

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 86 of 2010
(High Court Criminal Action No. HAC 126 of 2009)

BETWEEN : **JOSAIA USUMAKI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Chandra RJA**

Counsel : **Appellant in person.**
Ms. M. Fong for the Respondent

Date of Hearing : **20 March 2013**

Date of Judgment : **7 June 2013**

RULING

1. This is an application for leave to appeal out of time against sentence.
2. The Appellant was charged for one count of Robbery with Violence contrary to section 293(i) (b) of the Penal Code and on his pleading guilty was convicted and sentenced to 10 years imprisonment with a non-parole period of 9 years on 10 September 2010.
3. The Appellant filed an application for leave to appeal against his sentence which is dated 16 October 2010 but filed in the Court of Appeal Registry on 2 November 2010.

4. The grounds of appeal set out in the application for leave to appeal could be summarised as follows:
 - 1) That the learned judge erred in law and fact in failing to consider the prompt guilty plea.
 - 2) That the learned Judge erred in law and in fact in ordering 10 years imprisonment to run consecutively to the 13 years 6 months jail term he was serving and ignored the Totality Principles.
 - 3) That in all the circumstances of the case that the sentence of 10 years imprisonment consecutive to the present term of 13 years 6 months is harsh and excessive.

5. As regard the delay in filing the application for leave to appeal, it has been dated 16 October 2010 but filed in the Registry on the 2nd of November 2010. The Appellant has stated that he was unable to get legal representation to advise him regarding his right of appeal and that took for him to get advice. If the date of the application is taken into account, i.e. 16 October 2010 the delay is only six days. In view of the explanation for the delay, I allow the application for leave to appeal out of time.

6. The trial Judge in sentencing the Appellant considered the fact that it was a home invasion robbery with violence in the early hours of 24 September 2009 at about 2.30 a.m., that the complainant and her three daughters had been threatened and the Appellant and his friends had ransacked the house and stolen \$61,480 worth of properties and considered the event as a cowardly attack by the Appellant and his friends on four females, a mother and her three daughters as the aggravating factors.

7. As far as the mitigating factors were concerned the trial Judge only considered the guilty plea entered by the Appellant and disregarded the time spent in custody on the basis that he was a serving prisoner from 19 March 2010 in Nasinu Magistrate Court, Criminal Case No.224/10.
8. Having considered the aggravating and mitigating factors the Appellant was sentenced to 10 years imprisonment with a non-parole period of 9 years. The learned Judge however, did not refer to the previous sentence the Appellant was serving.
9. As regards the grounds of appeal, the learned Judge has considered the Appellant's prompt guilty plea and given credit for that as a mitigating factor and therefore there is no merit in that ground.
10. As far as the totality principle is concerned there is merit in that ground as there has been a failure on the part of the trial Judge to consider the sentence of 13 years and 6 months he was already serving.
11. The learned trial Judge had failed to consider the effect of the previous sentence in terms of the provisions in the Sentencing and Penalties Decree 2009.
12. In the recent decision of the Court of Appeal in *Asaeli Vukitoga v The State* AAU0049/08 (13 March 2013) the effect of the totality principle and the position regarding Section 22 of the Sentencing and Penalties Decree 2009 were considered in respect of sentencing an accused when he was already serving a sentence for an offence committed previously.

13. Section 22 of the Sentencing and Penalties Decree 2009 is to the effect that every term or imprisonment imposed on a person by a court must, unless otherwise directed by the court, be served concurrently with any uncompleted sentence or sentences of imprisonment.

14. In view of this position I allow the application for leave to appeal against sentence.

Orders of Court:

1. Application for leave to appeal out of time is allowed.
2. Application for leave to appeal against sentence is allowed.

Suresh Chandra
Resident Justice of Appeal