THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HELD AT KAMPALA

CRIMINAL APPEAL NO. 900 OF 2014

KAVUMA GEORGE..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Muzamiru Mutangula Kibeedi, JA

Hon. Lady Justice Irene Mulyagonja, JA

JUDGMENT OF THE COURT

The appellant was charged with aggravated Robbery contrary to Section 285 and 286(2) of the Panel Code Act. On 18th December 2014 he was found guilty of the said offence and sentenced to 31 years imprisonment by Hon. Justice Ducan Gaswaga in High Court Criminal Session No. 26 of 2012 holden at Kampala.

Being aggrieved by both conviction and sentence he now appeals to this Court on the following grounds:-

1. ***THAT*** *the learned Trial Judge erred in law and fact when he convicted the appellant based on the weak evidence of a single identifying witness which was not corroborated.*

2. ***THAT*** *the learned trial Judge erred in law and fact when he relied on the prosecution evidence in isolation of the defence evidence thereby reaching an erroneous decision.*

In the alternative and without prejudice to the above,

3. ***THAT*** *the learned trial Judge erred in law and fact when he sentenced the appellant to 31 years imprisonment which sentence is deemed to be harsh and excessive in the circumstances of the case.*

When this appeal was called for hearing on 29th March 2021 learned Counsel *Ms. Susan Wakabale* appeared for the appellant while *Ms. Sharifa Nalwanga* learned Chief State Attorney appeared for the respondent. The appellant was in attendance *via* video link to prison.

Both parties upon direction of the Court proceeded by way of written submissions.

The Appellant's case.

The appellant submitted on grounds 1 and 2 together. The main thrust of the appellant's case is that the appellant did not participate in the commission of the crime. It was submitted in this regard that the learned trial Judge erred when he relied on insufficient identification evidence of one witness to convict the appellant.

It was submitted that, the Police first arrested the appellant and then linked him to the crime of car robbery afterwards.

At the time of his arrest, it was submitted that no investigations had been conducted in respect of the crime he was charged with. In common parlance he was framed by the Police. It was further argued that, the truth of the above is evident as the complainant PW4 whose car is stated to have been robbed by the appellant was at all material times a serving Police officer.

It was submitted further that the appellant did not admit the offence and no confession was ever obtained from him by the Police.

Counsel also submitted that the appellant was tortured while in prison.

Counsel submitted that the evidence of identification relied upon by the trial Judge was insufficient as the conditions for proper identifications were absent.

He further submitted that PW2 the victim of the crime was only able to identify the appellant in Court because he had seen him at Police Station, where the Police had

pointed out the appellant to him. This was the time when an identification parade was carried, in respect of which the trial Judge found that it did not satisfy the established legal procedure and rejected it.

Counsel asked the Court to allow the appeal and quash the conviction.

In alternative, it was submitted that a sentence of 31 years was manifestly harsh and excessive in the circumstances. The appellant, it was argued ought to have been given a more lenient sentence as he was only 28 years old at the time, a first offender with a young family. Counsel further referred Court to the principle of consistency and uniformity in sentencing, arguing that in cases similar to this , Courts have imposed lesser sentences.

She referred us to *Oyet vs Uganda Criminal Appeal No. 115 of 2013*, aggravated robbery in respect of which a sentence of 40 years imprisonment was reduced to 15 years by this Court.

Counsel submitted that in the circumstances of this case, a sentence of 12 years would meet the ends of justice.

The Respondent's reply

The respondent opposed the appeal and supported the sentence.

Counsel submitted that the evidence of PW2 the victim was sufficient on its own to prove that the appellant had been positively identified as his assailant. All the conditions of proper identification were present as the witnesses clearly narrated to Court at the trial. Counsel pointed out that the victim PW2 had observed the appellant for over 10 minutes from a distance of just one metre. There was light emitted by a large bulb at the parking lot from which the appellant a special hire

driver had parked his car. The appellant had approached him there to hire his services to pick a patient and take her home.

The two sat in the same car for a journey that took about one hour.

Further that when they stopped the car the light in the cabin was switched on and was able to see the appellant properly and identified him later when he saw him.

Counsel referred to *Abdallah Nabulare & Other vs Uganda. Court of Appeal Criminal Appeal No. 9 of 1998* in which the predecessor to the Supreme Court held that corroboration is not required in every case.

Further that a Court may convict on evidence of a single indentifying witnesses.

In reply to ground 2 Counsel submitted that, the learned trial Judge properly evaluated the evidence as a whole and did not fail to consider the appellant's *alibi.*

Court, Counsel pointed out ,considered the appellant's defence of *alibi* and rejected the same having been destroyed during the appellant's cross examination. Counsel also pointed out that the *alibi* was an afterthought as the appellant had not brought it out earlier in his case. She asked the Court to dismiss this appeal and uphold the conviction and to confirm the sentence.

In respect of sentence Counsel, submitted that sentencing is the discretion of the trial Judge and the appellate Court cannot interfere with unless the Judge acted on a wrong principle or that the sentence was manifestly harsh and excessive.

In this case Counsel submitted that the sentence was appropriate in the circumstances considering that the maximum sentence was death. Further that, the victim sustained very severe injuries that would last his life time. These, Counsel submitted were very serious aggravating factors that the Judge took into account before he arrived at the sentence that he did.

She asked this Court to uphold it.

Resolution

This being a first appeal, we are required to re-evaluate the evidence and make our own inferences on all issues of law and fact. See Rule 30(1) of the Rules of this Court. We shall keep this legal requirement in mind as we determine this appeal.

The appellant submitted on grounds 1 and 2 together. We shall likewise determine them together.

The appellant's main issue with the Judgment of the trial Court is that, the conviction is based on insufficient identification evidence.

The conviction is based on the evidence of a single identifying witness the victim who testified as PW2. That evidence is not corroborated.

In respect of the evidence of PW2 the victim, upon which the learned trial Judge relied,he testified that, in 2011 he was a special hire taxi driver, stationed at Mulago stage in Kampala. He was a driver of a Toyota Premio, Registration No. UAP 315J, blue in colour. While on duty awaiting customers, at the said Mulago stage, on 12th June 2011 at about 8pm he was approached by two men who wanted him to take a patient from Mulago to Lungujja. The appellant is the one who approached him first. The appellant told the victim PW2 that he had a patient at Mulago hospital who had just been discharged and they wanted him to take them with the patient to Lugunjja. The two negotiated the special hire charges, with PW2 demanding shs.25,000/= for the journey while the appellant and his colleague were offering shs.20,000/=. After about 10 minutes of negotiation they all agreed at 20,000/=.

During this time the appellant was about 1 metre away from PW2. According to PW2's testimony the place where his car was parked was a 'stage',a designated place

for special hire taxis. It was well lit. The appellant and his colleague who was A2 at the trial and the woman who was said to have been sick entered the appellant's car and he drove them off. On the way they requested him to stop so they could buy food. He did, at Nakulabye. All along the appellant was sitted in the front passenger seat. He obliged. They stopped bought food including a bunch of banana (matooke) which was put in the boot of the car.

When they reached Lungujja, PW2 was told to park the car near a gate. He was not asked to proceed beyond the gate.

The appellant and his colleague moved the woman who was said to have been sick out of the car. They both carried her behind the car. They asked PW2 to help them remove the Matooke from the boot.

As he bent down to remove the Matooke out of the boot. He was hit on the head. He regained consciousness at the hospital, where he remained for over one month. PW2 stated that from the time he meet these assailants at Mulago to the time he parked the car at a gate in Lungujja was about one hour. So he was with the assailants for an hour.

The learned trial Judge went through the prosecution and defence evidence in detail. First he set out the law. Then the facts in relation to the requirements of the law in regard to identification evidence.

The Judge observed that witness PW2 had spent about 15 minutes negotiating with the assailant at Mulago. He saw them lifting the woman to his car. He sat with one of the assailants throughout the journey, which took about an hour whilst in the car. In respect of visibility, the Judge found that there was sufficient light at Mulago stage.

The two assessor's opinion was that the appellant and A2 were guilty of the offence they were charged with.

The appellant denied the offences and set up an *alibi* that on that night he had gone to Wobulenzi at midday to buy pineapples and returned the next day 13th July 2011 at 11 pm.

The law regarding evidence of a single identifying witness is well settled. But every now and again it is brought into question. We are now being required to determine whether evidence of a single identifying witnesses required corroboration or not. We are therefore constrained to reproduce in extenso the decision of the Court of Appeal of Uganda, the predecessor to the present Supreme Court of Uganda in *Abudala Nabulere, Kuluseni Mubala, Asani Bosa and Uganda Criminal Appeal No. 9 of 1978.*

> *"A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken. For this reason, the courts have over the years evolved rules of practice to minimise the danger that innocent people may be wrongly convicted."*

The above position of the law has not changed. The facts of this case as set out clearly shows that the victim PW2 had sufficient time to interact with the assailants that night. We note also that the interaction was cordial.

The would be assailants paused no threat to the witness and he had no reason to be afraid of them. On the contrary they took time with each other closely for over one hour. The witness sat with the assailant in the front seat of his car. They had a stopover. They moved on again. They stopped, got out of the car and talked, before they finally hit him.

We fault the learned trial Judge for having failed to caution himself of the dangers of convicting on evidence of sole identification witness. He did not warn the assessor also. This was an error.

However, we have warned ourselves of that danger. Having done so and having reviewed the evidence on record we are satisfied that the witness PW2 clearly and positively identified the appellant as the person who assaulted him on the night of 12th July 2011.

The appellant's *alibi* therefore fails, as he was clearly put on the scene by the PW2. In any event the *alibi* was not set out at the earliest possible opportunity to enable the prosecution adduce it during investigations.

Be that as it may, the appellant stated that he had gone with a vehicle to Wobulenzi that evening. Wobulenzi is just a few minutes' drive from Kampala. It is possible for one to be at Mulago at 8pm and later at Wobulenzi at midnight.

We find no merit in grounds 1 and 2 of this appeal.

We hereby dismiss them.

In respect of the alternative ground of sentence, it was submitted for the appellant, that the sentence imposed upon him was harsh and manifestly excessive in the circumstances. Counsel faulted the learned trial Judge for having failed to give due weight to the mitigating factors in his favour. Had he done so ,Counsel submitted, and further considered the principle of consistency and uniformity in sentencing he would have passed a more lenient sentence.

Counsel referred us to the decision of this Court in *Oyet vs Uganda (Supra)* in which this Court reduced a sentence of 40 years in respect of a similar offence to 15 years imprisonment. In the circumstances of this case Counsel submitted that a sentence of 12 years would meet the ends of justice.

The respondent supported the sentence.

Submitting that, it was fair and just. Further that this Court's jurisdiction in sentencing is limited and there was no reason for it to interfere with the discretion of the trial Judge, as the sentence was not illegal and the learned trial Judge did apply a wrong principle.

Further, the sentence was neither harsh nor manifestly excessive in the circumstances.

The law is now well settled. This Court can only interfere with the trial Judge's discretion on sentence in limited circumstances.

These include , where the sentence is illegal or based on a wrong principle, failure to take into account applicable principles or where it is harsh or manifestly excessive or too law as to amount to an injustice. See *Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A. 126.*

It is common ground that the sentence is not illegal. It is evident from the record that the trial Judge considered at the mitigation factors in favour of the appellant and weighed them against the aggravating factors. He also considered the fact that the offence of aggravated robbery carries a maximum sentence of death penalty.

We also observe that the motor vehicle that was robbed was never recovered and the Judge did not order any compensation. Further, in addition to the offence of aggravated robbery we are at loss as to why the Director of the Public Prosecutions did not in addition charge the appellant with attempted murder.

Be that as it may, we find no reason to interfere with the sentence imposed by the learned trial Judge and we hereby uphold it. This alternative ground therefore fails.

In the result this appeal fails and is hereby dismissed.

We so order.

Dated at **Kampala** this.....29th.....day of .....July..... 2021.

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Kenneth Kakuru
JUSTICE OF APPEAL

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Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

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Irene Mulyagonja
JUSTICE OF APPEAL