**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPAL**

**CRIMINAL APPEAL NO. 003 OF 2011**

1. **KIRABIRA SALONGO ABASI**
2. **NSUBUGA BOSCO MOSES ..... APPELLANTS**

**VERSUS**

**UGANDA..... RESPONDENT**

*(Appeal from the judgment, conviction and sentence of the High Court of Uganda at Kampala before Hon. Lady Justice Monica K. Mugyenyi dated 14th January, 2011 in criminal case No. 207 of 2010.)*

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA**

**Hon. Mr. Justice F.M.S Egonda -Ntende, JA**

**Hon. Mr. Justice Christopher Madrama, JA**

**JUDGMENT OF THE COURT**

The appellants on 20th July, 2012 were convicted of the offence of aggravated robbery contrary to *Sections 285 and 289 (2)* of the Penal Code Act (CAP 120) in High Court Criminal Case No. 207 of 2010 by Hon. Lady Justice Monica K. Mugenyi and were sentenced to 18 years and an order of compensation of Shs 409,000/= to the complainants. Being dissatisfied with the decision of the High Court they appealed to this Court on the following grounds;-

1. *That the learned trial Judge erred in law and fact when she found that the appellants had been properly identified.*

2. *That the learned trial Judge erred in law and fact when she meted out manifestly harsh and excessive sentences against the appellants and the attendant compensation order.*

**Representation**

When this appeal came up for hearing learned Counsel *Mr. Henry Kunya* appeared for the appellants while *Mr. Sam Oola* Senior State Attorney appeared for the respondent.

**Appellant's case**

On ground 1, Counsel for the appellants submitted that, the conditions were not favourable for correct identification of the assailant and as such the learned trial Judge erred when she found that the conditions under which the appellants were identified were favourable for identification.

He argued that the complainants PW1 Mustafa Mugerwa and PW2 Kakande Geoffrey in their testimonies stated that, the robbery took place very late in the night, in a dark environment surrounded by bushes. That they were kicked, forced to lay on the ground and were later squeezed in a vehicle. Counsel contended that, all the above were negative factors and as such the victims were not in position to properly identify the appellants. He further argued that the victims did not mention the names of the appellants as the assailants who robbed them while making reports to the Police Officer. He maintained that, the appellants were innocent and victims of mistaken identity.

On ground 2, Counsel submitted in the alternative and without prejudice to the a foregoing that, the sentence of 18 years imprisonment imposed upon the appellants was harsh and manifestly excessive in the circumstances of the case. He prayed to

Court to reduce the sentence to 10 years imprisonment. He prayed to Court to allow the appeal, quash the conviction and set aside the sentence.

**Respondent's reply**

Mr. Oola opposed the appeal and supported both the conviction and the sentence passed against the appellants by the learned trial Judge.

On ground 1, Counsel argued that, there was evidence adduced by the prosecution witnesses, PW1 and PW2 that squarely placed the appellants at the scene of the crime. He submitted that the witnesses in their evidence stated that, there was sufficient light emitted from the head lamps of the appellants' Motor vehicle. Secondly PW1 testified that, both the appellants were very well known to him for some time prior to the incident. He asked Court to dismiss the appeal.

On alternative ground 2, Counsel submitted that the sentence of 18 years imprisonment was neither harsh nor manifestly excessive in the circumstances of the case. She contended that the learned trial Judge had applied both the provisions of the law and the sentencing guidelines while passing the sentence of 18 years imprisonment upon the appellants. He also considered the sentencing range in similar cases and felt bound by the guidelines. He relied on *Tito Buhingiro vs Uganda, Supreme Court Criminal Appeal No. 8 of 2014* and *Bogere Assimwe Moses and Another vs Uganda, Supreme Court Criminal Appeal No. 39 of 2016.*

**Resolution**

This being a first appellate court, we have a duty to retry matters of fact by subjecting the evidence to fresh scrutiny and coming to our own conclusions on the controversies for resolution. The duty of this court is stipulated in *Rule 30 (1) (a)* of Rules of this Court that:

> *"Power to reappraise evidence and to take additional evidence.*

*(1) On any appeal from a decision of the High Court acting in its original jurisdiction, the court may-*

*(a) reappraise the evidence and draw inferences of fact"*

In the exercise of the duty to retry matters of fact and draw our own inferences, we have cautioned ourselves that we have neither seen nor heard the witnesses testify and made due allowance for that shortcoming. See; *Pandya vs R [1957] EA 336, Selle and Another vs Associated Motor Boat Company [1968] EA 123), Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses and Another vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.*

We shall keep the above principles in mind while resolving the grounds of appeal. We have listened to the submissions of Counsel and carefully perused the Court record as well as the judicial precedents cited to us. We now proceed with our duty of evaluating the evidence

In this appeal the first ground is that, "the learned trial Judge erred in law and fact when she found that the appellants had been properly identified."

It was submitted by Counsel for the appellants that, the evidence of PW1 and PW2 who were the main identifying witnesses was unreliable as the conditions at the time of the incident were unfavourable for proper identification. On this issue of identification, we are guided by the decision of *Moses Bogere and Another vs Uganda, Supreme Court Criminal Appeal No .1 of 1997,* in which the Supreme Court gave the following guidelines;-

*"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in criminal cases. The starting point is that a Court ought to satisfy itself from the evidence whether the conditions under which 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 if difficult. It is trite law that no piece of evidence should be weighed except in relation to the rest of the evidence. See: Suleman Katusabe vs Uganda, Supreme Court Criminal Appeal. No. 7 of 1991 (unreported)"*

The Supreme Court cited with approval the following passage from the case of *Abdala Nabulele & Another vs Uganda, Supreme Court Cr. App. No. 1978 reported in (1979) HCB 77* that has been followed in numerous other cases:-

*"where the case against the 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 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 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 mistaken identity is reduced but the poorer the quality the greater the danger....*

*When the quality 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 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"*

The learned trial Judge evaluated the evidence relating to the conditions under which the appellants were identified and found that the identity of the appellants was positively established. The appellants contend that the conditions for identification were all unfavourable. We shall therefore examine the positive and negative conditions for proper identifications.

We note that there is a degree of incredibility about the identification of the appellants by prosecution witnesses PW1 and PW2 who were the victims of the robbery in issue. They gave very little information regarding the conditions prevailing at the time the incident took place. During examination in chief, PW1 stated as follows at pages 11 and 12 of the record;-

*"I have known the two accused persons. The two accused robbed me.*

*On 15/8/2009 at 9:00pm I got a request to deliver stones. I loaded stones of quarter inch from S itabali, Gayaza road and was taking them to Magere, still on Gayaza road.*

*As I was coming back from loading the stones heading to Magere between 1 to 2:00am, I met the two accused persons at the side of the road.*

*They had emerged from the bush at the side of the road.*

*One of the accused persons whom I knew as muddu but I have heard him mention names of Kirabira Salongo (A1) pointed a gun at the car*

*I have known A1 as a boda boda rider. I have known him for 2 years...*

*I was robbed at Kabanyolo. Kabanyolo is between Sitabali and Magere*

*At the scene A1's face is the face I saw at the robbery scene.*

*I knew as muddu but I have heard him mention*

*They were at the top of the hill. We approached them when our head lamps were still on.*

*By the time I switched off the lights, I was scared.*

*The lights were taken off after the vehicle had stopped..."*

Similarly, PW2 stated at page 13 of the record as follows;-

*"I know the accused.*

*They way laid us and robbed us on 15/08/2009 at Kabanyolo...*

*At Uga-clinic we found two men but we only knew one by the names of Sam.*
*We asked ourselves what these men were doing. We continued with our journey.*
*When I saw a gun being pointed, I stopped. A2 had a panga...*
*I identified the accused using the head lamps of the car and the light from inside the vehicle (upon opening doors)*
*I knew both the accused persons before the incident. I had known Salongo (A1) for about 2 years. I knew A2 very well..."*

From the above testimonies we note that the victims stated that they switched off the headlamps after the vehicle had stopped. It was very late in the night at round 2:00am. The robbery took place in darkness and as such there was no sufficient source of light for proper identification. The victims did not mention any alternative source of light such as moon light. We also note that, the victims did not state the duration or the length of time the robbery took place. They did not describe the assailants in a detailed manner such as their physical features and the way they were dressed.

We note that the evidence of the PW3 Mulawa Abdul, a police officer in charge of the police station to whom the victims reported after the alleged robbery was also lacking in detail and was therefore unhelpful to the prosecution's case. PW3 testified that on the fateful day, he went to the scene of crime and found no person there. He stated at page 16 of the record that;-

> *"-Before going to the scene, police patrol car came heading to the scene with the driver and lights on (sic).*
>
> *-It alerted the robbers and they took off.*
>
> *-By the time I reached the scene, I found them gone.*
>
> *-I removed the buriers (sic) they had put on the road and went back to the station.*
>
> *-On reaching the station, I found some people. Most of the victims of that robbery, had come to lodge a complaint because the accused robbed many people in that night.*
>
> *-As I interacted with the robbery victims, one of them called Muyinda ascend on me that he had properly identified the accused.*
>
> *-He told me he had identified A1 and A2 who has a bonne (sic) hand using the head lamps of the vehicle. And that it was A1 holding a gun and A2 had a panga.*
>
> *-Also that A1 from the Conner (sic) entered the vehicle and pushed them out as A2 kept guard."*

The said Muyinda referred to in the above excerpt of PW3 was not brought as a witness by the prosecution. The identification evidence was only presented by PW1 and PW2.

From what we have set out above, we cannot rule out the possibility of mistaken identity. Although PW2 testified during cross examination that "we told the police who had robbed us because we knew them", we were unable to ascertain at what stage or exactly when the witnesses PW1 and PW2 told the police about the identity of their assailants. The prosecution did not produce in Court the statements recorded at the police station, by any of the witnesses from which we would have ascertained whether or not they had reported to the police the identity of their assailants at the earliest possible opportunity. The police Station Dairy (SD) indicating the nature and extent of the first information recorded in respect of this robbery which could have included the identity of the assailants was not produced in Court either. It is probable that the witnesses (PW1 and PW2) could have been told of the identity of the assailants by someone else. This may have been the case because PW3 ASP Mulawu the Office in Charge of the Police Station at which the incident was reported testified that, it was one James Muyinda another victim of robbery on that night who told him that he had identified the appellants as his assailants that night. Muyinda was not called to testify. This witness did not mention PW1 and or PW2 as having been the source of information as to the identity of the assailants.

The above coupled with the fact that no item stolen from the victims P2W and PW2 were recovered from the appellants lends credence to the possibility of mistaken identity.

For these reasons, we were not satisfied that the prosecution had proved beyond reasonable doubt the fact that the appellants or anyone of them had participated in the commission of the crime of aggravated robbery in respect of which they were indicted or convicted

In *Lt. Jonas Ainomugisha vs Uganda, Supreme Court Criminal Appeal No. 19 of 2015* the Court observed that where the issue of visual identification comes up, the Courts

shall be guided by, inter-alia, whether the absence of evidence of arrest and or police investigation had any or no adverse effect on the cogency of the prosecution case. In the present case, there were no serious investigations carried out by the police. No statements were taken from the alleged victims, among other flaws. As such, it is not improbable that the witnesses, identified the appellants as their assailants, because they were the people standing in the dock. This affected the cogency of the identification evidence of the appellants and causes us a great deal of unease, by reason of which we find that the appellants were not properly identified. For that reason, ground 1 of the appeal succeeds.

We find merit in this appeal and we hereby allow it. We shall not delve into ground 2 of this appeal. The appellants' conviction is hereby quashed and the sentence set aside. The appellants are set free, unless they are held on other lawful charges.

We so order.

**Dated** at **Kampala** this .....10th.....day of.....March.....2020.

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**Kenneth Kakuru**
**JUSTICE OF APPEAL**

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**F.M.S Egonda-Ntende**
**JUSTICE OF APPEAL**

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**Christopher Madrama**
**JUSTICE OF APPEAL**