THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MASAKA

CRIMINAL APPEAL NO. 430 OF 2015

KIGGUNDU ISAAC.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(Appeal against the judgment of the High Court at Masaka in Criminal Session case No 142 of 2012 before Oguli Oumo, J. dated 18/12/2014)

Coram: **Hon. Lady Justice Elizabeth Musoke, JA.**

Hon. Mr. Justice Ezekiel Muhanguzi, JA.

Hon. Mr. Justice Remmy Kasule, Ag. JA.

JUDGMENT OF THE COURT

Introduction

The appellant in this case was charged on one count of the offence of murder contrary to Section 188 and 189 of the Penal Code Act and on two counts of aggravated robbery contrary to Section 285 and 286 (2) of the Penal Code Act.

He was convicted on count one of the offence of murder and on count two of the offence of aggravated robbery and acquitted on the third count.

Brief Background

The facts giving rise to this appeal, as far as we could ascertain from the record, are that on the night of 17th March 2011, Nakazibwe Nuliat (PW1) was asleep in her house with her husband the deceased, Kaddu David when at about 1:00 am, two men broke into their home.

The two men were armed with a panga and a gun and demanded for money during the robbery and severely cut the deceased, took Shs. 550,000/= and left the deceased and Nakazibwe tied and locked up in their home.

On the same night of 17th March 2011, the same two men attacked the home of Nakibule Justine at about 3:00 am, while armed with a gun, and robbed her of Shs. 5,000/= and her mobile phone.

Matters were reported to the authorities and investigations ensued.

The deceased Kaddu David was rushed to hospital and later to a private clinic from where he died on 28th March 2011. A post mortem report was carried out and it was found that the deceased had a fractured skull as a result of a sharp object being used on the head and the cause of death was hemorrhagic shock.

On 27th April 2011, the accused was arrested in connection with rampant thefts in the area. He was examined and found to be mentally normal with no physical body injuries. He was thus charged on one count of murder and on two counts of aggravated robbery. He was tried and convicted and sentenced to 17 years imprisonment on the count of murder and to 20 years imprisonment on the second count of aggravated robbery.

Being dissatisfied with the said judgment of the High court, the appellant appealed to this court on the following grounds:-

"1. ***That the learned trial judge erred in law and fact when he held that the prosecution proved all the ingredients of murder and aggravated robbery beyond reasonable doubt, which decision occasioned a miscarriage of justice.***

2. The learned judge erred in law and fact when she sentenced the appellant to harsh sentences of 17 years for the offence of murder and 20 years imprisonment for the offence of aggravated robbery, which sentences occasioned a miscarriage of justice.

3. The learned trial judge erred in law and fact when she ordered the two sentences of 17 and 20 years imprisonment to run consecutively, which was a harsh sentence and occasioned a miscarriage of justice and appellant acquitted" (sic).

Representation

When this appeal was called for hearing, Mr. Alexander Lule, learned counsel represented the appellant on state brief and Ms. Nelly Asiku, Senior State Attorney represented the respondent. The appellant was present in court.

Submissions for the Appellant

Before counsel could submit on the grounds of the appeal, he sought and was granted leave, to amend the memorandum of appeal by joining the last two grounds of appeal to read:-

"That the learned trial Judge erred in law and fact when she sentenced the appellant to imprisonment of 17 years for murder and 20 years imprisonment for aggravated robbery to run consecutively which sentence was harsh and excessive thus occasioning a miscarriage of justice"

On the first ground of appeal, counsel challenged the participation of the appellant in the commission of the offence. Counsel argued that the evidence of PW1, the complainant, one Nakazibwe Nuliat was full of contradictions and inconsistencies which were major and could not have been relied upon to prove participation of the appellant in the commission of the offence. Mr. Lule pointed out that PW1 stated in her statement at police that the assailants who attacked her were Amon and Yuda and then testified in court that among the assailants that attacked her was the appellant, which evidence was contradictory in nature and was not sufficient to support his conviction.

Further, counsel submitted that PW1's evidence was contradictory, in as far as the arrest of the appellant was concerned, because on one hand she stated that the appellant was arrested on the night when the offences were committed and on the other hand stated that he was arrested while loitering in the village during the day.

Counsel contended that the conditions under which the appellant was identified were not favourable for correct identification. He pointed out that the source of light being a torch and the moon in this case were not favourable for correct identification given that PW1 was also under fear after being threatened by the assailants. Counsel relied on ***Kazarwa Henry V. Uganda, Supreme Court Criminal Appeal No. 17 of 2015***, in support of this argument.

Further, counsel argued that the appellant's alibi was not discredited by the prosecution at trial, who failed to place him at the crime scene. Counsel faulted the learned trial Judge for assuming the duty of the prosecution to discredit the appellant's defence of alibi and place him at the scene of crime. In support of this argument, he relied on ***Jamada Nzabaikukuza V. Uganda, Supreme Court Criminal Appeal No. 001 of***

2015. Counsel prayed court to quash the appellant's conviction and set him free.

On the second ground, Mr. Lule submitted that the sentences of 17 years imprisonment for murder and 20 years imprisonment for aggravated robbery were harsh and excessive considering the mitigating factors in this case. He submitted that this was a case where this court as an appellate court can interfere with the sentence of the trial court given the principles of consistency and uniformity of sentences. Counsel relied on ***Tuhumwire Mary V. Uganda, Court of Appeal Criminal Appeal No. 352 of 2015,*** where a sentence of 20 years imprisonment was reduced to a sentence of 10 years imprisonment for the offence of murder. He asked court to reduce the sentence in the event that ground one fails.

Submissions for the Respondent

The learned Senior State Attorney opposed the appeal and supported both the conviction and sentence and submitted that the learned trial Judge rightly convicted the appellant after she had properly evaluated the evidence on record as regards participation of the appellant in the commission of the offence.

Counsel supported the findings of the learned trial Judge that the evidence of PW1, a single identifying witness was credible. She pointed out that PW1's evidence met the conditions for correct identification as discussed by this Court in ***Abudhallah Nabulere & others V. Uganda, Supreme Court Criminal Appeal No. 9 of 1978.***

Counsel disagreed with the submissions of counsel for the appellant that the evidence of PW1 was full of contradictions and inconsistences. She argued that PW1 testified that she identified the appellant as one of the two men who attacked her and her husband; and that the

mention of Yuda and Amos, was hearsay because, PW1 was told by other people who had been attacked on that very night of the incidence.

Counsel added that the inconsistency in the evidence of PW1 in respect of the arrest of the appellant was minor because it did not go to the root of who killed the deceased and robbed PW1 of Shs. 550,000/=. She prayed that this court finds it minor and be ignored as was held in ***Alfred Tajar V. Uganda, EACA Criminal Appeal No. 167 of 1969.***

Ms Asiku further submitted that the appellant's defence of alibi was discredited by the evidence of PW1 which clearly placed the appellant at the scene of crime and also proved his participation in the commission of the offences. Counsel argued that much as PW1 was frightened by the incident, she was able to identify the appellant because the appellant was known to her by face and name and there was sufficient light; that is the moonlight and the light from the flashing torches of the appellant and his accomplice. She prayed court to find the evidence of PW1, a single identifying witness, credible and uphold the appellant's conviction.

In reply to ground two on sentence being harsh and excessive, counsel submitted that the appellant was convicted on two counts of murder and aggravated robbery which offences are grave and, upon conviction, attract a maximum sentence of death, the sentences of 17 years and 20 years imprisonment for murder and aggravated robbery respectively were not harsh nor excessive in the circumstances.

Counsel pointed out that the learned trial Judge considered both the aggravating and mitigating factors before she imposed the said sentences upon the appellant. Further that the sentences of 17 years and 20 years imprisonment were appropriate in the circumstances of

this case. She prayed court to confirm the sentences and dismiss the appeal for lack of merit.

Consideration by court

We have heard the submissions of both counsel. We have also carefully perused the court record and the authorities cited to us and those not cited but relevant to the determination of this appeal.

We are mindful of the duty of this court as a first appellate court as set out in Rule 30 (1) of the rules of this court and as it was well explained by the Supreme Court in ***Kifamunte Henry V. Uganda, Supreme Court Criminal Appeal No. 10 of 1997*** and ***Bogere Moses V Uganda, Supreme Court, Criminal Appeal No. 1 of 1997.***

We are required to re-evaluate the whole evidence that was adduced at the trial and to come up with our own inferences.

Ground one

The issue for determination under this ground is participation of the appellant in the commission of the offences of murder and aggravated robbery. The evidence that directly implicates the appellant to the crimes is that of PW1, Nakazibwe Nuliat who identified the appellant as the person who cut her husband and robbed her of monies worth Shs. 550,000/=

The evidence of PW1, Nakazibwe Nuliat, is the only evidence the prosecution adduced at trial and upon which the appellant was convicted.

In her evidence before court, PW1, Nakazibwe Nuliat, the wife to the deceased testified as follows:-

> ***"On the 17/03/2011 at Samaria Village we were sleeping in the night with my husband when thieves came and kicked the door. My husband run to***

the door and I realized there was light in the house and the door (wooden) at the front was kicked and it fell inside the house. I screamed and a thief ran. The light was for torches flashed inside the house. I made an alarm and a thief told me that scream again if you do so you will be finished. Don't you see that that one is gone. So I did not scream again. The thieves then entered and they asked me whether I knew why they had come. I told them no and they said they wanted money and life. When they mentioned that I knew I was going to die. They were two men. I knew I was going to die. I had a shop and the thief ordered me to open it. I opened the shop and we entered together. The one who commanded me to open whom I critically looked at is the accused in court.

Yes, I opened the shop. The shop was inside the house where I was residing. I entered the shop with the accused. The second thief remained leaning. And the accused told me he wanted life and money that is why he had come. That if I did not give him money, he would kill me.

I got a tin which had shs.150,000=. There was shs.50,000= sold and shs.100,000= not yet signed but airtime and gave it to him. And I told him that is all. He told me it was not enough, and he picked my savings box which was under the shelf on the floor which I used to save in my money.

I was also going to shop so I had put shs.550,000=, between the boxes. He got this hidden money by dismantling everything while searching. That is how he came across that money.

From then he told me that we get outside and we got outside. My husband was in the compound where he was cut from and I knew he had already died. He was cut from the door way. He was cut with a panga. I saw the person who cut my husband.

(Points to accused)

No he is the one who cut the deceased (my husband). When we got out he commanded me to undress. Both the thieves had torches. When I removed my clothes, he started touching me everywhere. Then he told me to spread my legs which I did. Then the accused asked me whom I stay with else and I told him it was only my husband. Then he told me to dress

up and he asked me where we had a kitchen. He held my hand and kept on asking me who resides in the first room. I told him it was chicken, next were goats and next our house. Then he told me if he got anyone and he would shoot me instantly to death.

Although it was night I identified the accused because they stayed there for a long time and I am the one taking them all over the house. There was moonlight. There was light from the torches and they took long inside. It took about an hour".

In cross examination, PW1 testified as follows:-

"Yes, it is my evidence that I knew the accused before incident. I knew him by his appearance, where he was staying and his name.

On that night of the attack I first saw the accused from the door/the entrance to my house. I saw him from the entrance with a panga and when he cut then I exclaimed "wowe nyabo."

Yes, I saw him at the door and the moonlight was out but there was a flash. When I saw him, he ordered me to take him to the shop. He was the one leading me into the shop. He told me to open the shop. Then I opened the shop then he entered. He pointed at the door and told me to open and he was standing there. So when I opened he entered. When he entered he turned and ordered me to also enter. When I entered I did not first kneel I was standing. He was flashing the torch on the steers (sic). I was facing the accused person. When we were in the shop, I had already identified him. Although it was night I recognized him. I recognized him from the door in the shop and outside when I was naked. All the 3 times, he was not flashing the torch towards me or himself but on the surroundings".

From her testimony, PW1 testified that she identified the appellant as one of the two men who attacked her and her late husband on the night of the incident. She testified further that she was able to identify the appellant correctly because she knew him before the incident and that there was a provision of light; that is the moonlight and flash light

from the torches the appellant and his accomplice had and that the incident took about an hour.

In his defence, the appellant raised the defence of alibi to the effect that he came to his Auntie's graduation party on 23/3/2014 in Kadugala, Mukungwe Sub-county, Masaka District. After the party he stayed for Easter and the day after Easter Monday, he went to visit his brother, Robert Lukwago in Samaria village. On his way back after the visit as he was waiting for a boda boda, three men armed with pangas arrested and beat him while alleging that he was involved in the robbery that happened the previous night. The lady who he did not know identified him as a man who killed her husband. The matter was reported to Kako Police Station who arrested him and took him to Masaka Prison.

The learned trial Judge did not believe the alibi of the appellant since he (appellant) had conceded that he went to the village to attend his sister's graduation, a fact that placed him at the scene of crime.

The law with regard to identification has been stated on numerous occasions. In the case of ***Abdulla Bin Wendo & Anor V R (1953) 20 EACA 166,*** the court held:-

> ***"Although a fact can be proved by the testimony of a single witness this does not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."***

The need for greatest care as emphasized in the above case is not required in respect of a single eye witness only but is necessary even where there is more than one witness where the basis is that of

identification. The point was stressed in ***Abudalla Nabulere & Anor V. Uganda, Court of Appeal Criminal Appeal No. 9 of 1978*** as follows:-

> ***"....Where the case against an 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 correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, 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 a mistaken identity is reduced but the poorer the quality, the greater the danger.***
>
> ***In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution...."***

Bearing the above caution in mind, we have reappraised the evidence on record with a view of determining whether the learned trial Judge indeed failed to properly evaluate the same evidence and came to a wrong conclusion in convicting the appellant.

PW1, testified that she saw the appellant at her home on the night the deceased was cut with a panga and robbed of shillings 550,000/=. PW1 also testified that there was sufficient light from the moon and the flash light from the torches the assailants had which helped her to identify

the appellant. She further testified that the appellant was from the neighboring village and she knew him well. This proved that she was familiar with him. PW1 stated that she identified the appellant even after his arrest.

With regard to proximity between the witness and the appellant, PW1 testified that when the appellant asked her where their kitchen was; he held her hand and kept asking her who resides in the first room of their house. Further, PW1 stated that she was the one who kept taking the appellant and his accomplice around the house. Finally PW1 testified that the appellant spent one hour in the house of PW1 during that night. The appellant raised the defence of alibi but during his examination in chief, he admitted to have been around the scene of crime; that is the neighboring village, Kadugala and at his brother's residence, in Samaria near PW1's residence where the incident took place.

Having subjected both the prosecution and the defence evidence to our own scrutiny in relation to the factors set out in ***Abudalla Nabulere & Anor Vs. Uganda*** (Supra), we are satisfied that conditions favouring correct identification were present. There was adequate light coming from the moon and the flashing light from the torches of the appellant and his accomplice that they had during the incident and the distance was close enough for PW1 to properly see the appellant and identify him. The appellant spent one hour in the house that night under observation of PW1.

In the circumstances, PW1 could not have been mistaken in stating that it was the appellant she saw at her residence. Therefore it is our considered opinion that the learned trial Judge was correct to hold that the appellant's alibi was disproved by the evidence of PW1 and his

admission that he was at or around the same village which placed him at the crime scene.

In respect of the inconsistences and contradictions in the evidence of PW1 as to the arrest of the appellant, we find them minor as they do not go to the root of the case. Ground one therefore fails and it is hereby disallowed.

Ground two

This ground is in respect of sentence and the appellant contends that the sentence of 17 years imprisonment for the offence of murder and 20 years imprisonment for the offence of aggravated robbery to run consecutively was harsh and excessive in the circumstances.

It is a well settled position in law that an appellate court will only interfere with a sentence imposed by a trial court in a situation where the sentence is either illegal or founded upon a wrong principle of the law. It will equally interfere with sentence, where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. See ***James v R (1950) 18 EACA 147, Ogalo s/o Owoura v R (1954) 24 EACA 270*** and ***Kizito Senkula v Uganda SCCA No. 24 of 2001***

The Supreme Court expanded these principles further in ***Livingstone Kakooza v Uganda, Supreme Court Criminal Appeal No. 17 of 1993***, by adding that an appellate court will also interfere with sentence where the trial court has overlooked some material factor.

These principles were further clarified by the Supreme Court in ***Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001*** as follows:-

"The appellate court is not to interfere with 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 when passing the sentence or where the sentence imposed is wrong in principle."

See also ***Kyalimpa Edward v Uganda Supreme Court Criminal Appeal No. 10 of 1995.***

While sentencing the appellant, the learned trial Judge at pages 67 and 68 of the record of appeal noted as follows:-

"The accused pleaded not guilty and the matter went to full trial

The prosecution called 3 witnesses to prove its case and court found the accused guilty on the count of murder and the first count of aggravated robbery.

Court convicted him on the 1st count of murder and 2nd count of aggravated robbery but acquitted him on the 3rd count of aggravated robbery.

The accused is a first offender. He is 25 years old, youth who has already been on remand for 3 years and 8 months which court takes into account.

The accused person has been convicted of two offences that is murder and aggravated robbery, both of which carry a maximum sentence of death. Having considered the submissions of both the prosecution in relation to the sentence and that of the accused person's counsel in mitigation, I find that the accused did not appear remorseful and the offences of such nature have increased in society. They are being committed by youths who are robbing honest hard working citizens as a way of getting rich quickly without working.

The way the offences were committed was brutal as the convict made his demands clear that is, money and life. They forcefully made their way into the victim's home and cut her husband causing him skull damage which led to his death. In those circumstances, court sentences him to seventeen

(17) years imprisonment on the first count of murder and 20 years imprisonment on the second count of aggravated robbery.

The sentences are to run consecutively and in addition, the court is ordering the convict to pay a sum of shs. 700, 000/= which was robbed from the victim, Nakazibwe Nuliat, comprising of a sum of shs. 550,000/= which was stolen from the saving box and shs. 150,000/= being the sum of money in airtime sold and unsold.

The convict has a duty (sic) to appeal against the conviction and sentence."

From the passage above, we find that the learned trial Judge took into account all the aggravating and mitigating factors as well as the remand period before sentencing the appellant. We do not find any material factor that was overlooked in sentencing the appellant.

In the exercise of its sentencing discretion, although court should be mindful that cases are not committed under the same circumstances, it must maintain consistency or uniformity in sentencing. See ***Kalibabo Jackson v Uganda, Court of Appeal Criminal Appeal No. 45 of 2001***

Therefore, for the determination of appropriate sentences for the offences in the instant case, we will be guided by sentences handed down for offences whose commission bears similarity with the present case.

In ***Tumusiime Obed & Anor v Uganda, Court of Appeal Criminal Appeal No. 149 of 2010***, the appellants were convicted of murder and aggravated robbery and sentenced to 16 years imprisonment and 14 years imprisonment respectively on each count. They appealed against both the conviction and sentence but later abandoned the ground in sentence. In upholding the appellant's conviction, court confirmed the

sentences of 16 and 14 years imprisonment for murder and aggravated robbery respectively and noted that the sentences were inordinately too low and amounted to a miscarriage of justice and that had the issue of severity of sentence been raised by either party to that case, court would have been inclined to enhance the sentences in respect to murder to at least 35 years imprisonment.

In ***Kalyamagwa v Uganda, Court of Appeal Criminal Appeal No. 189 of 2012***, the appellant was convicted on two counts of aggravated robbery and thereafter causing the death of a person. The trial judge passed no sentence for aggravated robbery and a death sentence for murder. He appealed against sentence and court held that death penalty is no longer mandatory but upheld the death penalty on grounds that the trial judge considered all the mitigating and aggravating factors and there was no lawful reason to interfere with the sentence.

In ***Bakubye Muzamiru & Anor v Uganda, Supreme Court Criminal Appeal No. 56 of 2015***, the appellants were indicted in the High Court on two counts. The first count was murder contrary to sections 188 and 189 of the Penal Code Act and the second count was aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. The trial judge convicted the two appellants on both counts. She sentenced them to 40 years imprisonment for murder and 30 years imprisonment for aggravated robbery. The sentences were to run consecutively. On appeal, this Court upheld both conviction and sentence and on further appeal, the Supreme Court upheld the conviction and sentence.

The facts in that case were that the appellants robbed Semakula Moses (deceased) of 3 motor vehicles, 2 passports, and personal effects and in the course of the robbery Semakula was murdered.

In ***Abaasa & Anor v Uganda, Supreme Court Criminal Appeal No. 54 of 2016,*** the appellant were charged with murder and several counts of aggravated robbery. They were convicted with murder and the three counts of aggravated robbery and sentenced to life imprisonment for murder and 15 years for aggravated robbery which was reduced to 35 years and 15 years for murder and aggravated robbery respectively by this court. The Supreme Court confirmed the same and noted that it had the discretion to impose a life sentence in offences where the maximum penalty is death.

In ***Omusenu Sande V Uganda, Court of Appeal Criminal Appeal No. 0029 of 2011,*** the appellant was convicted of the offence of murder and sentenced to 30 years imprisonment. On appeal, this Court reduced the sentence to 20 years imprisonment.

In ***Turyahika Joseph V Uganda, Court of Appeal Criminal Appeal No. 0327 of 2014,*** this Court reduced a sentence of 36 years imprisonment to 26 years imprisonment for the offence of murder.

In ***Aliganyira Richard V Uganda, Court of Appeal Criminal Appeal No. 19 of 2005,*** the appellant was convicted of aggravated robbery and sentenced to suffer death. On appeal, this Court reduced the sentence to 15 years imprisonment.

In ***Muchungunzi Benon & Anor V Uganda, Court of Appeal Criminal Appeal No. 0008 of 2008,*** this Court upheld a sentence of 15 years imprisonment for the offence of aggravated robbery.

In view of the sentencing range in the above cited cases and in applying the principles under which this court can interfere with the sentencing discretion of the trial court, we are un able to find that the trial court in exercising its discretion came to a wrong sentence that would warrant interference by this court. The sentences of 17 years imprisonment for the offence of murder and 20 years imprisonment for the offence of aggravated robbery are neither harsh nor excessive in the circumstance of this case. We therefore uphold the conviction and confirm the sentences of the trial court. We so order.

Dated this.....15th.....day of.....January.....2019.

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Elizabeth Musoke
Justice of Appeal

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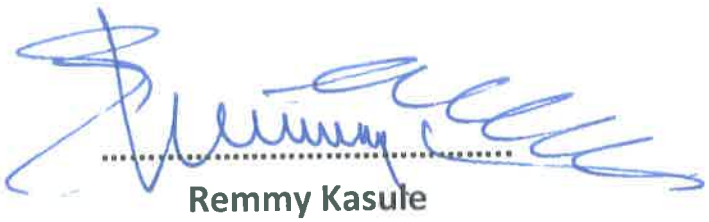
Ezekiel Muhanguzi
Justice of Appeal



Remmy Kasule

Ag. Justice of Appeal