THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT ARUA

CRIMINAL APPEAL NO. 0094 OF 2009

BUDEBO
KASTO…….....
.APPELLANT

VERSES.

UGANDA……
……..RESPONDENT

(Appeal from the decision of Hon. Justice J.W Kwesiga in Arua High Court Criminal Session Case No. 0091 of2008 delivered on 30/03/2009)

CORAM:

Hon. Mr. Justice Remmy Kasule, JA

Hon. Lady Justice Hellen Obura, JA

Hon. Mr. Justice Byabakama Mugenyi Simon, JA

JUDGEMENT OF THE COURT

Introduction

This is an appeal against both conviction and sentence. The

appellant was indicted, tried and convicted on the first count of murder contrary to sections 188 and 189, and on the second count of aggravated robbery contrary to sections 285 and 286 (2] of the Penal Code Act by Hon. Justice J.W Kwesiga. He was sentenced to life imprisonment on each count. The sentences were to run concurrently.

Background to the Appeal

The facts giving rise to this appeal, as found by the trial Judge, are as follows:

On 29th March, 2008 at 11.00pm, Adomati (PW1) was escorting his girlfriend Adiru Christine (deceased). He was carrying her on a bicycle. At a place near the deceased's home, two men emerged into the road, flashed a torch light and ordered PW1 to stop. One of them had a gun. They ordered PW1 and the deceased to lie down and both did so. The assailants started beating and kicking them. They later ordered PW1 and the deceased to get up and go away. While the two were running away, the assailants shot a bullet that killed the deceased. They took the bicycle away. PW1 recognized the appellant by voice as one of the attackers.

The appellant was arrested and when his house was searched, the police recovered a gun and a red and black phoenix bicycle with frame No. 1403. The appellant was indicted, tried and convicted of the offence of murder and aggravated robbery and sentenced to life imprisonment on each count. Dissatisfied with the decision of the trial Judge, he appealed to this Court against both the conviction and sentence.

Grounds of Appeal

1. The learned trial Judge erred in law and fact in finding that the appellant participated in the offence of the murder and aggravated robbery and that the two offences were proved beyond reasonable doubt.
2. The learned trial judge erred in law and fact in passing out a harsh and excessive sentence thus occasioning a miscarriage of justice.

Legal Representation

At the hearing of this appeal, Mr. Komakech Denis Atine appeared for the appellant on State brief and Ms Barbara Masinde, Senior State Attorney, appeared for respondent.

Submissions for the Appellant.

Counsel for the appellant agreed with the ingredients of the offence of murder and aggravated robbery which was set out by the learned trial Judge. He conceded that the fact that death occurred and it was unlawful as well as the ingredient of malice aforethought as relate to the first count of murder were proved by the prosecution beyond reasonable doubt Similarly, he did not contest the fact of theft, use of violence and deadly weapon in relation to the second count of aggravated robbery. However, what he contests on both counts is participation of the appellant.

On ground 1, counsel for the appellant submitted that throughout the evidence of PW1, the conditions were not favorable for identification. He argued that PW1 failed to connect the voice of the person he said he recognized to the actions of the appellant. According to him, PW1 did not indicate whether it was the appellant who went away with the

bicycle or remained behind and talked to them, then later fired the bullet that killed the deceased. Counsel also submitted that PW4's evidence was unreliable since he did not recognize the color of the rain coat one of the assailants was wearing because it was dark.

As regards the bicycle and the gun, counsel submitted that much as the bicycle was found in the appellant's possession, he did not know that there was a gun

in the luggage on the bicycle since a one Abubakar was the one who had left the bicycle behind. He further submitted that the gun was never used in the robbery and the murder and as such the gun shot could not be attributed to the appellant. Counsel concluded on this ground, that the appellant was not guilty of murder and aggravated robbery as was found by the trial Judge.

With regard to ground 2, counsel adopted his submissions on ground 1 and maintained that the appellant did not commit the offences. He contended that the trial Judge did not consider the mitigating factors and the period the appellant had spent on remand while passing sentence upon the appellant. Further, that the learned trial Judge only considered the fact that the appellant was already serving a sentence of 17 years imprisonment for robbery in another case.

In conclusion, counsel prayed that this appeal be allowed and the sentence and conviction be set aside. In the alternative and without prejudice to the above, counsel prayed that if this Court upholds the conviction, the sentence be reduced as the court may deem fit in the exercise of its discretion.

Submissions for the Respondent

Counsel for the respondent opposed the appeal. She submitted on

ground 1, that PW1 ably identified the appellant by his voice and also testified that it was the appellant that carried the gun that shot the deceased. Counsel further submitted that apart from PW4 identifying the appellant by his voice, he also called him by name, moved closer and saw the appellant's face. The appellant told PW4 to go away as he (appellant] was on his mission which, according to counsel, was robbing the victims. Counsel argued that the evidence of PW1 and PW4 was corroborated by the circumstantial evidence of the robbed bicycle that was recovered from the appellant's house two days after the robbery. She submitted on the law of recent possession as defined and explained in the case of ***Izongoza William vs Uganda; Supreme Court Criminal Appeal No. 6 of l 998.*** Counsel invited this Court to find that the circumstances of recovering the stolen bicycle in the appellant's house cannot be explained by any other hypothesis other than the guilt of the appellant. She argued that sections 285 and 286 (2) of the Penal Code Act which establish the offence of aggravated robbery do not require that the weapon be used as long as a robber is armed with a dangerous weapon. Mere possession suffices. But in the instant case, the appellant went ahead to shoot, injured and killed the deceased, counsel argued. According to counsel, there was no need to show that the gun that was exhibited released a shot or not.

On ground 2, counsel agreed that normally the period spent on remand should be considered by the trial court. However, she submitted that, in the instant case, the trial Judge considered the fact that the appellant was already serving a sentence and as such he was not on remand. She also argued that the maximum sentence for each of the counts is death but the trial Judge sentenced the appellant to life imprisonment which, according to counsel, was

lenient in the circumstances. Further, that the victim was a young girl of 19 years and therefore the sentence was appropriate. She prayed that this Court upholds the conviction and sentence.

Resolution by the Court

We have carefully studied the court record and considered the submissions of both counsel. We are alive to the fact that this court has a duty as the first appellate court under rule 30(1) (a) of the Rules of this Court to re-appraise the evidence and come up with its own conclusions. We are also further guided by the Supreme Court decision in the case of ***Father Narsensio Begumisa and others vs Eric Tibebaga; SCCA 17/2002*** in which Court held that;

> ***"It is a well- settled principle that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appellate court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."***

We shall therefore proceed to determine each ground of appeal separately in the order set out by counsel for the appellant.

The appellant does not contest the first three ingredients of each of the offences. What is contested is the ingredient of participation of the appellant. The appellant's 1st ground states that the learned trial Judge erred in law and fact in finding that the appellant participated in the offence of murder and aggravated robbery and that the two offences were proved

beyond reasonable doubt.

It was the contention of counsel for the appellant that the evidence of PW1 and PW4 who were the main prosecution witnesses was unreliable that the conditions for identification by PW1 were not favorable since he only identified one of the assailants by voice and yet he failed to connect the voice of the appellant to the actions of the assailants.

. He also argued that PW4 failed to identify the color of the rain coat which one of the assailants was wearing.

Counsel for the responded, on his part, submitted that PW1 ably identified the appellant by voice and also confirmed that it was the appellant who shot the deceased. She also submitted that PW4 corroborated PWl's evidence on identification of the appellant by voice and also testified that he moved closer to the appellant and recognized his face.

On the issue of identification, we are guided by the decision in the case of ***Moses Kasana vs Uganda; Criminal Appeal No. 12 of 1981 (1992-93) HCB***
where the Supreme Court underscored the need for supportive evidence where the conditions favouring correct identification are difficult. It stated thus;

> ***"Where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or***

circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and of fabricated alibi. "

Basing on the above authority, we have to point out that the supportive evidence required need not be that type of independent corroborate is required for accomplice evidence or for proving sexual offences

(See: George William Kalyesubula vs Uganda; Criminal Appeal No. 16 of 1997) (Unreported). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose. We think, that in the instant case, having regard to the difficult conditions that did not favour correct identification, there was need to look for other evidence which was supportive of the identification evidence.

Case law also highlights some factors which will assist court to determine whether the conditions under which the identification is claimed to have been made were or were not difficult. According to the case of ***Moses Bogere vs Uganda; (SC) Criminal Appeal No. 1/1997*** the conditions for making the identification is the starting point and the other factors are the length of time the accused was under observation, the distance, the light and the familiarity of the witness with the accused.

It was the evidence of PW1 and PW4 that they identified the appellant by his voice. According to the evidence of both of them, there were also other factors favoring correct identification other than the appellant's voice. PW4 testified that on that fateful night it was not dark and he managed to move closer to the appellant and saw his face. He was also familiar with him since he had known him earlier for two years. It was also his testimony that he had called the appellant by name and the appellant responded by telling him to go his way since he (appellant] was on his way on a mission. PW1 also testified that he recognized the appellant that night and also knew him before as the [appellant] had been staying with them in the trading center. We shall first deal with PW4's evidence of identification of the appellant by face before we consider the identification by voice.

PW4 said it was not dark although the time was 10.00pm. He did not disclose whether there was any source of light. It was under those conditions that he said he moved closer and identified one of the two people he met as the appellant. The trial court believed him.

We have ourselves reappraised the evidence and we find it difficult to believe that the night was not dark without any evidence indicating the source of light that rendered it so. Therefore, we are unable to agree with the finding of the trial Judge that PW4 did not only identify the appellant by voice, but he also moved closer and saw his face. This is because there was no evidence suggesting there was light that could have helped PW4 to identify the appellant's face.

Be that as it may, we have also considered whether there were other factors available that helped PW1 and PW4 to identify the appellant. Our reevaluation of the evidence on record reveals a number of

other factors.

First of all, both PW1 and PW4 testified that they identified the appellant by his voice. The trial Judge noted that PW1 stated that he had never talked to the appellant face to face. He further observed that such evidence of voice identification has to be treated with a lot of caution and unless it is corroborated by independent evidence it is likely to be unreliable. He referred to the Supreme Court case of ***Sharma & another vs. Uganda (2002)2 EA 589 (SCU)*** in support of that position.

In that case, the Supreme Court held;

> ***"Identification becomes a crucial issue if the identifying witness is unable to physically see the speaker whose voice she claims to identify and therefore it is necessary for the trial court to consider the identification with greatest care and caution. There is a possibility of mistaken identity by voice where it is claimed that the person identifying has never had face to face discussion with the person being identified."***

In a later decision of the Supreme Court in ***Sabwe Abdu vs. Uganda; Supreme Court Criminal Appeal No. 19 of 2007,*** the Court while accepting the evidence of identification by voice held that; ***"To identify a person's voice, one does not necessarily have to have talked to that person."*** That holding appears to have relaxed the more rigid position in ***Sharma case (supra)*** that seemed to suggest that the person identifying needed to have had face to face discussion with the person being identified. The full text of the decision in ***Sabwe case (supra)*** as relates to identification by voice is as follows;

" There is evidence on record that the girls were familiar with the appellant because he lived about a quarter of a mile from their home, they always passed by his home as they went to school and they used to hear him speak to other people. The appellant also used to come to their home where they would hear him speak to their father. We agree with the trial judge's finding that given these circumstances the girls would be able to identify the appellant by voice even if they had never directly talked to him .To identify a person's voice, one does not necessarily have to have talked to that person."

Sarkar on Evidence Fourteenth Edition 1993, at page 170 also states in relation to identification by voice as follows:

> ***"If the court is satisfied about the identification of persons by evidence of identification of voice alone no rule of law prevents its acceptance as the sole basis for conviction. Possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with voice could arise only when the voices heard are different from the normal voices on account of the situation or when identical voices are possible from other persons also..."***

Given the above position of the law, the evidence of PW1 and PW4 on identification of the appellant by voice can be relied upon provided there is proof that they were closely familiar with the appellant's voice. That is when the possibility of mistaken identity of the appellant's voice would be remote.

PW1 testified that he recognized the appellant by his voice as he talked to them during the incident. It was his evidence that the appellant used to stay with them at the trading centre and he would hear him talking to other people. That evidence was not challenged during cross-examination. On the basis of that evidence, we are satisfied that PW1 was closely familiar with the appellant's voice and according to the authority of ***Sabwe case***, his evidence could be relied upon as being free from the possibility of mistaken identification. Therefore, we do not agree with the trial Judge's finding that PWl's evidence on identification of the appellant by voice is not very reliable.
His decision was based on the previously rigid position stated in the ***Sharma case,*** which as we have stated above, has since been relaxed in the case of ***Sabwe.***

As for PW4, it was his evidence that the appellant responded to him when he called him (appellant) by name and he recognized his voice. From PW4's evidence, he was more familiar with the appellant's voice as he had known him for two years and had had a feast at the appellant's home. This means that PW4 had had opportunity to interact and also talk with the appellant face to face before the incident. He was closely familiar with the appellant's voice. Therefore, we find that the possibility of mistaken identity by voice was remote.

Secondly, it was the evidence of PW4 that upon learning of the deceased's death the following morning, he informed Atibuni Joel (PW5) that he had met the appellant with a gun on the road the previous night and he suspected him to have participated in the murder. PW5 in his evidence confirmed receiving information from PW4 who was in the company of the Local Council 1 Chairman of their village. He said he acted on that information and had the appellant arrested. Subsequent search of the appellant's house led to the recovery of the stolen bicycle and a gun. This piece of evidence is vital in corroborating the evidence of PW4 that he identified the appellant by voice the night he met him on the road.

Thirdly, the undisputed fact that the stolen bicycle and a gun were found in the appellant's house, upon a search, also provides further corroboration of the appellant's participation in the offence. We must observe that trial judge rightly criticized the weak investigation in this case which resulted into failure to get scientific evidence to prove that the gun recovered in the appellants house was the very one used in the robbery and murder.

Recover of the bicycle constituted strong circumstantial evidence basing on the doctrine of recent possession. The Supreme Court examined the doctrine of recent possession at length in the case of ***Erieza Kasaijja vs Uganda; Criminal Appeal No. 21/91 (unreported)*** and stated thus;

> ***".....firm evidence of recent possession, a species of circumstantial***
> ***evidence, is that if the accused is in recent possession of stolen property, for which he has been unable to give a reasonable explanation, the presumption arises that he is either the thief, or the receiver of the stolen goods, according to the circumstances. Hence, once the appellant has been proved to have been found in recent possession of stolen property, it is for the accused to give a reasonable explanation. He will discharge this onus on the balance of probabilities, whether the explanation could reasonably be true. If he does so then an innocent possibility exists which receives the presumption to be drawn from other circumstantial evidence."***

From the evidence before us, the appellant was found in possession of the bicycle belonging to PW1 which had been stolen from him by his assailants. The appellant did not give a reasonable explanation as to how he came into possession of the property. He referred to a one Abubakar as the person who had brought the bicycle and the luggage. The trial Judge found that explanation unbelievable and we cannot fault him for finding so. The fact that

the appellant was found in possession of the property of PW1 which was stolen corroborates the evidence of the prosecution witnesses that he was identified at the crime scene on that fateful night.

In the premises, we are not persuaded by the arguments advanced by learned counsel for the appellant on this ground. We find no merit in ground 1 and accordingly fails.

With regard to ground 2, it was contended for the appellant that the sentence of life imprisonment was harsh and that the trial Judge did not consider the mitigating factors as well as the period spent on remand by the appellant. The principles upon which an appellate court may interfere with a sentence of the trial Judge were stated by the Supreme Court in the case of ***Kiwalabye Bernard vs Uganda; Criminal Appeal No.143 of 2001 (unreported)*** as follows:

> ***"The appellate court is not to interfere with the sentence imposed by a trial court where that trial court has exercised its discretion on sentence, unless the exercise of that discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where the sentence imposed is wrong in principle***

Applying the above principles to the instant case, we have perused the record and studied the sentencing proceedings. The trial Judge did consider the mitigating factors raised by the accused and his counsel as well .as the aggravating factors presented by the prosecution. He particularly considered the fact that the appellant was at the time already serving a sentence of 17 years imprisonment for robbery under Criminal Session Case No. 92 of 2008. The appellant was therefore no longer on remand and he was not a first offender.

Considering the circumstances of the case, we do not find the sentence of life imprisonment to be harsh in the circumstances, the appellant having been convicted of the offence of both murder and aggravated robbery each of which carries a maximum sentence of death. Therefore, ground 2 also fails.

In conclusion this appeal is dismissed. We uphold both the conviction and sentences by the trial Judge.

We so order.

Dated at Arua this 6th day of JUNE 2016.

Hon. Justice Remmy Kasula

JUSTICE OF APPEAL

Hon.Lady Justice Hellen Obura

JUSTICE OF APPEAL

Hon.Justice Simon Byabakama Mugenyi

JUSTICE OF APPEAL