THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CRIMINAL APPEAL NO. 57 OF 2011

Rutabingwa James :: Appellant

VERSUS

Uganda:::Respondent

Coram: Hon. Mr. Justice Remmy Kasule, JA,

Hon. Lady Justice Faith E.K. Mwondha, JA

Hon. Mr. Justice Richard Buteera, JA

JUDGMENT OF THE COURT

Introduction:

This Appeal was against conviction and sentence of the Appellant by the Honorable Justice Eldad Mwangusya dated 02.02.2011. The Appellant was convicted and sentenced to 18 years imprisonment. The grounds were as follows:

1. The learned trial Judge erred in law and fact when he failed to evaluate the entire evidence on record when convicting the Appellant.
2. The learned trial Judge erred in law and fact when he admitted the charge and caution statement.

3. In the alternative but without prejudice to the former the learned trial Judge erred in law and fact when he passed a very harsh excessive punishment of 18 years imprisonment.

Appellant prayed that:

1. The Appeal be allowed
2. In the alternative the sentence of 18 years imprisonment be reduced.

Background:

Briefly, there were two accused persons namely Rutabingwa James (A1) and Musiime Robert (A2). The two were indicted for the offence of Aggravated Robbery C/S 285 and 286(2) of the Penal Code Act. It was alleged by the prosecution that the two accused persons on the 14.03.2006 at mile 8 along Mbarara District robbed Kawoya Elvis of Yamaha Motor Cycle No. UDC 536J and at or immediately before or immediately after the said robbery used or threatened to use a deadly weapon to wit a knife on the said Kawoya Elvis.

When they were arraigned before Court, both accused persons pleaded not guilty and denied the offence. Later A_2, Musiime Robert, changed his plea to that of guilty. He was convicted on his own plea of guilty and was sentenced to twelve years imprisonment. The trial proceeded against A_1 (the Appellant). He too was convicted and sentenced to 18 years imprisonment after a full trial. He was dissatisfied with both conviction and sentence. Hence this appeal.

Legal Representation:

At the hearing the appellant was represented by Ms. Janet Nakakande. Ms. Jennifer Amumpire, Senior Attorney was for the Respondent.

Submissions:

By Appellant's Counsel:

Counsel for the appellant submitted on the 1st and 2nd grounds of appeal together. She argued that the trial Judge admitted in evidence and relied on the charge and caution statement without first subjecting it to a trial within a trial. The trial Judge did not ask the defence counsel as to whether or not he objected to the charge and caution statement. Counsel relied on the cases of **Sewankambo Francis and two others vs Uganda: Criminal Appeal No. 33 of 2001 (SC) and Kabugo Ismail vs Uganda: Criminal Appeal No. 115 of 2001 (COA)** (unreported) and invited Court to hold that the trial Judge erred in admitting and acting upon the said charge and caution statement as proper evidence.

As to inconsistencies, Counsel submitted that the trial Court ignored and treated the inconsistencies as minor, yet they were major. In respect of the date of the commission of the offence there were different versions from PW3 as to when the offence was committed whether on 03.03.2006 or 14.03.2006. The exhibits of the knife and the blood stained clothes alleged to have been used in the commission of the offence were never tendered in Court even though Court granted a 2 days adjournment to produce the said exhibits. The medical evidence did not show that there was a deadly weapon used. The trial Judge thus erred to conclude that use or threat to use a deadly weapon was proved beyond reasonable doubt. In light of the said inconsistencies it was unsafe for Court to convict on the evidence that was before Court. Counsel prayed that grounds (1) and (2) be allowed.

On the 3rd ground, Appellant's Counsel submitted that the trial Court did not consider the period the appellant was on remand as provided in **Article 23** of the Constitution because the trial Judge ought to have written ***"taking into account"*** at the beginning of

sentencing in the Judgment. She prayed that the sentence be reduced.

By Respondent's Counsel:

Counsel for the Respondent opposed the appeal. As to the admission in evidence of the charge and caution statement there was no need for the trial Court to hold a trial within a trial because, according to the Court record, Counsel who represented the Appellant at the trial clearly stated that he had no objection to the charge and caution statement being admitted in evidence. Therefore, the charge and caution statement was not objected to or challenged that it was made involuntarily.

Though there was no weapon recovered, the Court was justified to convict as the appellant's alibi had been rightly rejected. PW2 testified as to how the incident took place and the trial Court had believed him.

On the use of a deadly weapon in the commission of the offence the Court made the right finding. PW2's evidence was that the victim had been stabbed and his clothes were full of blood. The victim was then taken to hospital on 13.03.2006 at 8.30 p.m.

On the inconsistencies Counsel submitted that the trial took place 4 years after the incident and as such some inconsistencies relating to dates should be excused due to lapse of time. PW3, for example, said that he saw the appellant and his co-accused on 03.03.2006 but later he stated also the date of 14.03.2006. The inconsistencies, like that one, were not deliberate lies to Court and they did not go to the root of proving the offence which the appellant was charged of.

On the 3rd ground Counsel submitted that the trial Judge considered the period the appellant was on remand as required by the constitution. The sentence was neither harsh nor excessive.

She prayed that the appeal be dismissed and the conviction and sentence be upheld.

Consideration of the Grounds of Appeal by Court:

This is a first appeal whereby this Court is mandated to re-appraise the evidence and draw inferences of fact pursuant to **Rule 30(1)(a) of the Judicature (Court of Appeal) Rules Directions SI. No. 13-10.** It has a duty to evaluate the evidence so as to come to its own independent decision whether the trial Court's decision can be sustained or not: See: **Kifamunte Henry v Uganda CR Appeal No. 10/97 (SC) and Pandya V.R [1957] E.A 336.**

In **Kifamunte Henry v Uganda** (Supra) it was held: ***"the first appellate Court has a duty to rehear 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. When the question arises which witness is to be believed rather than another and that question turns on the manner and demeanour, the appellate Court must be guided by the impressions made on the Judge who saw the witness, but there may be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a Court in differing from the Judge even on a question of fact turning on credibility of a witness which the appellate Court has not seen".***

On the 1st and 2nd grounds, prosecution evidence was briefly as hereunder

PW2, Kawoya Levis, the victim, who was a motor-cycle boda-boda rider was attacked by the alleged passengers who had hired him to

ride them on his motor-cycle to Rugando Trading Centre on 14.03.2006 at 7.30 p.m.

The alleged passengers included Benon, A2, whom he used to see in the Trading Centre at mailo 8 stage along Mbarara-Kabale road. He did not know (A1) the appellant.

On 03.03.2006 PW3, Biryomumaiso Christopher, saw the appellant and another man at 6.00 a.m. pushing a motor cycle Reg. No. UDC 536J. The two wanted to be assisted to know where they could get fuel. He had never seen the appellant before but he said he was sure he is the one he saw on the material day pushing the motor cycle. He confirmed that the appellant is the person who was arrested in his presence.

PW4, Sunday George, said he woke up early at 6.00 a.m. on 14.03.2006 and while going to Kimuli he met PW3 who requested him to arrest the appellant as one of the people suspected of having stolen a motor cycle. He and others arrested the appellant.

PW5, Kasule Mary, the mother of the victim Kawoya Levis, **PW2,** testified that on 13.03.2009 at around 8.30 p.m. her son, **PW2,** went home crying and was losing a lot of blood. He told her that he had picked two passengers who had stabbed and robbed him of his motor cycle.

PW6, Gasasira Alice, stated on oath that she was D/ASP in Uganda Police and that on 22.03.2006 she recorded a charge and caution statement of a suspect in a Robbery case by names of Rutabingwa James, the appellant. She had cautioned the appellant to the effect that he was not being forced to say anything unless he wished to do so and that what he would state in the statement could be used as evidence against him. The appellant then voluntarily made the statement in Runyankole language which language both the witness and the appellant were conversant in. The same was afterwards read back to the appellant by the witness in Runyankole before the

appellant appended his signature thereon. The witness also counter signed.

In his defence the appellant testified on oath that on 18.03.2006 he came from Tanzania and went through the immigration system to enter Uganda. His passport was stamped and dated 18.03.2006. He had arrived in Mbarara on the same day, stayed in Zebra Guest House where his documents had been retained at the reception. At 11.00 a.m. he heard a bang at the door and when he opened, he saw policemen. He was taken to the reception and the documents which had been retained by the receptionist were given to the police officer. He was put on a vehicle and was taken to police at Mbarara. The following day he was asked if he had any problem. He explained that his documents and money had been taken. PW6 asked him if he knew how to write and also to sign. He signed knowing that he was going to be released. The appellant when shown the charge and caution statement tendered in evidence as exhibit 2A he denied that the signatures were his. He also denied having signed the said statement. He said he first saw his co-accused Musiime on 24.03.2010 in the cells before going to Court.

The learned trial Judge, properly in our view, addressed himself and the assessors that in a case of aggravated robbery there are three ingredients to be proved beyond reasonable doubt so as to secure a conviction:

1. There has to be theft,
2. Use or threat to use a deadly weapon, at or before the theft and
3. Participation of the accused

There is no doubt in our minds, and we agree with the trial Judge, that the 1st and 2nd ingredients of the charge were proved beyond reasonable doubt. The medical report showed that the victim had multiple stitched wounds having been examined three days after the attack.

PW5 stated that her son **PW2,** told her that he was stabbed and she saw him bleeding profusely. The doctor explained that because the wounds had been stitched it was not easy for him to ascertain the type of weapon used. The size of the wounds showed that the weapon used was a deadly weapon and, whatever it was, it was of such a nature that when used for offensive purposes it was likely to cause death.

Counsel for the appellant submitted that there were inconsistencies in the prosecution case as regards the date when the offence was committed. However, as far as the date was concerned, PW2 himself testified that it was 14.03.2006 at 7.30 p.m. The Police Form 3 by inference shows that the date must have been 14th since it stated that he was taken for examination on the 17.03.2006, three (3) days after the alleged incident. PW2 stated that he did not know the appellant and he never stated whether he actually recognised him at the time of the incident. It was at night at 7.30 p.m. It was not shown whether there was any light to enable him see and or recognize the appellant. He stated that he knew Musiime the co-accused who pleaded guilty to the charge as he used to see him at mailo 8 stage along Mbarara-Kabale Road.

So apart from the evidence of the victim **PW2,** the rest of the evidence as to participation of the appellant in the commission of the crime depends on the doctrine of recent possession. It is trite law that ***"where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eyewitness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eyewitness".*** See: **Bogere Moses and**

Another V. Uganda. CRIMINAL APPEAL NO. 1 OF 1997 (SC) (unreported)

According to PW5 she took to Radio West the announcements about the incident on 15.03.2006. She appealed through the announcements for assistance to trace and arrest the robbers. She also reported to police a case of robbery and the details of the motor cycle. She was still in hospital when she was told that the robbers had been arrested.

From the testimony of PW2 the motor cycle was found on 15.03.2007 near the border with Tanzania. The evidence implicating the appellant was that the appellant joined A2 (Musiime) when he was pushing the motor cycle. They were pushing it from the forest where there was no road according to (PW3).

When it became day PW3 observed blood on the motor cycle and also on the jacket which was being worn by the appellant. The appellant and the other man pushing the motor-cycle wanted to know where the petrol station was. So PW3 volunteered to take them. A taxi came and he directed them. He was joined by (PW4). He then alerted the passengers on the pick up as to his suspicion of the appellant and his other colleague. Accordingly the two men were put on the Pickup and were taken to the chairman LC III who instructed that they be escorted to the Sub-County Headquarters from where they were taken to Mbarara Police Station.

At the Mbarara Police Station the appellant revealed that they had thrown the knife and jacket used in the robbery in the forest reserve. PW3 stated that when the jacket and knife were recovered they were handed over to the police at the Sub County Headquarters. It was A2 who told the appellant to disclose where the jacket and knife were, to avoid being killed. PW3 confirmed that the appellant was picked by police in his presence and that the appellant was the person he, (PW3) arrested.

From the evidence of PW2, PW3, PW4, PW5 it came out clearly that the appellant participated in the commission of the offence. The learned trial Judge so found and we agree with his finding.

It is true that there was no trial within a trial as Counsel for the Appellant submitted and yet the trial Judge relied on the charge and caution statement. We agree that the trial Judge erred because as it was held in the case of **Sewankambo Francis and two others vs Uganda: Supreme Court Criminal Appeal No. 33 of 2001** it was necessary to determine whether the charge and caution was made voluntarily. The trial Judge ought to have held a trial within a trial to determine the voluntariness or other wise of the charge and caution statement before accepting it as evidence.

However, having carefully perused the evidence on record and the Judgment we find that the trial Judge considered the evidence as a whole without necessarily relying on the said charge and caution statement in which, at any rate, the appellant denied participating in the crime. The learned Judge considered the evidence of the alibi of the appellant together with the evidence of the prosecution and then came to the conclusion that the appellant participated in the robbery.

We have ourselves re-appraised the evidence adduced at trial and drawn inferences of fact from it. It is clear that, even without considering the charge and caution statement, there was overwhelming evidence that proved beyond reasonable doubt that the appellant participated in the robbery. The appellant was seen pushing the motor-cycle that was the subject of the robbery. He was pushing it with A2 who was known to **Pw2** before the robbery. Appellant gave no reasonable explanation as to how he came to be in possession of this motor-cycle at the material time. This evidence was independent of the charge and caution statement.

The alibi the appellant raised was disproved by the prosecution through the evidence of **PW2, PW3**, and **PW4** which placed the

appellant at the scene of the crime and also in possession of the stolen motor cycle without any explanation as to how he came to be in possession of the same.

On the issue of inconsistencies and contradictions, it was clear from the record that though the dates where the offence is stated to have been committed especially in respect of **PW3** and **PW4** were at variance the substance of the case testified to was clearly that the offence was committed on/or about the 14th/15th March, 2006. The trial took place in 2010 that is 4 years after the robbery had happened. We are satisfied that the inconsistencies in the dates were due to lapse of time and not due to deliberate lies on the part of the witnesses who testified to those dates. The law on inconsistencies and contradictions is that minor and trivial discrepancies and inconsistencies may be ignored unless Court finds them intended to tell a deliberate lie and further that the weight to be placed on them must necessarily depend on how serious they were in relation to what is being investigated. See: **Emmanuel Nsubuga V. Uganda Criminal Appeal No. 16/1998 (SC).**

We are unable to find in this case that the inconsistencies were major and intended to tell deliberate lies to Court.

On whether the trial Judge gave a harsh and excessive sentence, it is clear to us from the Court Record that the trial Judge took into account the time the appellant spent on remand. He said... ***"he has spent close to 5 years on remand which will be taken into account".*** On reviewing all the evidence and the relevant factors relating to the sentence we find that the sentence of 18 years imprisonment was not harsh and excessive, considering the injuries inflicted on the victim and the fact that the maximum sentence for aggravated robbery is death.

Court Decision:

Accordingly we find no merit in the appeal and all the grounds of appeal fail. The appeal stands dismissed. The appellant is to serve his sentence imposed upon him by the trial Court to completion.

Dated at Kampala this ..19th.... day of ..September.... 2014.

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Hon. Mr. Justice Remmy K. Kasule

Justice of Appeal

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Hon. Lady Justice Faith E.K. Mwondha

Justice of Appeal

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Hon. Mr. Justice Richard Buteera

Justice of Appeal