THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 278 OF 2017

(Arising from High Court Criminal Session Case No. 0140 of 2016)

1. MAYINJA PETER
2. DDAMBA FRANCIS
3. MUGERWA HAMIS
4. SSEGUJJA MUHAMMED
5. LUKWAGO YASIN
6. MBUGGA ISAAC
7. LUKYAMUZI AHMED
8. No. 45843 PC. BAZIBU YUSUF :::::::::::::::::::: APPELLANTS

AND

UGANDA :: RESPONDENT

CORAM: HON. JUSTICE F.M.S EGONDA NTENDE, JA
HON. JUSTICE CHEBORION BARISHAKI, JA
HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF COURT

The 1st appellant was indicted and tried together with 7 others and all were convicted of the offence of Aggravated Robbery contrary to sections 285 and 286 of the Penal Code Act and sentenced to 28 years imprisonment respectively. The appellants filed appeals against both conviction and sentence. A8 No. 45843 PC. Bazibu Yusuf represented by Mr. Sewankambo on private brief filed a separate memorandum of Appeal under Criminal Appeal 278 of 2017, while A1 to A7

represented by Mr. Kunya on state brief filed a joint memorandum of Appeal under Criminal Appeal 273 of 2017.

In their memorandum of appeal, A1 to A7 raised the following grounds;

1. The learned trial Judge erred in law and fact in convicting the appellants without proof of the alleged stolen money.
2. The learned trial Judge erred in law and fact in convicting the appellants without proof of their participation in the alleged offence.
3. The learned trial Judge misdirected himself as regards the law and application of the doctrine of common intention.
4. The learned trial Judge erred in law and fact when he passed manifestly harsh and excessive sentences against the appellants.

In his memorandum of appeal, A8 raised the following grounds of appeal;

1. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thus came to a wrong decision that the appellant participated in the commission of the offence.
2. The learned trial Judge erred in law and fact when he was biased against the appellant and thus based his conviction on unsupported evidence that the appellant was a deserter from police and a leader of the group called Young-Stars Expendables in Kampala.
3. The learned trial Judge erred in law by awarding the appellant an excessive sentence of 28 years imprisonment.

At the commencement of trial, Mr. Sewankambo learned counsel for A8 applied for consolidation of both appeals under R. 63 of the Court of Appeal Rules because the appeals are premised on the same facts and arose from a joint trial of the appellants. Mr. Kunya learned counsel for A1 to A7, and Ms. Gladays Nyanzi A/DPP for the respondent had no objection to the consolidation. Consequently court allowed and ordered the consolidation of the two appeals.

Further to this development, Ms. Nyanzi for the DPP. conceded to the appeals by A2 to A8 and only opposed the appeal by A1. In the premises, court allowed the appeals by A2 to A8 inclusive, quashed their convictions and set aside the respective sentences. They were released forthwith. This judgment is therefore in respect of A1 Mayinja Peter alone.

Background

The brief facts of this case are that the appellant was indicted for the offence of aggravated robbery. It was alleged that on 26th April 2015, the victim Muchezi Ronald who was an importer of mosquito nets from China left Kampala with his bag containing 14,000,000/= and during the course of the robbery used deadly weapons to wit a panga and knives. He was travelling on a boda boda at Masajja when he met a group of boys armed with pangas, knives and iron bars and they ordered the motor cycle rider to stop and surrender the items. The victim tried to pull out a phone from his pocket and one of the thugs cut him on the head with a panga and he fell down. They beat up the motorcyclist and grabbed the bag. The cyclist wrestled the appellant while the victim raised an alarm which attracted nearby residents who found the appellant at the scene.

Appellant's submissions

At the hearing of the appeal, counsel for the appellant applied to amend the memorandum of appeal under Rule 43 (1) and (3) a of the Judicature (Court of Appeal Rules) Directions to delete the other appellants and proceed with Mayinja Peter's appeal only. He also abandoned ground three of the memorandum of appeal. The application was granted.

It was submitted for the appellant that there was no evidence to prove that the money was stolen. The victim did not testify and there was no police statement on the record. There was no evidence led at the

trial to confirm that the complainant had money which was stolen by the appellant. There was also no evidence that the appellant was found with a dangerous object. Whereas some witnesses testified that he was found with a knife at the time of his arrest, there was no search certificate to that effect. Failure by the prosecution to prove the ingredient regarding the stolen property left the prosecution case hanging.

Counsel relied on the case of **Odongo David Livingstone and ors Vs Uganda Criminal Appeal No. 0079 of 2017** in which it was held that where the prosecution fails to prove the elements of the offense of aggravated robbery, conviction will fail. Counsel submitted that whereas the appellant was at the scene of the crime, he did not participate in beating the victim but only switched off the motorcycle lights.

Finally, counsel argued that the sentence imposed of 28 years imprisonment on the appellant was harsh and excessive in the circumstances of the case. The appellant was a first time offender and had spent two years on remand. He prayed for a 10 year sentence as appropriate.

Respondent's submissions

In reply, counsel for the respondent opposed the appeal and submitted that the evidence of the prosecution witnesses placed the appellant at the scene of the crime and proved his participation in the commission of the offence. The existence of money was proved by the prosecution because the prosecution witness had an opportunity of speaking with the deceased who told them there was money in the bag. PW4 and PW5 testified about the existence of money. The appellant was placed at the scene of the crime by all prosecution witnesses and he cannot say he did not participate in the commission of the offence.

With regard to the sentence passed by the trial court, counsel submitted that the trial Judge put into consideration all the aggravating and mitigating factors and passed an appropriate

sentence of 28 years imprisonment. She prayed that the conviction and sentence be upheld by this court.

Consideration of the appeal

We are mindful of the duty of a first appellate court, which is to re-appraise the evidence as a whole and subject it to a fresh and exhaustive scrutiny, weighing conflicting evidence and drawing its own inferences and conclusion. This duty is provided for in **Rule 30(I) (a)** of the **Rules of this Court**. The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. Furthermore, a first appellate court has to bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowances in that regard **(Selle and Another v Associated Motor Boat Company [1968] EA 123**).

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

To prove the offence of aggravated robbery, the prosecution must prove beyond reasonable doubt the following ingredients:-

1. That there was theft.
2. That it was accompanied with violence.
3. That a deadly weapon was used.
4. The participation of the accused persons.

It is trite law that all the above ingredients ought to be proved beyond reasonable doubt since all the ingredients go hand in hand. Therefore failure to prove one is fatal to the prosecution case: See **Walakira Abas & Others v Uganda: Supreme Court; Criminal Appeal No. 25 of 2002 (Unreported).**

We shall first deal with the first ingredient of whether there was theft. PW1 testified that when he was attacked together with the victim by a gang of thieves, one of them hit the victim with a metallic object and he shouted that they had stolen his 14,000,000/=. PW1 held the appellant tight and the others fled away. Other residents came to their rescue and beat up the appellant while he kept shouting that they should not kill him because Bazibu Peter is the one who has the

bag. PW1 had seen the bag that the victim had while they were riding on the bicycle.

Unfortunately, the victim was not able to testify because he was hospitalized and he later died. PW1 was the only eye witness who testified in court that after the robbery, the victim kept shouting that they had taken his 14,000,000/= which was in the bag. The evidence of the theft was not challenged by the defence in cross examination.

Theft is the generic term for all crimes in which a person intentionally and fraudulently takes personal property of another without permission or consent and with the intent to convert it to the taker's use. Theft is also defined as the physical removal of an object that is capable of being stolen without the consent of the owner and with the intention of depriving the owner of it permanently. The evidence of PW1 showed that the victim had a bag with him which was stolen during the robbery. Whether the bag had 14,000,000/= in it or not does not make it a lesser offence. The defence witnesses did not testify to the fact that the 14,000,000/= was never stolen from the victim. In our view, the ingredient of theft was proved by the prosecution against the appellant.

2nd and 3rd ingredients: whether the theft was accompanied by violence; whether there was use of a deadly weapon.

The evidence of PW1 showed that one of the assailants had a metal object which was used to hit the victim on the head and blood started oozing out. PW1, PW4 and PW5 all testified to the fact that the victim was seriously injured with knives and iron bars. The victim died on 8th August 2016 in Mulago Hospital and the death certificate was exhibited as Exh. P.14.

There is also a medical report exhibited as Exh. P.7 and it showed that the victim had deep cut wounds on the scalp measuring 2cm x 6 cm.

A deadly weapon was defined in **Wasajja v Uganda (1975) EA 181** as;

"The vital consideration is that the weapon must be shown to be deadly in the sense of *"capable of causing death."*

We thus find that the injuries were caused with a sharp edged object and the injuries were classified as grievous harm. The iron bar was recovered at the scene of the crime and a knife was found with the appellant when he was arrested. These were deadly weapons capable of causing death. The 2nd and 3rd ingredients of the offence of aggravated robbery was also proved by the prosecution.

The appellant was arrested at the scene of the crime when an alarm was raised by PW1 while holding the appellant and residents came to their rescue. The appellant was caught in the act. We therefore find that the appellant participated in the offence and that all the ingredients of the offence of aggravated robbery were proved by the prosecution. We accordingly uphold the conviction of the appellant.

The last ground of appeal faulted the learned trial Judge for passing a harsh and excessive sentence in the circumstances of the case.

It is trite law that an appellate court should not interfere with a sentence imposed by a trial court where the trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial court ignored to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle (see **Kyewalabye Bernard v. Uganda Supreme Court Criminal Appeal No. 143 of 2001).** It does not matter that this Court would have given a different sentence if it had been the one trying the appellant (see **Ogalo s/o Owoura v. R (1954) 24 EACA 270).**

Counsel for the appellant argued that the trial court did not consider both the aggravating and mitigating factors of the case.

It is an important principle of sentencing that there should be uniformity and consistency in sentencing persons charged of similar offences. Objective 3(e) of the sentencing guidelines is to the effect

that the guidelines are to provide a mechanism that will promote uniformity, consistency and transparency in sentencing.

In **Pte Kusemererwa and another vs Uganda COA Criminal Appeal No. 83 of 2010**, the appellants were convicted of aggravated robbery and the sentence of 20 years imprisonment was set aside and substitute with 13 years' imprisonment.

Likewise, in **Baingana Geofrey and 3 others Vs Uganda COA Criminal Appeal No. 29 of 2013**, the sentence of 35 years imprisonment for aggravated robbery was set aside and substituted with a sentence of 20 years imprisonment.

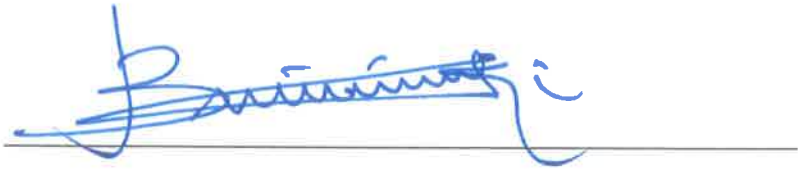
In the present case, we note that there was loss of life due to the grave injuries sustained during the robbery attack on the victim. However, the sentence of 28 years imprisonment is, in our view, on the higher note considering the principle of uniformity and consistency of sentences. We accordingly set it aside. After taking into account both the mitigating and aggravating factors in this case, we under S.11 of the Judicature Act sentence the appellant afresh to 20 years' imprisonment which we consider shall meet the ends of justice in this case.

The appeal against conviction is accordingly dismissed and the one against sentence is allowed as decided above.

We so order.

Dated this 13th of September 2019

Hon. Justice F.M.S Egonda Ntende, JA



Hon. Justice Cheborion Barishaki, JA

Hon. Justice Stephen Musota, JA