

UGANDA / JUDGMENT

Simbwa v Uganda (Criminal Appeal 15 of 2020) [2024] UGSC 28 (13 March 2024)

[2024] UGSC 28

COURT

Supreme Court of Uganda

BEFORE

Mwondha, JSC, Tibatemwa-Ekirikubinza, JSC, Tuhaise, JSC, Mike Chibita, JSC, Stephen Musota, JSC

CASE / FILE NUMBER

Criminal Appeal 15 of 2020

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: Mwondha; Tibatemwa - Ekirikubinza; Tuhaise; Chibita; Musota; IJSC

CRIMINAL APPEAL NO. 15 OF 2020

SIMBWA HASSAN KISEMBO

VERSUS

UGANDA

(Appeal arising from the decision of the Court of Appeal before Musoke, JA; Muhanguzi, JA; and Kasule, Ag JA; in Criminal Appeal No. 71 of 2015 delivered on 10th February 2020)

Judgment of the Court

This is a second appeal filed by the Appellant, following the dismissal of his first appeal by the Court of Appeal which upheld the conviction passed against him by the learned trial Judge.

Background

The brief facts of this case are that on the 7th day of September, 2010, at about 8.45 am, Ssegirinya Francis (victim), a taxi driver at Nyendo, Masaka, was approached by two men who inquired from

\$\mathbf{1}\$

him whether he was a taxi driver. He responded in the affirmative. One of the men then asked for his telephone contact. Later in the day he received a call from one of the men requesting to meet him in Nyendo. Ssegirinya drove to Nyendo and found the man (later referred to as Buttodene *aka* Kibuto) who confirmed having earlier telephoned him for a meeting. The man then hired Ssegirinya to transport him in his (Ssegirinya's) taxi vehicle to different places in Masaka Town. At Kyabakuza, the passenger requested Ssegirinya to park the car and he went out to purchase some refreshments. The passenger returned with the Appellant, and he had bought roasted meat, gonja (plantain) and splash juice. The two men, who were in the backseat, then offered a drink (splash juice) and gonja (plantain) to the driver (Ssegirinya). On eating and drinking the same, Ssegirinya lost consciousness. He woke up only to realize that he had been admitted in Masaka Hospital. The vehicle which Ssegirinya was driving as a taxi, Registration Number UAM 456P Toyota Corona Premio, had been robbed from him.

The matter was reported to police, and later, at an identification parade at Masaka Police Station, the victim identified the Appellant as one of the two men who had called him and hired him to drive them on the fateful day. The Appellant's colleague (Buttodene) was never arrested.

The Appellant was indicted with the offence of aggravated robbery contrary to Sections 285 and 286 (2) of the Penal Code Act. He was subsequently tried at the High Court at Masaka (Oguli Oumo J). He denied having robbed the victim. He was however convicted by the trial court of aggravated robbery, and was sentenced to 55 years' imprisonment. He was also directed to pay the owner of the car Uganda shillings \$41,000,000/\$ = (forty one million).

The Appellant appealed to the Court of Appeal against both conviction and sentence on two grounds that:-

- "The learned trial Judge erred in law and fact and misdirected \$i)\$ herself in finding that the offence of aggravated robbery was *proved beyond reasonable doubt.*
- *The learned trial Judge erred in law and fact when she sentenced* ii) the Appellant to imprisonment for 55 years for the offence of aggravated robbery which was manifestly harsh and excessive."

The Court of Appeal upheld the conviction, but it set aside the sentence of 55 years' imprisonment for not taking into account the mitigating factors, and also for being harsh and excessive. The Court of Appeal substituted the sentence with a sentence of 20

\$\overline{3}\$

years and 6 months' imprisonment. The compensation order remained effective as the Appellant did not contest it.

Dissatisfied and aggrieved with the decision of the Court of Appeal, the Appellant filed this appeal.

Representation

$\mathcal{L}^{\mathcal{L}}$

The Appellant was represented by Mr. Emmanuel Muwonge, on Private Brief, and Mr. Sebugwawo Andrew, on State Brief. The Respondent was represented by Ms. Barbra Masinde, Chief State Attorney in the Directorate of Prosecutions.

A Memorandum of Appeal was filed in this Court by M/S Nakagga & Co. Advocates on 27th December 2021. A Supplementary Memorandum of Appeal was later lodged by M/S Katende, Ssempebwa & Co. Advocates. At the hearing of this appeal, Mr. Muwonge orally sought leave of this Court to file the said Supplementary Memorandum of Appeal, which leave this Court granted. The Supplementary Memorandum of Appeal contained the following grounds of appeal:-

1. That the learned Justices of Appeal erred in law and fact when they upheld the Appellant's conviction for the offence of aggravated robbery without proof of the Appellant's participation.
- 2. That the learned Justices of Appeal erred in law and fact when they upheld the Appellant's conviction for the offence of aggravated robbery based on unsatisfactory circumstantial evidence.
- 3. That the learned Justices of Appeal erred in law and fact when they confirmed a compensation of UGX. \$41,000,000/= (Uganda Shillings Forty-One Million only) without any justification.
- 4. That the learned Justices of Appeal erred in law and fact when they passed an illegal and manifestly excessive sentence of 20 years and 6 months without considering all the mitigating factors.

Appellant's Submissions

On grounds 1 and 2, learned Counsel for the Appellant submitted that the ingredients of the Appellant's participation in the commission of the offence was not proved. He contended that the circumstantial evidence heavily relied on by the lower courts was unsatisfactory and failed the test of time, since there was no eye witness who saw the Appellant commit the offence.

Counsel submitted that the deadly substance was never proved by the prosecution as the substance that made the victim unconscious, and it was never forwarded to the Government analytical laboratory for examination and investigation; that the Doctor who examined the victim did not examine the blood samples of the victim and, as such, he could not ascertain whether it was indeed the food or drinks the victim ate which must have caused him the unconsciousness; and that therefore, the charge of Aggravated Robbery was never established beyond reasonable doubt.

Regarding the Appellant's participation, Counsel submitted 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 of Airtel Uganda, was insufficient and failed to place the Appellant at the scene of crime.

Counsel further submitted that, during the trial, no report of the identification parade was tendered in evidence, neither was the officer who carried out the identification report invited by the Prosecution to give his testimony; that this greatly watered down the prosecution case, and, as such, the court ought to have given the Appellant a benefit of doubt and acquitted him.

On ground 3, learned Counsel for the Appellant first sought the leave of this Court to raise this ground of appeal, since it was not raised before the Court of Appeal. He relied on Rule 70 of the Judicature (Supreme Court Rules) Directions. He then submitted that the Appellant did instruct his lawyer at the Court of Appeal to appeal against the compensation order of Uganda shillings 41 million made by the trial court against the Appellant to pay to the victim; that, however, he was let down by his lawyer, who either through foresight (meant oversight?) or slip rule (meant a slip of the pen?), did not raise the ground of appeal to the detriment of the Appellant; that in spite of that, the Court of Appeal did not reevaluate the evidence as a whole and reached a wrong decision.

Counsel submitted that both the trial court and the learned Justices of Appeal never stated under what circumstances they arrived at the figure of Uganda shillings 41 million as compensation, and that, as such, it was ambiguous and not clear.

On ground 4, learned Counsel for the Appellant submitted that in sentencing the Appellant, the learned Justices of Appeal failed to properly consider the mitigating factors in favour of the Appellant, and the period spent on remand. Counsel cited the case of *Rwabugande Moses Vs Uganda, Supreme Court Criminal*

Appeal No. 25 of 2014 to support his contentions. In addition, Counsel submitted that the victim was never severely injured, nor was there a loss a life; that as such, the sentence of 20 years and 6 months' imprisonment was manifestly excessive, harsh and illegal in the circumstances. He prayed that this Court either sets aside the sentence, or imposes a legal sentence of about 10 years' imprisonment.

Respondent's Submissions

In reply to the Appellant's submissions on grounds 1 and 2, learned Counsel for the Respondent submitted that there is direct evidence that placed the Appellant at the scene of crime. She referred this Court to the victim's testimony that even though he (the victim) did not know the Appellant before, he interacted with him and Buttodene for about 10 minutes when they were asking him for his contact, and that in fact it was the Appellant who talked to him first; that when the passenger went to fetch refreshments he returned with the Appellant; that after he ate, he felt dizzy; and that he later saw the Appellant at Masaka Police Station and was able to identify him as one of the two people who hired him, rendered him unconscious and stole his car.

Counsel further submitted for the Respondent that, the Appellant did not disassociate himself from the scene of crime and therefore, he had a common intention with Buttodene to rob the victim of his car. In addition, Counsel submitted that this evidence was supported by the testimony of PW2 Mwanje Bashir, also a taxi driver in Nyendo Masaka. PW2 also confirmed a similar attempt by the Appellant and Buttodene, who, in another incident, offered eats to another taxi driver known as Abdallah, but Abdallah had declined the offer because he was fasting. Counsel also referred to the testimony of PW4 Nyanzi Rashid, who participated in the arrest of the Appellant, and to the data of incoming and outgoing calls between the Appellant and Buttodene.

Regarding the deadly substance, Counsel submitted that the Court considered the victim's evidence that after eating gonja (plantain) and drinking splash juice, he was rendered unconscious; that the testimony of PW3 Sgt. Gidaga Alex confirmed that the victim was found lying by the roadside having lost consciousness; that PW5 Doctor Kyandidi Godfrey Mawa, who treated the victim, ruled out other causes of similar symptoms like underlying diseases as well as alcohol, and concluded that the patient could have been drugged using an anesthetic.

Counsel further submitted for the Respondent that the prosecution is not required to name the offensive substance as long as it is established that it is capable of causing death or grievous harm or inducing fear in a person that it is likely to cause death or grievous harm.

Regarding Ground 3, learned Counsel for the Respondent objected to this ground of appeal on the basis that the same was never raised before the Court of Appeal. He contended that it cannot therefore be raised for the first time at the instant second appeal.

Counsel conceded that no explanation was offered by the trial court as to how the value of the car, which the record of proceedings indicated as 14 million, translated into 41 million. However, she submitted that the vehicle was never recovered, and that it was a source of livelihood both for the victim and the owner who had hired it out; that in addition, the victim suffered injury as he lost consciousness for 4 days due to the substance administered to him by the Appellant. Counsel concluded that this therefore justified the award of 41 million by the two lower courts.

On Ground 4, learned Counsel for the Respondent submitted that the issue of the period spent on remand was properly dealt with by the learned Justices of Appeal, based on the decision in

Rwabugande Moses Vs Uganda (*supra*). He contended that they, therefore, cannot be faulted for their finding; secondly, that an appeal cannot lie to the Supreme Court on a matter of severity of sentence.

Resolution of the Appeal

At the hearing of this appeal, the coram included Justice Opio-Aweri (RIP), who however passed on before the judgment could be delivered; and Justice Arach-Amoko (RIP), who was then indisposed. This necessitated the re-constitution of the panel to replace the two justices. Learned Counsel for each side had the opportunity to address this Court again before the re-constituted panel. Each of the Counsel had no objection regarding the reconstituted panel, and each adopted their earlier respective submissions to enable this court determine this appeal.

The Supreme Court's jurisdiction as a second appellate court is limited to considering questions of law or mixed law and fact that were before the first appellate court. This Court is not required to re-evaluate the evidence like the first appellate court. See: Rule 30 (1) of the Judicature (Supreme Court Rules) Directions; and Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 2007.

Ground 1 and 2

It is the Appellant's argument that the decision of the learned Justices of Appeal to uphold the Appellant's conviction of aggravated robbery was in error as the evidence did not place the Appellant at the scene of crime; that therefore, the participation of the Appellant was not proved; and that the evidence the lower courts relied on was circumstantial evidence that failed the test of time. The Appellant submitted that, because there was no direct evidence that placed the Appellant at the scene of crime, he should be acquitted. Counsel for the Appellant also objected to the lower court's relying on the identification parade, on grounds that no report was availed and the police officer who conducted the parade did not testify.

The record shows that PW1 (the victim) testified that he was hired by the Appellant and Buttodene to drive Buttodene around Masaka in his car, and that when he ate the food and drank the splash juice given to him by the Appellant and Buttcdene, he lost consciousness. PW1 was further able to pick out the Appellant in an identification parade as one of the people who approached him that day. The evidence on record shows that prior to the victim losing consciousness, he interacted with the Appellant twice.

In addition, the phone records that were part of the evidence adduced before court show that the victim was called on phone by the Appellant and his colleague. Not only did the phone records prove that Buttodene and the Appellant were in constant contact on the day of the robbery, it also shows that the Appellant was in the same area as the victim. The evidence of PW2 further disclosed that the Appellant and his colleague had attempted to drug another taxi driver called Abdallah, the previous day.

It is not in doubt, as reflected from the record, that aside from the evidence of the victim (PW1), the other evidence that was relied on by the two lower courts was circumstantial. Circumstantial evidence was clearly relied on to prove the participation of the Appellant in the crime, and also regarding the substance that was ingested by the victim, making him unconscious for 4 days.

The learned Justices of Appeal in their Judgment (at page 9 – 13 of $\frac{1}{2}$ the record of appeal), re-evaluated the evidence pertaining to the participation of the Appellant in the commission of the offence and the circumstantial evidence that was relied upon by the learned trial Judge. It is also reflected on record that, in arriving at their findings, the learned Justices of Appeal warned themselves on the dangers of relying on circumstantial evidence. The findings of the learned Justices of Appeal were concurrent with the findings of the learned trial Judge. This Court is not required to re-evaluate the evidence like the first appellate court did, as we find no basis to do so.

The Appellant also submitted on the lack of an identification parade report, the absence of the testimony of the police officer who was in charge of carrying out the identification parade, and the failure on the part of the prosecution to establish with certainty what the deadly substance was. He contended that this weakened the prosecution's case and should have resulted into his acquittal.

Regarding the Appellant's contention on the lack of an identification parade report and the absence of the testimony of the police officer who was in charge of conducting the identification parade, the victim himself testified at page 3 of the High Court proceedings, that:-

"When he got out from Stanbic Bank, he told me to drive back to Kyabakuzza School, but before we reached, he stopped the vehicle and told me to park. After parking, he told me that we were waiting for children from Mbarara then he asked me whether I had empties of Soda in the vehicle. I gave him the empties of Soda, he went to the shop and bought drinks, when he came back, he came back with the

Accused person, when they came back they sat in the car and inquired from me what I wanted to take between Soda and Splash. I said splash and they gave me splash and Gonja, having taken, I started feeling dizzy, when I felt dizzy, I never recovered my senses." (underlined for emphasis).

This evidence of PW1 is direct, and is enough on its own, to place the Appellant at the scene of crime. It places the Appellant in the car (scene of crime) with the victim at the time the Appellant and Buttodene gave him the gonja (plantain) and the splash drink which he consumed and lost consciousness. The record shows that the victim was able to identify the Appellant as the person who, together with Buttodene, gave him foodstuff to eat which made him lose consciousness.

The victim's direct evidence shows that the offence was not committed in one place. It commenced with the Appellant and Buttodene approaching the victim and then hiring him. The two gave the Appellant foodstuff, that is, gonja (plantain) and splash juice, in his car which was stolen and never recovered. Buttodene was never arrested, but the learned trial Judge noted that the Appellant and Buttodene were working together to execute the crime. In addition to this, the phone records, which were part of the adduced evidence, show that the two men were in constant contact on the fateful day, and that the Appellant was in Masaka between 11 am and 3.30 pm on the date of the incident.

Regarding the failure on the part of the prosecution to establish with certainty what the deadly substance was, the record shows that the adduced evidence on record considered by the lower courts is that what was ingested by the victim left him unconscious for four days. The two lower courts relied on the expert evidence of the Doctor (PW5) who confirmed that the Appellant's state of unconsciousness was not due to illness or alcohol but possibly chloroform, ethyl, halothane which can cause unconsciousness when administered through food.

Thus, based on the above, we cannot fault the concurrent findings of the lower courts that the Appellant was not only directly identified by the victim (PW1), but also that the circumstantial evidence of his association with Buttodene (exhibit PE3, PW4 and PW2) placed him at the scene of crime at the material time, thus pointing to his participation in the commission of the offence he was indicted for.

Thus, based on the above findings, we agree with the learned trial Judge and the learned Justices of Appeal that the Appellant

participated in the commission of the offence and that he was properly identified and placed at the scene of crime.

Ground 3

As stated earlier, learned Counsel for the Appellant first sought leave of this Court under Rule 70 of The Judicature (Supreme Court Rules) Directions to raise a ground of appeal on an issue which was not raised before the Court of Appeal. The ground for which leave was sought is ground 3, which states:-

"3. That the learned Justices of Appeal erred in law and fact when they confirmed a compensation of UGX \$41,000,000/= \$ (Uganda Shillings Forty-One Million only) without any justification."

It was the Appellant's submission that the above ground was not raised at the Court of Appeal due to the oversight of the Appellant's Counsel, who, although he had been instructed by the Appellant to raise it as a ground of appeal and argue it on his behalf, did not raise it.

Learned Counsel for the Respondent objected to the leave being granted, on grounds that the issues raised in that ground of appeal were not raised at the first appellate court, and that, in addition,

the Appellant relied on Rule 70 of this Court's Rules, which was the wrong law.

\$\sim\$

Rule 70 of this Court's Rules states that at the hearing of an appeal,

"(a) the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 63 of these Rules; and

- (b) the arguments contained in any statement lodged under rule 64 of these Rules shall receive the same consideration as if they had been *advanced orally at the hearing.*"

It is on record that learned Counsel for the Appellant first sought leave of this Court to file a Supplementary Memorandum of Appeal. The application was not opposed by the Respondent, and leave was accordingly granted by this Court. The grounds of appeal in the Supplementary Memorandum of Appeal filed by Counsel included ground 3, as extracted above. Subsequently, in his submissions, learned Counsel for the Appellant sought another leave to include a ground of appeal not submitted on at the Court of Appeal. By the time Counsel sought this Court's leave for the second time, ground 3 had already been included in the Supplementary Memorandum of Appeal.

Thus, Rule 70 of The Judicature (Supreme Court Rules) Directions does not apply to this situation. The Appellant was not seeking to argue a ground of appeal not specified in the memorandum of appeal before this Court. He was rather seeking leave of this Court to introduce a ground of appeal on an issue not raised before the first appellate court (the Court of Appeal). Thus, in that light, Rule 70 of the Rules of this Court was not the applicable law.

Secondly, Counsel for the Appellant's submission that the Appellant's previous Counsel was directed to file this as a ground of appeal but failed does not stand. The record indicates on page 22-23 of the record of appeal, that, at the hearing of the appeal at Court of Appeal, Ms. Macrena Nyanzi, the Respondent's Counsel on her own initiative submitted on the compensation award, as follows:-

"*My lords I would also invite court to look at the last paragraph of*" the sentence at page 83. The victim PW1 stated that, the value of his car at page 9 was 14 million. At page 83 the convict is also directed to pay the value of the car of 41 million. Unless it was a typing error *but the record here says 41 million*

However, the then Appellant's Counsel did not reply to the extracted submission even after it was raised by Counsel on the other side. To that extent, this Court cannot fault the learned Justices of Appeal for confirming the compensation order as directed by the learned trial Judge. In any case, it was not a ground of appeal before them for consideration.

The Appellant, however, did seek the leave of court to introduce this ground of appeal and for possible consideration of it by this Court. The Respondent's Counsel's objection to allowing this ground of appeal was on the basis that the circumstances of the award of the compensation order do not fall within the bracket of an illegality; that, therefore this ground should not be entertained before this court.

As rightly stated by the Respondent, orders for compensation are not illegal, as is discernible from Section 126 of the Trial on Indictments Act and Section 286 (4) of the Penal Code Act. However, the peculiarity in this case is the discrepancy of the figures in the record of appeal and the final figure adopted by the learned trial Judge, which was confirmed by the learned Justices of Appeal.

In the interests of justice, and in exercise of this Court's inherent powers under rule 2 (2) of the Rules of this Court to achieve the ends of justice, and to enable an objective appreciation of the discrepancy, leave is granted to the Appellant, and ground 3 is adopted as part of the grounds of appeal in this appeal.

We have carefully perused the record, and read the submissions of the parties. Section 286 (4) of the Penal Code Act, Cap 120, gives court the discretion on the sum to be awarded as compensation for the loss suffered by the injured party. In directing the Appellant to pay the said compensation, the learned trial Judge, at page 83 of the record of appeal, stated:-

"..... *million shillings to the car owner."*

A reading of this order indicates that the learned trial Judge wanted the convict to pay the value of the car.

indictment against the Appellant had the following The particulars:-

"Simbwa Hassan Kisembo, on the 7th September, 2010, at Mwalo village in the Masaka District robbed Ssegirinya Francis of motor vehicle Reg No. UAM 456P Toyota Corona Premio, silver in color *worth 14 million shillings....*" (underlined for emphasis).

The victim (PW1), in his testimony before the High Court, at page 4 of the record of proceedings, indicated that Uganda shillings 14 million was the value of the car.

In the instant appeal, learned Counsel for the Respondent attempted to justify the award of 41 million Uganda shillings as being that the stolen vehicle was never recovered, that therefore, both the victim and the owner suffered material loss of the vehicle as well as their income. However, the record of proceedings at the High Court shows that the State never raised that issue before the trial court, neither through submissions, nor during allocutus proceedings. At the Court of Appeal, the record shows at page 29 of the record of proceedings that learned Counsel Macrena Nyanzi conceded before that court that; "That I will admit if it is a typing error that it was a mistake."

Having perused the evidence on record and the wording used by trial Judge when ordering the payment of the learned compensation, we are of the considered opinion that the learned trial Judge clearly meant to order a compensation which reflected the value of the stolen car, and the evidence shows that the value was then Uganda shillings \$14,000,000/\$ = (fourteen million). Thus, for that reason, we find that the correct value of the car then was Uganda shillings \$14,000,000/=\$.

In Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No. 123 of 2001 (Unreported), this Court noted:-

"the Appellate court will not interfere with the sentence imposed by the trial Court which has exercised its discretion on sentence unless the trial court ignores to consider an important matter or circumstance which ought to be considered while passing the *sentence or where the sentence imposed is wrong in principle."*

In the instant situation, however, this Court is not interfering with the sentence. It is merely exercising its inherent powers under rule 2 (2) of the Rules of this Court to achieve the ends of justice, having established from the record that the compensation for the stolen motor vehicle awarded by the lower courts was, on the face of the record, a mistake arising from a typing error, since it was at variance with the adduced evidence on record regarding the value of the stolen vehicle. It is in that light that this Court would substitute the figure of 41 million shillings quoted by the learned trial Judge in her judgment as the compensation order issued against the convict, (now Appellant), with Uganda shillings \$14,000,000/\$ = (fourteen million).

Having done that, we also consider that the value of 14 million for the vehicle in question was determined by the trial court more than ten years ago. Since then, numerous economic factors and financial dynamics, including inflation, have sprung up, such that the value of Uganda shillings 14 million more than ten years ago, has not remained static, but has increased. The evidence on record is that the vehicle in question, which was robbed and never recovered, was used by the owner for commercial purposes as a taxi. It is in that light that, in the interests of justice, and to cater for such economic dynamics, we would factor in interest at a commercial rate of 15% per annum, on the amount of Uganda shillings 14 million, from the date of the crime, that is, 7th September 2010, until payment in full.

This ground of appeal partly succeeds.

Ground 4

The Appellant's contention in this ground of appeal is that the Court of Appeal passed an illegal sentence by not considering the mitigating factors and the period spent on remand; and that the sentence of 20 years and 6 months' imprisonment was both harsh and excessive. The Appellant's Counsel relied on the case of *Rwabugande Moses Vs Uganda* (supra), where this Court held

that the period spent on remand has to be deducted from the final sentence passed against the convict pursuant to Article 28 (3) of the 1995 Constitution.

With respect, however, we find the decision in *Rwabugande Moses Vs Uganda* (supra) to be inapplicable to the circumstances of the appeal before us, because, as was held by this Court in *Asuman Abelle Vs Uganda*, Supreme Court Criminal Appeal No. 66 of 2016, the decision in *Rwabugande* does not have a retrospective effect. In the *Abelle* case, this Court clearly stated that the decision in the **Rwabugande** case would not bind courts for cases decided before that decision was made. The record in this appeal shows that the Appellant was sentenced on 3rd March 2015, and the decision in *Rwabugande Moses Vs Uganda* was made a year later, on 3rd March 2016.

The foregoing notwithstanding, however, it is a constitutional provision, under Article 23 (8) of the Constitution, that where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment. Though the Appellant's Counsel cited Article 28 (3) of the Constitution in his submissions on this matter, the relevant provision is Article 23 (8) of the Constitution.

We note, from the record of appeal, at page 12 of the Court of Appeal judgment, that the said court took into account the period the Appellant spent on remand when sentencing him, as that court stated:-

"The appellant 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 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."

It is also reflected on the same record of appeal at page 12, that the learned Justices of Appeal considered the mitigating factors in favour of the Appellant. They stated that:-

"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 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.*"

After considering the mitigating factors, the Court of Appeal sentenced the Appellant to 25 years' imprisonment, but, after considering the period spent on remand, told him to serve a sentence of 20 years and 6 months as from the date of conviction of 3rd March, 2015.

In view of the foregoing, it cannot therefore be said that the learned Justices of Appeal passed an illegal sentence against the Appellant. Regarding the severity of the sentence, the Appellant argued that 20 years and 6 months' imprisonment was harsh and excessive. Learned Counsel for the Respondent objected to this submission on the basis that appeals do not lie to the Supreme Court on severity of the sentence.

Section 5 (3) Judicature Act Cap 13 states that:-

"In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not *including the severity of the sentence.*"

The right to appeal is a creature of statute. In that respect, and based on the provisions of Section 5 (3) Judicature Act cited above, this Court shall not consider that part of the appeal which challenges severity of the sentence imposed against the Appellant.

Ground 4 of this appeal fails.

In conclusion this Court does not find merit in grounds 1, 2 and 4, but Ground 3 of this appeal partly succeeds.

Accordingly, the orders of the Court of Appeal regarding conviction and sentence are upheld. The orders of the Court of Appeal regarding compensation for the stolen motor vehicle registration number UAM 456P Toyota Corona Premio are also upheld. However, for reasons given, we would factor in interest at a commercial rate of 15% per annum, on the amount of Uganda shillings 14 million, from the date of the crime, that is, 7th September 2010, until payment in full.

We so order.

Dated at Kampala this 13th day of 13th 2024\$.

De

Trimenalia.

Faith Mwendha Justice of the Supreme Court

L'Usalemia.

Prof. Lillian Tibatemwa - Ekirikubinza Justice of the Supreme Court

AMulaise

Percy Night Tuhaise Justice of the Supreme Court

\$\overline{z}\$

Mike Chibita Justice of the Supreme Court

Dunthu?

Stephen Musota Justice of the Supreme Court

Delivered as directed to

931031024

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ugsc/2024/28/eng@2024-03-13>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/simbwa-v-uganda-criminal-appeal-15-of-2020-2024-ugsc-28-13-march-2024-unknown-topic-unknown-court-2024>

Prepared on 14 October 2026 · Esheria