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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

10 **AT MASAKA**

Criminal Appeal No. 71 of 2015

(An Appeal Arising from the Judgment of High Court of Uganda at Masaka in Criminal Session Case No. 33 of 2011 delivered on the 3rd March, 2015 before Hon. Lady Justice Margaret C. Oguli Oumo)

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Ssimbwa Hassan Kisembo :::::::::::::::::::::::::::::::::: Appellant

versus

Uganda :::Respondent

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Coram: Hon. Lady Justice Elizabeth Musoke, JA
Hon. Justice Ezekiel Muhanguzi, JA
Hon. Justice Remmy Kasule, Ag. JA

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JUDGMENT OF THE COURT

This is an appeal arising from **Masaka Criminal Session Case No. 33 of 2011** in which the appellant Ssimbwa Hassan Kisembo was convicted and sentenced to 55 years imprisonment on the
30 indictment of Aggravated Robbery contrary to **Section 285 and 286(2) of the Penal Code Act.**

Background:

On the 7th day of September, 2010, the victim Ssegirinya Francis, a taxi driver at Nyendo, Masaka, at about 8.45 a.m., was approached by two men, one of whom asked for his telephone contact, inviting the victim to meet in Nyendo. The victim drove there and found one man who conferment having earlier telephoned him for the meeting. The man then hired the victim to drive him in the taxi vehicle in different places of Masaka Town. In the course of being driven around, the one who had hired the vehicle was communicating with other people on phone. He also bought roasted meat, gonja and splash juice and he gave some to the driver victim. On eating and drinking the same, the victim lost consciousness and he woke up only to realize that he had been admitted in Masaka Hospital. The vehicle which he was driving as a taxi, Registration Number UAM 456p Toyota Corona Premio, had been robbed from him. The matter was reported to police and the investigations ensued. The appellant who had called the victim on his mobile phone was traced through that phone number. He was arrested. He was, identified by the victim as the appellant, Ssimbwa Hassan Kisembo, as the one who hired him on 7th September, 2010. The appellant was charged and tried in Court. Prosecution called 6 witnesses in support of their case. The appellant denied having robbed the complainant.

At the conclusion of the trial, the appellant was convicted of Aggravated Robbery and was sentenced to 55 years imprisonment. He appealed.

Grounds of Appeal:

60 The appellant appealed on 2 grounds of appeal, namely:

1. ***"The learned trial Judge erred in law and fact and misdirected herself in finding that the offence of aggravated robbery was proved beyond reasonable doubt.***

65 2. ***The learned trial Judge erred in law and fact when she sentenced the appellant to imprisonment for 55 years for the offence of aggravated robbery which was manifestly harsh and excessive."***

Legal Representation:

70 Mr. Tusingwire Andrew represented the appellant on State brief while Ms. Nyanzi Macrena Gladys, Assistant Director of Public Prosecutions 9DDP) represented the respondent.

Submissions of Counsel for the Appellant:

Counsel submitted as regards ground 1 that, while he conceded 75 that the prosecution had proved beyond reasonable doubt, the theft of the motor-vehicle, that subject of the charge, the two ingredients constituting aggravated robbery namely, the use of a deadly weapon and participation of the appellant in the robbery were not proved by the prosecution beyond reasonable doubt. 80 Counsel claimed that on the use of a deadly weapon, the learned effect that the substance administered to Pw1, Ssegirinya Francis, the victim, through the drinks and eats served to him, was a deadly one. Yet this substance was never defined by the doctor who in his testimony admitted that he did not carry out any blood sample

tests to ascertain the substance. Counsel invited Court to hold as it was held in the case of **Odongo David Livingstone and Others vs Uganda: Court of Appeal Criminal Appeal No. 76 of 2017**, whose facts had resemblance to the facts of this case, that the use of a deadly substance had not been proved and as such the charge of aggravated robbery had not been established beyond reasonable doubt.

As to participation of the appellant in the robbery, Counsel submitted that the prosecution's case on the participation of the appellant was premised on circumstantial evidence because there was no eye witness who saw the appellant commit the crime. He contended that the evidence of Pw1, the victim of the robbery, Pw2 who claims to have seen the appellant a day before the commission of the crime, Pw4, the arresting officer and Pw5, the ICT manager from Airtel Uganda, was not sufficient to prove beyond reasonable doubt that the appellant participated in the offence. This is because the learned trial Judge ought not to have relied on the evidence of the identification parade when no report of the same was tendered in Court by the police, and when the Police Officer who conducted the identification parade never testified as a witness. Counsel relied on the case of **Sentale vs Uganda [1968] EA 356** in support of this submission. Counsel further submitted constant communication with the appellant, at the material time, was never arrested and prosecuted, made the prosecution evidence very weak as regards the appellant's participation in the commission of the offence. Relying on **Katende Semakula vs Uganda: Supreme Court Criminal Appeal No. 11 of 1994,** Counsel prayed this Court to allow ground 1 of the appeal.

As to ground 2, Counsel submitted that the sentence of 55 years imprisonment was harsh and excessive given the fact that the
115 appellant was a first offender, which fact the trial Judge did not consider.

Counsel prayed that, in case a conviction is maintained, then the appellant be sentenced to 15 years imprisonment.

Submissions of Counsel for the Respondent:

120 Learned Counsel for the respondent opposed the appeal. Relying on **Section 286(3) of the Penal Code Act**, which defines a deadly weapon to include any substance intended to render the victim of the offence unconscious, Counsel submitted that the doctor's testimony clearly established that there had been violence exerted
125 upon the victim by use of a deadly substance. Thus aggravated robbery had been proved beyond reasonable doubt.

As to the participation of the appellant in the commission of the offence, Counsel maintained that the evidence of Pw1, Pw2, Pw4 and Pw5, circumstantial as it may have been, proved beyond
130 reasonable doubt that the appellant carried out the robbery.

With regard to ground 2 of the appeal, Counsel conceded that the sentence of 55 years imprisonment was harsh and excessive. She submitted that a sentence of 35 years imprisonment would be appropriate in the circumstances.

135 **Resolution of Court:**

This being the first appellate Court, we are required to re-appraise all the evidence adduced at the trial and make our own inferences on all issues; see: Rule 30(1) of the Rules of this Court. In **Bogere**

Moses vs Uganda: Supreme Court Criminal Appeal No. 01 of
140 **1997,** the Court held:

"We agree that on a first appeal, from a conviction by a Judge, the appellant is entitled to have the appellate Court's own decision thereon. The first appellate Court has a duty to review the evidence of the case and to reconsider the
145 ***material s 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.

The offence of aggravated robbery is constituted by the ingredients
150 of theft of a property, use of actual violence at, before or after, the theft, or causing grievous harm to the complainant, and the assailants being armed with a deadly weapon or a substance before, during or after the theft and the accused participating in the robbery.

155 The evidence that was adduced before the trial Court to prove or to disprove the above ingredients of the offence was circumstantial, to the extent that there was no evidence of eye witnesses who claimed to have directly witnessed the offence being carried out from the beginning to the end. It is of course no derogation of
160 evidence to assert that the evidence to prove a particular fact is circumstantial in nature. See: **Tumuheirwe vs Uganda [1967] EA 328.**

To the contrary, circumstantial evidence may offer the best evidenced as it can prove a case with mathematical accuracy.

165 However, as Lord Normand cautioned in **Teper vs R. 2[1952] A.C. 480 at 489, cited in Simon Musoke vs R. [1958] E.A. 715;** circumstantial evidence may be fabricated to cast suspicion on a person. Hence, before drawing the inference of guilt therefrom, Court must be sure that there are no circumstances existing, that 170 either weaken or destroy, the inference of guilt. See: Sharma Kumar vs Uganda: Supreme Court Criminal Appeal No. 44 of 2000.

To prove the first ingredient of theft, the evidence of Pw1, the victim, Pw2, and Pw3 which was not controverted by the defence, 175 proved beyond reasonable doubt that the motor-vehicle, registration No. UAM 456P Toyota Corona Premio, was stolen from Pw1 on the 7th September, 2010 at Masaka.

As to the ingredient of the use of violence by use of a deadly weapon, the learned trial Judge analyzed the evidence of Pw1, as 180 to how the appellant hired him to drive him around Masaka Town, and how the appellant and his colleague gave him eats and drinks, which made him dizzy and unconscious and when he woke up the vehicle had been stolen. The one who had hired him had also disappeared. This evidence was considered with the evidence of 185 Pw2, who too, identified the appellant, as one of those with others, who tried to do the same thing that was done on Pw1 to Pw2's driver the day before, on 6th September, 2010 again at Masaka. The driver refused to eat and drink because he was fasting.

The trial Judge also considered the police evidence of Detective 190 Sergeant Gidaga Alex, Pw3, of Kyabakuza Police Post, who came to the scene where Pw1 had been left on the road after he had become

dizzy and unconscious and the motor vehicle had been stolen from him. Pw1 told Pw3 what had happened to him. Pw3 took Pw1 to hospital and reported the case to Masaka Police Station.

195 The Judge also analyzed the evidence of Pw4, Dr. Kyandindi, who attended to Pw1 at Masaka Regional Referral Hospital. The doctor found Pw1, though breathing, to be unconscious and very ill. Pw4, as a doctor, was emphatic that the cause of Pw1's unconsciousness was not due to epilepsy or diabetes or alcohol as

200 there was no medical evidence of the same. Pw4 found that the unconsciousness of Pw1 could have been caused by a type of drug that doctors give to patients to make them sleep before medical operation, which drug can also be introduced into the blood stream of someone through breathing or through eats and drinks.

205 The learned trial Judge also analyzed the definition of violence in the Oxford Advance Learners Dictionary as being a behavior intended to hurt or kill. The Judge then considered Section 286(3)(b) as to a "deadly weapon" being inclusive of any substance intended to render the victim of the offence unconscious.

210 We are satisfied, on re-appraising all the relevant evidence and considering the appropriate law that the learned trial Judge properly approached the issue and dealt with the evidence and the law and arrive at the correct conclusion that the theft of the motor-vehicle was violently carried out by use of a deadly weapon.

215 As to the participation of the appellant in the offence, the learned trial Judge considered the evidence of Pw1, Pw2 and Pw4 as to how Pw1, who was employed by one Adam of UMEME to drive the car as a special hire taxi in Masaka Town, was hired by the appellant,

how Pw1 was given to drink Splash Soda and gonja by the
220 appellant and his colleague, after which Pw1 lost consciousness, and only regained the same when he was in Masaka Regional Referral Hospital. The vehicle he was driving had been stolen. What was done to Pw1 on 7th March, 2010, had been attempted to be done to Pw2 on 6th March, 2010, but the mission was not
225 accomplished and his colleagues tried to give some eats and drinks, but the driver declined the same as he was fasting. Pw2 clearly identified the appellant as one of those he dealt with the previous day of 6th March, 2010. Pw2 had also kept the Airtel telephone number 0758-429524 that the appellant and his
230 colleagues had left him and he, Pw2, passed on this very number to the police.

It is this very telephone number, amongst others, according to Detective Inspector Nyanzi Rashid, Pw4, as well as the telephone print out exhibit PE3, that, the police used to trace the appellant.

235 The learned trial Judge on receiving all the evidence of both prosecution and that of the defence came to the conclusion that Pw1, and Pw2 identified the appellant and his colleague Butoodene as having been in Masaka Town on 6th and 7th September, 2010 and having hired Pw2 and Pw1 and the other driver brought to
240 them by Pw2.

The telephone print out, Exhibit PE3, also proved beyond reasonable doubt that the appellant was in constant communication with Butoodene, in Masaka and away from Masaka on the days of 6th and 7th September, 2010.

245 This Court on subjecting all the evidenced adduced to fresh scrutiny finds and upholds the finding and conclusion of the trial Judge as correct that:

"I find that the accused has been put at the scene of the crime and even if the evidence is largely circumstantial, I find that
250 ***it is not incompatible with the innocence of the accused and it is not capable of any other hypothesis other than the guilt of the accused".***

It follows therefore that ground 1 of the appeal fails.

The second ground of appeal faults the trial Judge for imposing
255 upon the appellant a harsh and excessive sentence of 55 years imprisonment thus causing a miscarriage of justice.

As the appellate Court, we will only alter a sentence imposed by the trial Court, if it is evident that the Court acted on a wrong principle or overlooked some material factor, or if the sentence is
260 manifestly excessive in view of the circumstances of the case.

As sentencing Court should also act in such a way that it maintains consistency and uniformity in sentencing so that the sentence imposed in previou8s cases of a similar nature, while not precedents, do afford material for consideration. See: **Livingstone**
265 **Kakooza vs Uganda: Supreme Court Criminal Appeal No. 17 of 1993.**

The learned trial Judge in sentencing the appellant, hardly considered any mitigating factors in favour of the appellant. The Judge just noted that the appellant had not pleaded guilty to the
270 charge, had been convicted after a full trial and that the maximum

sentence for the offence was death. The learned trial Judge also observed how the appellant had committed the offence in an organized way through an elaborated work plan, which ought to be condemned and thus deserved a deterrent punishment.

275 The learned trial Judge then proceeded to impose the sentence. We, with respect, hold that it was an error on the part of the learned trial Judge not to consider the mitigating factors while imposing the sentence.

As to observing consistency and uniformity, this Court has 280 considered the cases of **Abelle Asuman vs Uganda: Supreme Court Criminal Appeal No. 66 of 2016**, where a sentence of 18 years imprisonment was left undisturbed by the Supreme Court as being legal upon an appellant convicted of aggravated robbery. The sentence was after the Court had taken into account the 285 remand period.

In **Kusemererwa and Another vs Uganda: Court of Appeal Criminal Appeal No. 83 of 2010**, a sentence of 20 years imprisonment was upheld by this Court in respect of appellants who had used guns in the commission of the robbery, and where 290 the victims of the robbery had not been bodily hurt.

In **Naturinda Tamson vs Uganda: Court of Appeal Criminal Appeal No. 13 of 2011,** a 16 year sentence of imprisonment was imposed upon a 29 year old convict of aggravated robbery.

This Court also considered a sentence of 37 years imprisonment 295 to be harsh and excessive for aggravated robbery and reduced the same to 25 years imprisonment in the case of **Twikirize Alice vs Uganda: Court of Appeal Criminal Appeal No. 764 of 2014.**

Being guided by the sentences passed in the cases considered above, this Court finds the sentence of 55 years passed by the
300 learned trial Judge to be harsh and excessive.

This Court accordingly sets the sentence of 55 years imprisonment imposed upon the appellant aside by reasons of having been passed upon the appellant without taking into account the mitigating factors and also for the said sentence being harsh and
305 excessive.

This Court accordingly sets the sentence of 55 years imprisonment imposed upon the appellant aside by reasons of having been passed upon the appellant without taking into account the mitigating factors and also for the said sentence being harsh and
310 excessive.

Pursuant to Section 11 of the Judicature Act, this Court proceeds to pass the sentence upon the appellant.

As to the mitigating factors, the appellant was aged 30 years at the time of his arrest as per Police Form 24 Exhibit PE, was father of
315 5 children, the youngest being 5 years old and the oldest being 13 years old. He was a first offender. He had opportunity to reform into a better citizen.

The aggravating factors are that the offence of which the appellant was convicted has a maximum sentence of death, the appellant
320 used a noxious substance on Pw1, the victim of the robbery, taking the said victim 4 days to regain consciousness. Had it not been for the quick intervention of the medical doctor and medical treatment, the victim could have died.

This is a case that calls for a deterrent sentence to stop as much
325 as it is possible, the carrying on of such offences in society; and at the same time to punish heavily those who carry on the said crimes so that a lesson is given to every one of what is likely to happen to someone convicted of such a crime.

Having considered the mitigating, the aggravating and the past
330 Court decisions as to sentence, this Court sentences the appellant to 25 years imprisonment for the offence of aggravated robbery.

The appellants was arrested on 14th September, 2011 and was kept in custody on remand up to the 3rd March, 2015, when he was convicted and sentenced on the same day. The appellant thus
335 spent a period of 4 years and 6 months in lawful custody before his conviction. This period is deducted from the sentence of 25 years imprisonment.

Accordingly the appellant is to serve a sentence of 20 years and 6 months as from the date of conviction of 3rd March, 2015.

340 In conclusion, the appeal is dismissed as to conviction of the appellant of the offence of aggravated robbery, but is partly allowed with the sentence being reduced in the terms stated above.

The appellant did not in any way contest the order of the trial Court ordering him to pay compensation of shs. 41 million to the owner
345 of the motor-vehicle that was the subject of the aggravated robbery, being the value of the said motor vehicle, which has never been recovered. The said order thus remains effective.

We so order.

Dated at ~~Gulu~~ Kampala this......10th....... **day of** ......February...... **2020**.

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Elizabeth Musoke
Justice of Appeal

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Ezekiel Muhanguzi
Justice of Appeal

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Remmy Kasule

365 **Ag. Justice of Appeal**