appellant while Ms. Harriet Adubango, Senior State Attorney appeared for the respondent.

Submissions by the appellants

Mr. Manzi learned counsel for the 1st appellant relied on this court's decision in ***Rwarinda John Vs Uganda,*** *Criminal Appeal Number 113 of 2012* in which it was stated that corroboration should not only confirm that the offense has been committed but also that the appellant is the one who committed it.

Counsel further submitted that, PW1 testified that the 1st appellant instructed her to open the behind gate which she did and 5 of them entered the premises. That apart from PW1, no other witness saw the 1st appellant at the premises when the robbery was taking place. That the other witness who was at the premises is PW2 who testified that he never saw A1 and A2 that evening. In addition that, the 1st appellant stated in his defense that a search was done at his home and they never found any article suspected to have been used in the aggravated robbery. That PW10 testified that they recovered a new motor cycle registration UAE357R from the 1st appellant's home but the said motorcycle was not connected to the robbery in any way.

In addition, that there was no corroboration of the evidence of PW1 when she said that she brought food to the security guard and the food was first taken away from her and a substance added. That PW1 did not see what substance or if any substance was added to the food. The offence of aggravated robbery was not proved to the required standard by the prosecution. That the evidence of PW5, PW6, PW8, PW9, PW10, PW11 and PW12 which was largely relating to print-outs did not corroborate the evidence of PW1 as far as connecting the 1st appellant to the robbery. That PW5 testified that in his analysis of all the print outs, there was no contact between Manina and Odongo, there was no call between Odong and Onekalit and no call between Manina and Jenifer Ronyero.

According to counsel, PEX10, the print-out for PW1's call log does not show that PW1 communicated with the 1st appellant.

In the alternative, counsel submitted that the trial Judge sentenced the 1st appellant to a harsh and excessive sentence of 31 years and 4 months yet he had spent 3 years and 8 months on remand. In addition, he had 4 children and 7 dependants and was the sole breadwinner of his family and was very remorseful. Mr. Manzi relied on the case of ***Kajura Kiiza & another Vs Uganda,*** *Court of Appeal Criminal Appeal No. 136 of 2009* in which this court imposed a sentence of 10 years for aggravated robbery and ***Aliganyira Richard Vs Uganda,*** *Court of Appeal Criminal Appeal No. 19 of 2005* in which this Court reduced the death sentence to 15 years for aggravated robbery. He proposed a sentence of 10 years as an appropriate one.

Ms. Wakabala learned counsel for the 2nd appellant submitted on ground one that according to the evidence of PW1, she met with the

security guards at Wilfo and she took for them alcohol and they drunk and she also states that she left the place drunk on the 22nd of June 2013. Counsel submitted that there were grave inconsistencies in the evidence of PW1 and PW2. PW2 made a statement that he had worked with Wilfo for the last 12 years and A4 had been there for 3 days before 23rd June 2013. That PW1 testified that she was not on duty for 3 days because she had Malaria. That on 22nd, PW1 went to Wilfo and these people shared a meal, they drunk and then on 23rd she came back with food and drinks which allegedly was stuffed with a substance to make the guards fall asleep.

She relied on the case of ***Atugonza Tony alias Akiki and 4 others Vs Uganda,*** *Court of Appeal Criminal Appeal No. 233 of 2012* in which a witness was giving contrary evidence to save one of the accused persons but because his charge and caution statement was on record, Court was able to use the earlier statement given to convict the accused person and this Court upheld the said conviction. That PW1 while giving her testimony could have been trying to save one person at the expense of the other.

In regard to ground two, counsel argued that there was no evidence on record that the telephone number 0752427709 from the printout belongs to the 2nd appellant. In his defense, the 2nd appellant stated that at the time the offence was committed, he was in Kampala. He had got a call from UNEB to pick his documents.

In the alternative, counsel submitted that the sentence of 25 years is harsh and excessive in the circumstances of the case. Whereas the prosecution alleged that 363,393,500/= (three hundred and sixty three million three hundred and ninety three thousand five hundred shillings)

had been stolen, they only managed to prove the theft of 23,745,100/= (twenty three million seven hundred and forty five thousand one hundred shillings) which was done by tendering in the copy of the cash book. This discrepancy, in counsel's view, aggravated the sentence passed by the trial Judge yet there was no evidence to prove that 363,393,500/= was actually stolen. Counsel prayed court to set aside the sentence and substitute it with an appropriate one of 5 years.

Mr. Kunya learned counsel for the 3rd appellant submitted that the 3rd appellant was never identified as having been at the scene of crime by PW1. That she testified that she had never seen A1 and A3 and was seeing them for the first time in the dock. That there was no evidence from the printouts or otherwise to show that the 3rd appellant ever participated in the robbery. Regarding the vehicle that the police officers recovered from his home, counsel submitted that, there was no evidence to show that it belonged to or was bought by the 3rd appellant. That the car belonged to his wife and could not connect him to the scene of the crime. That whereas the trial Judge found that this was a car which was from the proceeds of the alleged robbery, there was no evidence to support that finding.

He also submitted that the 21 years 4 months imprisonment meted against the appellant was manifestly harsh and excessive. He prayed that the appeal be allowed and the conviction be quashed and sentence be set aside.

Submissions of the respondent

Ms. Adubango submitted that the evidence of PW1 did not have any contradictions or falsehoods and that the trial Judge correctly relied on it and indeed arrived at a correct finding by convicting the appellants.

That PW1 gave an elaborate and detailed explanation of how this robbery was well executed and planned by the 1st and 2nd appellants. That court can convict on uncorroborated evidence of an accomplice witness, however the practice is that court seeks corroboration. That in this instant case, there was sufficient corroboration of the evidence of PW1.

Counsel submitted that, the evidence of PW6 regarding the 3rd appellant was to the effect that when his house was searched two sim cards were recovered and those two sim cards were found to have communicated to one Mpoza who had also communicated with PW1.

In regard to the sentences, counsel submitted that this is an offense that carries a maximum penalty of death and the sentences that were meted out to the various appellants were appropriate.

Consideration of the appeal

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See ***Pandya v R,*** *[1957] EA p.336* and ***Kifamunte v Uganda,*** *Supreme Court Criminal Appeal No. 10 of 1997* and ***Bogere Moses v Uganda,*** *Supreme Court Criminal Appeal No. 1 of 1997.* In the latter case, the Supreme Court held that;

"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court

must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

We have kept these principles in mind in resolving this appeal.

To prove the offence of Aggravated Robbery, the prosecution has to prove the following elements of the offence:-

1. There was theft of property.
2. Use of actual violence at, before or after the theft or that the accused caused grievous harm to the complainant.
3. The assailants were armed with a deadly weapon before, during or after the theft.
4. The accused participated in the robbery.

In determining if the above elements have been proved, court has to bear in mind certain established principles of law, namely: - that the burden of proof is on the prosecution to prove all the elements of the offence beyond all reasonable doubt; The burden never shifts save in a few cases provided for by the law; Even where the accused sets up a defense, it is still upon the prosecution to prove that nonetheless, the offence was committed.

We shall proceed to re-evaluate the evidence on record for the offence of aggravated robbery in relation to all the three appellants. We must note that the grounds of appeal of all the appellants, even though filed differently, are more or less the same.

To prove the 1st ingredient, the prosecution relied on the evidence of PW1 who was formerly A5. PW1 testified that on 22nd June 2013, the 1st appellant together with another unidentified person came to her and

convinced her to participate in a robbery. That the 1st appellant advised her to buy alcohol and take to the security guard at UWMFO, the place where the robbery would take place. That the 1st appellant and his colleagues bought food, put an unidentified substance in the food and gave it to her to give to the security guards. That after eating the food, they fell unconscious and she removed the keys from PW2's pocket and opened the rear gate. That the 1st appellant and his colleagues entered and stole money. That when PW1 threatened to report the appellants, she was given 300,000/= and promised to be taken to Sudan for safety.

PW2 testified that PW1 brought food for A3 and they all ate after which he fell unconscious and when he regained consciousness, he was at the police station.

PW3 testified that at the time the offence was committed he was the finance officer at UWMFO and was responsible for balancing the money and keeping it in a safe. That UWMFO was a co-operative savings society for giving loans to members. That on that day, he had left 339,648,400/= in the safe and 23,745,100/= which was not confirmed yet. That on 24th June when he reported to work early morning, the endorsement forms were found scattered on the floor and the safe had also been opened. The cash book entries were exhibited and marked 'P1'.

From the evidence on record, we note that the prosecution did not produce any photographic evidence of the scene of crime, the safe or an auditor's report to show that the theft actually occurred. All the police officers who testified in court mainly dealt with tracking of the phone numbers of the appellants. PW5 was the police officer who tracked the phone numbers of the appellants using PW1's phone

number from which he obtained a telephone printout. PW6 was a police officer working in Jinja but attached to flying squad. He also investigated the tracking of the phone numbers of the appellants after the offence had been committed.

PW7 was the LC secretary in Salaama parish where the 3rd appellant was residing. PW7 led the officers who carried out a search of his house and arrested him thereafter. PW9 is a police officer to whom the Toyota Raum got from the 3rd appellant's house was given as an exhibit. He was instructed by the commandant to take the vehicle to Gulu Police Station as an exhibit.

It is not clear to us if the management of UWMFO reported the robbery to police immediately they found out about it. Under normal circumstances, the police should have gone to the scene of crime before it was tampered with to ascertain if in fact there was a robbery. The evidence of PW1 which was relied on by the trial Judge to prove theft did not specifically show that there was theft. PW1's evidence only shows that the 1st appellant together with others entered into the premises of UWMFO. She testified on page 23 of the record that;

> *"...A1 instructed me to open the behind gate which I did. Five of them then entered the premises. It was A1 and other four I couldn't recognize. They were holding little like sticks. I told them I was afraid and begged them to let me go away. I then heard a bang on the behind side of the building. They had already broken into the said building. They instructed that if I was leaving I should take the utensils I had brought the food in. I did pick the utensils but left the waragi behind..."*

From the above excerpt, PW1 did not witness the robbery take place but only saw the 1st appellant together with others enter the premises. PW3 testified that the safe had been hammered however there was no photographic evidence of this and there was no evidence that when PW1 entered the premises, he had a hammer. PW1 testified that they had "little like sticks". Theft occurs when a person fraudulently and with intent to deprive the owner of a thing capable of being stolen, takes that thing from the owner without a claim of right. See **Section 254 (1) of the Penal Code Act.** We therefore find that the ingredient of theft was not proved by the prosecution to the required standard.

The prosecution had to prove that there was use or threat of actual violence at the stealing or immediately before or immediately after to any person or property with the intention to obtain or retain the thing stolen. Under section 286 (3) of the Penal Code Act, aggravation includes use of any substance and in subsection 3 (b), the substance is defined as a substance intended to render the victim of the offence unconscious. **Section 3** of the **Penal Code (Amendment) Act No. 8 of 2007** defines deadly weapon. It states;

> *"(3) In subsection (2) "deadly weapon" includes—*
>
> *(a) (i) an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument;*
>
> *(ii) any substance,*
>
> *which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm; and*

(b) any substance intended to render the victim of the offence unconscious." (emphasis added).

The prosecution argued that the guards who were guarding the premises where the property stolen was kept were given a substance intended to render the victim of the offence unconscious. The 1st problem encountered by the prosecution is that no substance was proved in evidence through analysis by laboratory or other forensic means. The evidence only discloses that the guards were given food and alcoholic drinks and thereafter, they fell asleep. The guards were not examined or their samples of blood taken to establish what substance they took, if any. Secondly, no witness testified to have seen anybody put substance in the food or drinks to render the victims unconscious.

There is therefore no evidence of what was in the food or drink to reach a conclusion that a substance that can render someone unconscious was used. It thus follows that the element of the offence of aggravated robbery of use of a substance at, immediately before or at the time of stealing could not be established. The court therefore had no evidence to resolve the issue of whether the guards fell asleep on account of having taken alcohol or of having been given a substance to render them unconscious.

From the above, we find that the learned trial Judge erred in law to find that the appellants had committed aggravated robbery by administering a substance on the victims which substance was intended to render them unconscious. Therefore, the 2nd ingredient of the offence of aggravated robbery was also not proved by the prosecution.

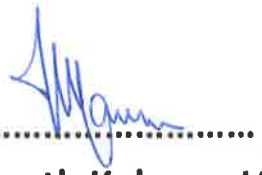
An appellate court, in our view, must establish whether the trial court considered the totality of evidence to determine whether essential elements of a crime have been proved beyond reasonable doubt. The test applicable was well stated persuasively in the famous South African case of ***DPP VS Oscar Leonard Carl Pistorious,*** *Appeal No. 96 of 2015.*

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence."

Having found that two of the essential ingredients of the offence of aggravated robbery, namely: theft and aggravation, were not proved by the prosecution, the offence of aggravated robbery was not proved against the appellants. We thus find no reason to proceed to the 4th ingredient of the offence which is participation of the accused. Before we take leave of this matter, we note that the way the police carried out its investigations left a lot to be desired. PW1, the main prosecution witness, only testified to have had close contact with the 1st appellant. She could not recognize the 3rd appellant at all and also, the telephone print-outs produced in evidence did not connect her in anyway with the 3rd appellant.

The appeal therefore succeeds. The convictions are quashed and sentences of the trial court are set aside. The appellants are hereby set free unless held on other lawful charges.

Dated at Arua this ..... day of 2019



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Hon. Justice Kenneth Kakuru, JA

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Hon. Justice Ezekiel Muhanguzi, JA

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Hon. Justice Christopher Madrama, JA