THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA;

HON. JUSTICE A. TWINOMUJUNI, JA

HON. JUSTICE C.N.B KITUMBA, JA.

CRIMINAL APPEAL NO.146 OF 2003

1. **HARUNA TURYAKIRA**
2. **SENOGA BIZIBU :::::::::::::::::::: APPELLANTS**
3. **JAMES KAIRUTU**

VERSUS

UGANDA :: RESPONDENT

[Appeal from the judgment of the High Court at Mubende (Akiiki-Kiiza,J) dated 23rd June, 2003 in Mubende Criminal Session Case No.312 of 2001].

JUDGMENT OF THE COURT:

The three appellants, Haruna Turyakira, Senoga Bizibu and James Kairutu, herein after referred to as 1st, 2nd and 3rd appellants respectively, were initially charged with robbery with aggravation, contrary to sections 272 and 273(2) of the Penal Code Act. After protracted trial, they were convicted of a lesser cognate offence of simple robbery, contrary to sections 272 and 273(1)(b) of the Penal Code Act. They were each sentenced to 14 years imprisonment, to pay compensation of Shs.800,000/= each to the victim and thereafter be under police surveillance for 3 years after their release.

The brief facts of the case were that the appellants and others still at large, on the 27th May 2000, at Kitera village Kasambya in Mubende District, robbed Ssebazungu Christopher of cash Ug.Shs.2.5 million and at or immediately before or immediately after the said robbery, used a deadly weapon, to wit, a panga on the said Ssebazungu Christopher.

On the night of the said robbery between 1a.m-2a.m, Ssebazungu Christopher, PWI, his wife, Natukunda Allen, PW2, and Faradina Katusabe, PW3, sister of PW2, were sleeping in the house. PWI and PW2, husband and wife, were sharing a bedroom while PW3 was sleeping in a different room. The attackers hit the door open and PWI, PW2 and PW3 all woke up.

The assailants first entered PW3's bedroom. They were 4 in number. PW3 was able to identify them all through 2 torch lights being flashed on and off. They demanded money

from her. She knew them before as village-mates and neighbours. They were the 1st, 2nd, and 3rd appellants and one Bashir who was lynched because of this robbery.

Thereafter, the attackers entered the bedroom of PWI and PW2. They were flashing torch lights while demanding money. The 1st and 3rd appellants tied PWI "kandoya" before assaulting him. In the first place, PWI was stabbed on the right shoulder with a knife by the 2nd appellant before the 3rd appellant stabbed him a second time.

As the assailants were demanding money, PWI told them that he had some money under the mattress. The 2nd and 3rd appellants pulled PWI off the bed and it was the 2nd appellant who picked one million shillings from under the mattress. PWI again showed them another one million shillings which the attackers picked from the cupboard. The total money robbed was shillings two million five hundred thousand only. PWI had known the appellants before the incident for many years as village-mates and neighbours. He was able to identify them by the torch lights and they also talked to him while demanding money. The attack took about 30 minutes.

Natukunda Allen, PW2 also identified the thugs as 1st, 2nd, 3rd appellants and one Bashir who was killed. She was able to identify them with the help of torch lights being flashed in the room. She also knew them before as village-mates and neighbours for many years. It was the 2nd appellant and Bashir who were flashing torch lights during the robbery. Like PWI, PW2 was also assaulted during the robbery. Dr. Busulwa who examined both witnesses confirmed the allegation of assault. He found PWI had 2 cut wounds on the chest measuring 3x2cm and 2x3cm respectively. He classified the injuries as "harm". The doctor also found PW2 with 2 cut wounds. The 1st one measuring 1.5cm x1cm and the 2nd one was 0.5cm x1cm. He classified injuries as "harm".

Faradina Katusabe, PW3, reported the robbery to LCI Chairman of the area one Ezekiel Mbyaliyehe, PW4. In her report, she mentioned the names of the attackers to PW4 who also confirmed the same in his testimony to the court. This witness got the report on 27th May 2000 but the robbery occurred on the night of 26th May 2000. PW4 arrested the 1st appellant on 27th May 2000. When the 2nd and 3rd appellants saw PW4's party, they took off. The 3rd appellant was caught after chasing them but the 2nd appellant escaped. Bashir was killed at Kitera Trading Centre.

In their defences, the appellants denied any involvement in the said robbery. The learned trial Judge did not accept their denials and convicted each of them on the strength of the prosecution evidence. The appellants being dissatisfied with the judgment have appealed against both the conviction and sentence on the following grounds:-

1. ***The trial Judge erred in law when he held that there was no any possibility of mistaken identity of the appellants and that the condition for a correct identification existed.***
2. ***The trial Judge erred on evidence and facts in believing the prosecution witnesses' evidence wholly.***
3. ***The trial Judge erred in law and fact when he held that the discrepancies in the prosecution case were minor and were not intended to deliberately derail court.***
4. ***There was no sufficient evidence to prove that the money, Shs.2,500,000/= (Shillings Two Million, Five Hundred Thousand only) alleged in the charge sheet was stolen by the appellants.***
5. ***The sentence of 14 years imprisonment, compensation of Shs.800,000/= (Shillings eight hundred thousand only) and police surveillance for 3 years over the appellants after release (14 years) was excessive.***

Mr. John Kityo, representing the appellants on private brief, filed written submissions with leave of court. Learned Counsel argued ground 1 separately, grounds 2 and 3 together, grounds 4 and 5 separately. Ms Alice Komuhangi Khaukha, learned Principle State Attorney, represented the State. She also filed written submissions in which she argued grounds of appeal in the same order. We shall follow the same pattern.

Ground 1:

The appellants contend that the conditions at the scene of the alleged robbery were not favourable for correct identification. Mr. Kityo pointed out that PWI was sleeping in the bedroom when the 3 assailants entered the room. He was made to lie facing down by assailants and as he was still lying in that position, the assailants exited the room. Much as PWI claimed to know the attackers for a long time, Mr. Kityo submitted that he did not know who demanded for the last amount of money. In counsel's view, that testimony contradicted PWI when he stated that he knew the appellants by their voices.

Learned counsel further pointed out that the attack took a very short time and that explains why PWI did not mention the names of his assailants when he made his statement to the police. According to counsel, PWI who was lying face downwards during the attack which

took a very short time in a dark room where the only source of light was torches being flashed on and off, would not correctly identify the assailants.

As regards the evidence of PW2, Mr. Kityo submitted that this witness was sleeping in a dark room. She immediately woke up and sat on her bed when she was slapped. If this witness had identified the appellants, she would have made a statement to police implicating them as her assailants but she did not. In counsel's view, the attack was violent; therefore, PW2 was frightened and could not identify the appellants in a dark room.

Regarding the testimony of PW3, Mr. Kityo submitted that she too must have been frightened when she heard the door being hit because this was not a social visit and the torch flashed at her directly must have blinded her. In counsel's view, it is inconceivable that PW3 could identify the red jacket allegedly worn by the 2nd appellant on the night of the robbery in darkness. It is trite law, according to counsel, that identification done under terrifying and frightening circumstances is suspect. In support of this argument, counsel relied on the decision of ***Abdallah Nasur vs. Uganda [1992-93] HCB 4.***

According to counsel, PW4 had no useful evidence to offer because he was not present at the scene of the alleged crime. All in all, Mr. Kityo submitted that the law relating to identification in criminal cases was stated by the Supreme Court in the case of ***Frank Ndahebe vs Uganda, SCC No.02 of 1993 (unreported).***

In this case, the attack was violent and it took place at night in a badly lit room with only torch light, the assailants were five in number and the Court held that the conditions favouring correct identification were not present. The court also held that the witnesses' failure to mention the name of assailant and other attackers to those who answered the alarm and the authorities was a major weakness.

In the instant appeal, Mr. Kityo submitted that the conditions favouring correct identification of the appellants were not present and that there is no evidence to support the trial Judge's finding that the three appellants were correctly identified by the prosecution witnesses.

Ms Alice Komuhangi Khaukha, learned Principal State Attorney, responded that the trial Judge was justified to hold that there were no any possibility of mistaken identity of the three appellants and that the conditions for correct identification existed. In his testimony, PWI stated that the attackers carried torches which they were flashing in his bedroom in which he

was sleeping with his wife, PW2. He clearly stated that by the use of torch lights, he could recognise all the three appellants. The witness could even narrate the specific roles each of the appellants played in the commission of this crime.

For example, PWI stated that it was the 2nd appellant who stabbed him, demanded for money and even picked the money from under the mattress after him, together with the 3rd appellant had got PWI off the bed. In counsel's view, this cannot be an imagination. The witness must have indeed identified his assailants.

As for PW2, Ms Khaukha submitted that she also correctly identified the three appellants and one Bashir who was lynched in connection to this incident. She was able to identify the appellants through torch lights. The appellants were well known to her and they stood at a close range from her. According to PW2, the appellants tied her with ropes. This means they were near to her, counsel emphasised.

Learned Principal State Attorney further submitted that PW3 also stated in her evidence that she correctly identified all the appellants and one Bashir who was killed in connection with this incident. The witness stated that the appellants had 2 torches which they were flashing and she was able to recognise them as village-mates and neighbours. After PWI and PW2 had been rushed to the hospital, PW3 informed L.C.I Chairman of the area, PW4, that it was the appellants who had attacked them. According to counsel, there was, therefore, no mistaken identity and PW3 who had the opportunity to disclose their identity to the authorities did so at an earliest opportunity possible.

Regarding the case of ***Frank Ndaheba (supra)***, Ms Khaukha submitted that that case is distinguishable from the current appeal. In the instant appeal, all the three appellants were known to PWI, PW2 and PW3 before the incident. These prosecution witnesses knew the appellants as village-mates and neighbours. They knew the appellants by their names, appearances and voices. Counsel further pointed out that in ***Frank Ndahebe*** case, the witness identified the appellant with a different name which name was not known by any one else in the village. The witness in **Ndahebe** case did not disclose the identities of the assailants at an earliest opportunity possible but PW3 in this case disclosed the identities of the appellants to L.C.I Chairman of the area.

This being the 1st appellate court, we are enjoined to re-appraise the whole evidence on record and come out with our conclusions. We must bear in mind that as an appellate court, we had

no opportunity of seeing the demeanour of the witnesses who testified in the lower court. Their credibility or incredibility was a matter for the trial Judge ***See: Rule 30(1)(a) of the Rules of this court; Bogere Moses & Anor v Uganda, SCCA No. 1 of 1997 and Festo Androa Asenua vs Uganda, SCCA No.1 of 1998.***

After perusing and evaluating the evidence on record of proceedings and considering the written submissions of counsel for both the appellants and respondent, we have agreed with counsel for the respondent that the facts in the case of **Frank Ndahebe** (supra) are distinguishable from the facts of the present appeal.

In the **Ndahebe case,** the victim of torture was a young victim whereas in the present appeal PWI, PW2 and PW3 are adults. Further, in the former case, the victim was attacked at night in a badly lit room with only torch light and the assailants were 5 in number. She did not mention the name of the assailant and other attackers to those who answered the alarm and the authorities.

In the current appeal, PWI, PW2 and PW3 knew the appellants before the incident as village-mates and neighbours. PWI and PW2 saw the appellants so clearly that they could even narrate the specific roles each of the appellants played in the commission of this crime. It was the 2nd appellant who stabbed PWI. Thereafter, the 2nd and 3rd appellants got PWI off the bed. It was the 2nd appellant who picked some money from under the mattress. Both PW3 and PW2 saw the 2nd appellant wearing a red jacket. Both witnesses identified all the 3 appellants and one Bashir who was lynched in connection to the incident.

PWI, PW2 and PW3 saw the 2nd appellant flashing a torch light on and off. PW2 and PW3 also saw Bashir flashing a torch light at the scene. As PWI, PW2 were rushed to the hospital with critical injuries, they were hospitalised for 2 weeks. PW3 who had remained at home, reported to the LCI Chairman (PW4) that it was the appellants and Bashir who attacked them.

The following day, PW4 and his team went to arrest the assailants. The 1st appellant was arrested. When the 2nd and 3rd appellants saw the arresting team, they fled. The arresting team chased them until the 3rd appellant was arrested. The 2nd appellant, however, escaped. Running away by the 2nd and 3rd appellants amounts to corroboration of the participation in the commission of the crime, as fleeing was incompatible with innocence. ***See: Kiwanuka Remigious vs Uganda, SCCA No. 41 of 1995.***

Disappearing from the village by the 2nd appellant soon after the incident, provides an additional corroborative evidence against him for the offence he was being charged. ***See: Isaya Bikumu vs Uganda, SCCA No.24 of 1989 (unreported).***

Taking into account our findings, we are unable to fault the learned trial Judge when he held that there were no any possibility of mistaken identity of the appellants and that the conditions for a correct identification existed. In the premises, the 1st ground of this appeal lacks merit.

Grounds 2 and 3:

Mr. Kityo contends that the trial court believed the prosecution's witnesses wholly and held that the discrepancies in the prosecution's case were minor and were not intended to derail court. Counsel pointed out that the learned Judge specifically held that the prosecution witnesses were straight forward and reliable. In counsel's view, that finding is erroneous because PWI claimed to have known the 1st appellant for about 15 years as a village-mate and had seen the 2nd appellant for 2 years and yet he never mentioned their names to the Police. Even PW2, according to counsel, never mentioned the names of her assailants to the police.

In counsel's view, the evidence of identification adduced by PWI and PW2 was weak and unreliable for non-disclosure of the names of the assailants to the police at the earliest opportunity possible. ***See: Yuill vs YuiII [1945] 1AII E.R. 183.***

As regards the evidence of PW3 and PW4, counsel Kityo submitted that both witnesses were liars. He pointed out that PW4 denied assaulting the 1st and 3rd appellants yet Exhibit PE3 and Exhibit PE5 show multiple wounds on them. In counsel's view, both appellants could not have sustained those wounds except through assault.

Learned counsel further pointed out that PW4 stated that PW3 told him the robbers were the three appellants and one Bashir. Interestingly, according to counsel, PW3 confessed that she named the attackers after their arrest. Counsel contended that those grave discrepancies in the prosecution's case should have been resolved in favour of the appellants because they create a reasonable degree of doubt as to whether it was the appellants who committed the alleged offence.

In reply, learned Principal State Attorney, submitted that learned counsel for the appellants dwelt a lot on the fact that PWI and PW2 did not disclose the identities of the appellants to

police at an earliest opportunity making their evidence unreliable. The reasons why both witnesses did not immediately make a disclosure of the identities of the appellants was because the witnesses were rushed to the hospital where they were admitted for 2 weeks.

Learned Principal State Attorney further pointed out that counsel for the appellants called both PW3 and PW4 liars. Denial by PW4 of the injuries found on the 1st and 3rd appellants did not in any way mean that PW4 had assaulted them. It is also not true that PW3 named the assailants after their arrest. She categorically testified that she mentioned the names of the appellants and one Bashir to the L.C.I Chairman (PW4) and that is what led to their arrest. According to the evidence on record, we agree with the submissions of the learned Principal State Attorney. In the circumstances, grounds 2 and 3 must also fail.

Ground 4:

It is the contention of counsel Kityo that there is no sufficient evidence to prove that Shs.2,500,000/= (Shillings two million five hundred thousand only) was stolen from the house of both PWI and PW2. According to counsel, PW4 stated that it was PW3 who informed the arresting party that money had been stolen. In counsel's view, it is an obvious lie because PW3 could not testify to a fact which was not within her knowledge.

In her response, Ms Khaukha submitted that on the night of the robbery, the appellants did not pay a social visit to PWI and PW2. They had gone on a mission of stealing which they successfully accomplished. PWI stated clearly that the appellants whom he had correctly identified entered the house while demanding money. PWI who had sold his groundnuts, directed them where the money was and they picked all the 2,500,000/=. Counsel pointed out that that evidence went uncontested during trial.

Clearly, the element/ingredient of theft was proved during the trial beyond reasonable doubt. We find this argument untenable at this stage. The evidence adduced by PWI that his Shs.2,500,000/= was stolen by the robbers was not challenged in any way at the trial. In that regard ground 4 of this appeal must also fail.

Ground 5:

Relates to sentence meted out on the appellants, orders of compensation and police surveillance. According to Mr. Kityo, the sentence of 14 years imprisonment is manifestly excessive. He hastened to point out that the appellate court can alter a sentence imposed by

the trial court if the Judge acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive. In support of this argument, counsel relied on the principles laid in ***Macharia vs Republic [2003] 2 EA 559.***

Regarding police supervision, counsel submitted that an order to that effect is normally made against habitual offenders. In support, he cited the case of ***Kimanzia vs Republic [1972] E.A. 495***. According to counsel, since the appellants in the current appeal are first offenders, who have spent over 3 years in prison and have relatives to look after, the order for police surveillance for 3 years after serving a sentence of 14 years is oppressive. In the circumstances, counsel suggested a sentence as would ensure the immediate release of the appellants.

Mr. Kityo submitted further that the appellants were also ordered to pay to the victims Shs.800,000/= each as compensation. In making this Order, according to counsel, the learned Judge did not follow the correct legal principles laid in the case of ***Selemani vs Republic [1972] E.A. 269.***

In that case, the Court of Appeal for East Africa held that before compensation can be ordered in a criminal case, the court must carry out an inquiry into the reasonableness of the compensation and the accused must be given an opportunity to be heard before the order.

It follows, according to counsel, that the Order for compensation must be set aside because the learned trial Judge never carried out any inquiry into its reasonableness and never gave the appellants an opportunity to be heard before he pronounced the Order.

In the result, Mr. Kityo prayed that this appeal be allowed, quash the conviction and set aside the sentence. In the alternative, Mr. Kityo submitted that in case the conviction is confirmed, the Order placing the appellants under police surveillance and that requiring them to pay compensation should be set aside, and the sentence of imprisonment be reduced to such a term of imprisonment as would ensure the immediate release of the appellants.

Ms Khaukha submitted that given the nature of the offence, the sentence meted out on the appellants was not excessive. The offence of Simple Robbery, according to law, carries a maximum sentence of life imprisonment. 14 years imprisonment, according to her, was very reasonable considering the manner in which the offence was committed. The offence was committed in a very violent manner, counsel emphasised.

Regarding the Order of compensation, learned Principal State Attorney prayed that we do not interfere with it. Her reason is that given the fact that the complainant had suffered loss at the hands of three energetic, youthful appellants, it was proper for the trial Judge to order the three appellants to compensate the complainant of his hard earned money.

Concerning police surveillance after the release of the appellants, she pointed out that the learned trial Judge gave reasons why he thought it proper to put them under police supervision. The appellants were village-mates to the complainant and instead of being good to them, they robbed them.

In conclusion, learned Principal State Attorney prayed that we should uphold the conviction and sentence and dismiss the appeal.

It is trite law that an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that if the appellate court had been trying the appellant, it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of a trial Judge unless the Judge acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive.

In the instant appeal, Simple Robbery carries a maximum sentence of life imprisonment. The appellants are sentenced to 14 years imprisonment after considering all the mitigating factors. We are not persuaded that the trial Judge acted on some wrong principle or over-looked some material factors or issued a sentence that was manifestly excessive to warrant interference with his discretion in passing the sentence.
Regarding an order for compensation, section 286(4) of the Penal Code Act provides thus:
"Notwithstanding section 126 of the Trial on Indictment Act, where a person is convicted of the felony of robbery, <u>the court shall</u>, unless the offender is sentenced to death, order the person convicted to pay such sum by way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person, and any such order may be executed in the manner provided by the Civil Act". [Emphasis ours]

Our understanding of the above provision is:

(a) that the person entitled has suffered loss or personal injury;

(b) that the compensation would be recoverable by civil suit; and

(c) that the compensation is reasonable.

In the present appeal, PWI and PW2 had suffered material loss of money and suffered personal injuries. The appellants robbed them of Shs.2,500,000/= and both victims were subjected to violent assault resulting into their being admitted in the hospital for 2 weeks.

We further find that the compensation of 2,500,000/= would be recoverable by civil suit and that each appellant to pay compensation of Shs.800,000/= is reasonable. Therefore, an order for compensation is a mandatory requirement of the provisions of section 286 (4) of the Penal Code Act. We are, therefore, unable to set it aside as required by counsel for the appellants.

On the issue of police surveillance for 3 years after the release of the appellants, we agree with the finding of the trial Judge on that order. The appellants are village-mates who should be good to their neighbours, the victims. In order to keep them out of their community, the trial Judge was justified to make an order of police supervision to restore peace in the village.

In the result, we find no merit in this appeal. We dismiss it; uphold the conviction and the sentence meted out on the appellants.

Dated at Kampala this 26th day of February 2009.

S.G. Engwau

JUSTICE OF APPEAL

A. Twinomujuni

JUSTICE OF APPEAL

C.N.B. Kitumba

JUSTICE OF APPEAL