THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

[*Coram: Egonda-Ntende, Barishaki Cheborion, Kibeedi, JJA*]

CRIMINAL APPEAL NO. 515 OF 2017

(*Arising from High Court Criminal Session Case No.310 of 2015 at Jinja*)

BETWEEN

Naminya Abdallah==========Appellant

AND

Uganda==========Respondent

(*An appeal from the Judgement of the High Court of Uganda [Luswata, J] delivered on 22nd February 2017*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant was indicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The particulars of the offence were that Naminya Abdallah and others still at large on the 8th day of June 2014 at Lubandi road Bugembe in the Jinja district, robbed Wabwire Farouk of motor cycle REG. UEC 366G Bajaj red in colour and at or immediately before or immediately after the time of the said robbery used a deadly weapon to wit an iron bar unto the said Wabwire Farouk. The learned trial Judge convicted and sentenced the appellant to 20 years imprisonment. Being dissatisfied with the decision of the trial court, the appellant appealed against the conviction and sentence on the following grounds:

> '1. The Learned Trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thereby reaching a wrong decision that the victim identified the convict which occasioned a miscarriage of justice.

2. The Learned Trial Judge erred in law and in fact when she failed to properly evaluate the evidence in support of ingredients of aggravated robbery and erroneously concluded that the offence had been proved beyond reasonable doubt.

3. The Learned Trial Judge erred in law and fact when she sentenced the appellant to 20 years imprisonment which was harsh and excessive in the circumstances of the case.

4. That the Learned trial Judge erred in law and fact when she relied on the evidence of PW1, PW3, PW4 and PW5 yet the same was hearsay and this occasioned a miscarriage of justice.'

[2] The respondent opposed the appeal.

Submissions of Counsel

[3] At the hearing, the appellant was represented by Mr. Kyabakaya Enoch Samson and the respondent was represented by Mr. Ojok Alex Micheal, Assistant Director of Public Prosecutions in the Office of the Director, Public Prosecutions. The parties filed written submissions.

[4] Counsel for the appellant set out the duty of a first appellate court as laid down in Pandya v Republic (1957) EA 336, Baguma Fred v Uganda [2005] UGSC 24, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

[5] Counsel for the appellant argued grounds 1 and 2 together. He submitted that during cross examination, PW2 stated that at the point he picked up the appellant, there were no street lights but in his police statement, he stated that he had recognised the appellant using security lights in the area which is contradictory. Counsel for the appellant was of the view that this was a grave contradiction that should not have been ignored by the trial court. Counsel relied on Sarapio Tinkamairwe v Uganda Supreme Court Criminal Appeal No. 27 of 1989 (unreported). Counsel for the appellant also submitted that PW2 could not have properly identified the two persons that sat at the back of his motorcycle given the fact that there were no street lights at the pickup point.

[6] Counsel for the appellant submitted that the appellant stated in his testimony that he knew nothing about the allegations against him or Buwekula village and that

when the offence was committed, he was at his home in Wanyama zone, Bugembe town council. Counsel for the appellant argued that the conditions for proper identification were not favourable because PW2 stated in his testimony that when his motorcycle fell into the pothole on Lubandi road, he refused to continue with the journey because it was very dark ahead. He also submitted that at the point of attack, the conditions could not have been favourable for a proper identification given the fact that PW2 did not identify the third assailant who came from the bush. Counsel argued that it is wrong to assume that prior knowledge of the appellant amounted to proper identification given the fact that there were different lighting conditions at the pick point and the scene of the crime.

[7] Counsel for the appellant relied on Abudalla Nabulere & 2 Ors v Uganda [1978] UGSC 5 and Uganda v George Wilson Simbwa Supreme Court Criminal Appeal NO. 37 OF 1995 (unreported) while submitting on how evidence of identifying witnesses should be handled. Counsel for the appellant argued that the possibility of mistaken identity cannot be ruled out since the incident took place between 8:00pm and 8:30pm. Counsel for the appellant further stated that the accused does not assume the burden of placing himself at the scene of the crime. He relied on Sekitoleko v Uganda [1967] EA 531 for this submission and stated that the learned trial Judge ignored the appellant's defense of alibi. Counsel for the appellant concluded by stating that had the trial Judge considered and properly evaluated all the evidence, she would have reached a different conclusion.

[8] With regard to the ground 3, counsel for the appellant stated that the appellant's mitigating factors were that he was a first offender, remorseful, regretted the incident, and he was his family's bread winner. Counsel for the appellant was of the view that the learned trial Judge over considered the aggravating factors than the mitigating factors. Counsel for the appellant stated that the learned trial Judge ought to have put into consideration the fact that the appellant's conviction was based on the evidence of a single identifying witness while sentencing the appellant. Counsel for the appellant referred to Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No.142 of 2007(unreported) and Kizito Senkula v Uganda [2002] UGSC 36 where the Supreme Court laid down the circumstances under which an appellate court can interfere with a sentence imposed by the trial court. Counsel for the appellant stated that in Buhingiro v Uganda [2018] UGSC 3, the appellant was sentenced to 19 years imprisonment for the offence of aggravated robbery. Counsel also stated that in Uganda v Waiswa & others [2010] UGHCCRD 52, the accused persons were indicted of aggravated robbery, tried and sentenced to a caution, in Uganda v Otto [2017] UGHCCRD 27, the accused

persons were convicted of the offence of aggravated robbery and sentenced to 6 years imprisonment. Counsel for the appellant submitted that given the above precedents, a sentence of 20 years imprisonment was not a proper exercise of discretion.

[9] With regard to ground 4, counsel for the appellant submitted that the evidence, as narrated by PWI and PW3, was largely hearsay evidence which is inadmissible. Counsel for the appellant relied on section 59 of the Evidence Act that requires all oral evidence to be direct and Seru Bernard v Uganda [2004] UGCA 69 where the same position was reiterated. Counsel for the appellant submitted that the learned trial Judge erred in law and fact by relying on the evidence of PWI and PW2 who were not eye witnesses to the commission of the offence thereby arriving at a wrong conclusion.

[10] Counsel for the appellant prayed that this court allows the appeal, quash the conviction and set aside the appellant's sentence or in the alternative, that the sentence of 20 years imprisonment be substituted with one of 8 years imprisonment.

[11] In reply, counsel for the respondent relied on Abudalla Nabulere & 2 others v Uganda (supra) where it was stated that a Judge should warn himself and the assessors of the special need for caution before convicting the accused in relevance on the correctness of the identification or identifications. Counsel for the respondent also relied on Moses Kasana v Uganda (1988-90) HCB 76 where it was held that there is need to look for supporting evidence where the conditions favouring correct identification are difficult. Counsel for the respondent submitted that PW2 was able to identify the appellant using the headlights of vehicles moving along the road and that PW2 knew the appellant as his neighbour and customer. Counsel stated that PW2's prior knowledge of the appellant meant that he knew him very well and that even the two talked. They were on the motorcycle for over 20 minutes before the attack and that immediately PW2 regained consciousness, he mentioned the identity of the attacker to PW3.

[12] Counsel for the respondent submitted that despite the robbery having taken place at night, PW2 was able to properly identify the appellant as one of his attackers. Counsel for the respondent was of the view that the learned trial Judge duly warned herself and the assessors on the special need for caution before convicting the appellant on identifying evidence. Counsel for the appellant submitted that the

learned trial Judge properly evaluated the evidence on record and arrived at the right conclusion and therefore grounds 1 and 2 lack merit.

[13] In reply to ground 3, counsel for the respondent relied on Kiwalabye Bernard v Uganda Supreme Court Criminal Appeal No. 142 of 2007 (unreported) and submitted that an appellate court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or the court is satisfied that the sentence imposed is manifestly excessive thus occasioning a miscarriage of justice. Counsel for the respondent stated that the maximum penalty for the offence of aggravated robbery is death, the victim was violently attacked and he has never recovered his motorcycle. Counsel for the respondent was of the view that the trial court put into consideration both the mitigating and aggravating factors therefore a sentence of 20 years' imprisonment was appropriate in the circumstances.

[14] In reply to ground 4, counsel for the respondent stated that PWI and PW3 only corroborated the evidence of PW2. He started that narration by the appellant of what happened to him to other witnesses is consistence and not hearsay evidence. Counsel for the respondent invited this court to find that this ground lacks merit. Counsel for the respondent prayed that this appeal be dismissed.

Analysis

[15] It is our duty as a first appellate court to subject the evidence adduced at the trial to a fresh re-appraisal and to determine whether or not the trial Judge reached the right conclusion, and to draw our own conclusions with regard to the law and facts of the case, bearing in mind, however, that we did not have opportunity to observe the witnesses testify and be able to determine their demeanour, in assessing their credibility. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10, Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

[16] The facts of the case according to the prosecution evidence is that on the evening of 8th June 2014 at around 8:30 pm Wabwire Farouk (the victim), a *boda boda* cyclist was riding his motor cycle from Bugembe cathedral stage to pick up his wife when he was stopped by the appellant who requested him to take him to his home at Buwekula. At a distance, the appellant requested Wabwire Farouk to transport another man. The appellant claimed that they were colleagues. They were to drop off the unknown man in another direction first but along the way as they

approached Lubandi road, the motor cycle fell into a ditch, got stuck and eventually the engine went off as he was trying to manoeuvre the motorcycle from the pothole. When the victim informed the appellant and the other person that he was not continuing with the journey because it was very dark ahead, it was at that appoint that the appellant and his colleague grabbed the victim by the neck and assaulted him. They were joined by another man having an iron bar which the assailants used to hit him repeatedly until he lost strength. The assailants stole the motorcycle. The victim managed to walk to the road where he lost consciousness. He woke up later in hospital and recalled the incident to various people who reported the matter to police leading to the appellant's arrest.

Grounds 1, 2 & 4

[17] Grounds 1, 2 and 4 shall be handled together since they are interrelated. The appellant contends that the learned trial Judge failed to properly evaluate the evidence on record thus reaching the wrong conclusion that the victim properly identified the appellant. This case mainly rests on the evidence of PW2, the only witness who was present during the commission of the offence. We therefore find it necessary to state the law on how evidence of identification should be handled. In Bogere Moses v Uganda [1998] UGSC 22, the Supreme court stated:

> '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 niece of evidence should be weighed except in relation to all the rest of the evidence (See Sulemani Katusabe Vs Uganda S.C.Cr. App. No.7of 1991 unreported).'

[18] While dealing with evidence of identification, courts have to consider whether the conditions were favourable for a proper identification. In Abudalla Nabulere & 2 Ors Vs Uganda [1978] UGSC 5, the Supreme Court stated :

'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.'

[19] During the hearing, the prosecution presented 5 witnesses. The PW2 was Wabwire Farouk, the victim in this case. He stated that he was a resident of Buwekula, Mafubira sub-county in Jinja district and that he is a *boda boda* cyclist. PW2 stated in his testimony that on 8th June 2014 between 8:00 pm and 8:30 pm, as he was siopping from cathedral road stage on his way to pick up his wife, the appellant called out to him from the opposite side of the road and requested him to take him to his home. He knew the appellant as he was his regular customer. He stated that he picked up the appellant but before they could take off, the appellant requested him to wait for his colleague who was to join them on the ride and he was to be taken to Lubandi road. PW2 stated in his testimony that he had never seen the other person before and that he sat at the backend of the motorcycle. He started that when they reached Lubandi road, his motorcycle fell in a ditch that had been dug as an off shoot for running water. He failed to manoeuvre the motorcycle from the pothole and that the engine went off.

[20] It was PW2' s testimony that he told the appellant and his colleague that he was stopping at that point since it was very dark ahead and that his motor cycle was new. He stated that the appellant grabbed his neck and pulled him from the motorcycle and that as they were struggling, the motorcycle fell on them. At that point, the appellant told his friend that 'don't you know what has brought you?' The colleague pulled out a knife and cut PW2 on the head. As they continued to struggle, a third person came with an iron bar and begun beating him until he lost strength. The assailants ran away with his motorcycle. He walked to the road where he lost consciousness and when he regained consciousness, he was in Jinja main hospital. He stated that the appellant had been his neighbour for about 8 months

and his customer for about 6 months. He also stated that his father bought him the motorcycle but it was registered in the names of Baiswike Ismail because he did not have a TIN number.

[21] Upon cross examination, PW2 stated that he was staying on the same road as the appellant. He also stated that the appellant would often call him to give him rides and that he carried the appellant on his motorcycle many times. PW2 stated that at the time he picked up the appellant and his colleague, it was not totally dark because vehicles and motorcycles were still moving on the road and one could recognise a person by the headlights despite the fact there were no street lights in the area.

[22] The evidence of PWI, Alamanzani Wanyama, a brother to the victim is mainly a recollection of the events following the attack on the victim. He stated in his testimony that he was informed by his neighbour that his brother had been cut, that his motor cycle had been stolen and that he was at Bugembe clinic. When he arrived at the clinic, indeed he found that the victim had been cut and was bleeding. He had wounds on his head and feet and the victim could not speak for four days. PWI stated that he came to know the appellant following his arrest upon reporting the matter to police. The rest of the evidence consists of an account to him by PW2 of the events of that fateful night which is hearsay evidence and should not have been admitted into evidence.

[23] The evidence of PW3 in as far as the events of the night of the attack on PW2 was hearsay evidence which is inadmissible. He also gave evidence leading to the arrest of the appellant. He stated that after the victim told him that the appellant had attacked him and stolen his motorcycle, he went with others to the police to report the matter. He stated that he directed the police to the home of the appellant in Buwekula following the directions given to him by the victim. PW3 stated that the appellant was not at home for the first two days they went looking for him but he returned on the third day as they were watching. PW3 stated that the appellant packed his vehicle and took a *boda boda* but it did not take him up to his home, he jumped off the *boda boda* before he reached his home and walked the remaining distance to his home. He stated that they alerted the police and returned to his home, the people at his home informed them that he was not there. The police directed them to open the door so that they could search the house for him. He stated that they found the appellant in the house in the bedroom that was closed.

[24] PW4, Ismaili Baiswike, confirmed the evidence of PW2 on how he came into possession of the motorcycle. He stated that PW2's father who had bought a motorcycle requested him to have it registered in his names because he did not have a TIN number. The testimony of PW5, the investigating officer confirmed the testimony of PW4 with documentary evidence. PW5 also stated that at the time he received the case file, the victim had been admitted to Jinja referral hospital, he had two wounds, one on the head and another on the right ear and was not in position to give a statement. He stated that when his health had improved, the victim led him to the scene of the crime, they proceeded to Lubandi road just after cathedral road in Bugembe. He stated in his testimony that he noticed at the scene a trench going across the road where they were installing water pipes. He drew a sketch plan of the place.

[25] The appellant testified in his own defence. He denied committing the offence in question. He stated that he is a resident of Wanyama zone Bugembe Town Council and doesn't know Buwekula village. DW1 stated that he had never been a customer of Wabwire Farouk nor his neighbour. Upon cross examination he stated that he was residing in his personal home in Wanyama zone Bugembe Town Council that he had purchased in 2013 before he was arrested. He stated that he had lived there for about two months before his arrest and before that he used to reside in Bugembe Budhumbuli village. The appellant also stated that he had lived in Bugembe for 10 years and that he did not know Lubandi road. DW1 stated in his testimony that he had never used a *boda boda* but rather he would use his boss' vehicle which he used to drive. DW1 also stated that he did not know Wabwire Farouk before his arrest and had never had a prior misunderstanding or grudge with him

[26] In the circumstances, we are of the view that the appellant was properly identified. He was well known to PW2 as a regular customer and a neighbour before the incident. PW3 stated that the appellant was arrested at his home in Buwekula. PW2 stated that there were headlights from moving vehicles on the road when he picked up the appellant and his colleague which would provide sufficient light for a proper identification. This is coupled with the fact that the PW2 was familiar with the appellant due to his prior knowledge of him. We do not find the evidence of DW1 (appellant) that he did not know the victim before his arrest or never stayed in Buwekula plausible. The evidence of PW2 was not shaken and the learned trial Judge was entitled to believe it which she did. The evidence of PW2 put the appellant at the scene of the crime and his defence could not stand.

[27] As we have mentioned above, part of the evidence of PWI and PW3 that consisted of PW2's narration of the incident to them was hearsay and it should not have been admitted nor relied upon by the trial court. Nonetheless, without consideration of such evidence, we find that the prosecution was able to prove their case beyond reasonable doubt based on the evidence of PW2. The flight of the appellant from his home for a period, the stealthy return on the day he was arrested and the attempts to evade arrest from his home, do not point to the appellant's innocence. Rather they point to his guilt.

[28] We therefore find that the learned trial Judge rightly found that all the ingredients of the offence of aggravated robbery had been proved against the appellant.

Ground 3

[29] The general principles regarding to the sentencing powers of an appellate court are well established and have been set out in numerous cases by the Supreme. For instance, in Kakooza vs Uganda [1994] UGSC 17 it was stated that:

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.CA 270.'

[30] The appellant's mitigating factors were that he was a first-time offender who was remorseful. These factors were not expressly taken into account by the trial court. The learned trial Judge disputed whether the appellant was remorseful or not in the following words,

> 'However, I am doubtful that this convict is remorseful because even now, his lawyer is still submitting that he was a victim in the circumstances. That he was also an innocent rider who was caught up in some robbery.'

[31] It might have been preferable for the sentencing court to question the convict in order to ascertain whether he was remorseful or not. Without questioning the convict or giving him an opportunity to express himself on the question of remorse

in his own words, the appellant was thereby prejudiced when the learned trial Judge took the view that he was not remorseful. This was contrary to section 98 of the Trial on Indictments Act and in particular proviso (a) thereto which states,

> 'the accused person shall be given an opportunity to confirm, deny or explain any statement made about him or her and in any case of doubt the Court shall in the absence of legal proof of the statement ignore the statement.'

[32] These 2 errors justify our interference with the sentence. The sentence is reduced to 16 years imprisonment. The compensatory order of the trial court shall remain in force.

Decision

[33] For the foregoing reasons, this appeal against sentence succeeds and the sentence is reduced to 16 years to be served from 22nd February 2017, the date of conviction. The compensatory order of the High Court shall remain in force.

Dated, signed and delivered at Mbale this 15th day of September 2020.

Fredrick Egonda-Ntende
Justice of Appeal

Barishaki Cheborion
Justice of Appeal

Muzamiru Kibeedi
Justice of Appeal