THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

[*Coram: Egonda-Ntende, Bamugemereire, Madrama JJA*]

CRIMINAL APPEAL NO. 039 of 2012

(*Arising from High Court Criminal Session Case No.371 of 2012 at Entebbe*)

BETWEEN

Lutaya Lutalo Godfrey==========Appellant

AND

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

(*An appeal from the Judgement of the High Court of Uganda [Mwondha, J] delivered on 9th March 2012*)

JUDGMENT OF THE COURT

Introduction

[1] The appellant together with Mutawe Edward alias Afande, Lubega Steven Liko, Kyambadde Moses and Kalyesubula John were indicted and convicted 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 on the 14th day of October 2010, the accused persons at Katale Bukwenda village, Nsangi subcounty in Wakiso district robbed Mutesi Sharifah Kinene Nalongo of two mobile phones, 10 gomesis, 5 gomesi belts, 4 kanzus, 3 hijab sharia dresses, passport no. B0690807, UGX250,000 and at or immediately before or after the said robbery threatened to use a deadly weapon to wit a pistol and pick-axe on the said Mutesi Sharifah Kinene Nalongo. The appellant was sentence to 35 years imprisonment.

[2] Dissatisfied with the decision of the trial court, the appellant appealed against the conviction and sentence on the following grounds:

> '1.THAT the learned trial Judge erred in law and fact when she convicted the Appellant relying on the evidence of a single identifying witness in difficult circumstances thereby occasioning a miscarriage of justice.
>
> 2. THAT the learned trial Judge erred in law and fact in dismissing the Appellant's defence of alibi relying on the unsatisfying evidence of identification and ruled that the appellant was placed at the scene of crime and occasioned a miscarriage of justice.
>
> 3. THAT the learned trial Judge failed to evaluate the evidence on record thereby arriving at wrong and unjust conclusions occasioning a miscarriage of just upon the Appellant.
>
> **4. THAT without prejudice to the foregoing,** the learned trial judge erred in law and fact when she passed a sentence of 35 years imprisonment upon the Appellant, which is illegal, harsh and excessive thereby occasioning a miscarriage of justice.'

[3] The respondent opposed the appeal.

Submissions of Counsel

[4] At the hearing, the appellant was represented by Mr. Richard Kumbuga and the respondent by Ms. Fatina Nakafeero, Chief State Attorney holding brief for Ms.Vicky Nabisenke. Counsel filed written submissions which they relied upon at the hearing of this appeal.

[5] Counsel for the appellant set out the duty of a first appellate court in evaluating evidence as stated in Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570,

Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

[6] Counsel for the appellant submitted on grounds 1 and 2 simultaneously. Mr. Kumbuga stated the law on how to handle evidence of a single identifying witness as laid out in Abudalla Nabulere & 2 Ors Vs Uganda [1978] UGSC 5. Counsel for appellant submitted that the conditions for identification were not favorable for PW1 to make a proper identification. He averred that PW1testified that the robbery took place at around 4:25 am and she was forced to lie down while covered with a blanket. Upon cross examination, that PW1 stated that she had never seen the appellant before the commission of the alleged crime and that she spent roughly 30 seconds observing her assailants.

[7] Counsel further submitted that a sham identification parade was carried out and cited Baluku Samuel and Anor v Uganda [2018] UGSC 26 for the rules governing how an identification parade should be conducted. Counsel contended that PW3 testified that PW1 saw the appellant wearing a kanzu that was among the property stolen from her and reported to police. She accompanied the police to arrest the appellant thus saw the appellant before the identification parade was conducted. Counsel for the appellant submitted that PW2 on the other hand stated that an identification parade was conducted and PW1 managed to identify the appellant from a group of 8 people whereas PW1 on the other hand stated that they were 6 people. Counsel argued that since PW1 had seen the appellant before the identification parade, it was erroneous and such evidence cannot corroborate her evidence of identification.

[8] It was counsel for the appellant's submission that while PW1 stated that it was the appellant that raped her, it was Lubega Stephen Liko that was charged with the offence of rape. Counsel for the appellant argued that this could have been a case of pure mistaken identity. He concluded that the appellant was not properly identified and that the prosecution did not sufficiently discharge the appellant's defence of alibi.

[9] With regard to ground 3 of appeal, counsel for the appellant submitted that the prosecution evidence was filled with contradictions and material falsehoods. He argued that the complainant did not report the offence of rape but the trial court kept on making reference to the offence. Further, counsel for the appellant submitted that the stolen kanzu that PW1 allegedly saw the appellant wear was not exhibited in court yet the trial judge also relied on the doctrine of recent possession to convict the appellant. Counsel was of the view that these are grave contradictions that occasioned a miscarriage of justice. Counsel for the appellant relied on Candiga v Uganda [2016] UGCA 19 for the submission that the inconsistencies and contradictions are so grave and only point to falsehoods in the prosecution evidence.

[10] With regard to ground 4, counsel for the appellant submitted that the learned trial judge did not properly take into consideration the mitigating factors and the period the appellant spent on remand thus imposing a harsh and excessive sentence. He cited Kusemererwa & Anor v Uganda [2014] UGCA 38. Counsel for the appellant prayed that this court substitutes the sentence imposed against the appellant with a fair and more lenient sentence.

[11] In reply to counsel for the appellant's submissions on grounds 1 and 2, counsel for the respondent submitted that that the learned trial judge was alive to the fact that the case hinged on the evidence of a single identifying witness in difficult conditions. The trial judge noted that such evidence must be tested with the greatest care and that there is need for close examination of the circumstances under which the identification was made. Counsel submitted that it is not true that PW1 looked at the appellant for only 30 seconds. She averred that PW1 testified that she recognised the appellant because she had a torch which she flashed when he was entering the room and when he was raping her. Counsel for the respondent submitted that upon cross examination, PW1 stated that she had a big rechargeable torch that she flashed at the appellant which she refused to switch off when the appellant instructed her to do so. She submitted that the 30 seconds were for when she peeped at the appellant from under the blanket. Counsel for the respondent also contended that PW1 managed to give an extensive description of the appellant as

a short, black man with a bald head, big eyes and small feet. Counsel argued that this extensive description was only possible after a long observation.

[12] Ms Nabisenke further argued that the principles governing identification parades as stated in Baluku Samuel v Uganda (supra) were properly adhered to. She submitted that it is not true that PW1 saw the appellant in a kanzu and went to call the police to arrest him. Counsel averred that PW1 testified that it was the police that called her to identify the appellant through an identification parade after they had arrested him. She stated that there was no prior interaction between PW1 and the appellant after the robbery. Counsel submitted that two different cases had been reported within the jurisdiction of Kajjansi police station, PW1's case of aggravated robbery and rape had occurred on 14th October 2010 and been reported at Bukwenda police post. Another case of burglary and theft was reported on 16th October 2016 at Nalumunye police post and it was the complainant in the latter that led to the arrest of the appellant. That it was after the arrest of the appellant that the police established that he fitted the description by PW1.

[13] Counsel for the respondent argued that in light of the above submissions, there was sufficient evidence on record to confirm that the appellant was properly identified during the night of the robbery and that since he was squarely placed at the scene of crime, his alibi does not hold. Counsel relied on Baluka Samuel v Uganda (supra) for this submission. She prayed that this court finds that the appellant was properly identified and dismiss grounds 2 and 3 for lack of merit.

[14] In reply to ground 3 of the appeal, counsel for the respondent argued that this ground offends Rule 66(2) of the Judicature (Court of Appeal Rules) Directions S. I. 13-10 for generalisation. Counsel for the respondent submitted that the ground does not specify which particular points of law or facts in the judgment of the trial court, are being appealed from. She referred to Opolot Justine & Anor V Uganda [2014] UGCA 39 where this court struck out a ground of appeal that was similarly worded for offending Rule 86(1) (now Rule 66(2)) of the rules of this court. Counsel for the respondent prayed that this ground of appeal be struck out.

[15] Notwithstanding the foregoing, counsel for the respondent argued that the contradictions and inconsistencies raised by the appellant are due to misinterpretation of the evidence on record. She stated that the case of burglary and theft was different from this instant case. Counsel submitted that the failure to charge the appellant with rape was a systematic failure that cannot be blamed on the complainant. She stated that PW1's testimony that the appellant raped her stands true because it was never challenged. Counsel for the respondent was of the view that the trial judge rightly opted not to convict the appellant for the offence because he had not been charged and pleaded to the offence. With regard to the identification parade, counsel for the respondent submitted that the officer who conducted the parade stated that he placed the appellant amongst 8 other people and since he was not challenged, his testimony stands over any other testimony. Counsel for the respondent stated that the contradiction in the number of people who participated in the identification parade is minor and does not go to the root of the case. She prayed that this ground is dismissed for lack of merit.

[16] In reply to counsel for the appellant's submissions on ground 4, counsel for the respondent cited Kyalimpa Edward v Uganda Supreme Court Criminal Appeal No.10 of 1995 (unreported) that lays down the principles under which an appellate court can interfere with the sentence imposed by the trial court. Counsel for the respondent submitted that there is no illegality in this case to warrant interference by this court. She submitted that under the third schedule to the Constitutional Sentencing Guidelines, the starting point of sentencing for the offence of aggravated robbery is 30 years imprisonment. She was of the view that the appellant fulfils the factors that aggravate the sentence under paragraph 31 of the guidelines. Counsel stated that the appellant was in a gang with 4 others who broke into PW1's house while armed with a gun , robbed her of her property and went ahead to rape her in the presence of her sister.

[17] Counsel submitted that a brief review of the decisions of this court reveals that 35 years is within the range of sentences passed by his court for the offence of aggravated robbery. Counsel for the respondent stated that in Katunda Johnson v Uganda [2009] UGCA 27, this court sentenced the appellant to life imprisonment for the offence of aggravated robbery while in Olupot Sharif & Anor v Uganda

Court of Appeal Criminal Appeal No. 0730 of 2014 (unreported) this court reduced the sentence of 40 years to 32 years' imprisonment for the same offence. Counsel for the respondent averred that in light of the above submissions, the sentence of 35 years' imprisonment is neither manifestly excessive nor harsh and prayed that this court maintains the sentence against the appellant.

[18] In conclusion, counsel for the respondent prayed that this appeal be dismissed.

Analysis

[19] 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.

[20] It is the case for the prosecution that on the 14th day of October 2010 while Mutesi Sharifah Nalongo Kinene (PW1) was sleeping in her room at around 4:25am in the night, she was woken up by her sister knocking on her door. Her sister, Nankinga Victoria informed her that she had been beaten by a snake. PW1 switched on her phone and opened the door. When she moved aside to let the sister in, a man pushed the sister into her room while pointing a gun at her. The man (appellant) kicked PW1 in the ribs, ordered her to switch off the torch and forced her to lie down while facing the floor. The appellant pulled a blanket off PW1's bed and covered them together with her sister who was already lying down. The appellant then called in his colleagues Mutawe Edward alias Afande, Lubega Steven Liko, Kyambadde Moses and Kalyesubula John and they proceeded to rob her of her property. When his colleagues had finished taking out the stolen property, the appellant proceeded to rape PW1. PW1 reported the matter and described the

appellant to the police. The police arrested the appellant on another charge and carried out an identification parade where PW1 identified the appellant as one of the robbers and the one who raped her.

[21] On the other hand, it was the case for the defence that the appellant was sleeping at his home at the time and on the date this offence was committed. It was not him that committed the offence. He set up an alibi.

Grounds 1& 2

[22] Grounds 1and 2 shall be handled together since they are interrelated. The question to be considered is whether there was proper identification given the circumstances in this case. 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).'

[23] Further, 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.'

[24] In considering the evidence before us we shall bear the foregoing principles in mind.

[25] PW1, Mutesi Sharifah Nolongo Kiyemba (complainant) in her testimony stated that she knows the appellant because he robbed her on 14th October 2010. She stated that at around 4:25am in the morning, she was sleeping when her sister Nankinga woke her up. She knocked on her door and told her to open that she had been bitten by a snake. When she opened the door, she saw a man pushing her into her room while holding her at gunpoint. The man kicked her in the ribs and ordered her to lie down. He slapped her when she refused. She eventually lay down facing the ground. The appellant covered her and her sister with a blanket and thereafter called his colleagues to enter the room. The colleagues were three in number and that the appellant called one of them *afande.*

[26] PW1 testified that the appellant threatened to kill her if she did not reveal where her valuable property was kept. She told him where she kept her land titles and money. While the appellant was guarding them, his colleagues were searching and collecting things in the room. She uncovered herself and saw the robbers. She stated that when she heard someone in the sitting room clapping, the others ran away, and the appellant raped her. They took about 30-35 minutes in the house. PW1 testified that when they realised that there was no longer movement in the house, they woke up and went to find out where the robbers had passed. They found that they had dug a hole in the wall of the kitchen. They also found at the site a pick axe, handle and a sack.

[27] PW1 further stated that she then went to report the matter to police at Bukwenda. She made a statement and described the person she had seen. She told the police that he was a short black man with a bold head, big eyes and small feet. She was called to identify the suspects in an identification parade when the police arrested the suspects at Kajansi police station. She stated that she recognised the appellant because she had a torch that she flashed when he was entering her room and when he was raping her. She identified the appellant from the six people paraded. PW1 stated that the robbers stole 2 mobile phones, 5 gomesi belts, 4 kanzus , 3 hijab and that she did not recover any property.

[28] Upon cross examination, PW1 stated that she had a big chargeable torch that she flashed at the appellant when he was entering her room. He ordered her to switch it off, but she refused. She stated that her sister was walking in front of the appellant but at the side. She was taller than the appellant. She peeped at the robbers for about 30 seconds after removing the blanket. She stated that she recognised the appellant when he was raping her and that she saw his feet when he was opening the blanket.

[29] PW2, Detective ASP Battle Daniel, the investigating officer stated that he came to know the appellant after he had been arrested on charges of burglary and theft sometime in October 2010. When PW1 reported the robbery to police, her description of the perpetrator fitted the description of the appellant. He decided to conduct an identification parade and the appellant was placed amongst a group of eight people and told to pick a position of his choosing. PW1 was informed that she was to face a group of people from which she would either identify or not the suspect. He stated that PW1 did not see the appellant before identification, she came after the people had been paraded. PW1 identified the appellant by touching him. He stated that upon identification, the appellant confessed to having committed the offence and revealed his colleagues; Lubega Steven Liko, Kyambadde Moses and Kalyesubula John who had also participated in the robbery.

[30] PW3 Mubiyungi James, the arresting police officer attached to Nalumunye police station stated that it was around the 16th day of October 2010 when he received a

complaint of burglary and theft from a complainant whose name he could not recall. Her home had been broken into and her properties stolen. She stated that she had identified somebody putting on a kanzu stolen from her and that she led them to the person at Katale Bukwenda. When they reached the appellant's place, he saw them and ran inside the house. They forced him to open up the door and he was arrested. PW3 stated that the complainant identified some of her stolen property that was in his house. He stated that the appellant confessed having broken into her house because she owed him some money. He then revealed other people that he was working with who were arrested from the same area.

[31] In his defence, the appellant denied having committed the offence. He raised the defence of alibi. He stated that he was at his home sleeping on the night of the robbery.

[32] On the issue of whether the appellant was properly identified, although the appellant was standing behind PW1's. sister who was taller than him, the appellant was not standing directly behind her sister, rather, he was standing at her side while holding her at gunpoint. PW1 stated that she had a big rechargeable torch that she flashed at the appellant before he ordered her to switch it off. Even then she refused to switch it off until he struck her. The distance between them was less than a meter. In our opinion, this was enough lighting for PW1 to see the appellant since he was in close proximity to her. PW5 also stated that she peeped at the appellant and his colleagues again when she was laying down and opened the blanket for at least three seconds. She saw his feet when he opened the blanket to rape her.

[33] PW1 had not been able to identify the participants in this crime and she said so. Of the participants in this crime it is only the appellant that had raped her. This close contact strengthened the opportunity for identification in our view. She reported to the police and gave a description of the appellant that was so accurate that when the appellant was arrested on another offence the police then suspected that he had committed this offence too and arranged for identification parade.

[34] PW1 identified the appellant at the identification parade. We find that counsel for the appellant's allegation that the identification was not properly conducted has no merit. From the evidence on record, PW1 did not see the appellant before the identification parade was conducted. PW3 testified that it was in another case in which the appellant had been arrested and charged with burglary and theft that the complainant had identified the appellant in a kanzu and led police to the appellant's home where he was arrested. PW2, the police officer who conducted the identification parade corroborated this evidence. He stated that the appellant was placed in the identification parade following PW1's description of one of her attackers in her police statement which fitted the appellant.

[35] PW2's testimony also brought out the fact that it was the appellant who disclosed his colleagues that had participated in the robbery to police. His colleagues, Mutawe Edward alias *Afande* (A2), Kyambadde Moses (A4) and Kalyesubula John(A5) who he disclosed pleaded guilty to the charge.

[36] For the aforementioned reasons, we are of the view that the appellant was properly identified and placed at the scene of the crime. His defence of alibi was sufficiently demolished by the evidence for the prosecution.

Ground 3

[37] The contradiction with regard to the number of people that were in the parade is minor and does not point to deliberate falsehood on the part of the testimony of PW1. PW1 was testifying after almost 2 years from the time the offence was committed. Memory especially for numbers could be fickle. PW2, the police officer who conducted the identification parade stated that the appellant was placed amongst eight people while PW1 stated that they were six people. This discrepancy is minor. Viewed together with the evidence in the case as whole it does not weaken the case for the prosecution.

[38] However, it was erroneous for the trial court to rely on the doctrine of recent possession to convict the appellant. From the evidence of PW3, the arresting

officer, the appellant was arrested wearing a *kanzu* that belonged to a complainant in a different case of burglary and theft. That evidence would be relevant in that other case of burglary and theft, and not in this one, save to explain how he was arrested. Notwithstanding that error we are satisfied that the appellant was properly identified by PW1 at the identification parade as the only participant she was able to recognise among those that committed aggravated robbery of properties belonging to her.

[39] PW1alleged in her evidence that the appellant had raped her after the robbery. This allegation was unchallenged. However, the appellant was not charged with rape. Instead Lubega Steven Liko who skipped bail was the one charged with the offence. It is possible that there was an error on the part of the police in charging the suspects. Nonetheless, the trial judge noted that she could not convict the appellant for an offence he had not been charged which was proper in the circumstances.

[40] Ground 3 fails.

Ground 4

[41] The general principles regarding the sentencing powers of an appellate court are well established and have been set out in numerous cases by the Supreme Court. 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.'

[42] The appellant's mitigating factors were that he was a first-time offender, young and capable of reforming. He prayed for leniency. The appellant had spent two years on remand. While considering the mitigating and aggravating factors we note that the appellant spent 2 years on remand. He committed a serious offence that carries the maximum sentence of death. We have taken into consideration the fact that the appellant was a first-time offender and pleaded for lenience.

[43] With regard to the range of sentences courts have imposed on cases of a similar nature , in Muchunguzi & Anor v Uganda [2016] UGCA 54 the appellants were convicted of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act and sentenced to 15 years imprisonment. This court confirmed the sentence on appeal. The appellants had attacked an old woman, the mother of the first appellant at night and hacked her with a *panga* thus inflicting several cuts on vital parts of her body. They robbed from her UGX 65,000.

[44] In Oyirwoth alias Balijuka v Uganda [2016] UGCA 18, this court confirmed the sentence of 15 years' imprisonment for the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The particulars of the offence were that on 29th June 2002 at Padea Trading Centre, Nebbi District, the appellant robbed a one Okello Innocent of bicycle spare parts valued at UGX 300,000 and at or immediately before or immediately after the said robbery used a deadly weapon, to wit a gun on the said Okello Innocent.

[45] In Aliganyira Richard v Uganda [2010] UGCA 50 this court substituted the sentence of death with 15 years' imprisonment for the offence of aggravated robbery. In Rutabingwa James vs Uganda [2014] UGCA 79, this Court confirmed a sentence of 18 years for aggravated robbery. In doing so, it took into account the fact that the appellant had spent up to five years on remand before conviction.

[46] In Ogwal Nelson & Ors v Uganda [2017] 81 this court imposed a sentence of 19 years' imprisonment for the offence of aggravated robbery and in Bogere & Anor Vs Uganda [2018] UGSC 9, two appellants were tried and convicted of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act and were each

sentenced to imprisonment of 20 years. On appeal against the sentence, this court dismissed the appeal. The appellants appealed to the Supreme Court which confirmed the sentence.

[47] After considering the mitigating and aggravating factors, sentences imposed by this courts in similar cases, we are of the view that the sentence of 35 years' imprisonment imposed against the appellant was harsh and excessive.

[48] In light of the above, we therefore set aside the sentence against the appellant. We find that a term of 18 years' imprisonment would meet the ends of justice. From that sentence we deduct the period of two years that the appellant spent in pre-trial detention. We accordingly sentence the appellant to 16 years' imprisonment to be served from 9th March 2012, the date of conviction.

Dated, signed and delivered at Kampala this 3rd day of NOV 2021.

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal