THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MASAKA

CRIMINAL APPEAL NO. 29 OF 2013

1. BAINGANA GODFREY
2. SEMPA EDIRISA
3. SEGIYUNVA JUMA
4. SEMUJU TWAHA :::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

UGANDA :: RESPONDENT

(Arising from the judgment of Lady Justice Faith Mwondha in Masaka High Court Criminal Case No. 444 of 2009)

CORAM: HON. JUSTICE EGONDA NTENDE, JA

HON. JUSTICE HELLEN OBURA, JA

HON. JUSTICE STEPHEN MUSOTA, JA

JUDGMENT OF THE COURT

The appellants were indicted, tried and convicted of Aggravated Robbery C/S 285 and 286(2) of the Penal Code Act and sentenced to 35 years' imprisonment.

We delivered a Judgment in summary on 12th day of June 2018 in which the appeal of appellants No. 1, No. 2, and No. 3 was allowed and their convictions quashed. The sentences were set aside and reasons for the decision and judgment in respect of appellant No. 4 were reserved to be given on notice hence this judgment.

Background

On 2nd September 2008, Ntsinga William, a cattle keeper in Kyankwanzi Kiboga District was riding his TVS motorcycle Reg. No. UDF 117Z back home when he saw a group of people ahead of him. Using the motor cycle headlights, he identified some of them as the

appellants and when he stopped to great them, they moved into the bush and one was holding something that looked like a gun. Sensing danger, he decided to ride off but before he could, an iron bar was pushed into his motor cycle wheel forcing it to stop and he fell off. They hit him with the iron bar until he was unconscious and stole his motorcycle, mobile phone, shoes and 7,000,000/=. In the morning he was rushed to hospital and the appellants arrested in relation to the offence. They were indicted, tried, convicted and sentenced to 35 years imprisonment.

The appellants were dissatisfied with the decision of the High Court and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and fact when she held that the appellants were properly identified without evidence satisfying proper identification.
2. The learned trial Judge erred in law and fact when she held that there was sufficient circumstantial evidence to convict the appellants whereas not.
3. The learned trial Judge erred in law and fact when she passed a harsh/severe sentence against the appellants and without considering the period the appellants had been on remand.

Representation

At the hearing of the appeal, Mr. Kasadha David appeared for the appellants while Ms. Okui Jacqueline, Senior State Attorney, appeared for the respondent.

Submissions of the appellant

Before submitting, it was noted that this appeal was filed out of time. Counsel for the appellants made an oral application for extension of time which we granted.

Counsel submitted that the appellants were not properly identified and the conditions for proper identification did not exist. He referred to the evidence of PW1 who testified that he identified the 1st appellant by his clothes but the said clothes were neither tendered in court nor described and there was no explanation as to

whether those clothes were extremely unique to be associated with the 1st appellant. That the same test was applied to the identification of the 2nd and 3rd appellants yet the said clothes were never tendered in court. PW1 further testified that he had identified the 4th appellant by his face since he had not covered his face.

That PW1 testified that he saw the 4th appellant from a 3 meters distance and greeted him. Counsel contends that being at night, and in a bushy place, it is highly doubtable that PW1could recognize the 4th appellant. In addition, counsel submitted that PW1 did not mention the appellant when he made a statement from the hospital bed after the incident. That the learned trial judge did not warn herself of the dangers of convicting on evidence of a single identifying witness.

From the record, it is only PW1 who alleges that he identified the appellants and therefore he becomes a single identifying witness for which it is a cardinal principle of law that the judge ought to have warned herself before convicting the appellant on the basis of that evidence.

Counsel cited the case of **Abdullah Naburere and 2 others vs. Uganda S.C.C.A No. 9 of 1987** in which it was held that where the case against an accused is wholly or substantially dependant on the correctness of one or more identifications of the accused which the defence disputes, the judge should warn himself or herself for that purpose and assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification.

On ground 2, counsel submitted that from the evidence on record, it is alleged that blood stained clothes were recovered from the 3rd appellant and some were recovered from the 1st appellant. These blood stained clothes were however not tendered in court. Another circumstance which was relied upon was that of *nigina* sandals which were alleged to have been seen with the 1st appellant. That there was a contradiction in the evidence regarding the colour of the

sandals in PW1's evidence. Counsel cited the case of **Odongo Ronald vs. Uganda S.C.C.A No. 048 of 2010** in which the Supreme Court observed that a court can convict basing on circumstantial evidence if such evidence can produce moral certainty to the exclusion of all reasonable doubt, is inconsistent with the innocence of the accused and incapable of any explanation or any other reasonable hypothesis than that of guilt.

On ground 3, counsel submitted that the sentence passed by the learned trial judge is illegal for he did not take into account the period the appellants had spent on remand. From the record, the appellants had been arrested in September 2008 and they were convicted in April 2013 and as such had spent 4 years and 7 months in custody. He cited the case of **Rwabugande Moses Vs Uganda S.C.C.A No. 25 of 2014** in regard to taking into account the period spent on remand and prayed that this court allows this appeal.

Submissions of the respondent

Counsel for the respondent submitted that the trial judge relied on satisfactory identification evidence to convict the appellants. PW1 testified that he knew the 4th appellant before the incident of the robbery as having lived in the trading centre and he had known him for over 10 years as the chairman of charcoal burners. He further submitted that PW1 testified that the ordeal of the robbery took about 2 minutes which in essence means it took 2 minutes for PW1 to identify the 4th appellant during the incident which was sufficient time to properly identify him.

Regarding the issue of caution, counsel submitted that although the Judge did not state that she was cautioning herself, she actually took into account the law on identification by a single identifying witness and her failure to note that she had cautioned herself was not fatal and did not occasion a miscarriage of justice to the appellant. Conditions for identification of the 1st, 2nd and 3rd appellant were also favourable by their clothes and PW1 was very clear that he knew the 3 appellants before.

On ground 2, counsel submitted that there was sufficient circumstantial evidence to warrant the conviction of the appellants. The victim's *nigina* sandals were found at the home of the 1st appellant when a search was carried out.

In regard to ground 3 and in respect to the 4th appellant, he submitted that the sentence was not illegal because the trial judge actually took into consideration the remand period of the appellants. Also considering the fact that the maximum penalty for aggravated robbery is death, the sentence of 35 years imprisonment was within the law and not harsh. Thus, the trial judge considered both mitigating and aggravating circumstances of the case before she arrived at the 35 years imprisonment. He therefore prayed that the sentence is upheld.

The duty of this court, as an appellate court of the first instance, is very well settled and has been expounded in numerous authorities. The most outstanding ones include: - **Pandya vs. R (1957) E.A 336, Okeno vs. R. (1972) E.A. 32., Bogere Moses vs. Uganda Cr. App. No.1 of 1997 (S.C) (unreported) and Kifamunte Henry vs. Uganda Cr. App. No.10 of 1997 (S.C) 10 (unreported).** This principle is also stated in Rule 29 of the Rules of this Court which states:-

"29 (1) on any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the court may: -
(a) re-appraise the evidence and draw inferences of fact;"

It is now our duty to re-appraise all the evidence on record and to arrive at our own conclusion as to whether or not the decision of the learned trial judge can stand or not. In so doing, we must bear in mind that we did not have the opportunity of seeing the witnesses as they gave evidence in the trial court, as the trial judge had, and therefore her findings of fact should be respected unless they are seen or shown to be clearly erroneous.

The first ground of appeal is that the learned trial judge erred in law

and fact when she held that the appellants were properly identified without evidence satisfying proper identification. The appellants argue that there were no conditions to support proper identification of the appellants while the respondent argues that there was proper identification.

From the record, PW1 testified that he knew all the appellants before the robbery. He specifically knew the 4th appellant to have been staying in the trading centre and he had known him for over 10 years. He saw the 4th appellant on that day when he stopped to greet him and also saw other people coming from the bush covering their faces. The head lamps of the motorcycle were on and he clearly recognized the 4th appellant, Semujju Twaha, who was also the one commanding the others.

The 1st appellant's home was searched and they found a pair of *nigina* sandals which belonged to the victim. There was also a blood stained trousers at the 4th appellant's home. The learned trial Judge held that the appellants were all properly placed at the scene of the crime but the evidence implicating the 1st, 2nd and 3rd appellants was circumstantial. The 3rd appellant was arrested after he purportedly made phone calls alerting people that the police was there. The 2nd appellant was a charcoal burner on PW1's farm and he was arrested trying to run away.

In the testimony of PW1, he said that his sandals were green in colour and yet the *nigina* sandals that were found at the 1st appellant's home were purple in colour. The 2nd appellant was arrested for purportedly trying to run away while the 3rd was arrested for making a phone call about the police being present after the incident. Therefore in evaluating the whole evidence adduced at trial, as a first appellate Court, it is our duty to determine whether or not, on the basis of circumstantial evidence that was adduced at trial, the learned trial Judge was justified to conclude that the prosecution had discharged the burden of proving beyond reasonable doubt that the 1st to 4th appellants had been placed at the scene of the crime.

We are of the view that there was a misdirection by the learned trial Judge in regard to the 1st, 2nd and 3rd appellants. The circumstantial evidence available did not place them at the scene of the crime in any way. PW1 testified that he knew the clothes of the 2nd and the 3rd appellants and he recognized them by the clothes. The trial Judge noted that the 2nd appellant had blood stained clothes which the 3rd appellant removed and hid. These clothes were however not tendered into evidence. They were not subjected to forensic examination/tests to establish the nature of blood on them.

The law on circumstantial evidence has been echoed in a number of cases. The test to be applied was re-stated in the case of **Simoni Musoke V R [1958] EA 715** in which the Court of Appeal of East Africa held that;

> *"in a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and also before drawing the inference of guilt the Court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt."*

See also **Teper vs. R (1952) 2 ALLER 447** and **Audrea Obonyo & Others vs. R (1962) EA 542** where the principle governing the application by Courts of circumstantial evidence were considered. We do not find the evidence in this case sufficient to meet the test in the above case in regard to the 1st to 3rd appellants. We therefore find that the evidence placing the 1st to 3rd appellants at the scene of the crime was insufficient and as such, the 1st and 2nd grounds of appeal succeed in regard to the 1st appellant, (Baingana Geoffrey), the 2nd appellant, (Sempa Edirisa) and the 3rd appellant, (Sengiyunva Juma).

The 4th appellant, on the other hand, was duly identified by the victim, PW1, who testified that he saw him clearly and even talked

to him before he was hit with an iron bar. The case of **Abdullah Naburere and 2 others vs. Uganda S.C.C.A No. 9 of 1987** set out the law regarding identification by a single witness. The learned trial Judge also cited the Abdullah Nabulere case and held that;

"as already summarized in this judgment the factors to rule out mistaken identity existed and so the alibi had been already perforated by the prosecution evidence..."

We do not agree with the appellant's counsel that the trial Judge failed to warn herself of the danger of convicting on the evidence of a single identifying witness. She held that the factors to rule out mistaken identity existed. The victim, PW1, had known the 4th appellant for about 10 years and on the fateful day, he recognized him and even talked to him before he was hit with an iron bar. Thus, the conditions favoring identification of the 4th appellant were favorable and as such, we find that the prosecution discharged its duty beyond reasonable doubt and the learned trial Judge rightly held that the 4th appellant committed the offence of aggravated robbery.

We now go ahead to address the 3rd ground of appeal on the sentence passed by the learned trial Judge. The appellant's counsel argued that the sentence was harsh and severe and also did not take into account the period spent on remand.

Needless to say, an appellate court should not interfere with the discretion of a trial court in the determination of a sentence imposed by that trial court unless that trial court acted on a wrong principle or overlooked a material factor or the sentence is illegal or manifestly excessive. (See **Kyalimpa Edward v. Uganda, SCCA No. 10 of 1995 and Kyewalabye Bernard v. Uganda, Criminal Appeal No. 143 of 2001(S.C)**

The learned sentencing Judge stated that;

"The convicts are first offenders who have been in prison since 2009. I take note of the manner in which they committed the offence. It was short of causing the death of the complainant. This offence is very

rampant in this area. The only way society can be protected is to give them custodial sentences to be out of circulation for some time. Taking all the above into account they are sentenced to 35 years imprisonment."

We do not consider this to be a sufficient indication that the learned trial Judge took into account the period the appellant spent on remand. Although the process is not a mathematical exercise, as was held in the recent case of **Abelle Asuman Vs Uganda S.C.C.A No 66 of 2016**, a sentencing Judge should clearly indicate the mitigating and aggravating factors he/she has taken into account.

Current jurisprudence has established that if a sentencing Judge does not take into account the remand period while determining the sentence, then the sentence that Judge passes is illegal as it is contrary to the mandatory provisions of Article 23(8) of the Constitution. See also the cases of **Bukenya Joseph v. Uganda SC Criminal Appeal No. 17 of 2010** and **Kizito Senkula v. Uganda SC Criminal Appeal No. 24 of 2001.** That being the state of the law, we have no option but to set aside the sentence of 35 years' imprisonment as an illegal sentence.

We now proceed to sentence the 4th appellant afresh. We note that the 4th appellant is a first offender with no previous record. He is capable of reform and was on remand for 5 years before conviction. We take note of the brutal manner in which the offence was committed. It was short of causing death of the complainant. The offence is rampant in the area.

Taking into account the above factors and the period he had spent on remand, we substitute the 35 year imprisonment sentence with 20 years imprisonment from the date of conviction which is 24/04/2013.

Conclusion

On the whole, we allow the appeal in regard to the 1st appellant, (Baingana Geoffrey), the 2nd appellant, (Sempa Edirisa) and the 3rd appellant, (Sengiyunva Juma) for the above reasons. Their

convictions and sentences are hereby quashed and set aside. The conviction of the 4th appellant, Semujju Twaha, is upheld.

Dated this ....30th..... Day of .....July..... 2018

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Hon. Justice Egonda Ntende, JA

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Hon. Justice, Hellen Obura, JA

Hon. Justice, Stephen Musota JA

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