THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Musoke, Gashirabake & Luswata, JJA]

CRIMINAL APPEAL NO. 369 OF 2019

(Arising from Criminal Session No. 037 of 2019)

KIBUULE MIKEY BRIAN.....APPELLANT

VERSUS

UGANDA ....RESPONDENT

[Arising from the decision of Henry Kawesa, J of the High Court of Uganda sitting at Mpigi in Criminal Case No.037 of 2019 dated 25th September 2019]

JUDGMENT OF COURT.

Introduction.

The Appellant was charged and committed to the High Court of Uganda on four counts of aggravated robbery contrary to **Sections 285 and 286 (2) of the Penal Code Act Cap 120.** On count one, it was alleged that on the 19th April 2017 at about 2:30am at Kasenge cell, Kyengera Town Council in Wakiso district, the Appellant and others still at large, while using deadly weapons to wit a knife, panga and club and while using violence or while threatening to use force, robbed Tushabe Julian of her Techno Phone valued at UGX 60,000/=.

On count 2, that the Appellant and others still at large robbed Mugisha Hakim Juma of his Nokia phone values at UGX. 50,000/= and cash of UGX 20,000/=.

On Count 3, it was alleged that the Appellant and others still at large robbed Mubere Joshua of three mobile phones valued at shs.150,000/=.

On the 4th count the Appellant and others still at large robbed Nziabake Kambesa of her bag valued at UGX 50,000/= and immediately after the said robbery threatened to use a deadly weapon to wit a knife, a panga and sticks on the said victims.

The Appellant was tried by the High Court of Uganda at Mpigi and on the 25th day of September 2019 the Appellant was convicted on count1 and count 4 and sentenced to serve 20 years imprisonment from the day he was first remanded on each count.

Aggrieved with the High Court decision the Appellant appealed to this court on grounds:

'1. *The learned trial Judge erred in law and fact when he relied on the uncorroborated prosecution evidence that was marred with contradictions and inconsistences which occasioned a miscarriage of justice to the Appellant.*

2. *The learned trial Judge erred in law and fact when he relied on evidence of an unreliable single identifying witness to the detriment of the Appellant.*
3. *The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence adduced by prosecution and defence thereby reaching a wrong decision.*
4. *The learned trial Judge erred in law and fact when he convicted and sentenced the Appellant without considering the Appellant's unrivalled Alibi hence occasioning miscarriage of justice to the Appellant.*
5. *The learned trial Judge erred in law and fact in sentencing the Appellant to 20 years imprisonment on the first count of Aggravated Robbery contrary to* ***Section 285 and 286(2) of the***

Penal Code Act *and 20 years imprisonment on the second count of aggravated Rrbbery which sentences were deemed illegal, manifestly harsh and excessive in the circumstances'.*

The Respondent opposed the appeal

Representation

The Appellant was represented by Mr. Emmanuel Muwonge at the hearing while the Respondent was represented by Ms. Sharifah Nalwanga. Both counsel relied on written submissions filed earlier in this matter.

The appellant was in court via a visual video link.

Duty of this court.

We have carefully read the submissions of both counsel and the authorities cited. We have carefully perused the record of appeal. We are also mindful of our duty, as the 1st appellate court, to reappraise all material evidence that was adduced before the trial court and come to our own conclusions of fact and law while taking into account the fact we neither saw nor heard the witnesses testify. See **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10, Kifumante Henery vs. Uganda SCCA No. 10 of 1997 and Pandya vs. R [1957] E.A 336**

Ground 1

Submissions by counsel for the Appellant

Counsel opted to jointly argue grounds 1,2,3, and 4.

Counsel for the Appellant submitted that the learned judge relied on the uncorroborated evidence of the single identifying witness of PW1. Counsel

argued that according to PW1's evidence the events occurred at night when it was not favourable for proper identification. He also further argued that they did not conduct an identification parade for the complainant to identify the Appellant at the police.

Counsel furthermore argued that PW1's evidence was marred with contradictions and inconsistences. The victim was not able to state which kind of phone that was stolen from her.

Counsel submitted that the trial Judge wrongly convicted the Appellant without proving the participation of the Appellant. Counsel cited **section 101(2) of the Evidence Act** which provides that:

> "when a person is bound to prove the existence of any of the fact, it is said that the burden of proof lies on that person"

Section 103 of the Evidence Act,

> "the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by law that the proof of that fact lies on any particular person"

Counsel went ahead and cited the precedents that lay down the law regarding identification by a single witness. He cited **Abdulla Bin Wendo and Anor R (1953) 20 EACA 166** and **Abdallah Nabulere and Anor vs. Uganda [1970] HCB**.

Counsel for the Appellant submitted that the prosecution did not discredit the defence of alibi by the Appellant, and the trial Court ought to have believed this defence.

Submissions of counsel for the Respondent.

Counsel for the Respondent submitted that PW1 told court that she got to know the Appellant on the 19th April 2017. On that day she woke up at 2:00am in the night and realised that there were many people in the room flashing torches. She was able to recognise Brian the Appellant because he told her that they were going to rape her if she did not have money.

Furthermore, in her examination in chief she stated that she was able to see the Appellant from the light that was coming from the sitting room since her bedroom had a transparent curtain. He had a bag on his back, wore a black trouser, a knife and stick. Counsel submitted that the trial Judge found that PW1, PW2 and PW3 positively identified the accused.

For PW2, Counsel submitted that he was able to recognise the Appellant. PW2 stated that the Appellant had a stick, a handle for a hoe and used it to hit him. He told court that the Appellant spent about 2 hours in the house. That the Appellant took money from him, and all this time he was looking at the Appellant using the light from the bulb within the room. He told court that the child Yasin ran and reported to police which responded immediately and came and arrested the Appellant.

Counsel submitted that the evidence was corroborated by the evidence of PW3 who stated that the child of Mukonjo came and reported to them. When he came they were all arrested. PW3 stated that he was able to recognise the Appellant because he by passed him when he went to join the others. He used the light from the pillar of the house.

To buttress her submissions counsel relied on **Abdullah Nabulere and others vs. Ug. COA No. 09 of 1978,** where court held that the Judge should examine

closely the circumstances in which the identification was made particularly the length of time the accused was under observation, the light, the familiarity of the witness with the accused.

Counsel submitted that since the factors of correct identification were favourable at the time of commission of the crime, PW1, PW2 and PW3 placed the Appellant at the scene of the crime. It is therefore not fatal that the identification parade was not conducted. Counsel cited **SGT Baluku and Another, Supreme Court Criminal Appeal No.21 of 2014**, where it was held that the failure to conduct an identification parade did not occasion any injustice to the Appellants.

Consideration of court.

We shall consider grounds 1,2,3, and 4 together as they touch upon the identification of the appellant and whether or not the appellant's alibi was demolished by the prosecution.

It was the Appellant's contention that the police did not conduct an identification parade for him to be identified. It is trite that an identification parade is needed in criminal matters, although it is not in all cases that identification parade is held, particularly where an accused is not a stranger to the victim. Supreme court in dismissing arguments for an identification parade in **Mulindwa Samuel vs. Uganda, Criminal Appeal No.41 of 2000,** had this to say:

> "regarding identification parade we, with respect are unable to agree that the failure to hold one was fatal to the Appellant's conviction. The objective of an identification parade is to test the ability of a witness to pick out from a group the person, if present, who the witness has said that he has seen previously on a specific occasion. Where identification of an accused person is an issue at his trial, an identification parade should usually be held to confirm that the witness saw the accused at the scene of crime. However, where other evidence sufficiently connects the accused with the crime as the case in the present

appeal, failure to hold an identification parade is not fatal to the conviction of the accused"

The circumstances of this case present facts where the identification was not an issue for the victims. There was other corroborative evidence that sufficiently connects the accused with the crime. The evidence for the prosecution was adduced through three witnesses PW1, PW2 and PW3. PW1 testified that she first knew the Appellant on the 19 /04/2017. It was the night the robbery occurred and it was 2.am. It was the uncontroverted evidence of PW1 that she was able to see the Appellant at night using the light from the sitting room because her curtain was transparent but the house did not have a ceiling so the light went through the bedroom. She also further averred that the Appellant and the other people spent an hour at her home and she was able to identify the Appellant because she was the one who did evil to her while the rest where just checking.

While PW2 testified that they never switch off their light at night, so on the fateful night at around 3am, the Appellant and others attacked her in her house asking for money and phones. She testified that she was able to see the Appellant because she was looking at him when he asked for money. At that moment one of her sons ran to report to PW 3. This was corroborated by PW3 who testified that Mukonjo's son told him that there were thieves. He then called the police. He averred that while he was in his house he first saw two men out then, the Appellant who was following them. He was able to identify the appellant through the light that was on the pillar of the house. This evidence was uncontroverted. He said that shortly the appellant was arrested by the police with the others. In the circumstances we find that there was no need to conduct an identification parade.

What matters to court is whether considering the circumstances of the case there was positive identification of the Appellant. In **Abdulla Nabulere and 2 others vs. Uganda Court of Appeal No.12 of 1981[1979] HCB 77,** court held that:

> "where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correct identification or identifications. The reasons for the special caution is that there is a possibility that a mistaken witness can be a convincing one, that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced, but the poorer the quality the greater the danger"

As stated above, the Appellant spent 1½ hours in PW1's house and 2 hours at PW2's house. There was ample time for the victims to identify the appellant. Both rooms were lit with light that was sufficient for identification. PW2 said that she knew the appellant before but their identification was corroborated by that of PW3 who saw the Appellant run through his window. This witness sufficiently identified the Appellant and ably put the Appellant at the scene of the crime.

It is therefore our finding that the prosecution proved the participation of the Appellant beyond reasonable doubt.

Grounds 1,2,3 and 4 fail.

Ground 5

Submissions by counsel for the Appellant

Counsel for the Appellant submitted that the sentence was illegal, manifestly harsh and excessive in the circumstances of this case. The trial court did not take into consideration the time the Appellant spent on remand. Furthermore, the trial court did not state whether the sentence is to be served consecutively or concurrently.

Counsel cited **Rwabugande Moses vs. Uganda; Supreme Court Criminal Appeal No. 25 of 2014**, where the court held that in imposing a sentence against the convict, the period spent on remand must be taken into account and it must be done in an arithmetic way.

Counsel cited **Kiwalabye Bernard vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001,** where court held that the appellate court will not interfere with the sentencing discretion power of court unless it is evident that the sentence is excessively harsh or where the sentence is so low to lead to a miscarriage of justice.

Counsel prayed that this court invokes **Section 11 of the Judicature Act** to exercise the sentencing power as though it was the original court.

Court further cited paragraph **6(1) of the Constitution (sentencing guidelines for court of judicature)** where every court must take into account any circumstances which the court considers relevant. Counsel further prayed that this court considers the mitigating factors that the Appellant is a first offender, a married man and that he has spent 2½ years in prison

Counsel cited **Tamale Richard vs. Uganda; Court of Appeal Criminal Appeal No 19 of 2012,** where the court interfered with the discretion of the trail court and

reduced the sentence of 25 years imprisonment imposed on the Appellant to 18 years imprisonment.

Submissions of counsel for the Respondent

Counsel for the Respondent conceded that the sentence was illegal to the extent that the learned trial Judge erred in law and fact when he failed to arithmetically deduct the period spent on remand as per **Article 23(8) of the Constitution** which requires that the court takes into consideration the period the accused has spent on remand. Counsel cited **Rwabugande Moses vs. Uganda (Supra)**

Counsel further submitted that the sentence of 20 years' imprisonment is not manifestly excessive and harsh considering that the maximum sentence for aggravated robbery contrary to **Section 286 (2) of the Penal Code Act is** death and also the **Constitution sentencing guidelines for courts of Judicature Practice Directions, 2013**. As stipulated under item 4 of part 1 under sentencing ranges in capital offences start from 35 years which can be increased on the basis of the aggravating factors or reduced according to the mitigating factors.

To support her submission counsel cited **Byamukama Jonas vs. Uganda Court of Appeal Criminal Appeal No. 0381 of 2014,** where this court found the sentence of 20 years' imprisonment imposed on the Appellant to be within the respective sentencing range.

Consideration of court.

It is a constitutional right of every convicted person under **Article 23(8) of the Constitution** and guideline 15 of the sentencing guidelines, to have the period spent on remand deducted while passing the sentence. Failure to do so, renders the sentence illegal. In **Nashimollo Paul vs. Uganda SCCA No.046 of 2017**, the

Supreme court held that in arriving at a sentence, the trial court must calculate the period the Appellant has spent on remand and subtract if from the proposed sentence.

According to the record, the trial Judge did not take into consideration the time spent on remand and as such the sentence is illegal because it offends **Article 23(8) of the Constitution of the Republic of Uganda.** We accordingly set the sentence aside.

It however has to be appreciated that by the time the judgment was passed on the 25th September 2019, the position of the law in **Rwabugande Moses** (*supra*) had been over turned by the Supreme Court decision in **Abelle Asuman vs. Uganda Criminal Appeal No 66 of 2016,** which was decided on 19th April 2018, deciding that the arithmetic deduction of the period should be left to the discretion of the sentencing court. Since by 25th September 2019 it was not mandatory to arithmetically deduct the period spent on remand, it would suffice if the Judge made consideration of the time spent on remand.

That said, we set aside the sentence in the trial court. We invoke our powers under **Section 11 of the Judicature Act, and Rule 2(2) of the Judicature (Court of Appeal Rules) Directions SI 13-10.** We proceed to exercise the powers of the trial Court by re-sentencing the Appellant by imposing a sentence we think is appropriate in the circumstances.

We sentence the Appellant to 20 years imprisonment on count 1 and deduct 2½ years spent on remand. We therefore sentence him to 17½ years starting from the time trial judgment was passed. We sentence the Appellant to 20 years imprisonment on count 4 and we deduct 2½ years spent on remand. We therefore sentence him to 17½ years starting from the time the judgment was passed. Both sentences shall run concurrently.

Save for the adjustment of the sentence to take into consideration the time the appellant spent on remand, we find that this appeal lacks merit and it is hereby dismissed.

We so order.

Dated at Kampala this 25th **Of** **2022**

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ELIZABETH MUSOKE

JUSTICE OF APPEAL

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CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

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EVA K. LUSWATA

JUSTICE OF APPEAL