THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

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

CRIMINAL APPEALS NO. 164 & 394 OF 2014

(*Arising from High Court Criminal Session Case No.0091of 2016 at Masindi*)

BETWEEN

Mwesigwa John==========Appellant no.1
Mwine Julius ========== Appellant no.2
Sekatiko Pascal ========== Appellant no.3
Katushabe Robert ========== Appellant no.4

AND

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

(*An appeal from the Judgement of the High Court of Uganda [B. Mugenyi, J] delivered on 16th August 2019*)

JUDGMENT OF THE COURT

Introduction

[1] The appellants and others still at large were indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act in count 1, aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act in count 2 and attempted murder contrary to section 204 of the Penal Code Act in count 3.

[2] The particulars of the offence in count 1 were that Musigwa John, Mwine Julius alias Bob, Sekatiko Pascal and others still at large on the night of 2nd July 2015 at Kaitahindi village along Muhorro Kagadi road in Kibaale district murdered Mwebaze Jimmy Abdul Rashid. The particulars for count

2 were that Musigwa John, Mwine Julius alias Bob, Sekatiko Pascal and others still at large on the night of 2nd July 2015 at Kaitahindi village along Muhorro Kagadi road in Kibaale district robbed Mwebaze Jimmy Abdul Rashid of motorcycle registration no. UEE 0185 Bajaj Boxer and immediately before or immediately after the said robbery used or threatened to use a deadly weapon to wit a *panga* on the said Mwebaze Jimmy Abdul Rashid. For count 3, the particulars of the offence were that Musigwa John, Mwine Julius alias Bob, Sekatiko Pascal and others still at large on the night of 2nd July 2015 at Kaitahindi village along Muhorro Kagadi road in Kibaale district unlawfully attempted to cause the death of Mwesigwa Wilson.

[3] The appellants were each sentenced to 40 years imprisonment for the offence of murder and sentenced to 15 years imprisonment for the offence of aggravated robbery. The sentences in count 1 and count 2 were to run concurrently. For the offence of attempted murder, the appellants were each sentenced to 20 years' imprisonment to run consecutively.

[4] Dissatisfied with the decision of the trial court, the appellants have appealed against the conviction and sentence on the following grounds:

> '1. The Learned Trial Judge erred in law and fact in failing to properly evaluate the entire evidence on record adduced at trial before convicting the appellant thereby leading to a miscarriage of justice.
>
> 2.The learned trial judge erred in law and fact when she held that each of the appellants had been properly identified by a single identifying witness MWESIGWA WILSON who suffered unconsciousness during the incident thereby wrongly convicting the appellants on unreliable evidence.
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> 3.The learned trial judge erred in law and fact when she failed to take into account the adverse conditions to proper identification when evaluating the evidence and convicted the appellants on unreliable evidence.
>
> 4.The learned trial judge erred in law and fact when she passed a very harsh and excessive cumulative sentence of 60 years' imprisonment in the circumstances.'

[5] The respondent opposed the appeal.

Submissions of Counsel

[6] At the hearing of this appeal, the appellants were represented by Mr. Simon Kasangaki and the respondent by Mr. Oola Sam, Senior Assistant Director of Public Prosecutions. Both counsel relied on their written submissions on record.

[7] Counsel for the appellants submitted that the duty of a first appellate court is set out in Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10, and is further amplified in Baguma Fred v Uganda [2005] UGSC 24, Kifamunte Henry v Uganda [1998] UGSC 20 and Pandya v R [1957] EA 336.

[8] Counsel for the appellant submitted on grounds 1,2 and 3 together. He contended that the circumstances did not enable a proper identification by PW2. Mr. Kasangaki contended that there is inconsistency as to how long PW2 was unconscious after being hit on the head during the incident. He contended that the lighting was poor to enable proper identification and that PW2 had blood flowing in his eyes which impaired his vision. Counsel further argued that PW2 was too scared by the incident for him to properly identify his assailants, that he could not recognise the colour of the *gomesi* that the assailants were putting on. He submitted that PW2 could not have recognised that the assailants had a gun because he had never seen one before.

[9] Counsel for the appellant relied on Lubega Bosco & another v Uganda Court of Appeal Criminal Appeal No. 32 of 2012 (unreported) for the proposition that where a court is faced with a single identifying witness in difficult circumstances creating doubt, the doubt should be resolved in favour of the appellants. Mr. Kasangaki contended that PW2 was unable to recount accurately the events of that night particularly the identity of the assailants because he became unconscious during the attack. He was of the view that the evidence of PW2 cannot be relied upon without corroboration due to inconsistencies. He relied on Walakira Abas and others v Uganda [2004] UGSC 28, Okwang Peter v Uganda [2001] UGCA 6 and John Katuramu v Uganda [1998] UGSC 14.

[10] With regard to ground 4, counsel for the appellant submitted that the trial judge did not consider some of the appellants mitigating factors while

sentencing. He submitted that the appellants were first time offenders, of relatively young age at the time of commission of the offence and that they spent four years in pre-trial detention. Counsel for the appellants further argued that the trial court should have imposed a lenient sentence because the appellants were remorseful.

[11] He contended that the sentences imposed against the appellants are not within the range of sentences imposed by the Supreme Court in cases with similar facts. He referred to a number of cases to support this submission. He cited Abelle V Uganda [2018] USGC 10, Adongo v Uganda [2014] UGCA 56, Tuhumwire Mary v Uganda [2016] UGCA 69, Karobe Joseph v Uganda Court of Appeal Criminal Appeal No.243 of 2013 (unreported), Amandu Alex v Uganda Court of Appeal Criminal Appeal No. 0153 of 2014 (unreported), Twinomujuni Baala v Uganda Court of Appeal Criminal Appeal No. 024 of 2011 (unreported).

[12] Counsel for the appellants prayed that the sentence in respect of the offence of aggravated robbery be reduced to 8 years, that the sentence for the offence of murder be reduced to 10 years' imprisonment and the sentence of attempted murder be reduced to 5 years' imprisonment. He prayed that the sentences run concurrently. Counsel for the appellants relied on R v Sawedi Mukasa [1946]1 EACA 1 and R v Fulabhai Patel and another 13 EACA 179 for the submission that as a general rule, where a person has been charged and convicted on two counts involving the same transaction, the court should direct that sentences should run concurrently.

[13] In reply to grounds 1,2 and 3, counsel for the respondent submitted that it was erroneous for the trial judge not to consider the other evidence adduced by the prosecution when she opted to consider the evidence of PW2, who was present at the scene of the crime. Counsel referred to Uganda v George Wilson Simbwa Supreme Court Criminal Appeal No. 37 of 1995 (unreported) to demonstrate how evidence of a single identifying witness should be handled. Counsel submitted that the learned trial judge reached the right conclusion that each of the appellants had been placed at the scene of the crime. He submitted that the trial judge noted that the contradictions and inconsistencies in the evidence of PW2 were minor and did not go to the root of the case. He was of the view that the trial judge noted rightly that PW2 lost consciousness after he had identified the appellants. Counsel for the respondent contended that the trial judge should have taken into

consideration the evidence of PW3 which corroborated the evidence of PW2.

[14] With regard to ground 4, counsel for the respondent submitted that the learned trial judge did not take into consideration the period that the appellants spent on remand which is mandated by the Constitution thus rendering the sentences illegal. He relied on Rwabugande v Uganda [2017] UGSC 8. He was of the view that a sentence of 38 years imprisonment would be appropriate for the offence of murder, 15 years for aggravated robbery and a sentence of 11 years imprisonment would be appropriate for the offence of attempted murder to run concurrently. He relied on Wamutabanewe Jamiru v Uganda [2018] UGSC 8 for guidance.

Analysis

[15] It is our duty as a first appellate court to subject the evidence adduced at the trial to a fresh re-appraisal and to draw our own conclusions with regard to the law and facts of the case, bearing in mind that we did not have opportunity to observe the witnesses testify. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10.

Grounds 1,2 and 3

[16] Grounds 1,2 and 3 shall be handled together since they are inter-related. The essence of the grounds is that the appellants were not properly identified and placed at the scene of the crime. PW2 was a sole identifying witness. The learned trial judge directed herself on the law regarding the evidence of a single identifying witness before proceeding to evaluate the evidence of PW2. She pointed out the need to be cautious with such evidence and the need to ensure that conditions of identification are favourable before a conviction can be secured.

[17] In Abudalla Nabulere & 2 Ors Vs Uganda [1978] UGSC 5, the Supreme Court stated:

> 'Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a

> mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.'

[18] Further, in Bogere Moses v Uganda [1998] UGSC 22, the Supreme Court stated:

> 'This Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult. It is trite law that no niece of evidence should be weighed except in relation to all the rest of the evidence (See Sulemani Katusabe Vs Uganda S.C.Cr. App. No.7of 1991 unreported).'

[19] It was PW2's testimony that on the night of 30th June 2015 at 10:00pm, he set off with his brother Mwebaze Jimmy Abdu Rashid (the deceased) to Kyabakara village on the deceased's motorcycle to pick up their father Mbabazi Levi at Kagadi who had arrived from Kampala. When they reached the tea plantation at Kaitabahindi, they slowed down because there was a ditch they had to pass through. It was at that point that they encountered the assailants who PW2 identified as the appellants. PW2 stated that the appellants were wearing *gomesis*. The appellants stopped the duo. Mwesigwa John (appellant no.1) caught PW2 while Mwine Julius (appellant no.2) caught the deceased. Sekatiko Pascal (appellant no.3) then asked them to choose between life and the motorcycle while Katusabe Robert (appellant no.4) pointed something that looked like a gun at them.

Appellant no.3 cut PW2 on the cheek with a panga. PW2 asked appellant no.3 'Why are you killing us. We are Agaba's children.' Then appellant no.3 said 'John they have recognised us.' It was then that appellant no.3 cut the deceased with a panga while appellant no.2 was still holding him. Thereafter appellant no.1 cut PW2 on the head and eye with a panga. He fell down and became unconscious. He regained consciousness a week later while in hospital. PW2 never saw the motor cycle again. He did not know what happened to it after the incident. The post mortem report carried out on the deceased showed that the cause of death was direct brain trauma and excessive haemorrhage. PW2's medical report revealed that he had suffered grievous body injuries on his right cheek, left eye and parietal scalp.

[20] The appellants gave unsworn testimonies in which they denied having participated in the offence. Appellant no. 2 and appellant no.3 raised the defence of alibi.

[21] Upon reviewing the evidence on record, we are of the view that the circumstances were favourable for proper identification. There was sufficient lighting to enable PW2 see the people that attacked them. Counsel for the appellant's contention that the quality of the moonlight was not tested in court is baseless. PW2 stated in his evidence that he was able to identify the appellants with the aid of the moonlight and the light from the motorcycle head lamp. He stated that they were able to move without the head light if they wanted because the moonlight was sufficient. PW2 stated that when he was cut, much of the blood was flowing backwards, little blood would flow in his face when he faced down and was not able to impair his vision. Much as PW2 was frightened by the incident, he had known the appellants for a considerable period of time prior to the incident and ably identified the roles played by each of the appellants during the attack.

[22] With regard to the inconsistences in the evidence of PW2, in NOO875 Pte Wepukhulu Nyuguli v Uganda [2002] UGSC 14, the Supreme Court stated:

> 'It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses, should be ignored and that major ones which go to the root of the case, should be resolved in favour of the accused (**See Alfred Tajar -V- Uganda**

> **Cr. Appeal No. 167 of 1969 EACA)** (unreported).But each case must be decided on its facts.'

[23] The contradiction with regard to the time that the incident lasted is minor and does not point to deliberate falsehood in the testimony of PW2. PW2 testified in cross examination that he estimated the scuffle took 15 minutes while the incident lasted 20 minutes before he lost consciousness. We agree with the trial judge's finding that PW2's loss of consciousness has no bearing on the identification of the appellants. PW2 lost consciousness after recognising the appellants as their attackers.

[24] In light of the above, we find that grounds 1, 2 and 3 fail for lack of merit.

Ground 4

[25] The general principles regarding the sentencing powers of an appellate court are well established and have been set out in numerous cases by the Supreme Court. In Kakooza vs Uganda [1994] UGSC 17 the Supreme Court held:

> 'An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration: See Ogalo S/O Owoura v R (1954) 21 E.A.CA 270.'

[26] Counsel for the respondent submitted that the sentence against the appellants is illegal because the learned trial judge did not take into consideration the period that the appellants spent on remand. The sentencing order against the appellants states as follows:

> **'Sentence:**
> I have listened to the submissions for count one of murder, the convicts deprived a young innocent man of his life for no good reason. He was killed in the most gruesome way and his family deprived of his support. This offence is rampant and must stop. I will hand down a sentence of 40 years for each convict. Remand will be removed from that period.
> Aggravated robbery, the convicts robbed with violence and almost killed PW2 in the process and succeeded in killing the deceased. This inhuman acts are rampant and

> must be stopped. I will hand down a sentence of 15 years to run concurrently with count one.
> Attempted murder, PW2 narrowly survived death just because of the selfish and greedy acts of convicts. He will be affected for life both emotionally and physically. I will hand down a sentence of 20 years for each convict to run consecutively. This will teach others who plan to do such terrible acts not to attempt the same.'

[27] Article 23 (8) of the Constitution requires court to take into account the period spent by a convict in lawful custody in imposing the term of imprisonment. Article 23(8) of the Constitution states:

> 'Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.'

[28] According to Rwabugande Moses v. Uganda [2007] UGSC 8, it is mandatory to deduct this period from the sentence imposed. Failure to do so renders the sentence imposed illegal. This period should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. It must be considered and that consideration must be noted in the judgment. See Abelle Asuman v Uganda [2018] UGSC 10.

[29] In light of the above, we are of view that the learned trial judge did not take into consideration the period the appellants spent in pre-trial detention. It appears that the remand period was to be deducted from the 40 years' sentence imposed on each appellant for the count of murder by some unspecified person and not the learned trial Judge. This renders the sentence vague and ambiguous. It is therefore illegal.

[30] We therefore set aside the sentences imposed against each of the appellants and invoke section 11 of the Judicature Act that gives this court power to impose sentences of its own.

[31] We note that the appellants were arrested in July 2015 and convicted on 16th August 2019. They spent 4 years and 1 month on remand. We have put into consideration the fact that the appellants were first-time offenders, of a relatively young age, and pleaded for leniency. However, we also note

that the appellants were charged with grave offences. The maximum punishment for the offences of murder and aggravated robbery is death while for the offence of attempted murder is life imprisonment. It is crucial that sentences reflect the severity of the offences.

[32] We also note that there is need for parity in sentencing. See Livingstone Kakooza v Uganda [1994] UGSC 17. In Guloba Rogers v Uganda [2021] UGCA 16, the appellant had been convicted of the offence of aggravated robbery contrary to sections 285 and 286 (2) and murder contrary to sections 188 and 189 of the Penal Code Act Cap 12 and sentenced to 47 years' imprisonment. On appeal, this court reduced the sentence to 35 years' imprisonment.

[33] In Tumusiime & Anor Vs Uganda [2016] UGCA 73, the appellants were convicted of murder contrary to sections 188 & 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act and sentenced to 16 years and 14 years imprisonment respectively on each count to run concurrently. This court was of the view the sentence was inordinately low and amounted to a miscarriage of justice due to the circumstances of the case in respect of the offence of murder were the murder was premeditated, and was compound with aggravated robbery. It stated that had the issue severity of sentence arisen, it would have enhanced the sentence to 35 years imprisonment.

[34] In Bakubye & Anor v Uganda [2018] UGSC 5, the appellants were indicted and convicted of murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. The trial Judge sentenced them to 40 years imprisonment on count 1 and 30 years of imprisonment on count 2 and the sentences were to run consecutively. On appeal against the sentence, this court found that the sentence was neither harsh nor excessive and thereby upheld the conviction and sentences given by the High Court judge. The Supreme Court confirmed the sentence.

[35] In Onyabo Bosco V Uganda [2017] UGCA 98, the appellant was indicted and convicted of the offence of murder contrary to sections 188 and 189 of the Penal Code Act and aggravated robbery contrary to section 286(2) of

the Penal Code Act and sentenced to 45 years' imprisonment in respect to the offence of murder while the sentence in respect to aggravated robbery was suspended. On appeal, this court set aside the sentence and sentenced the appellant to 20 years' imprisonment for the offence of murder and 18 years' imprisonment for the offence of aggravated robbery.

[36] In Byagonza v Uganda [2000] UGSC 3, the appellant was tried and convicted of the offences of murder, attempted murder and aggravated robbery. He was sentenced to death in respect of the offences of murder and aggravated robbery and 7 years' imprisonment for the attempted murder. The sentences in respect of the aggravated robbery and attempted murder were suspended.

[37] In Ogwal Nelson & Ors v Uganda (Criminal Appeal No. 606 of 2015) (unreported) this court imposed a sentence of 19 years' imprisonment for the offence of aggravated robbery and in Bogere & Anor Vs Uganda [2018] UGSC 9, the two appellants were tried and convicted of Aggravated Robbery contrary to section 285 and 286 (2) of the Penal Code Act and were each sentenced to a term of imprisonment for 20 years. On appeal against the sentence, this court dismissed the appeal. The appellants appealed to the Supreme Court which confirmed the sentence.

[38] In Kia Erin v Uganda [2017] UGCA 70, the appellant was convicted of the offence of murder and sentenced to imprisonment for life. On appeal, the sentence was substituted with a sentence of 18 years of imprisonment. In Tumwesigye Anthony v Uganda [2014] UGCA 61, the appellant was convicted of murder and sentenced to 32 years of imprisonment, this court reduced the sentence to 20 years on appeal.

Decision

[39] In light of the above, we are of the view that the appropriate sentence for all the appellants on count 1 of murder would be 25 years' imprisonment; 20 years' imprisonment, on count 2, for the offence of aggravated robbery and 7 years' imprisonment on count 3 for the offence of attempted murder.

[40] In light of Article 23(8) of the Constitution, we deduct from each of the sentences the period of 4 years and 1 month the appellants spent on pre-trial detention. After subtracting the said period, the appellants are to serve

a term of 20 years and 11 months' imprisonment on count 1 for the offence of murder; a term of 14 years and 11 months on count 2 for the offence of aggravated robbery and a term of 2 years and 11 months on count 3 for the offence of attempted murder. All sentences to run concurrently from the 16th day of August 2019, the date of conviction.

Dated, signed and delivered at Kampala this 24th day of March 2022.

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Christopher Madrama
Justice of Appeal