THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASINDI

(Coram: Richard Buteera (DCJ), Hellen Obura & Irene Mulyagonja JJA)

CRIMINAL APPEAL NO. 599 OF 2015

OMIRAMBE CHARLES::APPELLANT

VERSUS

UGANDA ::RESPONDENT

(Appeal from the decision of the High Court at Masindi before Hon. Justice Rugadya Atwoki J in High Court Criminal Session Case No. 119 of 2009 dated 8th September, 2010)

JUDGMENT OF COURT

The appellant was indicted and convicted on his own plea of guilty of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act and was subsequently sentenced to 10 years imprisonment by the High Court at Masindi (Rugadya,J)

Background to the Appeal

The facts of this case as found by the trial Judge are that on the night of 16/01/2009 at Copelow village, Kiryandongo Sub-County, Masindi District, the appellant and his accomplices attacked Tiko Jesca the wife of Nyakunu Amos and demanded for money. They beat her up using sticks and deadly weapons. She refused to hand over the money to them. They broke into her bedroom and therefrom robbed a bicycle, house hold items like plates and cups, radio, brief case, weighing scale, bag of clothes and other items. They were identified at the scene and the matter was reported to police. The police went to the home of his accomplices and recovered the stolen items. Investigations revealed the identification of the appellant and he was also arrested. The recovered items were exhibited and the appellant and his accomplices were charged with the offence of aggravated robbery. The appellant

pleaded guilty to the offence and he was convicted on his own plea. He was sentenced to 10 years imprisonment. Being aggrieved by the sentence, he has appealed to this Court on one ground namely that;

> *"The learned trial Judge erred in law and fact when he imposed an illegal and ambiguous sentence on the appellant thereby occasioning a miscarriage of Justice."*

Representation

At the hearing of this appeal, Mr. Mbalirwe Mohammed represented the appellant on State Brief while Mr.Kulu Idambi Assistant Director Public Prosecution from the Office of Director Public Prosecutions represented the respondent. The appellant was physically present in Court.

Counsel for the appellant sought leave to appeal against sentence only which was granted. Both Counsel informed court that they had filed written submissions which they prayed to be adopted.

Appellant's Case

On the first limb of the ground, it was submitted for the appellant that in arriving at the sentence of 10 years imprisonment, the learned trial Judge did not take into account the period the appellant had spent on remand. Counsel cited ***Rwabugande Moses vs Uganda, SCCA No. 25 of 2014*** and submitted that the requirement of arithmetical reduction of the time a convict spends on remand from the sentence imposed by the sentencing court stems from Article 23 (8) of the Constitution. To buttress his submission, he relied on ***Kajooba Vesencia vs Uganda, CACA No. 0118 of 2014*** where this Court held that the decision in ***Rwabugande Moses vs Uganda*** (supra) was an attempt to interpret Article 23(8) of the Constitution for purposes of its application by the trial courts in taking into account the period that the appellant had spent on pre-trial detention prior to his conviction and sentence.

Regarding the second limb on ambiguity of sentence, counsel submitted that after the learned trial Judge noted that the appellant had been previously convicted and was serving a sentence of 15 years, he did not state whether that sentence was to run concurrently with the 10 years imprisonment sentence as was the case for the appellant's co accused Ruva Godfrey. Counsel prayed that this Court exercises its powers under section 11 of the Judicature Act and pronounces that the sentences run concurrently.

In conclusion, counsel prayed that this Court finds the sentence imposed against the appellant illegal and ambiguous and substitutes it with an appropriate sentence taking into account the period the appellant spent on remand.

Respondent's Reply

In response to the first limb of the ground, counsel for the respondent referred this Court to page 17, line 11 of the court record and he submitted that not only did the learned trial Judge take note of the period the appellant had spent on remand, but he also arithmetically deducted it. He also referred to the cases of ***Ssetumba vs Uganda, CACA No. 046 of 2020*** and ***Okuja Francis vs Uganda CACA No. 144 of 2014*** whose facts are similar to those in this case and the appellant in that case was convicted on his own plea of guilty and sentenced to 15 years imprisonment. On appeal to this Court, his sentence was reduced to 10 years imprisonment

Regarding ambiguity, counsel submitted that it was within the discretionary powers of the learned trial Judge not to allow the appellant to serve concurrently given the fact that he was a habitual offender. He argued that had it been the intention of the learned trial Judge that the appellant serves the sentences concurrently, he would have stated it clearly in his judgment. Further, that it is not a general rule that since the appellant's co accused served concurrently and were released it should also apply to him. Counsel relied on section 2 (2) of the Trial on Indictments Act to support his submission.

He prayed that court finds the sentence imposed against the appellant neither illegal nor ambiguous given the fact that the appellant was a habitual offender and did not learn any lessons from the previous sentences imposed on him. He further prayed that this ground be dismissed for lacking merit.

Court's consideration

As a first appellate court we are enjoined to re-evaluate the evidence of the entire case and come to our own conclusion on findings of fact and Law. ***See; Rule 30(1) of the Judicature (Court of Appeal Rules) Directions; Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.***

The appellate court in exercising its power to review sentences is governed by the principle cited in ***Kizito Senkula vs Uganda, SCCA No. 24 of 2001*** that;

> *" ...in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in* ***James -vs- R (1950) 18 EACA 147,*** *it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."*

On the first limb of the ground of this appeal, Counsel for the appellant submitted that the trial Judge during sentencing did not take into account the period the appellant had spent on remand. Article 23 (8) of the Constitution enjoins court while passing sentence to take into account the period a convict spent in lawful custody prior to completion of his or her trial.

Failure to do so, renders the sentence passed illegal. ***See: Rwabugande Moses vs Uganda (supra).***

We note from the sentencing proceedings at page 17 of the record of proceedings that the learned trial Judge stated as follows;

> *"I note that robbed property was recovered, I also noted and taken into account the period that they have spent 1 year and 5 months on remand were part of this offence...."(sic)*

In our considered view, the literal interpretation of the above wording of the sentence demonstrates that the learned trial Judge was aware of the period of 1 year and 5 months the appellant spent on remand and he had considered it. It did not have to be an arithmetic deduction as argued by counsel for the appellant. In any event, the sentence in this appeal was imposed on 08th September, 2010 before the decision in ***Rwabugande Moses vs Uganda (supra)*** which was made on 3rd March, 2017. We are alive to the fact that the sentencing regime before ***Rwabugande Moses vs Uganda (supra)*** did not require the court to apply a mathematical formula while taking into consideration the time spent on remand. ***See; Kizito Senkula vs Uganda, SCCA No. 24 of 2001; Kabuye Senvawo vs Uganda, SCCA No. 2 of 2002; Katende Ahmed vs Uganda, SCCA No. 6 of 2004 and Bukenya Joseph vs Uganda, SCCA No. 17 of 2010.***

In ***Abelle Asuman vs Uganda, SCCA No. 66 of 2016*** the Supreme Court stated as follows:

> *"Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution."*

Guided by the above decided cases, we accept counsel for the respondent's submission that the learned trial Judge took into account the period of 1 year and 5 months the appellant had spent on remand and we therefore find no reason to fault him. In the result, we find no merit in this limb of the ground of appeal.

Regarding ambiguity of the sentence imposed, we note that the learned trial Judge while sentencing the appellant stated as follows;

> *"The state strongly expressed that they ought to be given a maximum penalty and this is death. The reason were that these are serious offences, State told court that A3 is serving a sentence of imprisonment of 15 years for the offence while A2 has a previous conviction for a minor trespass. Neither their counsel nor the two denied the sentence of previous criminal record as stated by the state. I therefore take it that those are not first offenders. I note that robbed property was recovered, I also noted and taken into account the period that they have spent 1 year and 5 months on remand were part of this offence. I have noted that their co accused in this case A1 also pleaded guilty and was sentenced to 10 years imprisonment on 13/5/2010 i.e about 3 months ago. I would have given them too slightly less sentence, but for purposes of consistence and in view of the circumstances of the case, I sentence the two accused to the ten (10) years imprisonment."(Emphasis added)*

From the above excerpt of the sentencing proceedings, we observe that the learned trial Judge alluded to the sentence of 15 years imprisonment which the appellant was serving having been convicted, for purposes of showing that the appellant was not a first offender. In our well-considered view, it was not intended for consideration of concurrence of sentence.

Section 122 (1) of the Trial on Indictments Act provides as follows;

> *"122. Sentences cumulative unless otherwise ordered.*
>
> *(1) Where a person after conviction for an offence is convicted of*
>
> *another offence, either before sentence is passed upon him or her under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him or her under*

the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or of any part of it; but it shall not be lawful for the court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under section 110(c)(i) or any part of it."

From the above provision, it is clear that where the court has not directed that the sentence passed in a subsequent conviction runs concurrently with that under the first conviction, then it implies that the subsequent conviction shall be executed after the expiration of the former (first) conviction.

Therefore in the instant case, since the learned trial Judge did not indicate in his sentencing that the appellant serves the sentences concurrently, we are of the considered view that he intended that the appellant serves the sentence of 10 year imprisonment after the expiration of his sentence of 15 years imprisonment. We therefore reject counsel for the appellant's submission that the sentence was ambiguous.

In regard to the view that the appellant's sentence should have run concurrently as it was for the appellant's co accused Ruva Godfrey, we note that an appropriate sentence is a matter of judicial discretion of the sentencing court and each case presents its own facts upon which a court will exercise its discretion. See: ***Kaddu Kavulu Lawrence vs Uganda, SCCA No. 72 of 2018.***

In the instant appeal, we find that the learned trial Judge judiciously exercised his discretion in sentencing the appellant differently from his co accused and since it has not been proved that he acted upon some wrong principle or over-looked some material factor or imposed a sentence which was harsh and manifestly excessive in view of the circumstances of the case, we find no reason to interfere with his discretion.

In the premises, we uphold the sentence and accordingly dismiss this appeal.

We so order.

Dated at **Masindi** this..27th..day of.....November.....2024

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Richard Buteera

DEPUTY CHIEF JUSTICE

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Hellen Obura

JUSTICE OF APPEAL

.....

Irene Mulyagonja

JUSTICE OF APPEAL