THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 09 OF 2019

(Coram: Elizabeth Musoke, Cheborion Barishaki and Hellen Obura, JJA.)

OKWAKOL SAM :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Soroti before Oyuko Ojok, J delivered on the 14th day of December, 2018 in Criminal Session Case No. 03 of 2016.)

JUDGMENT OF THE COURT

Introduction

By a decision of the High Court (Oyuko Ojok, J.) delivered on 14th December, 2018, the appellant herein was convicted on Count one of the offence of murder contrary to sections 188 and 189 and on Count two of the offence of attempted murder contrary to section 204 of the Penal Code Act, Cap. 120. He was sentenced to 56 years and 04 months' imprisonment on each count to run concurrently.

Background to the Appeal

The background facts of this case as per the record are that on the 4th day of May 2015, Okwakol Sam alias Badang (the appellant), Okia Yusuf (DW2) and a third person who is still at large, attacked Ojur Daniel (the deceased) at his shop, ransacked him while menacingly asking him for money. During the incident the deceased was shot at and he sustained gunshot wounds from which he died. During the same transaction, the appellant and others attempted to kill Ekaju Kasmiro (PW2) when they shot him in the thigh. The appellant, DW2 and his wife were arrested, indicted and tried of the offences of murder and attempted murder. The

wife of DW2 was acquitted for having no case to answer, meanwhile DW2 pleaded guilty after closure of the prosecution case and upon being found to have a case to answer and sentenced. He later testified as defence witness, hence reference to him as DW2. The appellant was put to his defence, found guilty as charged and sentenced as aforementioned.

Being dissatisfied with the decision of the trial Court, the appellant appealed to this Court on the following grounds;

1. *That the learned trial Judge erred in law and fact when he held that the appellant had positively been identified thereby convicting him occasioning a miscarriage of justice.*

2. *That the learned trial Judge erred in law and fact when he convicted the appellant relying on prosecution evidence that was full of contradictions and inconsistencies thereby occasioning a miscarriage of justice.*

3. *That without prejudice to the foregoing, the learned trial Judge erred in law and fact when he passed a sentence of 60 years imprisonment upon the appellant, which is harsh and excessive thereby occasioning a miscarriage of justice.*

The appellant prayed that this Court allows the appeal, sets aside the order of conviction and sentence and the appellant be accordingly acquitted. In the alternative, the appellant prayed that his sentence be substituted with one deemed appropriate by this Court. The respondent opposed the appeal.

Representations

At the hearing of this appeal, Mr. Richard Kumbuga appeared for the appellant on State Brief. For the respondent, Ms. Macrina Nyanzi Gladys Assistant Director Public Prosecutions held brief for Vicky Nabisenke, Assistant Director Public Prosecutions. The appellant could not physically be in court due to the restrictions on movement of inmates following the Standard Operating Procedures put in place to avert the spread of Corona Virus 2019. However, he was facilitated to participate

in the court proceedings using zoom technology. Counsel for both sides, with leave of Court, filed written submissions which have been considered in this judgment.

Appellants' submissions

On ground 1, counsel submitted that there was no sufficient evidence to prove that the appellant had been positively and accurately identified. He contended that PW2 testified that he identified the appellant and Okia Yusuf as the assailants while PW3 testified to identifying only Okia Yusuf. Counsel argued that as a result of the above, the case had a single identifying witness which meant that the court had to consider whether the circumstances of the case enabled PW2 to properly identify the appellant. He referred this Court to the decision in ***Abudalla Nabulere & Another vs Uganda; Supreme Court Criminal Appeal No.9 of 1978.***

Counsel further submitted that the incident happened in the night between 10:00pm and 11:00pm which was too dark unless it is proved that there was sufficient light. He argued that PW2 used light from a solar powered bulb to identify the appellant which, according to him, was not enough light for correct identification and that PW3 who was in the same circumstances 20 metres away failed to identify the appellant. Counsel further argued that PW2 had gone for a short call when the assailants arrived, he was shot at when he returned and he immediately lost consciousness which left him with no opportunity to identify the assailants. He added that PW2 stated that the assailants had tied black cloths on their heads which was corroborated by PW3 who testified that the assailants were wearing black clothes.

Counsel submitted that the above circumstances were not conducive for positive identification of the appellant. He concluded that the learned trial Judge erred when he never considered the above factors but only relied on the familiarity between PW2 and the appellant as well as the sufficient light at the scene to conclude that the appellant was properly identified.

On Ground 2 counsel submitted that the learned trial Judge erroneously relied on the evidence that was full of contradictions and inconsistencies thereby occasioning the appellant a miscarriage of justice. He submitted that PW2 testified that Okia Yusuf shot him and held him down and started searching him and that as he did so, he (PW2) heard another gun shot in the shop. Counsel argued that this was impossible since there was only one gun used in the incident and so Okia could not have fired the gun while holding PW2 down. In counsel's view, that evidence was intended to mislead court.

As to where PW2 was when the assailants came to the scene, counsel submitted that PW2 testified in chief that he had gone for a short call but later changed his testimony in cross examination and stated that the assailants had found him seated on the veranda. Further, that PW2 had stated in his evidence in chief that he lost his consciousness upon being shot and only woke up when he heard people crying but in cross-examination, he stated that he lost his consciousness on his way to the hospital.

On duration of the incident and the people who were at the scene when the assailants came, counsel submitted that PW2 told court that the attack lasted for 2 hours and the other people who were at the scene were the deceased, his wife and Akuto while PW3 testified that the same incident had lasted 30 minutes and the people at the scene were the deceased, Osega and Ekaju. According to counsel, these cannot be treated as minor contradictions but rather gross ones that leave an inference of lack of proper identification of the assailants.

Counsel also contended that PW3 contradicted himself when he testified in court that he saw 2 people on a motorcycle and he did not identify the appellant yet in his Plain Police Statement he had said he saw 3 people including the appellant.

Counsel relied on the decision in ***Pte Wepukhululu vs Uganda; Court of Appeal Criminal Appeal No. 21 of 2001*** that quoted among others, the decision in ***Alfred***

Tajar vs Uganda; EACA Criminal Appeal No. 167 of 1969 (unreported) to the effect that major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. He then submitted that the above inconsistencies and contradictions were grave and only pointed to falsehoods and deliberate untruthfulness on the part of the prosecution witnesses and a conviction arrived at based on these contradictions would not ordinarily stand.

On Ground 3 counsel submitted that the learned trial Judge did not properly take into account the mitigating factors thereby arriving at a harsh and excessive sentence. Further, that the learned trial Judge departed from the conventional rule of uniformity in sentences thereby arriving at a very excessive sentence. He referred this Court to the decision in ***Aharikundira Yustina vs Uganda; Supreme Court Criminal Appeal No.27 of 2005.***

Counsel also cited ***Guloba Rogers vs Uganda; Court of Appeal Criminal Appeal No.57 of 2013*** where it was held that there is room for reform of an accused who is a first offender and is of youthful age.

He submitted that had the learned trial Judge addressed his mind to the mitigating factors and the principle of uniformity of sentences, he would have arrived at a more lenient sentences.

Without prejudice to the other grounds of appeal, counsel invited this Court to consider the sentences of 60 years' imprisonment passed against the appellant on both counts harsh and excessive and to substitute it with a fairer and more lenient one of 20 years' imprisonment on each count.

Respondent's submissions

On ground 1 counsel submitted that the learned trial Judge extensively analyzed the evidence on the participation of the appellant and came to the conclusion that the

prosecution had proved beyond reasonable doubt that the appellant had participated in the murder of the deceased and attempted murder of PW2.

Counsel argued that the appellant had been positively identified by both PW2 and PW3 and therefore counsel's submission that this was a case of a single identifying witness does not stand. She referred court to the decision in ***Opolot Justine & Anor vs Uganda; Court of Appeal Criminal Appeal No. 155 of 2009*** where court held that in instances of more than one identifying witness, the issue is not that of a single identifying witness but rather it is about the correctness of the identifications.

Counsel submitted that there were sufficient factors to aid correct identification, namely that; PW2 had known the appellant for 2 years before the incident, he heard the appellant issuing orders to the other assailants as they were demanding money from the deceased, he was standing at the door of the shop while the assailants were inside the shop about 1½ metres away, that he questioned the appellant about his actions and there was light coming from a solar bulb inside the shop. Counsel further submitted that PW2 witnessed the events until when the deceased was shot a second time. She stated that it was until then that he lost his consciousness but regained the same thereafter and gave his father the names of the assailants.

Counsel also submitted that PW3's testimony was consistent with that of PW2. He stated that he knew the appellant as a cousin to the deceased and had known him prior to the incident. Further, that PW3 described in detail and with consistency what had transpired that night, namely that; he had observed the incident from a distance of about 20 meters with the aid of the light from a solar bulb and the assailants wore black clothes. Counsel additionally referred this Court to Exhibit DEXNo.1 (Plain Police Statement of PW3) where PW3 stated that he had seen the appellant and a one Okia-Imoring who left the scene running in the same direction while the motor cycle rider drove off to Komolo trading centre in the opposite direction. She invited

this Court to look at the principle concerning corroboration using previous statements as envisaged under ***Section 156 of the Evidence Act.***

Counsel concluded by inviting this Court to dismiss this ground of appeal and uphold the conviction since the appellant had been positively identified by PW2 and PW3.

On ground 2, counsel submitted that the appellant's contention concerns minor contradictions relating to when the deceased was shot, how long the incident took, which people were at the scene of crime, whether PW2 had gone for a short call or was at the veranda when the assailants came and when PW2 lost his consciousness.

She submitted that the contradictions were minor and negligible and the learned trial Judge was correct in disregarding them completely since they did not go to the root of the case. She nevertheless submitted that the contradictions can be explained by the fact that the witnesses and the assailants had all been drinking at the deceased's shop earlier on in the evening at around 8:00pm and the assailants only left and returned to attack the deceased.

As regards the contradiction on the time, counsel urged this Court to consider the fact that this incident traumatized the witnesses and thus they can be excused as regards the contradictions in their evidence as to how long the incident lasted. She also invited this Court to focus on the fact that there were gun shots that killed someone and left the other wounded. According to counsel, PW2 and PW3 properly identified the appellant with the aid of the light coming from a solar bulb and this was further aided by the fact that they knew him prior to the incident. Counsel referred to the decision in ***Wepukhulu Nyuguli vs Uganda; Court of Appeal Criminal Appeal No.21 of 2001*** to support her submission. She concluded by urging this Court to disregard the inconsistencies and contradictions since they were minor and uphold the appellant's conviction.

On ground 3, counsel submitted that the learned trial Judge, before sentencing the appellant, weighed both the mitigating and aggravating factors and concluded that the offences were very rampant, the appellant had no right to take away the deceased's life and that the appellant was not a good role model to children and the whole society. He therefore found that a reformatory sentence of 56 years and 4 months' imprisonment was appropriate.

Counsel agreed that the sentences handed to the appellant were not uniform and consistent to sentences in offences of a similar nature. She therefore prayed that this Court revises the sentence of the offence of murder to 35 years and the offence of attempted murder to 15 years to run concurrently. She referred this court to the decisions in ***Rwabugande vs. Uganda (supra); Aharikundira Yustina vs Uganda (supra); Muhwezi Bayon vs Uganda;Court of Appeal Criminal Appeal No.198 of 2013; Mbabazi Aggrey vs Uganda; Court of Appeal Criminal Appeal No.115 of 2015.***

Resolution by Court

We have carefully studied the court record, considered the submissions for either side, and the law and authorities cited therein; as well as those not cited but applicable to the present case. The duty of this Court as the first appellate court is to re-evaluate all the evidence on record and make its own finding. In so doing, it should subject the evidence to a fresh and exhaustive scrutiny. See: ***Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10*** and ***Kifamunte Henry vs Uganda; Supreme Court Criminal Appeal No. 10 of 1997; Pandya vs R (1957) EA 336***. With the above stated duty in mind, we shall proceed to resolve the grounds of appeal. We prefer to resolve grounds 1 & 2 together to avoid repetition since they are in a way interrelated.

Grounds 1 & 2

In ground 1 of appeal, the appellant faults the learned trial Judge for misdirecting his mind on the law on identification thus reaching a wrong decision, which occasioned a miscarriage of justice to him and in ground 2 it is contended that the learned trial Judge erred in law and fact when he relied on prosecution evidence that was full of inconsistencies and contradictions to convict the appellant which occasioned a miscarriage of justice.

On ground 1, counsel contended that though PW2 testified to having seen the appellant, PW3 who was also at the scene of the crime did not mention seeing the appellant there. Counsel submitted that the incident happened in the night between 10:00pm and 11:00pm and the source of light (solar powered bulb) that PW2 used to identify the appellant was not sufficient for correct identification. Further, that it was PW2's testimony that at the time the assailants arrived, he had gone for a short call and that when he returned he was shot at and he immediately lost consciousness. Counsel argued that this left PW2 with no opportunity to identify the assailants. He added that it was PW2's testimony that the assailants had tied black cloths on their heads, which was corroborated by PW3, and thus they could not have easily identified them.

By these arguments and contentions, counsel was of the view that the above factors were not suitable for positive identification of the appellant. It was his contention that the learned trial Judge erred when he relied on PW2's mistaken familiarity with the appellant and the insufficient light at the scene to conclude that the appellant was properly identified.

The law regarding correct identification is to the effect that when a person is identified in difficult circumstances, the court is required to first warn itself of the likely dangers of acting on such evidence and only do so after being satisfied that correct identification was made which is free of error or mistake. In doing so, the court considers; whether the witnesses were familiar with the appellant, whether there was light to aid visual identification of the appellant, the length of time taken by the witnesses to observe and identify the appellant

and the proximity of the witnesses to the appellant at the time of observing the accused. **(See *Abdalla Bin Wendo vs R (1953) 20 EACA 106*; *Roria vs R [1967] EA 583*** and ***Abdalla Nabulere and 2 others vs Uganda (supra)).***

On identification of the appellant, the learned trial Judge in this case found that there were sufficient factors for proper identification, namely that;

1. PW2 and PW3 interacted with the appellant, DW2 and his wife at the Trading Centre before the incident and they left at 8.00 pm as confirmed by the appellant and DW2.

2. There was sufficient light from the 2 solar bulbs from the deceased's shop as mentioned by PW2 and PW3.

3. PW2 had informed court that he knew the appellant 2 years prior to the incident while PW3 said he knew the appellant 1 year prior to the incident. He added that indeed the parties knew each other since DW2 had testified that he was a neighbor to PW2 and PW3 and that the appellant's wife had come inquiring from him as to why her husband was being arrested yet he was not anyone in authority.

4. The incident lasted for a long time. PW2 stated that it took 1 hour 30 minutes while PW3 it started at 9.00pm to 10.00pm.

5. PW2 during his state of expecting death, mentioned the identity of the assailants and told his father who pursued them until they were arrested.

The learned trial Judge concluded that the above circumstances coupled with the fact that PW2 and PW3 had earlier in the evening before the incident interacted with the appellant while drinking at the deceased's shop and that the appellant and DW2 had left at 8:00pm and came back later after changing in black clothes to rob the deceased's shop which facts DW2 corroborated in his evidence, showed that PW2 and PW3 were very consistent and truthful in properly identifying the appellant and DW2 at the scene, leaving out the element of mistaken identity.

However, as noted above, the appellant faults the learned trial Judge for misdirecting his mind on the law of identification and for failing to properly evaluate the evidence on record thereby occasioning a miscarriage of justice to him. We shall re-evaluate the evidence on record ourselves with a view to determine whether or not the learned trial Judge indeed erred.

The evidence on record shows that PW2, PW3, PW4, the deceased, the appellant and DW2 were known to each other. The appellant testified that he did not know DW2 prior to the incident although he stated that they were neighbors. We will analyse the appellant's evidence and that of DW2 regarding their knowledge of each other later. The appellant also stated that the deceased was his cousin. He added that he had gone to drink at the deceased's shop earlier on in the evening but left at 8.00pm. PW2, PW3 in their respective evidence corroborated the fact that the appellant had earlier that evening had drinks at the deceased's shop before the incident.

PW2 testified that on the fateful night at around 9:00pm, he was seated at the veranda of the deceased's shop and then he went for a short call. On coming back, he got the appellant, DW2 and a one Mukulu in the shop holding the deceased and the appellant was ordering him to give them money. PW2 said he was standing at the door, a distance of one and half metres away from where the assailants were and there was light in the shop supplied by solar bulb. He (PW2) asked the assailants why they had come to steal from their own brother even when there was ample solar light and he was shot at on his thigh by DW2 who climbed on his back and wanted to shoot him again but ended up just searching him. PW2 said DW2 was holding a gun and his face was not covered.

He further testified that he heard another gunshot in the shop and he managed to face there to see what the assailants were doing. The deceased was pulled out and shot the 2nd time, then Mukulu took a metal box which he brought and broke open with a hammer and after putting the money in the bag they had, Mukulu kicked him (PW2) before leaving. PW2 said when the deceased was shot the 2nd time he was a half a metre away from him. Further, that he (PW2) was bleeding and he became unconscious and when he got back

to his senses he got people crying and he could recognize the voices of Omoko and Richard. His father, Eriba Michael (PW4) who was also there took him to a nearby health centre. He was able to tell his father the names of the assailants. In cross-examination, he stated that he lost his senses after bleeding for a very long time but before that he knew what was happening. In re-examination PW2 said he lost consciousness at the time he was picked to be taken to the hospital. PW2 further testified that from the health centre his wound was dressed then a vehicle came and took him to Soroti. When asked how long the transaction took, he said 2 hours.

In cross-examination PW2 confirmed that when the incident happened there were only 3 people besides him, namely; the deceased, his wife and Aketo. He also said when the assailants came he was seated at the veranda and he first saw them when they entered the shop and thought they were customers.

On the other hand, PW3 testified that on the fateful night at 9.00pm while he was seated with the deceased, three people including the appellant and DW2 came on a motorcycle and asked the deceased for fuel. The deceased at first had not heard them but when they repeated their request he got up to pick fuel. The three assailants jumped off the motorcycle and followed the deceased to the shop. PW2 who had gone behind the house for short call came back and found the assailants who were all putting on black clothes dragging the deceased. He recognised DW2 who had a bag. DW2 pushed the deceased from the veranda into the shop and raised the gun as if to scare him (PW3) and he fell down and crawled to the fence about 20 metres away. He remained there to observe the events since there was security light. PW2 then came and asked what the assailants were doing and yet they are all brothers but they instead shot his thigh and he fell in front of the building.

PW3 further testified that one of the assailants carried the metallic box, removed money from it and put in the bag they came with. DW2 took a step back and shot the deceased in the lower abdomen. The assailants then carried a crate of beer, sat on the motorcycle and ran away. PW3 said the incident took about 30 minutes plus and he was able to observe

everything using the solar light that was in the shop. In cross-examination, PW3 said the appellant whom he had known before the incident was putting on black clothes.

It is pertinent to note that the Plain Police Statement which PW3 had earlier recorded and was admitted on record as "Exhibit D.E.1", had some few variations from his evidence on oath. In that statement, PW3 had stated, *inter-a-lia;* that on arrival of the assailants, when DW2 saw him, he wanted to shoot him but his gun became stuck and he (PW3) ran behind the shop and advised the deceased's wife to run with him to a nearby place known as Ogangai. As they were running away, PW2 who was smoking cigarettes behind the shop was going back to the front. He left the deceased's wife in the place they had run to and got courage to go back but when he returned he hid at the corner of the house and watched the assailants from there.

PW3 further stated that he managed to identify the appellant who drew a knife and escorted the deceased into the shop and brought out the box of money for the village savings which he broke using a hammer they came with, took all the money and put in the bag DW2 had carried. As the deceased was walking back to the shop, DW2 shot him and he also landed down. The assailants immediately left the scne taking opposite directions. The rider whom he could not identify took the direction of Komolo Trading Centre while the appellant and DW2 took the same route they entered from.

PW4 who said he was at his home when the incident happened testified that he got information that his son PW2 had been shot and the deceased killed and so he went to the scene where he found PW2 lying near the road at the deceased's shop. He was in critical condition as he had bled too much. The body of the deceased was still lying at his home. When he asked PW2, he was able to talk so he told him that he was shot by DW2 in the presence of the appellant and a one Mukulu who is at large. He called for a motor vehicle and took PW2 to Soroti Referral Hospital.

The appellant, who testified in his defence as DW1, stated that the deceased was his cousin but said he did not know PW2. He testified that on the fateful night he and another

person went to the deceased's shop at 6.30 pm to drink and he found other people there drinking. At 8.00pm, they left for home which was half a kilometre from the centre and few minutes later, they heard gun shots and people were crying. He rushed to the scene together with his mother, uncle, brother, wife and other sisters and they found many people there. He saw two people who were shot, his cousin and another person. The police did not come to the scene but a blue vehicle came and took the person who was shot. The security light enabled him to identify Emalikat, a doctor whose name he did not know and the father of the victim. They stayed there until 1.30am to 2.00am and they went back home.

The appellant testified further that the following day at 8.00am he came back to the scene together with his wife, uncle and sisters and they welcomed people. At 9.00am he saw policemen coming and they moved around. The GISO (Abim) came to him with a policemen and asked where he was the previous day, if he also drunk there and who he thought killed the deceased and he told them he did not know. He was picked and taken to the police post where he was interrogated by a group of soldiers. DW2 and his wife were also called and interrogated. The District Police Commander (DPC) eventually took him to Amuria Central Police Station (CPS) where he stayed for one month and he was transferred to South CPS and later taken to court and prison.

In cross-examination, the appellant stated that he used to see DW2 since they were neighbours in Soroti and he had stayed with him for one and a half years and that he did not know he was a soldier. He said earlier in the evening when he came to drink he had seen DW2 and his wife (who was also a co-accused) at the shop but said he did not see DW2 at the scene of the crime.

DW2 on his part stated that he did not know the appellant. He testified that on the fateful night at 10.00pm, Omuko Sam who was a retired soldier, himself and Mukulu went to the trading centre. Omuko went and asked for fuel for motorcycle from the deceased and he was given half a litre. Omuko told his brother, the deceased that the fuel was not enough.

DW2 said Omuko gave him instruction to follow the deceased. He followed and entered the shop and Mukulu asked the deceased for money. DW2 stated that he was carrying a gun which the deceased saw and he got scared where upon he told his wife to pick a box which had money and give to Mukulu. The deceased recognized Omuko and said; "why do you come and steal my money at this time?" DW2 stated that Omuko who is a brother to the deceased instructed him to shoot him and he shot him.

When PW2 who had gone for a short call came back and asked what was happening, DW2 said he also shot him. DW2 described how they were dressed during the incident. He was putting on an army rain coat which was army green in colour, black clothes and a mask. Mukulu was also putting on black clothes with a cap. He did not state what Omuko Sam was putting on. He said he was arrested at the funeral of the deceased. He saw police call the appellant and the appellant's wife who was his former schoolmate came and asked him why her husband was being arrested. He went to his home, picked water and went to the pit latrine. When he returned, police officers came and arrested him. Meanwhile Mukulu who had been beaten by the mob escaped from the hospital.

He added that he gave the gun they used to Omuko Sam who was also the owner of the motorcycle. DW2 said Omuko was arrested in respect of the same gun and his relatives knew about it. In cross-examination, DW2 stated that earlier at 6.00pm he was at the shop where he was served by the deceased. He said he could not remember seeing the appellant there. When he was asked whether he and the group left at 8.00pm he said yes but when asked what a coincidence it was that the appellant also left at 8.00pm, he said he did not know. He also confirmed that the two solar light bulbs inside the shop were on. He then said then said he had never stayed with the appellant and that they are not related. DW2 also stated that the incident lasted one and a half hours and thereafter they went to the home of Omuko Sam which was half a kilometre from the centre. In re-examination, DW2 confirmed that he planned the incident with Omuko Sam and Mukulu.

From the evidence of PW2, PW3, the appellant and DW2 as summarised above, it is clear that there was indeed ample light at the scene to aid proper identification as found by the learned trial Judge. We also agree that both PW2 and PW3 were familiar with the appellant. It is also not in dispute that the appellant and DW2 were earlier that evening at the scene and left at 8.00pm an hour or so before the incident and both of them reside not far from there. The evidence as summarized above shows that the incident lasted for over 30 minutes giving the witnesses especially PW2 who was in close proximity ample time to observe the assailants.

The above findings notwithstanding, we need to consider some contradictions and inconsistencies as contended in ground 2 of the appeal that would ordinarily cast some doubt on the accuracy of identification of the appellant.

The law on inconsistencies and contradictions have been stated in numerous authorities. In ***Bumbakali Lutwama & 4 ors vs Uganda, SCCA No. 38 of 1989*** *(unreported)*, citing with approval the decision of the East African Court of Appeal in ***Alfred Tajar vs Uganda, Criminal Appeal No. 167 of 1969*** *(unreported)*, the Supreme Court held inter-alia that inconsistencies and contradictions in the prosecution case may be ignored if they are minor or do not point to deliberate untruthfulness on the part of the prosecution witnesses.

With the above principle in mind, we shall consider the number of contradictions and inconsistencies in the prosecution evidence as pointed out by counsel for the appellant to determine whether the failure by the learned Judge to consider them caused a miscarriage of justice to the appellant as contended for him. We will also point out some curious coincidences in the defence case that can strengthen the prosecution case.

It is contended that the evidence of PW2 had some contradiction as regards the shooting of the deceased at the very time DW2, who was the only person with the gun, was said to have been holding PW2 down after shooting him. It is not in dispute that DW2 had a gun and he was the one shooting as confirmed by PW3 and DW2 himself. Our own re-evaluation of the evidence of PW2 reveals that PW2 stated that he was shot at by DW2

who immediately stepped on him and searched him possibly for money. He then heard another gun shot in the shop. We do not see any contradiction or inconsistency because DW2 did not have to be inside the shop in order to shoot from there. He could easily fire a shot from wherever he was. In any event, PW2 did not state that he heard the gun shot at the very moment the appellant was stepping on him and searching him. It only so happened that the statement followed each other but that does not mean that it happened simultaneously. We therefore find no basis for this complaint.

It is also contended that there was contradiction regarding how long the incident took. We note that while PW3 was asked how long the transaction lasted immediately after he had narrated the story of shooting up to the point when the assailants left and he said about 30 minutes plus, PW2 on the other hand was asked the same question after he had narrated the story of the shooting in the shop and what transpired thereafter including being taken first to a nearby health centre and later to the hospital in Soroti. His response therefore to this blanket question as to how long the transaction lasted could have included the period after the incident up to the point when he was taken to the hospital in Soroti. We cannot therefore conclude that he contradicted PW3 when it is not clear whether his answer was covering only the period of the incident as executed by the assailants or covered the entire period up to when PW2 was taken to the hospital in Soroti.

We wish to make a general observation that the evidence on the length of time assailants take to execute their mission is usually guess work or approximation since it is rare for people to time such events as it normally takes them by surprise. It would therefore be very unfair to expect all the witnesses to say precisely how long the incident lasted. We are mindful that in cases where the question of identification is in issue, the length of time taken is material in helping court determine whether the witnesses had ample time to observe the assailants for purposes of identifying them but, in our view, all the witnesses need not unanimously state the same length of time. There should be allowance for some reasonable variations, in which case, court then looks at the average time.

In the instant case, we are satisfied that the incident lasted for over 30 minutes which was ample time and that suffices. We therefore find the inconsistencies on time minor since it did not go to the root of the prosecution case.

On the contradiction regarding the particulars of people who were at the scene of crime at the time of the incident, PW2 told court that there were three people, namely; the deceased, his wife and one Aketo while PW3 told court that there were PW2, the deceased, Osega and the deceased's wife. Both PW2 and PW3 said the deceased and his wife were present. We, however, note that while PW2 mentioned Aketo and did not talk about PW3, PW3 mentioned Osega and PW2. We observe that PW3 said when DW2 raised his gun to scare him, he fell down and crawled to the fence about 20 metres away and he hid there. We, must however, point out that this was a deviation from what PW3 had stated in his Plain Police Statement where he said when the assailants arrived at the scene and DW2 tried to shoot him, he ran away with the deceased's wife to a nearby place but upon gaining courage, he returned and hid at the corner of the house and watched the assailants from there. Much as the said statement was tendered in evidence as an exhibit, PW3 was never cross-examined on it to establish the exact place where he hid and so this contradiction remains unexplained. Perhaps the deviation in the evidence on oath from the Plain Police Statement can be attributed to the passage of time given that the offence was committed in May 2015 and PW3 testified in November 2018, a period of over three years.

Be that as it may, for purposes of determining whether PW3 was at the scene or not, we are of the view that PW2 could not have seen PW3 when he was in hiding either near the fence or at the corner of the house.

As to whether Aketo or Osega were present, in our view, the names of all the people present during the incident was not a material aspect of the evidence for purposes of proving the offence. We therefore find this inconsistency also minor and cannot fault the learned trial Judge for not considering it.

As regards the contradiction regarding the whereabouts of PW2 when the assailants arrived at the deceased's shop, PW2 told court, in his evidence in chief, that he had gone for a short call but in cross examination he stated that he was seated at the veranda and when they entered the shop he thought they were customers. When whether the assailants bought anything, PW2 said he did not know because when he came back he saw they had tied pieces of cloth on their heads. On a further cross examination, PW2 said he did not know how these people entered the shop.

In our view, this clearly shows that he was not present at the time the assailants arrived at the scene just as he had testified in chief and as corroborated by the evidence of PW3. We therefore do not find any major contradiction that goes to the root of the prosecution case.

On the contradiction regarding the time when PW2 lost his consciousness, PW2 told court that when he questioned the behaviour of the assailants, he was shot at by DW2 and he fell down. He narrated what transpired thereafter as already summarized in his evidence above. He then said he later lost his consciousness since he had lost a lot of blood but regained it shortly after and he was able to tell his father, (PW4) the names of the assailants.

Our observation is that though PW2 had a near death experience, it appears he was conscious throughout the incident and he was able to observe everything before he lost his consciousness after bleeding a lot. He was later able to narrate the whole episode in court and his evidence was corroborated by that of PW3, PW4 and DW2. We therefore find no contradiction since the evidence on record reveals that PW2 lost his consciousness after observing the incident.

On the whole as regards the contradictions and inconsistencies in the prosecution case, while we accept the contention that the learned trial Judge did not address his mind to them, upon our own re-evaluation of the evidence on record as above, we find that the

contradictions in the prosecution evidence were not material and as such did not go to the root of the case to occasion a miscarriage of justice to the appellant.

However, upon our careful re-evaluation of the evidence of DW2 against the evidence of the appellant, PW2 and PW3, we see some curious coincidences as well as some contradictions that point to deliberate falsehood intended to mislead court. First of all, we note that DW2 testified that he did not know the appellant and that he had not seen the appellant earlier as he drank from the deceased's shop. He added that he had planned and executed the crime with one Omuko Sam and Mukulu. The learned trial Judge considered this evidence and drew an inference that Omuko Sam is indeed the appellant.

It is noteworthy that both PW2 and PW3 testified that the appellant is a cousin of the deceased. DW2 himself said Omuko was a brother of the deceased. Is this just mere coincidence? The appellant testified that he did not know DW2 but he had seen him for 3 years. Asked in cross-examination whether he knew DW2, the appellant said he used to see him as they were neighbours in Soroti but when asked how long he had stayed with him he said one and a half years. Again when asked how far the home of DW2 was from the centre he said it was nearer than his-about 150 metres. Now, could the appellant and DW2 have been neighbours without knowing each other? Better still, if the appellant did not know DW2, how come he said he stayed with him for one and a half years and how come he knew that his home was nearer to the centre than his?

It is also pertinent to note that DW2 said the appellant's wife who is his former schoolmate approached him and asked why her husband had been arrested. Could it be that DW2 only knew the appellant's wife and not the appellant? DW2 also stated that the home of Omuko Sam was half a kilometre from the trading centre which is the same distance of the appellant's home as testified by him. Is this a mere coincidence?

Our conclusion is that the contradictions and coincidences point to deliberate untruthfulness on the part of the appellant and DW2 regarding their knowledge of each other and we find that they had conspired to deliberately lie to court.

Upon evaluating the evidence on record, the learned trial Judge in his judgment concluded that Omuko Sam was the appellant and we have no reason to fault him for so doing on the basis of the evidence of PW2 and PW3 who properly identified the appellant as one of the three people who executed the incident at the scene of crime. We only need to point out, with all due respect, the error the learned trial Judge made when he was considering the inconsistencies and contradictions in the defence case and he said thus;

> *"According to PW2 and PW3, Omuko responded to the alarm and came to the scene of crime and yet DW2 alluded that after the killing, they rushed to Omuko's home to show the lies between A1, A2 and Omuko. This implies that its not possible for Omuko to be at 2 places at the same time. This is a deliberate lie which strengthened the prosecution case as per the case of* ***Mutiyo vs Uganda*** *which held inter alia that a deliberate lie by the accused only strengthens the prosecution case."*

We have thoroughly perused the evidence on record and we do not see anywhere where PW2 and PW3 stated that Omuko responded to the alarm and came to the scene of crime. In fact, nowhere in the evidence of PW3 did he mention the name Omuko. It was PW2 who talked about "Omoko" whose voice he recognized among the people who were crying when he regained his consciousness and not Omuko unless PW2 meant the same person. It is therefore confusing for the learned trial Judge to say; "the lies between A1, A2 and Omuko", and yet at the same time conclude that the appellant, who was A1 at the trial, is the same as Omuko. In any event, no witness by the name Omuko testified for the learned trial Judge to conclude that he (Omuko), the appellant and DW2 who was A2 at the trial were lying.

Apart from that error which, in our view, did not affect the ultimate finding of the learned trial Judge on the guilt of the appellant, we find no merit on grounds 1 and 2 of the appeal and they must fail.

Ground 3

Counsel for the appellant submitted that the learned trial Judge erred in law and fact when he did not consider the fact that the appellant was a youth, a mitigating factor that would have guided him while arriving at the appropriate sentence for the appellant. He also added that the sentence the learned trial Judge imposed was harsh and excessive.

The law on the role of an appellate court in reviewing the sentence of the trial court was articulated in the case **of *Kyalimpa Edward vs Uganda; Supreme Court Criminal Appeal No. 10 of 1995,*** where the Supreme Court referred to ***R vs De Haviland (1983) 5 Cr. App. R(s) 109*** and held as follows;

> *"An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own fats upon which a Judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the trial 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 an injustice. See: Ogalo s/o Owousa vs R (1954) 21 E.A.C.A. 270 and R vs Mohammed Jamal (1948) 15 E.A.C.A. 126"*

This Court also put some emphasis on the role of an appellate court in interfering with the sentencing discretionary powers of a trial Judge in the case of ***Aharikundira Yustina vs Uganda (supra)*** were it held that;

> *"Interfering with the sentence of the trial court is not a matter of emotion but rather one of law. Unless it can be proved that the trial judge flouted any of the principles in sentencing, then it does not matter whether the members of this court would have given a different sentence if they had been the one trying the appellants. In the instant case, he found that the most appropriate sentence was death. Without proof that this discretion was biased or unlawful, this court would have no lawful means of interfering with the same".*

The sentencing regime in Uganda is further guided among others; by the ***Penal Code Act*** Cap. 120 which stipulates the various offences and the punishments to be handed down

to persons found guilty of offences and by the ***Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions Legal Notice No. 8 of 2013*** (Guidelines). The purpose of the Guidelines is inter alia; to provide principles and guidelines to be applied by courts in sentencing; to provide sentencing ranges and other means of dealing with offenders; to provide a mechanism for considering the interests of victims of crime and the community when sentencing and to provide a mechanism that will promote uniformity, consistency and transparency in sentencing.

The record of proceedings shows that the learned trial Judge considered the Guidelines which gives the starting point for murder as 35 years. The learned trial Judge then went on to consider both the aggravating and mitigating factors that were presented to him. He weighed the mitigating factors against the aggravating factors. These included the fact that the appellant was a first offender, he was youthful and therefore had a chance to reform, he was said to have a young family that would suffer if he is given a long custodial sentence and he had been on remand for 3 years and 6 months.

The learned trial learned Judge however, observed that the offence was rampant in society and no one had the right to take another person's life. He referred to the Book of Exodus chapter 20 which commands Christians not to take any one's life. He added that the appellant was not a good role model to his children and the society and therefore deserved a custodial sentence to take him away from the community and to help him reflect and reform.

In the premises, he sentenced the appellant to 60 years but took into consideration the 3 years and 6 months he had spent on remand and reduced the sentence to 56 years and 4 months.

We find that the learned trial Judge took into consideration the mitigation factors as highlighted above. We must nonetheless determine whether the sentence of 56 years and 4 months meted out to the appellant for the offences of murder and attempted murder was harsh and excessive in the circumstances of this case as contended for the appellant. In

so doing, we will consider the range of sentences that have been impose by this \court and the Supreme Court in similar offences and be guided by the principle on consistency and uniformity of sentences.

The consistency principle is to the effect that the sentences passed by the trial court must as much as circumstances may permit, be similar to those passed in previously decided cases having a resemblance of facts as the one in which sentence is being passed; and the appellate Court, may if called upon to do so, be justified in interfering with the sentences which contravene this principle. ***See: Aharikundira Yustina vs Uganda (Supra).***

We agree with the learned trial Judge that ***The Constitutional (Sentencing Guidelines for the Courts of Judicature) (Practice) Directions (Supra)*** in the 3rd schedule provide that in murder cases, the starting point should be 35 years while the maximum point should be death. The Guidelines provide that the sentencing range of similar cases should be from 30 years to death after taking into account the aggravating or mitigating factors in each case.

We will now move to consider the sentences passed in previous murder cases of a similar nature. In ***Abaasa & Anor vs Uganda; Court of Appeal Criminal Court No.33 of 2010***, the appellants were convicted of murder and sentenced to life imprisonment by the High Court. On appeal to this Court, the sentence was found to be excessive and reduced to 35 years' imprisonment. In ***LDU Kyarikinda vs Uganda; Supreme Court Criminal Appeal No.296 of 2009,*** *the* appellant was convicted of murder and sentenced to death. On a 2nd appeal, the Supreme Court reduced the sentence to 35 years.

In the present case, we find the sentences imposed by the learned trial Judge out of range of sentences imposed in similar cases cited above and others noted cited. We therefore find it harsh and excessive. In our considered view, considering both the aggravating and mitigating factors, a sentence of 30 years' imprisonment for the offence of murder in Count one and a term of 15 years' imprisonment for the offence of attempted murder in Count 2 would be appropriate to meet the ends of justice. From these sentences, we shall deduct

the period of 3 years and 6 months that the appellant spent in pre-trial detention. We accordingly sentence the appellant to 26 years and 6 months' imprisonment on Count one and 11 years and 6 months on Count two. The sentences are to run concurrently from the date of conviction which is 14th December 2018.

In conclusion, the appeal against conviction is dismissed for the reasons stated herein above and the appeal against the sentences is allowed on the above stated terms.

We so order.

Dated at **Jinja** this ..... day of 2022

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Hon Lady Justice Elizabeth Musoke

JUSTICE OF APPEAL

.....

Hon Mr. Justice Cheborion Barishaki

JUSTICE OF APPEAL

.....

Hon Lady Justice Hellen Obura

JUSTICE OF APPEAL