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THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Bamugemereire, Madrama, JJA)

CRIMINAL APPEAL NO 273 OF 2015

1. MUGABE ROBERT}

10 **2. BUHAMIZO SERENZO} APPELLANTS**

VERSUS

UGANDA} RESPONDENT

*(Appeal from the decision of the High Court at Holden at Entebbe delivered
by the Hon. Lady Justice Elizabeth Alividza on 24th July, 2015 dated in
15 Nakawa Criminal Session Case No. 348 of 2012)*

JUDGMENT OF COURT

The appellants were indicted of the offence of aggravated robbery contrary to section 285 and 286 (2) of the Penal Code Act, cap 120 laws of Uganda. They were tried and convicted as charged and sentenced to a term of 32 years' imprisonment. The facts are that the appellants on 2nd April 2012 at around 3:30 AM at Naddangira Kakiri Town Council in Wakiso district robbed Bbosa H. Moses of cash amounting to Uganda shillings 3,600,000/=, 2 television sets, 3 mobile phones, 2 cameras, one radio recorder, 1 DVD player, clothes and shoes all valued at Uganda shillings 5,870,000/= and immediately before, at and immediately after the robbery used a deadly weapons including a gun, cutlass and a hammer on the victim. The appellants were arrested and some of the stolen property was found in their position.

The appellants were aggrieved by the decision of the High Court on the issue of sentence only and appealed to this court against sentence only on the ground that:

5 The learned trial judge erred in law and fact by imposing a manifestly harsh sentence on the appellants.

At the hearing of the appeal the Respondent was represented by Nabisenke Vicky Assistant DPP but the appellants counsel was absent though he had filed written submissions. The appellant attended court by tele video link and agreed that the submissions of his counsel be considered as the address on the appeal. Court was addressed by way of written submissions and judgment was reserved on notice.

10 The appellant's counsel submitted that the sentence of 35 years' imprisonment imposed on the appellants was manifestly harsh. He relied on **Abaasa Johnson v Uganda; Criminal Appeal No 33 of 2010** for the proposition that the court will only interfere with the sentence imposed by a trial court in a situation where the sentence is either illegal, or founded upon a wrong principle of law. The court will equally interfere with sentence where the trial court has not considered a material factor in the case or has imposed a sentence which is harsh and manifestly excessive in the circumstances. Counsel further relied on **Kiwalabye Bernard v Uganda; Civil Appeal No 143 of 2001**. He submitted that in the instant case, the second appellant was a first offender with a family of 3 school going children and the first child is in secondary school. In mitigation of sentence the second appellant stated that he prayed for a lenient sentence because he had children and the first was in secondary school. He prayed that the 32 years' imprisonment is reduced to 10 years' imprisonment.

20 Further, first appellant's counsel also submitted that the first appellant was 27 years old at the time of his arrest while the second appellant was 29 years old. He relied on **Kabatera Steven v Uganda; Criminal Application No 123 of 2001** where the Court of Appeal held that age of an accused person is always a material factor that ought to be taken into account before sentence is imposed.

25 The appellant's counsel submitted that the sentence imposed was not consistent with other sentences for similar offences as stated in **Tamale**

5 **Richard v Uganda; Court of Appeal Criminal Appeal No 00 19 of 2012.** In that appeal, the appellant was 20 years at the time of commission of the offence and was convicted of aggravated robbery and sentenced to 20 years' imprisonment. On appeal, the Court of Appeal reduced the sentence to 13 years' imprisonment. Further in **Aliganyira Richard v Uganda; Court of**
10 **Appeal Criminal Appeal No 19 of 2005,** the appellant was convicted of aggravated robbery and sentenced to suffer death. On appeal, the court reduced the sentence to 15 years' imprisonment. The appellant's counsel also relied on **Muchunguzi Benon and another v Uganda; Court of Appeal Criminal Appeal No 008 of 2008** where the Court of Appeal upheld a
15 sentence of 15 years' imprisonment for the offence of aggravated robbery. In **Tumusiime Obed and another v Uganda Court of Appeal Criminal Appeal No 149 of 2010,** the appellant was convicted of aggravated robbery and sentenced to 30 years' imprisonment. On appeal, the Court of Appeal reduced the sentence to 10 years' imprisonment. Lastly, counsel relied on
20 **Amandu Alex v Uganda; Court of Appeal Criminal Appeal No 0153 of 2014** where the appellant was convicted by the trial court of aggravated robbery and sentenced to 30 years' imprisonment. On appeal, the Court of Appeal reduced the sentence to 10 years' imprisonment.

In light of the precedents, the appellant's counsel prayed that this court sets
25 aside the sentence and substitutes it with a sentence of 10 years' imprisonment.

In reply, the respondents counsel conceded to the appeal. The respondent's counsel submitted that the Court of Appeal as well as the Supreme Court on numerous occasions have held that an appellate court should only alter
30 the trial court's sentence if the said trial court acted on wrong principle, overlooked some material factor or the sentence was harsh or manifestly excessive. (See **Livingstone Kakooza v Uganda; SCCA No 17 of 1993, Rwabugande Moses v Uganda; Supreme Court Criminal Appeal No 25 of 2014**).

35 The respondent's counsel's submitted that after careful review of the learned the trial judge's notes, it is apparent that the learned trial judge

5 considered mostly factors that aggravated the robbery and some mitigating factors like the fact that the appellants were young and could still reform and had been on remand for about 3 years. She disregarded other factors raised on the appellant's behalf and the fact that the appellants were first time offenders, had children and the actual period spent on remand was 3
10 years and 3 months. As a result, she sentenced the appellants to 35 years' imprisonment. Basing on the decision of the Supreme Court in **Aharikunda Yusitina v Uganda; Supreme Court Criminal Appeal No 27 of 2015** that the failure by the trial judge as well as the Court of Appeal to evaluate and consider all the mitigating factors raised on behalf of the appellant
15 rendered the sentence erroneous and set it aside. On that basis the respondent concedes that the learned the trial judge's failure to consider all material factors rendered the sentence passed erroneous. She prayed that this court invokes its powers under section 11 of the Judicature Act to impose an appropriate sentence.

20 Counsel submitted that that the sentencing guidelines put the starting point for such cases at 30 years' imprisonment. In the facts, the complainant lost valuable property valued at Uganda shillings 5,870,000/=. The appellant's acted in a group of 4 assailants, broke into the complainant's home while armed with a gun and other deadly weapons, threatened him and proceeded
25 to rob him of his hard earned property and cash. Although some of the property was recovered from the appellants, other properties like his two phones, cameras, DVD recorder and cash were never recovered. Other aggravating factors and the trauma suffered by the child who was with the complainant on the night of the robbery, the rampant nature of the crime in
30 the jurisdiction of the trial court and the need to deter would-be offenders.

In light of the above the respondent's counsel prayed that this court be pleased to exercise its jurisdiction to impose a sentence of 30 years' imprisonment against the appellants. The sentence is within the range of sentences passed by the Court of Appeal for the offence of aggravated robbery. In **Kigozi Livingstone and another v Uganda; Criminal Appeal No
35 365 of 2016**, the Court of Appeal held that there was a tendency of the court

5 to impose terms of imprisonment for aggravated robbery of between 12 to 25 years. Further in **Olupot Sharif and another v Uganda; Court of Appeal Criminal Appeal No 0730 of 2014**, the Court of Appeal reduced a sentence of 40 years' imprisonment imposed by the trial judge to 32 years' imprisonment.

10 **Resolution of appeal**

We have carefully considered the appellant's appeal, the submissions of counsel and the authorities cited. This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction and our duty is to subject the printed evidence on record to fresh scrutiny (see rule 30 of the
15 Rules of this court). We however do not need to spend much time to re-evaluate the evidence as the facts in this appeal are not in dispute. Secondly, the appellant's appeal is against sentence only on the ground that it is manifestly excessive. The appellant's counsel relied on the precedents of this court and that of the Supreme Court. On the other hand, the
20 respondent conceded to the appeal but proposed that the court exercises its jurisdiction under section 11 of the Judicature Act to impose a sentence of 30 years' imprisonment.

The appellants counsel submitted that a sentence of 10 years' imprisonment would be appropriate in light of the age of the appellants and the fact that
25 the second appellant had children who were school going and that those factors had not been taken into account by the trial court in mitigation of sentence.

An appellate court may interfere with a sentence imposed by the trial court under the circumstances set out by the East African Court of Appeal in
30 **Ogalo s/o Owoura v R (1954) 21 EACA 270**. In that matter, the Appellant appealed against a sentence of 10 years' imprisonment with hard labour for the offence of manslaughter and the East African Court of Appeal held that:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence
35 on the mere ground that if the members of the court had been trying the Appellant

5 they might have passed a somewhat different sentence and it would not ordinarily
interfere with the discretion exercised by a trial Judge unless as was said in
James v. R, (1950) 18 EACA 147, "it is evident that the Judge has acted upon wrong
principle or overlooked some material factor". To this we would also add a third
10 criterion, namely, that the sentence is manifestly excessive in view of the
circumstances of the case

The appellants were convicted of aggravated robbery contrary to section
285 and section 286 (1) of the Penal Code Act. The facts as stated in the
judgment are that the appellants were charged with aggravated robbery
when they with another at large on 2nd April, 2012 at Naddangira in Kakari
15 Town Council robbed Bbsosa Moses of cash amounting to Uganda shillings
3,600,000, two television sets, 3 mobile phones, 2 cameras 1 radio recorder,
and 1 DVD player and all the property was valued at Uganda shillings
5,870,000/=. Further, immediately before, at and after the robbery the
appellants used a deadly weapon to wit a gun, cutlass, and a hammer on
20 the victim. The offence occurred at 3 AM at night when the victim was in bed
sleeping and heard noises. His bedroom was forcefully opened and 3 men
entered. They demanded for money and other property. They searched for
items and took money which was on the victim. They made their demands
and the victim cooperated and directed them to where the items where.
25 After that they locked the victim up in the bedroom using a small chain they
had come with. They entered the house after they had cut the window of the
victim's house.

The state counsel prayed for a sentence of 35 years' imprisonment. On the
other hand, the defence counsel submitted that the appellants were first
30 offenders, they were also young persons who are capable of reform and
she prayed for lenience. There was threatening of violence and the home
was forcibly broken into at night. In the circumstances she suggested a
period of 20 years' imprisonment for the appellants. A2 Buhamizo Serenzio
who is now the second appellant in mitigation stated that he had 3 children,
35 the first child was in secondary school. He stated that if he did not get back
to his children they would become useless citizens and prayed that he is

5 given a lenient sentence so that he goes back to take care of the children. Further he stated that he had been on remand for 3 ½ years.

The learned trial judge considered a sentence of 35 years' imprisonment to be appropriate and deducted the period of 3 years spent on remand and sentenced the appellants to 32 years' imprisonment.

10 There is no difficulty in setting aside the judgment on the ground that the appellants had spent a period of 3 years and 3 months on remand as a matter of principle because the sentence infringed article 23 (8) of the Constitution which commands that a person convicted and sentenced to a term of imprisonment for an offence, shall have taken into account any
15 period he or she spends in lawful custody in respect of the offence before completion of his or her trial in imposing the term of imprisonment. Obviously, the learned trial judge took the period of pre-trial remand into account but not to the full extent of the period. The appellants were indicted
20 sometime in April 2012. They were sentenced on 24 July 2015. This was a period of 3 years and 3 months. This court can interfere with the sentence on the ground of contravention of article 23 (8) of the Constitution.

Secondly, the sentence was manifestly excessive in light of precedents. In **Abelle Asuman v Uganda Supreme Court; Criminal Appeal No 66 of 2016** the Appellant had been tried and convicted of the offence of aggravated robbery
25 and was sentenced by the High Court to life imprisonment. On appeal to the Court of Appeal, the sentence of life imprisonment was substituted with a sentence of 18 years' imprisonment. On further appeal to the Supreme Court on the ground that the sentence of 18 years' imprisonment was a harsh, illegal and excessive sentence in the circumstances of the case, the
30 Supreme Court upheld the 18 years' imprisonment imposed by the Court of Appeal. In **Muchunguzi Benon and Muchunguzi Thomas J v Uganda; Court of Appeal Criminal Appeal No 008 of 2008 [2016] UGCA 54 (26th October 2016)**, the Appellants were convicted of aggravated robbery and sentenced to 15 years' imprisonment by the High Court. On appeal to the Court of Appeal,
35 the sentence was upheld. The robbery involved violence in that the victim of

5 the offence had been hacked with a cutlass and sustained several injuries on her body.

In the instant appeal, there was no physical assault. The appellant was locked in his room and threatened with violence.

10 Further in **Naturinda Tamson v Uganda; Supreme Court Criminal Appeal No 025 of 2015 [2017] UGSC 64 (26th April 2017)**, the Appellant appealed from the decision of the Court of Appeal which had imposed a sentence of 16 years' imprisonment for aggravated robbery. The Appellant had been convicted by the High Court of the offences of rape, defilement and aggravated robbery and was sentenced to 18 years' imprisonment on each of the counts which
15 sentences were to run concurrently. The Court of Appeal reduced the sentence of 16 years' imprisonment and the Supreme Court dismissed the further appeal against sentence.

Again the facts of the above appeal are distinguishable from the facts of the appellant's appeal. In **Naturinda Tamsom** (supra), the robbery involved rape
20 and defilement. On the other hand, in **Bogere Asimwe Moses and Senyonga Sunday v Uganda; Supreme Court Criminal Appeal No 39 of 2016 [2018] UGSC (19th April 2018)** the Supreme Court upheld a sentence of 20 years' imprisonment imposed for aggravated robbery. The Appellants were 22 and 23 years old respectively and court noted that there was no violence, no
25 death occurred and some property was recovered. Last but not least in **Tukamuhebwa David Junior and Mulodo Yubu v Uganda Supreme Court; Criminal Appeal No 59 of 2016 [2018] UGSC 7 (9th April 2018)**, on appeal, the sentence of 18 years imprisonment for aggravated robbery was set aside for contravention of Article 23 (8) of the Constitution, but the Supreme Court
30 held that a sentence of 20 years imprisonment was appropriate in respect of the aggravated robbery and took into account the 3 years and 7 months the Appellant had spent in lawful custody. The final sentence imposed was 16 years and five months' imprisonment from the date of sentence by the High Court. The offences involved were aggravated robbery coupled with
35 rape.

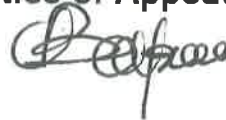
5 In the premises, the appellants appeal against sentence is allowed. We accordingly set aside the sentence. Exercising the powers of this court under section 11 of the Judicature Act, we have considered the facts of the case as stated above and the precedents in cases of aggravated robbery.

10 The facts in appellant's offence include the fact that there was no physical injury meted on the victim though there was threatening of violence and forcible entry into premises at 3.00 am with guns and a cutlass. Some property was recovered. The appellants were relatively young offenders; they were also stated to be first offenders. The first appellant was found to be 27 years old at the time of commission of the offence. The second
15 appellant was found to be 29 years old. Taking into account their age, that they are first offenders, that no physical injury was inflicted on the victims when the offence was committed, the fact that some of the property was recovered, a sentence of 17 years' imprisonment would be appropriate in the circumstances. Taking into account the period of 3 years and 3 months
20 the appellants spent in pre-trial detention, we impose a sentence of 13 years and 9 months' imprisonment on each of the appellants which sentences commence on the date of sentence by the High Court on 24th of July 2015.

Dated at Kampala the 13th day of September 2021

25 
Fredrick Egonda - Ntende

Justice of Appeal



Catherine Bamugemereire

Justice of Appeal

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Christopher Madrama

Justice of Appeal

