THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO.200 OF 2017

KINYERA ROBERT OKIDI..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(Appeal from a Judgment, conviction and sentence of the High Court of Uganda Holden at Pader before Hon. Mr. Justice Vincent Okwanga dated 4th April, 2017, in Criminal Case No. 0051 of 2012.)

CORAM: **Hon. Mr. Justice Kenneth Kakuru, JA**
Hon. Lady Justice Percy Night Tuhaise, JA
Hon. Mr. Justice Remmy Kasule, Ag. JA

JUDGMENT OF THE COURT

This appeal arises from the decision of Vincent Okwanga, J in High Court Criminal Case No. 0051 of 2012 dated 4th April, 2017.

The appellant was on 4th April, 2017 convicted of the offence of aggravated robbery contrary to *Sections 285* and *288 (2)* of Penal Code Act and was sentenced to 25 years imprisonment.

Being dissatisfied with that judgment, he now appeals to this Court on the following grounds;-

1. *That the learned trial Judge erred in law and fact when he ignored the contradictions and inconsistencies in the prosecution witnesses thus occasioning miscarriage of justice.*

2. *The learned trial Judge erred in law and fact when he convicted the appellant on evidence of identification without considering proper conditions thus occasioning a miscarriage of justice to the appellant.*
3. *The learned trial Judge erred in law and fact when he ignored the defence of the appellant thus occasioning a miscarriage of justice.*

In the alternative

4. *The learned trial Judge erred in law and fact when he failed to evaluate the evidence as a whole thus occasioning miscarriage of justice.*

Representation

When this appeal came up for hearing, *Mr. Odokel Opolot* learned Counsel, appeared for the appellant on private brief while *Mr. Patrick Omia* learned Senior State Attorney appeared for the respondent. The appellant was present.

Appellant's case

It was submitted for the appellant that the prosecution evidence contained a number of inconsistences and contradictions, which were ignored by the learned trial Judge. Counsel submitted that had the trial Judge considered them, he would have found out that they were not minor as they pointed to deliberate falsehoods on the part of the prosecution witnesses.

Further, Counsel submitted that, the contradiction and inconsistencies rendered the prosecution weak and unreliable and therefore insufficient to sustain a conviction. He pointed out the contradictions and inconsistencies as follows; the prosecution witnesses gave contradictory evidence in respect of the number of live ammunitions recovered from the scene of the crime. PW2,PC Komakech Justine stated that there were 6 live ammunitions and 3 empty cartridges while the PW4, D/AIP Agen Joseph and PW5, D/CPL Alyai Alfred both stated that they recovered 11 live ammunitions and 11 spent cartridges

Then there was also a contradiction in respect of the colour of the torch which was recovered from the scene of the crime, PW3 stated that it was brownish in colour, PW4 stated that it was blue in colour and PW5 stated that it was light green in colour. There were contradictions on actual monies that were allegedly recovered in that the witnesses mentioned differed amounts. Counsel argued that such contradictions and inconsistencies weakened the prosecution case and the learned trial Judge ought to have considered them as grave contradictions and inconsistencies.

On the second ground, learned Counsel submitted that, the learned trial Judge erred when he convicted the appellant of the offence of aggravated robbery in the absence of credible evidence linking the appellant to the crime. Counsel argued that the appellant was not positively identified by the witnesses as the conditions for proper identification were absent. It was dark, the witnesses were terrified by the attackers who fired a volley of bullets into their small hut. The time the witnesses spent with the assailants was very short and the distance between them was not favorable for positive identification. Counsel submitted that, the only evidence linking the appellant to the crime was purely circumstantial, which was so weak and insufficient on its own to prove the appellant's participation beyond reasonable doubt. Counsel faulted the prosecution for having failed to establish the ownership of the motorcycle of which the appellant was convicted of stealing.

Further that, the prosecution failed to produce the mobile telephone printout of the one Ojok Bosco who stated that he had called the appellant at the time the incident was taking place. He argued that, the telephone printout would have settled the question as to where the appellant was at the material time. Having failed to do so the prosecution had failed to place the appellant at the scene of crime and the learned trial Judge ought to have found so.

Counsel contended that the learned trial Judge erred when he considered only the prosecution evidence and ignored the defence thus arriving at a wrong conclusion.

In the alternative, Counsel submitted that the sentencing of the appellant to 25 years imprisonment was manifestly harsh and excessive in the circumstances of this case. Further, that the learned trial Judge failed to take into account or ignored the principle of consistency in sentencing when he imposed a sentence that is out of the established range of sentences set by this court and the Supreme Court over the past years.

Finally, Counsel submitted that, the trial Judge failed to properly evaluate the evidence at the trial and in the result arrived at the wrong conclusion that the appellant was guilty as charged when the evidence was insufficient to sustain a conviction of aggravated robbery against the appellant. He prayed this Court to allow the appeal, quash the conviction and set aside the sentence.

Respondent's reply

Mr. Omia opposed the appeal and supported the sentence. He submitted that the inconsistences referred to by Mr. Odokel were all minor and did not go to the root of the case and therefore the learned trial Judge was justified when he ignored them. He submitted that, there were no contradictions within the prosecution evidence. The number of bullets fired, the number of spent cartridge found did not go to the root of the offence of aggravated robbery but on the contrary confirmed or strengthened the prosecution case.

In respect of identification of the appellant, learned Senior State Attorney submitted that, the appellant was well known to the witnesses and therefore they were able to identify him by voice first and later by the assistance of a lantern and a torch. While outside, witnesses were able to identify him as there was moonlight and they were in very close proximity with him. Counsel asked this court to dismiss the appeal as

the trial Judge had properly evaluated the evidence and had come to the correct decision.

Resolution

This being a first appellate Court, we are required to re-appraise all the evidence adduced at the trial, and make out our own inferences on all issues of law and fact. See:-*Rule 30(1)* of the Rules of this Court, *Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997* and *Bogere Moses Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997.*

We proceed to do so.

In respect of ground one, Counsel faulted the learned trial Judge for having failed to consider the inconsistencies and contradictions in the evidence of the prosecution. The contradictions referred to by Counsel for the appellant related to the number of live ammunition and spent cartridges found at the scene of the crime. We found that there were no contradictions as 11 spent cartridges were recovered and 11 live ammunitions also recovered. Any difference in numbers is minor as it would not lessen or otherwise impact on the evidence that a deadly weapon to wit a gun was used during the robbery.

The exact number of bullets fired would in that regard be irrelevant. It is in fact proof that the fire arm used was capable of discharging bullets. As to the ownership of the motor cycle, again this is irrelevant. Even if the motor cycle that was stolen from the complainant PW3 was proved to have belonged to someone else that would not in any way impact on the culpability of the appellant. It was not his. He found it in possession of PW2 and forcefully took it away, in the process immediately before or immediately after he used a deadly weapon to wit a gun. That is all was required to be proved.

The law on contradictions and inconsistencies was well settled in *Alfred Tajar vs Uganda [EACA] Criminal Appeal No. 167 OF 1969 (unreported)* where the court observed that major inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness. We find that the trial Judge was justified when he treated the contradictions and inconsistencies in the prosecution case as minor and ignored them. Accordingly we find no merit in this ground and we dismiss it.

In respect of ground two, Counsel for the appellant challenges the Judge's finding that there was sufficient evidence to put the appellant at the scene of the crime. In his judgment from pages 9 to 19, the learned trial Judge did set out the evidence of both the prosecution and the defence witness on the issue of identification and proceeded to carefully evaluate it. He concluded at pages 14-19 as follows;

> *"In the instant case, I find that the evidence of the two eye witnesses, PW2 and PW3, who claim to have identified the accused person at the scene of crime was amply corroborated by one another. Both made the identification of this accused person when conditions favorable to correct identification existed. These conditions were:-*
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> *The accused person was well known to these two witnesses before this incident took place. There were good sources of light from the moonlight that shone brightly that night and later on in the house where PW3 was robbed from, there was an electric rechargeable lamp that was lit throughout the entire episode when the accused and his accomplice harassed and robbed her before putting off that light and then leaving the place, shutting the door over her in the house. Both witnesses identified the accused person from close proximity with the*

accused. The accused had spoken to these two witnesses before, and during the robberies which enabled both witnesses to identify him by voice as well.

Whereas, PW2 caught the accused in his hand and had a brief scuffle with him before fleeing to the bush, PW3, was held by the accused in her hand as he led her back to the house where she was sleeping in before the attack and subjected her to many questions and demands as his other accomplice also entered the house and joined in ordering PW3 to give them money. In that process PW3, was in a conversation with the accused.

Furthermore, these two witnesses did not only identify the accused only but were also able to positively identify his accomplice in the crime as well as Lance Corporal Okello Francis Ocii, a younger brother to the accused. They promptly mentioned the names of the two attackers to the authorities and all those who responded in the morning to console them at their home.

The conduct of the accused person the following morning, who is a Gombolola Internal Security Officer of Awere Sub-County, who had received several frantic and desperate telephone calls from concerned residents who were very alarmed the previous night when this incident was taking place in their village leaves a lot to be desired.

Both DW1 and DW2 were emphatic that the following morning, the accused person did not go to the scene of the previous nights shooting which was barely a few kilometres away from Corner Rackoko where the accused lived. He stayed at his home from 6:00am when he came out of his house Up to around 2:30pm, when he was arrested from his home by combined team of the Police CID and the army who were investigating this matter. Despite receiving very many reports of gun shots and robbery having taken place at the home of PW2,

Justine Moro Komakech, whom the accused knew very well, the accused did not report this security issue to any of his supervisors or any other authority at all.

I find that such conduct is not a conduct of an innocent person. Rather, it points to a conduct of a guilty mind on the part of the accused, which is capable of corroborating the evidence of identification of the accused by PW2 and PW3 at the scene of crime at the time these crimes were being committed.

Accordingly, I find and hold that the identification of the accused person at the scene of crime by PW2, and PW3 respectively, was correct and was free from any errors of mistaken identification as such identification by the two witnesses above were done when the conditions favored a correct identification."

The appellant was well known to the witnesses PW3 and PW4. He concedes to this in his defence. PW3 and the appellant had a physical scuffle during the attack and the evidence that there was bright moonlight that night was not challenged. The prosecution witnesses were also able to identify the appellant as one of the assailants by his voice. He spoke briefly to both witnesses during the attack. He was aware that the victims had money from the sale of land which he demanded. There was a lit lamp in the room. This together with his conduct after the incident, when he failed to respond to or investigate an armed attack that had taken place in his own jurisdiction as a GISO led credence to the prosecution case. Some clothes similar to those described by the prosecution witnesses were recovered from his home.

The legal position on identification was discussed by the Supreme Court in *Bogere Moses Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.* The Court stated as follows:-

"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to all the rest of the evidence (See Sulemani Katusabe vs Uganda Supreme Court Criminal Appeal No. 7 of 1991 unreported)."

In *Abdalla Nabulere and Another Vs Uganda [1979] HCB 77*, the Supreme Court held that, where the conditions favouring correct identification were favourable, the Court should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witnesses with the accused. All these factors go to the quality of the identification evidence.

We are satisfied that the conditions were favourable for proper identification. The appellant was positively identified and placed at the scene of the crime thus destroying his alibi. The evidence of his wife DW2 and his own evidence that he was sleeping at his home that night is not credible. Being a security officer employed by Government to monitor peace and security in the Sub-county and having been informed on phone that night that his village was under attack, it is inconceivable how he could have stayed at his home doing nothing that whole morning until he

was arrested. His conduct was indeed inconsistent with his innocence and we find so.

We find that the learned trial Judge properly evaluated all the evidence before him and came to the correct conclusion that the prosecution had proved the offence of aggravated robbery against the appellant beyond reasonable doubt.

According we find no merit in this ground of appeal.

As to the alternative ground in respect of sentence, Counsel submitted that the sentence of 25 years imprisonment was harsh and manifestly excessive in the circumstances of the case and inconsistent with sentences in other cases with similar facts.

This court as a first appellate Court may only interfere with the trial Court's discretion in sentencing in limited instances. These were set out in *Kiwalabye Bernard Vs Uganda, Supreme Court Criminal Appeal No.143 of 2001,* as follows;-

> *"The appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of the 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 a trial Court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."*

See also: *Ogalo s/o Owoura vs R. (1954) 21 E.A.C.A. 126, R. vs Mohamedali Jamal (1948) 15 E.A.C.A. 126* and *Livingstone Kakooza vs Uganda, Supreme Court Criminal Appeal No. 17 of 1993.*

In this case, the sentence of 25 years imprisonment for the offence of aggravated robbery is not illegal.

In *Olupot Sharif & another Vs Uganda, Court of Appeal Criminal Appeal No. 0730 of 2014*, the appellant was convicted of the offence of aggravated robbery and was sentenced to 40 years imprisonment. On appeal, this Court reduced the sentence to 32 years imprisonment.

The trial Judge took into account the period of 2 years and 7 months the appellant spent on remand. He was found guilty on two counts of aggravated robbery. He was an employee of Government as a Gombola (Sub-county) internal security officer. His duty was to ensure safety of lives and property of the citizens of Uganda and other residents in his area. Instead he used a Government gun to terrorise and rob the people. Aggravated robbery carries a maximum death sentence. A sentence of 25 years imprisonment is on the lower side of the sentencing scale.

We find no reason to interfere with it and we accordingly uphold it.

This appeal is therefore dismissed.

The appellant's conviction is hereby upheld and the sentence is confirmed.

We so order.

Dated at **Gulu** this 20th day of DEC 2019.

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Kenneth Kakuru
JUSTICE OF APPEAL

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Percy Night Tuhaise
JUSTICE OF APPEAL

.....

Remmy Kasule
Ag. JUSTICE OF APPEAL