THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0220 OF 2015
(Arising from High Court (Criminal Division) Criminal Case No. 0076 of 2012)

SSEKITOLEKO EDWARD :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala (Criminal Division) before Alividza, J. delivered on 4th June, 2015 in Criminal Session Case 0076 of 2012)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE HELLEN OBURA, JA
HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court (Alividza, J.), in which the appellant was convicted of Aggravated Robbery contrary to sections 285 and 286 (2) of the Penal Code Act, Cap.120, and accordingly sentenced to serve a term of imprisonment of 20 years. He was also ordered to pay compensation to the complainant of Shs 25,000,000/= (Twenty Five Million Shillings) being the value of the motor vehicle which he allegedly stole from the said complainant.

Brief Background

The appellant was duly charged, committed and tried on an indictment containing the offence of Aggravated Robbery contrary to sections 285 and 286 (2) of the Penal Code Act, Cap. 120. The relevant facts as accepted by the learned trial Judge were that:

The complainant, one Katamanywa Ismail owned a vehicle operating in Bulenga which was used in the business of ferrying sand to building sites. The said vehicle was ordinarily operated by the complainant's employee, one

Kagame Fred who also had a turn boy. On 3rd June, 2011, the said driver and his turn boy were approached by someone who wanted his sand to be transported to a building site in Kalitunsi, Mutundwe, Rubaga division. Along the way at Nalukolongo Fuelex Petrol Station, the turn boy was left behind and was asked to link up with another unidentified man to go and collect the money used for hire.

Apparently, the turn boy met the man and was taken to a house in Kireka where after the mystery man disappeared. Meanwhile, upon reaching the building site in Mutundwe, the driver was assailed, by being hit on the head and left for dead. Subsequently, the driver's assailant (who the learned trial Judge found to be the appellant) disappeared with the vehicle which had been used to ferry the sand and the same was never recovered.

Thereafter, a local resident discovered the driver lying unconscious at the building site and informed the area Local Council 1 Chairman who arranged for him to be taken to police and subsequently to hospital for treatment. Consequently, the appellant was arrested in connection with this case and tried in the High Court. On the basis of the above facts, the learned trial Judge convicted the appellant as indicted. Being dissatisfied with the decision of the learned trial Judge, the appellant lodged this appeal in this Court on grounds which were formulated as follows in an amended Memorandum of appeal dated 22nd February, 2019:

"1. **The learned Judge erred in law and fact when she failed to appraise uncorroborated illegal evidence of theories occasioning a miscarriage of justice thereby wrongly convicted appellant of aggravatedv robbery of an un exhibited motor vehicle UAP 103X in absence of proof of ownership. (sic)**

2. **The learned Judge erred in law and fact by passing orer that the Appellant pays shs. 25,000,000/= to the complainant of the vehicle. (sic)**

3. **The learned Judge erred in law and fact when she imposed upon the Appellant harsh excessive custodial imprisonment of 24 years. (sic)"**

Representation

At the hearing of the appeal, Mr. Rukundo M Seth Henry, learned Counsel represented the appellant, while Ms. Jacquelyn Okui, learned Senior State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. This Court granted permission to the parties to file written submissions which were accordingly adopted.

Appellant's case

On ground 1, counsel for the appellant faulted the learned trial Judge for proceeding with a trial based on a defective indictment which did not disclose the name of the person who was robbed. We shall immediately dismiss this contention because **section 22** of the **Trial on Indictment Act, Cap. 23** provides that:

> **"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In the present case, the particulars of the offence disclosed that:

> **"Sekitoleko Edward and others still at large on the 3rd day of June 2011 at Kitauluzi Zone, Rubaga Division in the Kampala District robbed motor vehicle Reg. No. UAP 103X Isuzu Elf valued at 27,500,000/= (twenty seven million, five hundred thousand shilling the property of Katamanywa Ismail."**

In our view, the above particulars sufficiently disclosed the nature of the offence. Therefore, the assertions by counsel for the appellant that the indictment was defective as to the particulars have no merit and we dismiss them forthwith.

Further still, while submitting in support of ground 1, counsel for the appellant faulted the learned trial Judge for failure to properly appraise the evidence on record which occasioned a miscarriage of justice making the following contentions:

a) No evidence was adduced for the prosecution to prove that Motor Vehicle No. UAP 103X was stolen by the appellant with the learned trial judge filling the gaps in the evidence with hypotheses which never proved the offence beyond reasonable doubt.

b) No deadly weapon was recovered from the scene of crime nor was any such weapon subsequently exhibited in the trial Court.

c) No evidence was adduced for the prosecution to prove that the victim suffered grievous harm.

d) The appellant's involvement in the offence in question was not brought out by the prosecution evidence.

In support of the above contentions, counsel pointed out that PW1 Katamanywa Ismail, the complainant and the owner of the vehicle in issue, had failed to prove ownership of the vehicle and the log book presented in evidence by the prosecution indicated that the relevant vehicle was owned by Mahad Trading Company Ltd. He further pointed out that PW2 Kagame Fred, the victim had failed to positively identify the appellant saying during his examination-in-chief at page 29 that, "I know him by face but I cant (sic) remember his face."

Furthermore, counsel for the appellant pointed out that no deadly weapon was recovered from the scene of crime, PW4 Kabali Geoffrey who had visited the crime scene only testifying that he found sand for plaster, car tyre marks and two phones at the scene of crime. In addition, PW5 an Assistant Inspector of Police testified that he went to the scene of crime and found the victim (PW2) with stab wounds and he helped to take him to Mulago Hospital for treatment. Counsel asserted that on the weight of the evidence alluded to above the learned trial Judge should have found that the offence of aggravated robbery had not been proven beyond reasonable doubt.

In further support of ground 1, counsel made a lengthy, albeit, incoherent attack on the testimony of PW2 (the victim) contending that he was an

utterly unreliable witness and as such it was unsafe to sustain the appellant's conviction based on the testimony of PW2.

On ground 2, counsel faulted the learned trial Judge for passing an illegal order of compensation against the appellant. While substantiating on the illegal order, counsel stated, firstly, that the particulars of the offence did not indicate who the victim of the offence in issue was. Secondly, that there was no medical evidence of injury adduced by the prosecution to prove that the complainant was injured. Thirdly, that the quantum of compensation of Shs. 25,000,000/= was not proven. For the foregoing reasons counsel contended that the order of compensation imposed by the learned trial Judge was arbitrarily made and prayed to this court to set the said compensation order aside.

On ground 3, counsel submitted that the sentence imposed on the appellant by the learned trial Judge was harsh and excessive. He contended that in the circumstances as the appellant was a first offender, was HIV positive on HIV chronic care, and had developed a urethral stricture that culminated into failure to pass urine necessitating the use of a catheter, the sentence imposed by the learned trial Judge was not justified. He prayed to this Court to deem it fit to reduce the sentence of 20 years imprisonment which was imposed by the learned trial Judge.

Respondent's case.

The learned Senior State Attorney for the respondent opposed the appeal and supported the conviction and sentence imposed upon the appellant by the learned trial Judge. On ground 1, she submitted that the circumstantial evidence adduced for the prosecution tended to prove the appellant's participation in the commission of the offence. According to counsel, it had been proven that the appellant had boarded the stolen vehicle with PW2, the driver, travelling with him up to the scene of crime and while at the scene of crime the appellant had assaulted PW2. She cited **Kyeyune Joseph vs Uganda, Supreme Court Criminal Appeal No. 48 of 2000,** for the proposition that in a case depending exclusively upon circumstantial evidence, the court must before deciding upon a conviction be satisfied that

the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and before drawing the inference of the accused's guilt from circumstantial evidence, court has to be sure that there are no co-existing circumstances that would weaken that inference. In reference to the appellant, counsel submitted that the inculpatory facts in this case were incompatible with his innocence and as a result, he was rightly convicted.

Counsel further submitted that the injuries sustained by the victim, namely open wounds which rendered him unconscious implied that he had either been stabbed or cut by a deadly weapon. In view of the above analysis, counsel asked this Court to dismiss ground 1.

On ground 2, counsel supported the order of compensation imposed by the learned trial Judge contending that it was passed in accordance with Section 285 (4) of the Penal Code Act, Cap. 120. In counsel's view, the Court could award such compensation as was sufficient in the opinion of the court under the foregoing section. She prayed that ground 2 fails.

In supporting the sentence meted on the appellant by the learned trial Judge, counsel submitted that the said sentence was passed in accordance with the law and after the relevant aggravating and mitigating factors had been taken into account. Moreover, in counsel's view, the sentence of 20 years was within the sentencing range for the offence of aggravated robbery. She then prayed that this Court upholds the sentence imposed by the learned trial Judge.

Resolution of the Court.

We have carefully considered the submissions of counsel for either side, the court record as well as the law and authorities cited and those not cited which are relevant to the determination of this appeal. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with our own inferences. **See Rule 30 (1) of the Rules of this Court and Kifamunte Henry v. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.**

We shall proceed to determine this appeal keeping the above principles in mind.

Ground 1

The submissions on this ground relate to the sufficiency of the evidence on record and whether that evidence could support the conviction of the appellant for the offence of aggravated robbery. The offence of aggravated robbery is provided for under **sections 285** and **286 (2)** of the **Penal Code Act, Cap. 120** which sections are reproduced below:

> **"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."**

Section 286 (2) of the same Act provides that:

> **"(2) Notwithstanding subsection (1) (b), where at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death."**

Our reading of the above provisions reveals that the ingredients of the offence of aggravated robbery, which have to be proved beyond reasonable doubt before a decision is made to convict the accused person are that:

> **"1. There was theft of a thing capable of being stolen.**
>
> **2. Actual violence was used by the offender in the course of commission of the theft in issue.**
>
> **3. The offender used or threatened to use a deadly weapon or caused death or grievous harm to the victim in the course of commission of the theft in issue.**
>
> **4. The accused person was the offender."**

Before reaching a decision on whether the appellant's conviction can be sustained, we shall proceed to re-evaluate the evidence on record in relation to the above ingredients. Reading the 1st and 4th ingredients together, the prosecution had to show that the vehicle in issue was stolen by the appellant. On the 1st ingredient, PW1 Katamanywa Isma testified at page 16 of the record that his vehicle, of the make of Isuzu Elf Tipper plate number UAP 103 X was stolen from PW2 Kagame Fred whom he employed as its driver. PW2 corroborated PW1's evidence on the point when he testified that the vehicle in issue was taken after he was assailed at the crime scene. In our view, that evidence brought out ingredient one and it was unnecessary for PW1 to bring receipts of ownership of the said vehicle to Court. Therefore counsel for the appellant's assertions in that regard are rejected.

On whether it was the appellant who stole the vehicle in issue, we observe that the vehicle in issue was never recovered. None of the prosecution witnesses testified about its fate. We further observe that this was a curious case where the Investigating Officer was not brought as a prosecution witness which left a huge gap in the prosecution case. As it stands, no one saw the appellant making off with the vehicle, not even PW2 (the victim). In the relevant testimony at pages 28 to 30 of the record, PW2 testified that:

> **"Florence: Do you know the accused person?**
>
> **PW2: I know him.**
>
> **Florence: Who is he? How do you know him?**
>
> **PW2: I know him by face but I can't remember his face? (sic)**
>
> **Florence: How do you know him?**
>
> **PW2: He came and hired me.**
>
> **Florence: When was that?**
>
> **PW2: It was in June I have forgotten the day.**
>
> **Florence: Go ahead what happened?**
>
> **PW2: I used to transport sand, I was seated in my car Isuzu Elf it was UAP 103X.**
>
> **Florence: So what happened?**

PW2: He came and we loaded the sand he took me to Mutundwe in an unfurnished structure at around 6:30 pm we loaded the sand and we took it to Mutundwe when I reached the house after unloading I reversed he came thinking he wanted to tell me something, he hit me at the back of my head and I became unconscious.

Florence: What did he use?

PW2: I didn't get to know what it was.

The next thing I knew I was in Mengo Hospital. That is all."

Understandably, considering the fatal blow to PW2's head (a delicate part of his body), he could hardly reconstruct the events of the day. Being mindful of the burden on the prosecution to prove the case against the appellant to the requisite standard, namely, beyond reasonable doubt which was discussed by **Denning, J.** in the oft-cited case of **Miller vs. Minister of Pensions [1947] 2 ALLER 371** where he observed that:

> **"The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."**

Counsel for the respondent asked this Court to find that there was circumstantial evidence pinning the appellant to the theft of the vehicle in issue. She contended there was evidence which established that the appellant had assaulted PW2, who was driving the vehicle, shortly before it was stolen. It was counsel's view, that, in the circumstances, it was rightly concluded by the trial Court and it ought to be the conclusion of this court, too, that the appellant must have stolen the vehicle in issue.

She suggested that there was circumstantial evidence from which the above facts would be inferred. We observe that circumstantial evidence is evidence

based on inference and not on personal knowledge or observation. **(See: Black's Law Dictionary, 8th Edition)**.

According to the **Halsbury's Laws of England, Volume 11 (2) (2006 Reissue)**:

> **"Circumstantial evidence is evidence of one or more facts (such as motive, opportunity, or fingerprints left at or near the scene of the crime) from which other facts (which may be the facts in issue, or secondary or collateral facts) may then be inferred or deduced."**

Before circumstantial evidence must be relied on, the Court must be satisfied that some well-known principles, which were laid down in **Simoni Musoke vs Republic [1958] 1 EA 715**, have been satisfied. In that case the Court held:

> **"...in case depending exclusively upon circumstantial evidence, he (the learned trial Judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.**
>
> **...**
>
> **As it is put in Taylor on Evidence (11th Edn.), p. 74–**
>
> **"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."**
>
> **...**
>
> **And as was stated in the judgment of the Privy Council in Teper v. R. (2), [1952] A.C. 480 at p. 489 as follows:**
>
> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

In the present circumstances, there was evidence of opportunity, because the appellant had the opportunity to steal the motor vehicle after he assaulted PW2. Indeed, when he assaulted PW2, the motor vehicle PW2 was driving, almost simultaneously disappeared. We accept the submissions of

counsel for the respondent that the necessary inference from the above stated facts was that the appellant stole the vehicle in issue, because the vehicle disappeared at almost the same time he assailed PW2.

As regards the second ingredient, whether the appellant used actual violence in the course of stealing the motor vehicle, we find that the same was proved. PW2, the victim testified that the appellant hit him on the head with a certain instrument, and he became unconscious and later woke up in a hospital. Hence, in our view, this ingredient was proved.

As regards the third ingredient, on whether a deadly weapon was used in the circumstances, we find that this was not proven. The alleged deadly weapon was not tendered in court by the prosecution, and none of the witnesses were sure about what it was. We note that where the alleged weapon is not produced before the trial Court, a conviction for Aggravated Robbery should not be entered, but rather a conviction of Simple Robbery would be entered where all the other ingredients have been proved. **See: Wasaja vs. Uganda [1975] EA 181; Birumba & Another vs. Uganda, Supreme Court Criminal Appeal No. 0032 of 1989**. Therefore, the conviction for aggravated robbery cannot be sustained against the appellant because the weapon he used when he stole the motor vehicle in issue, was not produced before court, for it to ascertain that it was a deadly weapon.

Accordingly, we substitute a conviction of the lesser offence of Simple Robbery contrary to **Section 285 & 286 (1) (b) of the Penal Code, Cap. 120** for Aggravated Robbery contrary to **Section 285 & 286 (2)** of the **Penal Code Act, Cap. 120** by the trial Court.

Grounds 2 and 3

These two grounds relate to the Sentence and Orders which may be imposed against the appellant. Having substituted, a conviction for the offence of Simple Robbery, we shall proceed to determine an appropriate sentence and other relevant orders. We do so under Section 11 of the Judicature Act, Cap. 13, which empowers this Court in appropriate circumstances to exercise the powers of the High Court.

We note that under **section 286 (1) (b)**, the maximum sentence, which the High Court may impose for the offence of Simple Robbery is life imprisonment. It is now well established that prior to sentencing, the Court must take into consideration the relevant mitigating and aggravating factors.

The relevant mitigating factors, which were submitted for the appellant in the trial Court were:

He was a first offender. He was in a poor medical condition which required a lenient sentence, as he was HIV positive, on HIV chronic care, and he had developed a urethral stricture that culminated into failure to pass urine necessitating the use of a catheter. The appellant was capable of reforming, and indeed had reformed as there was a letter of recommendation from the prison officers. The appellant was the primary caregiver for his young family of a wife and very young children. The appellant had also suffered gunshot wounds, sustained during the course of his arrest.

The aggravating factors were:

The offence of which the appellant was convicted was grave in nature, and attracted life imprisonment as the maximum sentence. The appellant used violence against the victim.

We further note that there is a requirement to maintain consistency in sentencing, which is achieved by taking into consideration the sentences previously imposed by the Courts in cases involving similar facts. The range of sentences for Simple Robbery is from 6 years to 14 years, as the decided cases below will show:

In **Kyamanywa Simon vs. Uganda, Court of Appeal Criminal Appeal No. 5 of 1998**, this Court imposed a sentence of 6 years imprisonment on the appellant, after it had substituted his conviction of Simple Robbery by the High Court, for one of Aggravated Robbery.

In **Adam Owonda vs. Uganda, Supreme Court Criminal Appeal No. 008 of 1994**, the Supreme Court confirmed a sentence of 8 years imprisonment, for an appellant who had been indicted in the High Court of

the offence of Aggravated Robbery but was convicted of the lesser offence of Simple Robbery.

In the **Katuku case (supra)**, the appellant had forcefully broken into the house of the victim, by hitting the door of the said house with a stone, and there after robbed her of Shs. 140,000. He was convicted of Simple Robbery and sentenced to 12 years imprisonment.

In **Haruna Turyakira & 2 others vs. Uganda Court of Appeal Criminal Appeal No. 0146 of 2003**; and **Supreme Court Criminal Appeal No. 007 of 2009**, the appellants, had been charged with Aggravated Robbery, but were convicted of the lesser cognate offence of Simple Robbery, and sentenced to 14 years imprisonment. The trial Court's sentence was upheld on appeal to both the Court of Appeal and the Supreme Court.

Considering all the above factors, we find that in the circumstances, a sentence of 10 years imprisonment is appropriate for the offence of Simple Robbery. We note that no witness was called for the prosecution to testify about the date the appellant was arrested. Therefore, we shall believe his testimony that he was first arrested over the relevant offence on 17th July, 2011. The appellant had been in custody for 3 years, 11 months and 17 days while attending trial, a period we shall deduct from the sentence imposed above. Therefore, he will serve a sentence of 6 years and 13 days imprisonment from the date of his conviction on 4th June, 2015.

We have no reason to interfere with the order of compensation imposed by the trial Court against the appellant, as it was empowered to make the said order under the law. **See: Article 126 (2) (c) of the 1995 Constitution** and **Section 126 of the Trial on Indictments Act, Cap. 23.** Therefore, the compensation order imposed against the appellant by the High Court to pay Shs. 25,000,000/= to the owner of the vehicle which he stole is upheld.

The substantive grounds of this appeal, are disposed of accordingly.

We so order.

Dated at Kampala this ..... day of ..... 2020.

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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