5 **THE REPUBLIC OF UGANDA**

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 355 OF 2017

1. **MUGANGA RICHARD**
2. **LUSSIE BILLY**
3. **SSELWANJJE JOHN BOSCO** ..... **APPELLANTS**

10

VERSUS

UGANDA ..... **RESPONDENT**

(Appeal from the decision of the High Court of Uganda at Kampala before Hon. Mr. Justice Wilson Masalu Musene, J dated 5th day of September, 2017 in Criminal Case No. 0285 of 2014)

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CORAM: **Hon. Mr. Justice Kenneth Kakuru, JA**
Hon. Mr. Justice Muzamiru Mutangula Kibeedi, JA
Hon. Lady Justice Irene Mulyagonja, JA

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JUDGMENT OF THE COURT

This appeal arises from the decision of *Hon. Justice Wilson Masalu Musene, J* in the High Court of Uganda at Kampala in Criminal Case No. 0285 of 2014 dated the 5th day of September, 2017.

25 **Brief background**

It was the prosecution's case at the trial that, on the 23rd day of March 2014 at Kabuusu, Rubaga Division in Kampala District, the appellants robbed Muhendo Tadeo of Motor Vehicle Reg. No. UAQ 727K TOYOTA PRADO, Silver in Color, Cash Ug. Shs 190,000/= (Uganda Shillings One Hundred and Ninety Thousand only), 2 Nokia

Phones and immediately before or after the time of the said robbery threatened to use a deadly weapon to wit:- a gun. The appellants denied the charges. They were tried, and each convicted and sentenced to 14 years imprisonment for the offence of Aggravated Robbery contrary to *Sections 285 & 286 (2)* of the Penal Code Act.

The appellants being aggrieved with both conviction and sentence appealed to this Court on the following grounds:-

1. *That the learned trial Judge erred in law and fact when he relied on unreliable evidence of a single identifying witness.*
2. *That the learned trial Judge erred in law and fact when he relied on unreliable circumstantial evidence to convict the Appellants.*
3. *That the Learned trial Judge erred in law and in fact in sentencing the Appellants to 14 years imprisonment which is deemed illegal, manifestly harsh and excessive in the circumstances.*

Representation

At the hearing of this appeal, *Mr. Emmanuel Muwonge* learned Counsel appeared for the appellants on state brief while *Ms. Rose Tumuheise* learned Assistant Director of Public Prosecutions appeared for the respondent. The appellants were not in Court physically, but followed the proceedings *via* video link to prison due to COVID-19 Pandemic restrictions. Upon the direction of the Court, parties proceeded by way of written submissions. The submissions were on record at the time of the hearing.

Counsel for the parties addressed Court very briefly.

Appellants'case

In respect of grounds 1 and 2, it was submitted that, the appellants did not participate in the commission of the offence. Counsel argued that, the complainant could not have possibly identified the appellant due to the fact that, the robbery happened very fast

5 according to his testimony in Court. The complainant stated that, he was attacked by men with a gun, they sat on him, he was later hit and he lost his consciousness. It was contended that, since the victim was put at gun point, he must have been very scared and afraid to positively identify the people he did not know.

Further that, the complainant did not state how he was able to identify the appellants.

10 He did not state the clothes they were wearing, neither did he state the conditions that enabled him to identify the appellants as the persons who attacked him and robbed his vehicle. Counsel argued that, a conviction which is based solely on doubtable, false or mistaken visual identification causes a degree of uneasiness and as such a conviction based on such evidence amounts to a miscarriage of justice. There is 15 always the possibility that a witness though honest may be mistaken. He referred us to *Walakira Abas & others vs Uganda, Supreme Court Criminal Appeal No. 25 of 2002* and *Senoga Sempala Jafari vs Uganda, Court of Appeal Criminal Appeal No. 34 of 2005.*

Counsel submitted that, the victim did not positively identify the 1st, 2nd and 3rd appellants as his testimony on identification was lacking. Further that, the 20 identification parade was conducted 10 days from the time of the arrest of the 1st, 2nd and 3rd appellants. It was conducted by PW5, the same person who was the investigating officer. Counsel argued that, the procedure used to conduct the identification parade was full of flaws and full of irregularities, which affected its results and importance, a fact the trial Judge failed to take note of. He contended that, 25 failure to observe the procedure while carrying out an identification parade rendered the whole process a nullity. He cited *Senoga Sempala Jafari vs Uganda, Court of Appeal Criminal Appeal No. 34 of 2005 and Sentale vs Uganda [1968]E.A. 365 at 369* for the above preposition.

In respect of ground 2, it was submitted that, the appellants' conviction was based on 30 unreliable circumstantial evidence. It was argued that, there was no direct evidence

5 linking the appellants to the commission of the offence. It was the prosecution's case that the appellants were found near the stolen Vehicle. It was however argued that, that does not infer guilt upon the appellants. Counsel contended that, the appellants gave explanations as to why they were near the stolen vehicle. However, the learned trial Judge considered only the prosecution evidence in isolation of the appellants' 10 defence. He submitted that, Court must examine both the prosecution and defense evidence before coming to a decision. The Prosecution evidence ought not to be examined in isolation of defence. He cited *Uganda vs George Willison Simbwa, Supreme Court Criminal Appeal No. 37 of 1995.*

Counsel submitted that, the circumstantial evidence on which the learned trial Judge 15 relied to convict the appellants was lacking and he ought to have ruled in favour of the appellants. He submitted that, it is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on the conviction, find that the inculpatory facts are incompatible with innocence of the accused person and incapable of explanation upon any other reasonable hypothesis 20 than that of guilt. He Cited *Ahimbisibwe Allan and Another vs Uganda, Court of Appeal Criminal Appeal No. 132 of 2010.*

He prayed that Court allows the appeal and quashes the conviction.

In respect of ground 3, Counsel submitted, in the alternative and without prejudice to the foregoing, that the term of 14 years imprisonment imposed upon the appellants 25 was harsh, excessive and illegal in the circumstances. Further that, the learned trial Judge erred in law and fact when he failed to comply with the provisions of Article 23 (8) of the Constitution thereby rendering the sentence a nullity. It was submitted that, the learned trial Judge failed to consider the period of 4 years, the appellants had spent in pre-trial detention.

5 Counsel prayed that Court sets aside the sentence on that account, invokes Section 11 of the Judicature Act and imposes a lenient sentence upon the appellants taking into consideration the mitigating factors in favour of the appellants and the period that they spent in lawful custody.

Respondent's reply

10 Ms. Tumuheise learned Assistant Director of Public Prosecutions opposed the appeal and supported both the conviction and sentence. In respect of grounds 1 and 2, she submitted that, the prosecution adduced sufficient evidence of five witnesses to prove its case and therefore the learned trial Judge did not rely on the evidence of a single identifying witness and unreliable circumstantial evidence as contended by the 15 appellants.

It was submitted that, while inside the car the victim was able to identify the appellants with the aid of light in his car and while outside the car with light emitted by the security lights at the petrol station. Further that, the victim spent a long time with the appellants and in the process, he was able see and identify them as the 20 people who robbed him of his car, money and phones and this helped him to recognise them during the identification parade.

She submitted that all the 3 appellants were found in possession of the stolen vehicle by the Police Officers. The appellants tried to flee from the vehicle, however they were later arrested. It was submitted that the evidence of PW1 shows that he was attacked 25 and robbed by three men, the information given to PW2 indicated that the stolen vehicle was seen at Karuma with 3 men in it. Further, that PW3 who participated in the arrest testified that he found 3 men in the vehicle at the time of interception and arrest.

5 It was submitted that the learned trial Judge properly evaluated all the evidence on record and arrived at the right conclusion. She prayed that Court upholds the conviction and dismisses the appeal.

On the alternative ground 3, Counsel submitted that, the sentence of 14 years imprisonment was neither harsh nor manifestly excessive in the circumstances of the 10 case. She contended that, the learned trial Judge applied both the provisions of the law and the Sentencing Guidelines while passing the sentence of 14 years, imprisonment upon the appellants. He also considered both the aggravating and mitigating factors in respect of the offence. She prayed Court confirms that the sentence, if it could not be enhanced.

15 **Resolution**

This being a first appeal, we have a duty to re-evaluate the evidence and to make our own inferences on all issues of law and fact. See *See: Rule 30(1)* of the Rules of this Court, *Pandya vs R [1957] EA 336, Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Bogere Moses and Another vs Uganda, Supreme Court* 20 *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 brief submissions of Counsel and carefully perused the written submissions, Court record as well as the judicial precedents cited to us. We now proceed with our duty of evaluating the evidence.

25 In this appeal the first ground is that, "the learned trial Judge erred in law and fact when he relied on unreliable evidence of a single identifying witness"

Counsel for the appellant contended that, the commission of the offence happened very fast, the complainant was put on gun point, he was engulfed with fear which adversely affected his ability to correctly identify the appellants. He was also hit and 30 he lost his consciousness. Further that, he did not state how he was able to identify

5 the appellants, he did not state the clothes they were wearing, neither did he state the conditions that enabled him to identify the appellants as the persons who attacked and robbed him of the motor vehicle.

The law on identification by a single witness was laid out in *Abdullah Bin Wendo and another vs R (1953) 20 EACA 583.* The law was further developed in *Abdulla Nabulere*
10 *vs Uganda, Supreme Court Criminal Appeal No.9 of 1978 and Bogere Moses vs Uganda (supra).*The principles deduced from these authorities are that-

i. *Court must consider the evidence as a whole.*
ii. *Court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were favourable or difficult.*
15 iii. *The court must caution itself before convicting the accused on the evidence of a single identifying witness.*
iv. *In considering the favourable and unfavourable conditions, the court should particularly examine the length of time the witness observed the assailant,the distance between the witness and the assailant, familiarity of the witness with the*
20 *assailants, the quality of light, and material discrepancies in the description of the accused by the witness.*

The single identifying witness in this case was PW1 Muhendo Tadeo. He testified that, on 22nd May, 2014, he was attacked and robbed by three men. He stated that he was able to identify them with the aid of light from the petrol station where he was
25 attacked, as well as lights in the car. In his testimony he stated as follows: -

> *"On the night of 22.05.2014, towards 1.00am, I drove towards MM Restaurant at Kabuusu. After parking, a man armed with a gun confronted me... He attacked me at Kabuusu Petrol Station. A second and third person came. They tied me after pulling me from the driver's seat, two of them tied me as one was driving. I was*
30 *able to identify them...*

5 *I used the light in the car. A1 Richard is the one who first put me at gun point. Then A2, Billy is the one who drove the vehicle. Then A3, Sserwanje assisted by A1 pulled me from the driver's seat to the middle chair. They asked me whose vehicle it was. A3 was sitting on me as A1 interrogated... They were three as they are...*

At the petrol station where I was attacked, there were security lights of the petrol
10 *station..."*

During cross-examination, he stated that: -

"I was able to identify the accused persons with the assistance of the lights inside and outside the car.

They covered my head with a soft material/kavera. I was able to see. They put
15 *kaveera on my head at the place of dumping. They dumped me in the bush. I was able to see through that kaveera. There was bright moonlight outside as well... I was called at the police to identify the accused persons. In the first group 12 people were brought. I identified two A1 and A2. Second group had people I was able to identify A3, Sserwanje..."*

20 From the above testimony, we note that, the witness was in close proximity with the appellants as they were all in the car. He was able to identify them with the aid of light emitted by the security light at the petrol station, the light in the car as well as moonlight after he was dumped in a bush. The length of time he spent with the appellants was long since they drove him from Kabuusu to Buwambo along Gayaza
25 road. We agree that, there were favourable conditions for positive identification of the appellants by PW1, the single identifying witness. Further, the witness was able to pick out the appellants from other prisoners during the identification parade.

It was the appellants' contention that the witness did not describe the clothes the appellants were putting on at the time of the commission of the offence. We note that
30 description in respect of clothes is not a material fact for proper identification and

5 therefore it does not water down the testimony of the witness in respect of proper and positive identification.

The witness in testimony narrated the whole ordeal during the commission of the offence. He stated that, he was hit shortly before being dumped, not during transit as contended by the Counsel for the appellants. Therefore, he was conscious throughout 10 and was able to and did identify the appellants as the people who robbed him. He was able to narrate whatever happened and the people who came to his rescue. We therefore find that there were favourable conditions for positive identification.

The legal position is that the Court can convict on the basis of evidence of a single identifying witness. However, the Court should always warn itself of the danger of the 15 possibility of a mistaken identity in such a case. This is particularly important in cases where there were factors which presented difficulties for identification at the material time. The Court must in every such case examine the testimony of the single witness with the greatest care and where possible look for corroborating or other supportive evidence, so that it can be sure that there is no mistake in the 20 identification. If, after so warning itself and scrutinising the evidence, the Court finds no corroboration for the identification evidence it can still convict if it is sure that there is no mistaken identity. Corroboration therefore is only a form of aid required where conditions favouring correct identification are difficult. See: *Abdala Nabulere & Another vs Uganda (Supra) Moses Kasana vs Uganda (1992 - 93) HCB 47* and *Bogere* 25 *Moses & Another vs Uganda (Supra).*

However in this case, PW1's testimony is corroborated by PW3, No. 45465 P.C Achola Joseph, the officer who arrested the appellants. He stated that, he received a report about a stolen vehicle which was heading toward West Nile. In his testimony during examination in chief, he stated that: -

30 *"...The information was that the vehicle was parked at Perungo, 50 km from Pakwach. We suspected they could be armed. We picked a traffic person and*

moved to the bridge. When we reached URA checkpoint, on Pakwach side, the vehicle was behind the lorry park. We checked all the number plates. We surrounded the vehicle with help of the army.

There were three people in the car. We ordered them to come out. It was coming to 6:00am. They opened the doors, came out and ran away. As they were running, we shot up in the air to scare them. In the process, we arrested two. One jumped in the river. It was A2 who jumped into the river. We arrested A1 and A3. A1 was behind co-driver's seat. A3 was driving. We took A1 and A3 to the Police cells.

A2 came out at 2:00pm, seeking transport to Kampala. He was seen by women who collect firewood. He was arrested by the army men who were guarding the bridge..."

From the above, we note that the people identified by PW1 are the same persons who were arrested by PW3. PW1 stated that there were three in number. The police found three people in the stolen vehicle therefore this supports the evidence of PW1.

PW2, Sembogo Fredrick, the owner of the stolen vehicle, reported the robbery and he was informed that the car was seen at the checkpoint at Karuma. He was also informed that there were three people in the car. At the time of the arrest, two were arrested and one jumped into the river.

The prosecution evidence regarding the inception and arrest was unchallenged. The appellants were found in possession of the stolen vehicle. It was not in dispute. The mode of arrest and the events that transpired were all accepted by the appellants. However, in their defence, they all testified that they were simply passengers who boarded the vehicle at different points along the road. We agree with the learned Judge that their testimony was untrue and was therefore rightly rejected. It could not have been a coincidence that, the people identified by PW1 as the attackers were the same people who contended that they were passengers in the stolen vehicle.

5 We find the evidence of PW1 was sufficient to warrant a conviction, the same evidence was sufficiently corroborated by PW3 the arresting officer and PW2. In the result we find that the appellants were positively and properly identified by the single identifying witness. We find no reason to fault the learned trial Judge's findings and conclusion. We accordingly uphold it and find no merit in this ground of appeal.

10 In respect of ground 2, it is the appellants' contention that the learned trial Judge relied on unreliable circumstantial evidence.

A conviction based on circumstantial evidence is one where there was no eye witness to the commission of the offence. In the case before us there was a single identifying witness, PW1 who gave his testimony in Court about the commission of the offence by 15 the appellants. The prosecution relied on direct evidence and circumstantial evidence. We note that, the circumstantial evidence of the arresting officer actually corroborated and or confirmed the direct evidence of the victim. Therefore it cannot be contended that, the learned trial Judge relied on only unreliable circumstantial evidence.. Therefore, this ground is misconceived and accordingly fails.

20 In respect of the alternative ground about sentence. It was contended that the sentence imposed was harsh, excessive and illegal due to the fact the learned trial Judge failed to comply with Article 23(8) of the Constitution.

As an appellate Court, we are constrained in the exercise of the powers we have to interfere with sentence handed down by a trial Court. The Supreme Court has laid 25 down the principles that should govern our exercise in that regard. In *Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1995,* the Court spelt out the principles as follows: –

> *"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is 30 the practice that as an appellate Court, this Court will not normally interfere with*

5 *the discretion of the sentencing judge unless the sentence is illegal, or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura Vs R. (1954) 21 E.A.C.A. 126, R. Vs Mohamedali Jamal (1948) 15 E.A.C.A. 126."*

See also: *Livingstone Kakooza Vs Uganda, Supreme Court Criminal Appeal No. 17 of*
10 *1993.*

We have carefully perused the record and note that the learned trial Judge considered the remand period. While passing the sentence, the learned trial Judge sated as follows;-

"The Convicts are young men who should learn to work hard to earn an honest
15 *living as opposed to robbery and theft. However, I shall take into account the mitigating factors by Counsel for the convicts, particularly that, they are within the youthful bracket and can reform to lead a better life thereafter.I have considered that the convicts may be first offenders as no previous convictions have come out*

20 *In the premises, instead of 18 years of imprisonment, I subtract the period of four (4) years of remand. Each convict is therefore to serve 14 years imprisonment."*

From the above, it is very clear that the learned trial Judge took into account the period spent in lawful pre-trial detention.

We have considered the mitigating factors raised by the appellant's Counsel which
25 were also raised at the trial. We are satisfied that before arriving at the decision to impose a 14 year sentence the trial Judge took all the mitigating factors into account. He also considered the aggravating factors.

The appellants in this case deliberately used a deadly weapon to wit: a gun in the commission of the offence of robbery. This is a serious aggravating factor.

5 However, the first appellant was a youth aged 29 years at the time of the commission of the offence. He was a first offender as there is nothing on record to show otherwise. He has good prospects of reform. He had been on remand for 4 years. He was married and had 2 children to take care of.

The second appellant was a youth aged 22 years at the time of the commission of the 10 offence. He was a first offender as there is nothing on record to show otherwise. He has good prospects of reform. He had been on remand for 4 years. He was married and had 5 children to take care of.

The third appellant was a youth aged 28 years at the time of the commission of the offence. He was a first offender as there is nothing on record to show otherwise. He 15 has good prospects of reform. He had been on remand for 4 years. He was married and had 2 children to take care of.

These factors were also considered by the trial Judge. We note that, the trial Court also took into consideration the need to maintain uniformity of sentences. The judicial precedents show that sentences for aggravated robbery range from 10 years to 20 20 years imprisonment. The sentence of 14 years imprisonment imposed upon the appellants is in the range of sentences imposed earlier by this Court and the Supreme Court for the offence of aggravated robbery.

In *Aliganyira Richard vs Uganda, Court of Appeal Criminal Appeal No. 19 of 2005*, the appellant was convicted of aggravated robbery and sentenced to suffer death. On 25 appeal, this Court reduced the sentence to 15 years imprisonment.

In *Muchungunzi Benon & Another vs 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.

5 In *Tumusiime Obed & Another vs Uganda, Court of Appeal Criminal Appeal No. 149 of 2010,* the appellant was convicted of aggravated robbery and sentenced to 16 years imprisonment. On appeal to this Court, it was reduced to 14 years.

We therefore find no reason to interfere with the sentence of 14 years imprisonment imposed by the learned trial Judge and we hereby uphold it.

10 In conclusion, this appeal substantially fails and is hereby dismissed. The appellants shall continue to serve the sentence that was imposed by the trial Judge.

We so order.

Dated at **Kampala** this.....26th.....day of .....August..... 2021.

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Kenneth Kakuru

20 **JUSTICE OF APPEAL**

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25 **Muzamiru Mutangula Kibeedi**

JUSTICE OF APPEAL

30 .....

Irene Mulyagonja

JUSTICE OF APPEAL