THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 034 OF 2020

MUBIRU YASIN::APPELLANT

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala before Oyuko-Ojok, J. delivered on 3rd February, 2020 in Criminal Session Case No. 0302 of 2018)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA
HON. LADY JUSTICE EVA K. LUSWATA, JA

JUDGMENT OF THE COURT

Background

On 3rd February, 2020, the High Court (Oyuko, J.) convicted the appellant on two counts; the first of **Kidnapping or detaining with intent to procure a ransom** contrary to **Section 243 (1) (c)** of the **Penal Code Act, Cap. 120** (count one); and the second of **Aggravated Robbery** contrary to **Sections 285 and 286 (2) of the Penal Code Act, Cap. 120** (count two). The High Court sentenced the appellant to 27 years and 9 months imprisonment on count one, and 17 years and 9 months on count two, but did not indicate whether the sentences were to run concurrently or consecutively.

The High Court decision followed the trial of the appellant on an indictment alleging, with respect to count one, that the appellant was part of a group that on the 12th day of March, 2017 at Bukoto, Kampala District, by use of force kidnapped, abducted, took away and detained Kalenge Mubarak (victim) against his will with intent to procure a ransom of 400,000,000/= (Four Hundred Million Shillings). In relation to count two, it was alleged that the appellant's group had on the 12th day of March, 2017, between Bukoto and Kabuma-Salaama, Sabbaggabo, in Kampala and Wakiso districts, stolen 2,100,000/= (Two Million One Hundred Thousand Shillings) and four ATM cards from the victim, and at, immediately before, and immediately after the

said robbery threatened to use a deadly weapon, to wit a gun (pistol) on him.

The facts of the case, as far as we have gathered from the record, can be summarized as follows. On 12th March, 2017, the victim went to eat at Afro-American Restaurant situated in Bukoto, Kampala District. He left the restaurant at around 5.30 p.m and went to his car which he had left at the parking lot. On getting there, he found that another car, a Toyota Ipsum, had been parked infront of his car and he was unable to leave. He opened the passenger door, and immediately, two men entered and sat in the driver and co-driver's seats. The men told the victim that *"Afande"* another man, who was seated in the Toyota Ipsum, wanted to talk to him. The victim tried to resist but the men dragged him out and took him to the Toyota Ipsum, where he met the appellant. The men drove the car and took the victim to a house in Kabuma-Salaama, Makindye. On getting to the house, the victim was blindfolded and taken to a room. He was made to sit on a chair and he was tied up. Soon thereafter, Afande came and spoke to the victim and demanded for ransom of Ug. Shs. 400,000,000/=. The victim was told to contact his father for the money, and that if he failed to get the money he would be cut into pieces with a panga. Afande thereafter left.

The victim was kept in the room for three days, under the watch of four men, who tortured him on several occasions. While in custody, the victim's wallet containing Ug. Shs. 2,100,000/= and four ATM cards was stolen by the captors. However, on the fourth night, the victim escaped from the house and successfully made his way to a nearby trading centre, despite being pursued by his captors. He was rescued by good Samaritans who called his relatives, who also informed the police and they went to rescue the victim. The victim was thereafter taken to Case Clinic for medical attention, as he had sustained injuries while escaping.

After getting better, the victim was interviewed by police officers from the Criminal Investigation Department. He subsequently led the police officers to the house where he had been detained. The police officers discovered that the house belonged to the appellant. The appellant was subsequently arrested and taken into custody at Jinja Road Police Station. An identification parade was conducted at the said Police Station, and the victim picked out the appellant as part of the people who had kidnapped him. The appellant

was subsequently charged with the offences mentioned earlier. Although he denied the offences, the learned trial Judge believed the prosecution case and convicted the appellant as charged, and thereafter sentenced him as earlier mentioned.

The appellant, being dissatisfied with the decision of the High Court, appealed to this Court on the following grounds:

"1. **That the learned trial Judge erred in law and fact when he relied on the uncorroborated prosecution evidence that was marred with contradictions and inconsistences which occasioned a miscarriage to the appellant. (sic)**

2. **That the learned trial Judge erred in law and fact when he relied on evidence of an unreliable single identifying witness to the detriment of the appellant.**

3. **That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence adduced by prosecution and defence thereby reaching a wrong decision.**

4. **That the learned trial Judge erred in law and fact when he convicted and sentenced the appellant without considering the appellant's unrivalled alibi hence occasioning a miscarriage of justice.**

5. **That the learned trial Judge erred in law and fact in sentencing the appellant to 27 years imprisonment on the count of Kidnap with intent to murder and 17 years imprisonment on the second count of Aggravated Robbery without giving options whether the sentences were to run concurrently or consecutively which sentences were deemed illegal, manifestly harsh and excessive in the circumstances."**

The respondent opposed the appeal.

Representation

At the hearing, Mr. Emmanuel Muwonge, learned counsel appeared for the appellant, on State Brief. Mr. Joseph Kyomuhendo, learned Chief State Attorney, appeared for the respondent. The appellant followed the hearing, via Zoom Video Conferencing Technology, from the prison he is incarcerated.

The parties, with leave of the Court, relied on written submissions filed before the hearing.

Appellant's submissions

Counsel for the appellant argued the grounds in the following manner: grounds 1, 2 and 3, jointly; followed by each of grounds 4 and 5 independently.

Grounds 1, 2 and 3

Counsel made several points in his submissions on grounds 1, 2 and 3. First, he submitted that the learned trial Judge erred in basing on the evidence of PW1 Kalenge Mubarak to convict the appellant yet PW1 never positively identified the appellant as one of the assailants on the fateful day. According to counsel, identification was made difficult by the circumstances prevailing on the fateful day, which terrified PW1 and made it impossible for him to correctly identify the assailants. Counsel pointed out that the men who kidnapped PW1 had a gun and had blindfolded him, which must have terrified him. Counsel further submitted that PW1's identification of the assailants was rendered difficult because the assailants had on head gear that concealed their faces.

Furthermore, counsel faulted the learned trial Judge for failing to adhere with the legal requirements set out in the cases of **Abdulla Bin Wendo and Another vs. R (1953) 20 EACA 166 and Abudalah Nabulere and Another vs. Uganda [1970] HCB 77,** requiring a trial Judge to caution him/herself before relying on the identification evidence of a single identifying witness if the conditions at the time he/she made the identification were difficult; and the rule requiring the trial Judge to find corroboration before relying on such evidence. Counsel contended that in the present case the learned trial Judge had relied on the uncorroborated evidence of PW1 which had caused a miscarriage of justice to the appellant.

Counsel further submitted that the learned trial Judge erred in relying on evidence from an identification parade that was tainted with irregularities and illegalities. Counsel contended that the identification parade at which PW1 picked out the appellant as one of his captors was, in several regards, conducted contrary to the guidance set out in the cases of **Sergeant Baluku and Another vs. Uganda, Supreme Court Criminal Appeal No. 21 of 2014 (unreported); Sentale vs. Uganda [1968] EA 365; and R v. Mwango s/o Manaa [1936] 2 EACA 29**. Counsel submitted

that the instances of non-compliance with the guidance included failure by the police officers to keep a written report from the identification parade. Counsel pointed out that PW4 Businge Festal, the Presiding Officer, only gave oral evidence as to what happened at the identification parade, which was insufficient in the circumstances. It was further submitted that PW3 failed to give necessary information about the identification parade, such as what guided him as he conducted the parade, information on the physical features of the appellant, whether he had a beard or not, which in counsel's view undermined the legitimacy of the identification parade.

In conclusion, counsel submitted that grounds 1, 2 and 3 ought to succeed.

Ground 4

Counsel submitted that the learned trial Judge erred in disbelieving the appellant's alibi which was not destroyed by the prosecution evidence. He pointed out that whereas the appellant admitted that he owned the house where PW1's captors had kept the victim, he also testified that he had rented part of the house, including the room where PW1 was kept, to a tenant. The appellant also testified that on the days PW1 was kept in captivity, he was not staying at his home. Counsel contended that the learned trial Judge did not follow the guidance set out in **Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (unreported)** in the evaluation of the appellant's alibi, and that he erred in not doing so. Counsel submitted that ground 4 ought to also succeed.

Ground 5

Counsel began by setting out the principles upon which an appellate Court may interfere with a sentence imposed by the trial Court. He referred to **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No. 143 of 2001 (unreported),** for the proposition that the appellate Court is not to interfere with the sentence imposed by the trial Court which has exercised its discretion unless the exercise of the discretion resulted in a harsh and manifestly excessive sentence or where the sentence imposed is so low as to amount to a miscarriage of justice or where the sentencing judge proceeded on a wrong principle. He also referred to the cases of **Kakooza vs. Uganda [1994] UGSC 17 and Lutaya vs. Uganda, Court of Appeal**

Criminal Appeal No. 039 of 2012 (unreported) which enunciated similar principles.

Counsel submitted that there are various reasons for this Court to interfere with the sentences that the trial Court imposed on the appellant. First, counsel submitted that the sentences of 27 years and 9 months imprisonment and 17 years and 9 months imprisonment were illegal because the trial Court failed to specify whether they were to run concurrently or consecutively. Counsel submitted, without giving authority, that failure to specify whether the sentences are to run concurrently or consecutively renders sentences illegal. Secondly, it was submitted that the sentences imposed on the appellant were illegal as the learned trial Judge failed to deduct the remand period, contrary to **Article 23 (8) of the 1995 Constitution** and the relevant guidance set out in **Rwabugande vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014 (unreported).** Thirdly, it was submitted that the Court should interfere with the sentences as the learned trial Judge imposed them without taking into account several mitigating factors such as the fact that the appellant was a married man and responsible for caring for his family. In view of these submissions, counsel urged this Court to set aside the sentences imposed on the appellant and imposed lawful sentences after taking into consideration all factors.

Respondent's submissions

Counsel for the respondent argued grounds 1, 2 and 3 jointly, followed by each of grounds 4 and 5 separately.

Grounds 1, 2 and 3

Counsel submitted that the learned trial Judge properly evaluated the evidence and arrived at the just and correct conclusion to convict the appellant as charged. With regard to identification of the appellant, counsel submitted that contrary to the submissions of counsel for the appellant, PW1 properly identified the appellant under favourable circumstances. It was submitted that although PW1 (the victim) did not know the appellant prior to the commission of the offences, the victim was kidnapped at 5:30 p.m, when there was sufficient light to aid identification. The victim also had sufficient time to observe his assailants at the time of the kidnap and a

further opportunity to identify them in the house where he was kept hostage. Counsel contended that because the prevailing conditions favoured correct identification, there was no need for the learned trial Judge to caution himself as stated in the cases **Abdalah Bin Wendo** and **Abdallah Nabulere (supra).**

Counsel also disagreed with the appellant's submission that there was no evidence to corroborate PW1's evidence, and contended that there was sufficient circumstantial evidence that offered corroboration. He referred to the case of **Rwalinda vs. Uganda, Supreme Court Criminal Appeal No. 03 of 2015 (unreported)** where it was held that corroboration is offered by evidence which confirms the material circumstances of the crime and the identity of the accused in relation to the crime. It was further held that corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his/her connection to the crime. Counsel referred to the following circumstantial evidence that corroborated PW1's testimony; 1) The house in which PW1's captors kept him, admittedly belonged to the appellant. 2)The conduct of the appellant in evacuating his family from the relevant house on 12th March, 2017, the day PW1 was kidnapped indicated that the appellant knew that the house was going to be used to detain the victim. It was also submitted that there was further circumstantial evidence in the fact that after the appellant was charged, he met PW1 and requested him to drop the charges. In counsel's view this amounted to conduct of a guilty person.

As regards the appellant's submission in relation to the manner of conducting the identification parade, counsel submitted that any issues in that regard were immaterial as the learned trial Judge did not base on the evidence from the identification parade to convict the appellant. The primary basis for the appellant's convictions, according to counsel, was the evidence of PW1, and thus any issues relating to the identification parade were immaterial.

Counsel concluded by submitting that grounds 1, 2 and 3, ought to be disallowed.

Ground 4

Counsel supported the learned trial Judge's decision to disbelieve the appellant's alibi. He submitted that it is trite law that an accused person who

raises a defence of alibi does not assume a duty to prove it. The duty lies on the prosecution to disprove the alibi by adducing evidence that places the accused person at the scene of crime. Counsel contended that the prosecution discharged its burden through the evidence of PW1 Kalenge Mubarak which placed the appellant at the two scenes of crime, that is, at Bukoto where the victim was kidnapped, and at Kabuma Salama where the appellant and his accomplices robbed PW1's property. In those circumstances, counsel contended that the alibi was destroyed.

It was further submitted that in any case, the appellant's alibi was raised belatedly which did not afford an opportunity for it to be investigated. Counsel submitted that a belated alibi should be taken as an afterthought and offering corroboration for the prosecution case. For this submission, counsel cited the authority of **Asenua vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1998 (unreported).**

Counsel submitted that ground 4 ought to fail.

Ground 5

Counsel supported the sentences imposed on the appellant and submitted that the sentences were neither illegal nor manifestly harsh and excessive. In relation to the submission that the sentences imposed on the appellant were illegal because the learned trial Judge omitted to state whether they were to run concurrently or consecutively, counsel submitted that the said omission was curable under **Section 2 (2)** of the **Trial on Indictments Act, Cap. 23** which sets out the default position as follows:

> **"When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the court may direct, unless the court directs that the punishments shall run concurrently."**

Counsel submitted that the sentences imposed in the present case ought to be deemed to have been ordered to run consecutively in accordance with the above mentioned provision.

With regard to the submission that the learned trial Judge failed to consider the period that the appellant spent on remand, counsel replied that was not true. He urged this Court to find that the learned trial Judge duly considered the remand period and complied with **Article 23 (8)** of the **1995 Constitution**.

Counsel also disagreed with the appellant's submission that the learned trial Judge omitted to consider vital mitigating factors. Counsel submitted that the learned trial Judge considered all the mitigating and aggravating circumstances as well as the nature of the offence committed which involved torturing and stealing from the victim. Counsel further submitted that the concurrent sentences of 27 years and 9 months imprisonment that were imposed on the appellant were neither harsh nor manifestly excessive because they are similar to sentences imposed in decided cases. For this submission, counsel referred to **Ojangole vs. Uganda, Supreme Court Criminal Appeal No. 34 of 2007 (unreported)** where the Court upheld a sentence of 32 years imprisonment for aggravated robbery; and **Senkungu vs. Uganda, Court of Appeal Criminal Appeal No. 264 of 2015** where this Court upheld a sentence of 27 years imprisonment for aggravated robbery.

Counsel submitted that ground 5 ought also to fail.

Resolution of the Appeal

We have carefully studied the record and considered the submissions of counsel for both sides as well as the law and authorities cited. We have also considered other laws that were not cited. As this is a first appeal, we shall begin by recalling the following principles on the role and duty of this Court when handling first appeals. Under **Rule 30 (1) (a)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**, on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may reappraise the evidence and make inferences of fact. Further, in **Uganda vs. Ssimbwa, Supreme Court Criminal Appeal No. 37 of 1993 (unreported)**, it was held that it is the duty of a first appellate Court to give the evidence on the record, as a whole, that fresh and exhaustive scrutiny which the appellant is entitled to expect and draw its own conclusions of fact. However, as the first appellate Court never saw or heard

the witnesses give evidence, it must make due allowance in that respect. We shall bear the above stated principles in mind as we proceed to determine this appeal.

We shall consider grounds 1, 2 and 3 jointly, and thereafter, each of grounds 4 and 5 independently.

Grounds 1, 2 and 3

Counsel for the appellant made several points in his submissions in relation these grounds. Firstly, he contended that the learned trial Judge erred in believing the evidence of PW1, the single identifying witness in this case, because the circumstances prevailing at the time he observed the assailants rendered correct identification difficult.

The law on identification evidence was summarized in the case of **Abudala Nabulere & 2 Others vs. Uganda, Supreme Court Criminal Appeal No. 9 of 1978 (unreported)**, where it was stated as follows:

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

In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support to identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered.

When, however, in the judgment of the trial court, the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation made in difficult conditions; if for instance the witness did not know the second accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification."

PW1, the victim in the present case, testified that he had observed the appellant as one of the assailants who had kidnapped him at Afro-American Restaurant in Bukoto, Kampala, where he had gone to have a meal. PW1 testified that on returning to his car after leaving the restaurant, he found two men in the car. The men told him that "Afande" wanted to meet him. They then removed him from his car and took him to an Ipsum car which was nearby. In the Ipsum car, PW1 met another man, whom he identified as the appellant. The three men told PW1 not to make an alarm. They soon blindfolded him and took him to a house about 20 minutes from the Restaurant.

PW1 testified that they took him into the house, sat him on a chair and using a rope, tied his hands and legs together. The men told him the "Afande" would come and see him. PW1 testified that "Afande" came and informed him that the men had kidnapped him and that he would be released if ransom of Ug. Shs. 400,000,000/= was paid. Afande told him to contact his father for the money. PW1 testified that during the detention, the men stole his property, including money Ug. Shs. 2,100,000/= which he had in his

wallet, and 5 ATM Cards. PW1 testified that he was thereafter detained at the house for about 3 to 4 days, where after he escaped from the house. He ran to a nearby trading centre where he was rescued by good Samaritans. PW1 testified that he saw the appellant as one of the men who had overseen his detention at the house.

It will be noted that PW1 did not know the appellant prior to commission of the commission of the crime. Therefore, an identification parade at which PW1 identified the appellant was organized.

Counsel for the appellant submitted that the conditions at the time PW1 identified the appellant were difficult. We do not see how this can be the case. PW1 was kidnapped at 5.30 p.m, when there was sufficient day light, and a person is able to make proper observations. Further, although it is true that PW1 was blindfolded at certain periods during his kidnapping and detention, his evidence was that there were certain other periods when he was not blindfolded. For example, he was not blindfolded shortly after the men went into his car and also when they pushed him into the Ipsum Car. The victim also stated that he had seen the appellant at an occasion during his detention, when *"Afande"* came demanding for ransom. It is our view that, during those periods, the victim was able to observe the appellant as one of the assailants.

We also reject counsel for the appellant's submission that because the victim was likely terrified by the assailants, he was not able to properly identify the appellant. While it is true that victims are generally terrified during commission of crime, this does not always prevent them from correctly observing their assailants. PW1's testimony was not shaken during cross examination and we are satisfied that he was a truthful and reliable witness. We therefore reject counsel for the appellant's submission that the conditions prevailing at the time PW1 identified the appellant were difficult.

The further submission of counsel for the appellant concerned the manner of conducting the identification parade at which PW1 identified the appellant. An identification parade is a process at which the police organizes a lineup of several persons, including the suspect in a crime, and asks a witness to the crime to pick out the suspect. An identification parade is conducted where the witness did not know the suspect before the commission of the

crime. In **Sergeant Baluku and Another vs. Uganda, Criminal Appeal No. 21 of 2014 (unreported)**, the Supreme Court reiterated the rules on conducting an identification parade that had been enunciated in **R v. Mwango s/o Manaa (1936) 3 EACA 29** and emphasized in **Ssentale v. Uganda [1968] EA 365** and **Stephen Mugume v. Uganda, Supreme Court Criminal Appeal No. 20 of 1995**. The rules are as follows:

> "1. **That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.**
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> 2. **That the officer in charge of the case, although he may be present, does not carry out the identification.**
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> 3. **That the witnesses do not see the accused before the parade.**
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> 4. **That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.**
>
> 5. **That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.**
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> 6. **Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.**
>
> 7. **Exclude every person who has no business there.**
>
> 8. **Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.**
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> 9. **If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.**
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> 10. **See that the witness touches the person he identifies.**
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> 11. **At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.**
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> 12. **In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "Pick out somebody", or influence him in any way whatsoever.**

13. **Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably."**

The Supreme Court further held:

> **"Every Police Officer conducting an identification parade should abide by the above Rules and should inculcate in himself or herself the practice of always abiding by them to the letter. This will ensure that both the accused person and the Court are satisfied with the conduct of the identification parade even if the accused may agree or not agree with the outcome of the conduct of the identification parade.**

Counsel for the appellant submitted that, in several respects, the identification parade in this case was conducted contrary to the guidance set out in the above cases. For example, there was no written report about the identification parade. Instead, PW4 Detective Assistant Inspector of Police Kukundakwe Busingye Festal, the police officer who conducted the parade gave oral evidence about the manner in which the parade was conducted. He testified that he conducted the identification parade in an open ground at Jinja Road Police Station where such parades are normally conducted. He testified that the parade included 9 persons, 8 volunteers and the appellant.

The submission of counsel for the appellant that there was no report from the identification parade involving the appellant is incorrect. The written report was tendered in evidence and marked Exhibit PEX2. We have read that report and it contains details about the identification parade. The report indicates that the parade was conducted at 2.41 p.m on 24th April, 2017 at Jinja Road Police Station. The line up during the parade had 9 persons, the appellant and 8 volunteers. It is indicated in the report that the appellant neither objected to any of the persons included in the parade nor to their standing positions during the parade. Most importantly, there is no evidence that PW1 saw the appellant on the day of the parade before identifying him. It is true, as counsel for the appellant submitted, that the report did not set out details on the physical attributes by which PW1 was able to pick out the appellant such as whether he had a notable beard or not. However, we do not find this to have been fatal to the identification of the appellant nor to have occasioned a miscarriage of justice.

We find that PW1 correctly identified the appellant as one of the assailants because the conditions prevailing at the time he made the identification enabled him to do so. Grounds 1, 2 and 3 must fail.

Ground 4

The appellant, in ground 4, claims that the learned trial Judge erred when he rejected his alibi defence. In the case of **Bogere and Another vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 (unreported)**, it was held that a trial Court may rightly reject an alibi if the prosecution adduces evidence putting the accused person at the scene of crime. The Supreme Court went on to observe:

> **"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces, evidence showing that the accused person was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se, the other version is unsustainable."**

The appellant testified in his defence, and denied the offences. However, he acknowledged that he was the owner of the house at which PW1 was detained, and that he ordinarily resided at that house. However, he testified that he rented a room in the house to one Manisoor Swaleh. The appellant testified that on the day the relevant offences were committed, he went to his work place at Ham Towers and returned late in the night. The appellant testified that he left his work place at 4 pm and went to Usafi Mosque between 7pm and 8pm where he met with his wife. The appellant did not say whether he went home after leaving the mosque.

In cross examination, the appellant testified that he left his wife at Usafi Mosque where she stayed for 3 days, after which he took her to Matuga.

The appellant's evidence was therefore that he was away from his house on the date of commission of the offences.

We have considered both the prosecution and the defence evidence. We find that the prosecution evidence was compelling and put the appellant at the scene of crime. We therefore conclude that the appellant's alibi was rightly rejected.

Ground 4 of the appeal must also fail.

Ground 5

Ground 5 is against the respective sentences imposed on the appellant of 27 years and 9 months imprisonment for the offence of Kidnapping with the intent to procure a ransom and 17 years and 9 months for the offence of Aggravated Robbery. It is worth reiterating the applicable principles on appeals against sentence. In the case of **Kyalimpa vs. Uganda, Criminal Appeal No.10 of 1995 (unreported)**, the Supreme Court quoting with approval from the cases of **R vs. Haviland (1983) 5 Cr. App. R(s) 109 and Ogalo s/o Owoura vs. R (1954) 21 EACA 126** held that:

> **"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."**

Counsel for the appellant submitted that the sentences imposed by the trial Court were illegal because the learned trial Judge failed to specify whether the said sentences that were imposed on separate counts were to run concurrently or consecutively. Counsel for the respondent submitted that the trial Court's omission could be cured by applying the default position under **Section 2 (2)** of the **Trial on Indictments Act, Cap. 23**, to the effect that where a trial Court omits to state whether sentences are to run concurrently or consecutively, such sentences shall by default be deemed to run concurrently. Section 2 (2) provides:

"When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her for those offences to the several punishments prescribed for them which the court is competent to impose, those punishments, when consisting of imprisonment, to commence the one after the expiration of the other, in such order as the court may direct, unless the court directs that the punishments shall run concurrently."

We do not think that the above provision sets out the default position referred to by counsel for the respondent. The provision instead sets out the opposite position which is that where two or more sentences are imposed upon conviction for two or more offences, the sentences shall commence "one after the expiration of the other," that is, consecutively, unless the trial Court orders for the sentences to run concurrently. In the case of **Magala Ramathan vs. Uganda, Criminal Appeal No. 01 of 2014 (unreported)**, the Supreme Court confirmed that the default position, is that multiple sentences under Section 2 (2) shall run consecutively unless the Court directs that they run concurrently.

However, we are alive to the common law principle of totality in sentencing which was discussed by the Supreme Court of Queensland, Australia, in the case of **R v Schmidt [2013] 1 Qd R 572 (per Fryberg J).** The Court stated:

"Numerous examples of the application of the principle may be found throughout Australia during the 1980s and in 1988 the High Court delivered judgment in what has become the leading decision on the principle in this country, Mill v The Queen. In a joint judgment the court wrote:

"The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, Principles of Sentencing, 2nd ed. (1979), pp 56–57 as follows (omitting references):

'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and

specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong ["]; "when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences"."

In **R vs. Jamieson and Another [2008] EWCA Crim 2761**, the England and Wales Court of Appeal articulated the following principles in relation to the principle of totality in sentencing:

> **"A sentencing judge should pass a total sentence which properly reflects the overall criminality of the defendant and the course and nature of the criminal conduct disclosed by the offences for which he stands to be sentenced while always have regard to the principle of totality."**

It is our considered view that the above principles are relevant when a Court has to determine, under Section 2 (2) of the Trial on Indictments Act, Cap. 23, whether sentences should run consecutively or concurrently. In determining this question, the Court will consider whether the total sentence, comprising of the longest of the sentences, or the aggregate of several sentences is the most appropriate in view of the appellant's criminal conduct.

We have considered the circumstances of the present case. The appellant was part of a gang that kidnapped and detained the victim for several days. The victim was terrified by the acts. He was also tortured while in detention. However, on the other hand, the record shows that the appellant was a first offender and was responsible for caring for a family consisting of a wife and three children. In relation to the offences, we have considered that the appellant was part of a gang that kidnapped the victim. The offence of aggravated robbery was committed while the victim was in detention, whereby by a member of the gang stole the victim's property which was said to be a wallet and cash, Ug. Shs. 2,000,000/=. However, it could not be ascertained if it was the appellant who stole the property.

In view of all the circumstances, we find that concurrent rather than consecutive sentences are appropriate in this case. Accordingly, we order that the sentences imposed on the appellant, that is 27 years and 9 months

imprisonment for the count of Kidnapping and 17 years and 9 months imprisonment for Aggravated Robbery, shall run concurrently.

Ground 5 is therefore resolved accordingly.

In conclusion, for the reasons given above, the appellant's appeal against conviction fails. His appeal against sentence succeeds to the extent that the two sentences imposed on the appellant shall run concurrently from the date of his conviction on 3rd February, 2020.

We so order.

Dated at Kampala this ..... day of ..... 2023.

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Elizabeth Musoke

Justice of Appeal

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Christopher Gashirabake

Justice of Appeal

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Eva K. Luswata

Justice of Appeal