THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA.

CRIMINAL APPEAL NO. 227 OF 2014.

(Coram: Bamugereire JA, Madrama JA, Kawuma Luswata JA)

(Appeal from the Judgment of the High Court of Uganda (Wilson Musalu Musene, J) at Entebbe delivered on the 7th May, 2014)

JUDGMENT

1. NSEREKO VINCENT
2. CHART SUNDAY..... APPELLANTS

VERSUS

UGANDA ..... RESPONDENT

Introduction

1] The High Court decision followed the trial of the appellants on an indictment which in relevant part alleged that Nsereko Vincent and Chart Sunday on 22/4/2011 at Kinawa Nalumunye in the Wakiso District robbed one Kanyike Christopher of his Sonny DVD player, four mobile phones and Shs. 700,000.

2] The facts of the case, as we have ascertained from the record, may be summarized as follows. On the night of 22/4/2011 at 1:00am the appellants who were armed with a panga and ropes, attacked and broke into the home of Christopher Kanyike, who was sleeping in the house with his wife Nakabuko Serwo Kamiyati and their two daughters, Beatrice Nanja and Tracy Namutebi. The 1st appellant tired Kanyike Nakabuko and Nanja with ropes and guarded them while holding a panga. While the 2nd appellant searched the house for valuables. Following the attack which took about four hours, the appellants took with them a Sonny DVD player, four mobile phones and Shs. 700,000 in cash. The same morning, Nanja managed to identify the 1st appellant as one of the assailants who attached her home and informed both Namutebi and their father. Subsequently, while at the Trading Center, Namutebi also identified the 2nd appellant as the other attacker. Both

appellants were arrested, indicted and convicted of the offence of aggravated robbery contrary to section 285 and 286(2) of the Penal Code Act, Cap 120 and sentenced to 18 years' imprisonment.

3] Being aggrieved with the conviction and sentence of the High Court, both appellants appealed to this court on two grounds of appeal set out in the Memorandum of Appeal as follows: -

1. **That the learned trial judge erred in law and fact when he held that the appellants had been correctly identified without taking into consideration the factors which rendered identification difficult, thereby occasioning a miscarriage of justice**
2. **That the learned trial judge erred in law and fact when he passed a sentence of 18 years' imprisonment upon the appellants which is manifestly harsh and excessive in the circumstances thereby occasioning a miscarriage of justice.**

4] **Representation**

At the hearing of the appeal, the appellants were represented by learned counsel Shamim Nalule who held brief of Ssebabi Kenneth. On the other hand, the respondent was represented by learned Principal Assistant Director of Public Prosecutions Nabaasa Caroline. Both counsel filed written submissions.

Submissions for the appellant

5] Counsel for the appellant submitted that the ingredient of participation of the appellants was not made out since the trial judge did not take into consideration the factors which at the material time rendered identification difficult. Relying on the celebrated decision of **Abudala Nabulere & Anor vs Uganda Criminal Appeal NO. 9/1978,** he argued that in this case, the factors existed to render identification of the attackers difficult.

6] Counsel specifically related the evidence of PW1, PW2 and PW3 who were frightened and traumatized by the attack. That some were ordered to lie face down, and tied with ropes or pushed under the bed, positions not favorable for accurate identification. Counsel added that all the eye witnesses admitted not to have known the attackers before the incident

and the attackers used torches which later become dim, and then a lantern which could not provide sufficient light to enable the witnesses to accurately identify the attackers. He then conceded that his submissions were not meant to create an impression that frightened and traumatized victims of an attack cannot identify their attackers or the position from which the identifications were made, but that such factors that must be taken into consideration in evaluating the evidence in order to determine if conditions were easy or difficult for identification, which the trial judge did not do.

7] Again citing authority, counsel argued that the Judge failed to follow the settled principles when considering evidence of identification by eye witnesses, or to consider the evidence of factors, conditions or circumstances which at the material time could have rendered identification of the attackers difficult leading to a possibility of mistaken identity. In his view, the conviction of the appellants did not pass the test as clearly set out in established authorities which resulted into a miscarriage of justice. He accordingly prayed for the convictions to be quashed and appellants to be set free.

8] On ground two, counsel again cited authority to argue that an appellate court may interfere with sentence only if it is illegal or manifestly excessive so as to amount to an injustice. In his view, the trial judge did not properly take into account the mitigating factors in favour of the of the appellants and also departed from the conventional rule of uniformity in sentences thereby arriving at a very excessive sentence. That had the Judge been mindful to those factors, he would have arrived at an appropriate sentence.

9] He prayed that this court finds the sentence of 18 years' imprisonment passed against the appellants too harsh and excessive and substitute it with a fairer and more appropriate one of 10 years' imprisonment for each of the appellants, bearing in mind how much time the appellants have spent in lawful custody.

Submissions for the respondent

10] It was submitted for the respondent that the learned trial judge was mindful of the law on identification and canvased the same. Counsel pointed to the Judge's comments that all four witnesses who testified identified the appellants, and gave evidence that corroborated each other on what each appellant did during a robbery which lasted a long duration within PW1's house. That he also noted PW4's evidence where she identified a special feature on the 2nd appellant's coat which was confirmed when the coat was retrieved from the latter's house. In addition, that the Judge noted that there were other factors for a favourable identification other than the torches and lantern light.

11] Counsel then argued that the Judge appreciated the evidence adduced that not all witnesses were tired up during the robbery and that although frightened they were capable of and did correctly identify the appellants, and as such, placed them at the scene of crime. Counsel conceded that none of the witnesses knew either appellant before the attack but even then that, the light from the torches and later the lantern as well as the duration taken during the attack, enabled the witnesses to make a correct identification. He contested the argument that the light was insufficient because the 2nd appellant used the same light to search the house. That in fact, the diming of the torches and eventual lighting of a lantern supports the witnesses' assertion that the attack took a very long time.

12] With regard to the second ground, respondent's counsel generally agreed on the law governing appeals on sentence. She argued however that sentencing is a matter of discretion to be exercised in accordance with the unique facts of each case. In her view, the offence of aggravated robbery is grave and attracts a maximum sentence of death with a starting point of 35 years in line with the Constitution Sentencing Guidelines for Courts of Judicature) (Practice) Directions, Legal Notice NO. 8/2013 (hereinafter the Sentencing Guidelines). Counsel saw no illegality in the sentence as claimed because before arriving at a sentence, the trial judge took into consideration both the mitigating and the aggravating factors and also discounted the

period of three years spent on remand. In his view, none of the rules on sentencing were offended to warrant interference on appeal.

13] In conclusion, counsel considered a sentence of 18 years' imprisonment as lenient especially when the appellants were spared the maximum sentence of death or the next severe sentence of life imprisonment. Citing previous authorities in which this court upheld sentences of 27 and 26 years' imprisonment for the same offence, she prayed that this appeal be dismissed, and both the conviction and sentence be upheld.

Consideration of the appeal

14] We have considered all the evidence that was adduced before the trial court, the judgment, the submissions of both counsel, the precedents cited, as well as the applicable law generally. In this appeal, we are required to consider whether the appellants were correctly identified, and if the sentence can be quashed. This is a first appeal and under **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions (hereinafter COA Rules)** our duty is to retry matters of fact by subjecting the evidence on record to fresh scrutiny. In the exercise of that duty, we are aware that unlike the trial Judge, we have no advantage of having seen or heard the witnesses testify and shall make due allowance in that regard. **See Pandya V R [1957] EA 336,** and **Kifamunte Henry V Uganda; SCCA NO. 10 of 1997**

15] Both counsel made substantial submissions on the law of identification. The authorities provided are an indication that they fully understood the principles to be followed. We agree that identification is a common point of contention in most cases of aggravated robbery, and this is by no means an isolated case. We choose to follow the celebrated decision of the Supreme Court in **Bogere Moses and another vs Uganda, Criminal Appeal No. 1 of 1997.** The Court held:

"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with the evidence of identification of eye witnesses in criminal cases. The starting

point is that a court ought to satisfy itself from the evidence whether the conditions under which identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction unless it is satisfied that mistaken identity is ruled out. In so doing, the court must consider the evidence as a whole, namely, the evidence of any factors favouring correct identification together with those rendering it difficult."

16] In that case, their Lordships went on to discuss at length, various leading authorities on identification including, **Roria vs Republic [1967] E.A 584** and **Abdalla Nabulere & Anor vs Uganda, [1979] HCB 77** which the trial Judge also followed. The following were advised as the main factors to be considered by a court considering identification evidence. We can summarize them as follows:

1. Whether there was sufficient light.
2. Whether the witness knew the accused before or they were a complete stranger.
3. Whether the witness had sufficient time to look at the accused or only had a fleeting glance.
4. The distance between the witness and the accused at the time of recognition.
5. Any other distinctive features which might have helped in the recognition of the accused by the witness.

17] After perusing the judgment, we are of the view that the trial Judge made a thorough evaluation of the identification evidence and equally made a detailed decision on it. At page four and five of the judgment he considered the evidence of PW1 who identified both appellants first by the torch and then by a lantern that one of them lit. He observed that PW4 continued to observe A2 as he searched the house, and added that the following day, after PW4 saw the 2nd appellant in the Trading Centre, she made a report leading to his arrest. At page 5 of the judgment, the Judge considered all the principles laid down in **Nabulere vs. Uganda (supra)** and determined that identification by four witnesses who were consistent and steady

in their testimonies was sufficient evidence of identification and we find no element of error. He in addition commented on the appellants' demeanor as that of people trying to *"hide something"*. We refer to his observations and final decision on identification.

18] The above notwithstanding, we are still mandated to revisit the evidence on identification which we do under the guidance of established authority. Firstly, all witnesses maintained that the attack took place inside a house, during the night at around 1:00am. That would indicate a period of near darkness. Each maintained that the appellants carried out the attack using light from two torches flashed in many directions and when those dimmed, a lantern which they lit. **PW1,** the complainant, testified that they were awoken by two men flashing torches in different directions. That the lantern lit was big in size, he added that was lying sideways facing the door way. On her part, **PW3** testified that the lantern was placed between the corridor and the door of her bed room where she, PW1 and PW2 were tied. She also lay sideways facing the door way and could see. She identified the first appellant as he was seated on a speaker flashing a torch and guarding them. PW2 also testified to have Identified the first appellant by lantern light as he sat on the speaker and A2 as the one who dragged her from her bed room to PW1's room while flashing torches. On her part, PW4 testified that she identified the 2nd appellant when he flashed a torch on the wall.

19] IAs pointed out for the appellants, all four witnesses testified that they did not know the appellants before the attack. None the less, each insisted that they were able to identify them with the aid of the torches and a lantern light. PW3 was specific that the 2nd appellant lit the lamp that he placed between the corridor and bed room where she was. We consider PW2's earlier evidence to the police that only one torch was used as a minor contradiction corrected during the trial by all four witnesses that two were used. Indeed, that same morning, **PW2** who was walking with **PW4,** saw the 1st appellant again and identified him. She immediately informed both PW1 and PW4 of

her observations. Equally, PW4 found the 2nd appellant the following day and identified him.

20] We note as the Judge did that there was other independent evidence supporting that of identification. PW4 testified that during the attack, the 2nd appellant was wearing a jacket with a hole at the back which she saw when he bent over in her room to check through her property. PW1 and PW3 mentioned that it rained heavily the same night of the attack and the same jacket was recovered from the 2nd appellant's house when still wet. This was in line with the evidence of **PW1** who testified that the police recovered a jacket from the 2nd appellant's house which was still wet and brownish with white spots. **PW5 No. 37037 D/C Peter Kwabe** testified that during the search of the 2nd appellant's house, he saw a brown jacket, which was torn on the back. **PW6 NO. 26785 Isaac Kolyanga** the investigating officer, testified that among exhibits he received, was a jacket which was dark brown with white stripes on the hands. That jacket was at inception of the trail admitted into evidence as PEX 5 without contest from the defence. Therefore, was strong evidence placing the appellants at the crime scene, and the Judge was correct to reject the 2nd appellant's lame explanation that it was a child who wet the jacket.

21] Thirdly, as pointed in the judgment, the evidence of **PW1**, **PW2** and **PW4** indicated that the attack took some time. Each testified that the appellants broke into the house at around 1:00am and left at around 5:00am, which would be four hours as stated by **PW1.** In addition, **PW4** testified that A2 who went to her room several times, spent a considerable time rummaging through her property. Lastly, the attack took place inside the house in a space of two rooms. There would be close proximity between the appellants and the identifying witnesses. Both **PW1** and **PW3** were tied up by the 1st appellant on orders of 2nd appellant. Again, **PW2** testified that she watched as the 2nd appellant searched her room, she even tried to hit him with a stick but was restrained and also tired up and pushed her under the bed. She added that it was the 2nd appellant who dragged her from her bed room to the bed room where **PW1** and **PW3** were restrained. In fact, her attempts to retaliate with a

stick, point not to a frightened but determined victim. Further, the act of tying up the three witnesses, and the spaces in which the attack took place would give reasonable inference that there was close proximity between the witnesses and the appellants, as the attackers.

22] Having subjected both the prosecution and the defence evidence to our own careful scrutiny, in relation to the factors set out in **Abudala Nabulele (supra)** and other authorities of equal strength, we are satisfied that the conditions favouring correct identification were present. The attack happened for a considerably long time, there was sufficient light to aid correct identification and the identifying witnesses were at a very close range with the appellants. As pointed out by the Judge, all four witnesses were very consistent and their accounts supported the same narrative. A few hours after the attack, the some of those witnesses saw and immediately pointed out the appellants, and further incriminating evidence in the form of a coat was retrieved from the 2nd appellant's house.

23] In the circumstances, **PW1**, **PW2**, **PW3** and **PW4** could not have been mistaken in stating that it was the appellants who robbed them despite the heavy rain and absence of electricity. Therefore, we consider the decision of the judge on the fact of identification as correct. We have no grounds to depart from it .

24] Accordingly, the first ground fails.

Ground two

25] It was submitted for the appellants in the alternative that, the sentence was manifestly harsh and excessive. Both counsel presented the correct position of the law and we repeat that this court will only interfere with a sentence imposed by a trial court in a situation where the sentence is either illegal, or founded upon a wrong principle of the law. It will equally interfere with sentence, where the trial court has not considered a material factor in the case; or has imposed a sentence which is harsh and manifestly excessive in the circumstances. **See Kiwalabye Bernard vs Uganda, SCCA NO. 143 of 2001 (unreported).**

Should we find merit in this ground, then we are to invoke Section 11 of the Judicature Act to impose a sentence suiting the facts of the case.

26] Both counsel made submissions during the allocution proceedings. It was stated for the prosecution that the offence which was rampart was grave and attracted the death penalty. Further that the appellants who had shown no remorse took property which was never recovered. State counsel prayed for a deterrent sentence of 20 years. Conversely, it was submitted in mitigation that the appellants who were of youthful age, had family responsibilities and were praying for mercy of the Court.

27] In his sentencing ruling, the trial Judge stated as follows: -

"This Court is aware that offences of this nature are rampant and can only be discouraged by giving of deterrent sentences. The maximum penalty is death as submitted by counsel for the state. People's hard earned properties should not just be taken away by armed thugs or robbers as if the convicts, said to be youthful could not work for themselves and earn an honest living. The other factor is that offences of this nature, capital robbery is life threatening and could easily result into injury or death altogether. So despite being first offenders, a deterrent sentence is called for. Court will however; take into account the period of remand of 3 years. So instead of 2I years, I subtract 3 years of remand and do hereby sentence each of you to serve l8 years imprisonment."

28] Going by that ruling, there could be merit in the appellant's arguments that more attention was given to the aggravating factors. However, the omission to give equal attention to mitigating factors did not in the circumstances occasion a miscarriage of justice. Firstly, nothing substantial was presented for the appellants. Their actual family responsibilities were not explained, and we do not agree that men aged 36 and 42 (respectively) at the time they were sentenced, were youthful. Nothing would compel the Judge and this Court to ignore the aggravating factors that were grave. The appellants attacked an innocent family in the dead of night and threatened them with a panga, tired them up with ropes and stole their property,

which was never recovered. The Judge who was not impressed by their demeanor during the trial, was correct not to appreciate their plea of mercy. That said, we are still mandated to consider whether in the circumstances, the sentence was manifestly harsh,

29] Respondent's counsel requested us to consider The Sentencing Guidelines which provide for a sentencing range for the offence of aggravated robbery as 30 years and up to death. We agree that the Guidelines are useful in keeping sentences within consistent ranges in line with the principles of uniformity which is encouraged for all courts. See for example this Court's decision in **Kajungu Emmanuel Vs Uganda: Criminal Appeal No.625/2014.** The Guidelines are not binding, and we prefer to consider judicial precedents with similar facts as a more persuasive determinant.

30] In **Muchunguzi & Anor vs Uganda (Criminal Appeal No. 8/2008) [2016] UGCA 54 (26 October 2016),** This court upheld a sentence of 15 years where the appellants attacked an old woman, with a panga inflicting several cuts on vital parts of her body and then robbed shs. 65,000/- In **Rutabingwa James vs. Uganda Court of Appeal Criminal Appeal No. 57/2011**, this court considered the injuries inflicted during a robbery before confirming an 18-year sentence. Also in **Adama Jino Vs. Uganda, Criminal Appeal No. 50/2006**, this Court reduced a death sentence to one of 15 years' imprisonment after considering that there was no loss of life and the appellant appeared repentant. Again in **Pte Kusemererwa & Tusiime Moses vs Uganda Criminal Appeal No. 83/2010**, this Court reduced a sentence of 20 years to 13 years for aggravated robbery. Yet in **Ouke Sam vs Uganda Criminal Appeal No. 251/2002**, this Court confirmed a nine-year sentence for aggravated robbery.

31] Stemming from the above, the sentence range for a similar offence is between 9 years on lower end and 20 years on the higher end in terms of imprisonment. The facts of this case is that a panga (being a deadly weapon), and other violence was used during the attack. However, there was no loss of life and neither of the victims suffered any serious injury. The

appellants have no record of previous conviction and did pray for mercy. In our view and in line with the quoted authorities, we consider the sentence of twenty-one years as manifestly excessive. We would reduce it to a term of 16 years. We would as a matter of law deduct the three years each appellant spent in lawful custody, and sentence each of the appellants to 13 years' imprisonment.

32] In the final result, the appeal succeeds in part. The appellant's conviction shall stand. They shall serve a term of thirteen years' imprisonment to run from the date of their conviction by the High Court on 7th May 2014.

DATED at Kampala this....4th.....day of.....October.....2022.

.....

CATHERINE BAMUGEMEREIRE JA

.....

CHRISTOPHER MADRAMA JA

.....

EVA K. LUSWATA JA