THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Mulyagonja & Mugenyi, JJA

CRIMINAL APPEAL NO. 0467 OF 2020

1. SSETUMBA FRANK
2. MUYINGO ANDREW ::::::::::::::::::::::::::::::: **APPELLANTS**
3. SSERWANGA ROBERT

VERSUS

UGANDA ::: **RESPONDENT**

(An appeal against the decision of Basaza Wasswa, J delivered on 4th December 2020 in Kampala High Court Criminal Session Case No. 538 of 2019)

JUDGMENT OF THE COURT

Introduction

The appellants were indicted for the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act. After a full trial, they were convicted and sentenced to 25 years' imprisonment.

Background

The facts that were accepted by the trial judge were that on 29th April 2019, at around 2:30am, the appellants broke into Kamya Godfrey's homestead at Bulaga Village, Nakabuga in Wakiso District and entered a room that was inhabited by his son, Ssozi Julius. They put the lights on and demanded for money from Ssozi, with threats to hack at him with *pangas*

if he did not give it to them. The victim was able to identify all three of his assailants because he had often seen them in the village at a shop where they usually spent their time watching films. He tried to resist the demands but the assailants hacked at him with *pangas* causing him an injury on his head, upon which he fell on his bed but he was able to make an alarm prompting them to also hack at both his legs. The victim's father, Kamya Godfrey, heard the alarm and was able to identify the assailants through the windows of his house in the same compound, which had security lights on. They were also known to him prior to the attack.

The victim's father saw the appellants running away with their *pangas*, one of them with some property that they got from the victim's room. On entering the victim's room, he found him on his bed, unconscious. The victim was hospitalised for treatment for a considerable period of time. The appellants were subsequently arrested and identified by both the victim and his father at an Identification Parade (ID Parade).

The appellants were charged with aggravated robbery and they denied having committed the offence. They each offered the defence of *alibi* but the trial judge dismissed it, convicted and sentenced each of them to 25 years' imprisonment. Dissatisfied with both their conviction and sentence, they appealed to this court on three grounds as follows:

1. That the learned trial judge erred in law and fact when she used unsworn Assessors to convict the appellants thereby occasioning a miscarriage of justice.
2. That the trial judge erred in law and fact when she dismissed the appellants' defences of *alibi* yet the prosecution did not disprove them

in any way, by way of evidence by investigation *(sic)* thereby occasioning a miscarriage of justice.

3. In the alternative, that the trial judge erred in law and fact when she sentenced the appellants to 25 years' imprisonment which sentence was illegal, manifestly harsh and excessive in the circumstances.

Representation

At the hearing of the appeal on 17th August 2023, Ms. Shamim Nalule represented the appellants on State Brief. The respondent was represented by Ms. Nabisenke Vicky, Assistant Director of Public Prosecutions. The appellants appeared in court *via* video link from Murchison Bay Prison in Luzira where they were servicing their sentence.

Counsel for the parties applied to adopt their written submissions as their final arguments in the determination of the appeal. Their prayers were granted and the appellants' counsel was given up to the 21st August 2023 to file her submissions in rejoinder, but she did not do so. This appeal was therefore considered upon the written submissions that were available by the date of the hearing only.

Analysis and Determination

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence before the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. [See **Bogere Moses & Another v Uganda; Supreme Court Criminal Appeal No. 1 of 1997.**]

We observed the principles above in resolving this appeal. We carefully reviewed the record set before us and considered the submissions of both counsel, the authorities cited and those not cited that were relevant to the appeal. We reviewed the submissions related to each ground immediately before we disposed of it. The grounds were disposed of in chronological order.

Ground 1

The appellants' grievance in this ground of appeal was that the trial judge occasioned a miscarriage of justice when she *"used"* unsworn assessors to convict them of the offence of aggravated robbery.

Submissions of Counsel

Ms. Nalule, counsel for the appellants, stated that the trial judge appointed two assessors but failed to administer the assessors' oath before the commencement of the trial, which is a mandatory requirement under section 67 of the Trial on Indictment Act (TIA). That the failure to administer the oath to the assessors rendered the trial a nullity. She emphasised that the importance of assessors in a trial is stressed in section 3 of the TIA and they must therefore be sworn in. She asserted that a trial without swearing in the assessors contravenes Article 28 (1) of the Constitution.

Ms Nalule relied on the decision in **Komakech v Uganda (1992-1993) HCB 21** where, in somewhat similar circumstances, the appellant was released. She prayed that this court nullifies the entire trial for what she opined was *'a grave and incurable error.'* She called for the immediate release of the appellants.

In reply, Ms. Nabisenke for the respondent argued that the failure of the record to show the initial swearing in of assessors is not fatal. She referred court to page 16 of the record where, at the second hearing on 19th October 2020, the trial judge reminded the assessors that they were still on oath. Further, that according to the record of appeal, at page 38, the case came up for hearing again on 27th October 2020 and the court again reminded the assessors that they were still on oath. She submitted that no miscarriage of justice was occasioned as the assessors were present throughout the hearing and rendered their opinion to the court.

Ms Nabisenke relied on Black's Law Dictionary, 8th Edition by West Publishers, at Page 1019 where *"miscarriage of justice"* is defined as *"a grossly unfair outcome in a judicial proceeding, as when a defendant (accused person) is convicted despite a lack of evidence on an essential element of the crime."* She further referred to Article 126 (2) (e) of the Constitution which provides that substantive justice must be administered without undue regard to technicalities. She also referred to **Uganda v Guster Nsubuga & Robinhood Byamukama; SCCA No. 92 of 2018**, and submitted that the clerical oversight in recording the swearing in of assessors is a technicality that should not overshadow the need to render justice. She further submitted that in the event that this court finds that the failure to swear in the assessors is fatal, it should order a retrial.

She distinguished the facts in the instant case from those in **Alenyo Marks v Uganda; SCCA No. 08 of 2007,** which counsel for the appellant relied upon, arguing that in **Alenyo's case**, the Supreme Court found that ordering a retrial would cause an injustice since two of the appellants had already completed their sentence while Alenyo Marks had already served 12 years of his 20-year sentence. She argued that in the instant case, the

appellants were sentenced in December 2020 to 25 years' imprisonment for a crime they committed in 2019. That they therefore could not be said to have stayed on remand for a long time or served a long part of their sentence. She also cited **Mugisha Wilson v Uganda; Court of Appeal Criminal Appeal No. 309 of 2010,** where a retrial was ordered because the appellant had only served 10 years out of his 50-year sentence of imprisonment. She then reiterated that should this court find the lack of proof of swearing in of assessors to be fatal, it should order a retrial.

Resolution of Ground 1

Counsel for the appellants contends that the trial judge did not swear in the assessors before the trial commenced while counsel for the respondent asserts that there is evidence on the record that they were sworn in. We carefully reviewed the record of proceedings in order to establish the true position on the assessors. We found that on two occasions during the trial, the judge reminded the assessors that they were still on oath. This was recorded at page 16 of the record, for the proceedings that took place on 19th October 2020, and at page 38 for the proceedings on 27th October 2020. The trial judge on both occasions stated, or something similar, that: *"Assessors you are reminded that you are still on oath."*

To one perusing the record, the two statements would imply that she did swear in the assessors, though this part of the proceedings was not recorded. But in the event that she did not, we also observed that the trial judge agreed with the assessors' opinion and convicted the appellants as they recommended. It is for this reason that the complaint was raised here as having occasioned a miscarriage of justice.

It is true that the attendance of the assessors is required at criminal trials under the TIA. Their presence is mandatory as it is provided for in section 3 of the Act as follows:

> **3. Assessors.**
>
> **(1) Except as provided by any other written law, all trials before the High Court shall be with the aid of assessors, the number of whom shall be two or more as the court thinks fit.**

Section 67 of the TIA goes on to provide for their oath as follows:

> **At the commencement of the trial and, where the provisions of section 66 are applicable, after the preliminary hearing has been concluded, each assessor shall take an oath impartially to advise the court to the best of his or her knowledge, skill and ability on the issues pending before the court.**

In **Agaba Lillian & Amutuheire Patrick v Uganda; Criminal Appeals No 247 & 239 of 2017,** this court considered an appeal in which multiple complaints were raised about the assessors. The appellants complained that the trial judge failed to properly appoint assessors and neither administered their oath nor summed up the case for them. The court relied on section 34 of the Criminal Procedure Code Act which permits the court to ignore procedural errors and omissions where no miscarriage of justice has been caused, as well as section 139 of the TIA which provides as follows:

> **139. Reversability or alteration of finding, sentence or order by reason of error, etc.**
>
> **(1) Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission,**

irregularity or misdirection has, in fact, occasioned a failure of justice.

(2) In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

The court then further referred to the decision of the Supreme Court in **Ndaula v Uganda [202] 1 EA 214,** at page 217, where it was observed that an assessor does not become an assessor by reason of taking the assessor's oath; rather he takes that oath because he is an assessor duly listed and selected to serve as such, under the Assessor's Rules. That the failure to swear in an assessor falls within the ambit of the provisions of section 137 of the Trial on Indictments Decree, now section 139 of the TIA. The court observed that because it was not suggested that the omission to swear the assessors occasioned a failure of justice, it was satisfied that it did not.

In **Agaba Lillian's** case (supra) court considered that the decision in **Ndaula** was by the Supreme Court, and therefore, it took precedence over decisions of the Court of Appeal where is was held that the failure to swear assessors would result in the quashing of the decision of the High Court. The court in **Agaba Lillian's** case therefore found that the omission to swear in the assessors could not result in setting aside of the decision of the trial court.

In the appeal now before us, Ms Nalule referred to a decision of this court, **Komakech v Uganda** (supra) to support her submission that the appellant's conviction should be set aside on account of not swearing in the assessors. However, the reminders of the trial judge to them that they were still under oath are sufficient to prove that they took it. In the event

that they did not do so and the reminders were given in error, we find that no injustice was caused to the appellants so that the situation is covered by section 139 (2) of TIA.

Ground 1 of the appeal therefore fails.

Ground 2

The appellant's grievance in this ground was that the trial judge erred when she rejected the appellants' defences of *alibi* yet the prosecution did not disprove them by way of evidence produced after investigating them. That she thereby occasioned a miscarriage of justice.

Submissions of Counsel

Counsel for the appellants submitted that the burden of proof lies with the prosecution to prove the allegations against the suspects beyond reasonable doubt. She referred to **Woolmington v DPP [1935] UKHL 1** and **Miller v Minister of Pensions [1947]2 ALL ER 372** in support of her submission. She further submitted that the prosecution relied upon five witnesses while the defence called six. That all of the appellants raised the defence of *alibi* which the trial judge rejected even when it had not been investigated by the prosecution. Counsel relied on the decisions in **Ainomugisha v Uganda; Criminal Appeal No. 19 of 2015** and **R v Sukha Singh s/o Wazir Singh & Others 1939 (6 EACA) 145**, where it was held that the defence of *alibi* should be brought forward at the earliest opportunity by the prisoner.

She further submitted that the 1st appellant raised the defence of *alibi* as soon as he was arrested. That he informed the police that on 29th April 2019, he was at home because he was involved in a road traffic accident the day before, and presented medical evidence to prove his condition. It

was counsel's contention that instead of carrying out investigations to ascertain the truth of his assertions, PW5 simply testified that the 1st appellant was *'a bad person'* but she did not carry out the necessary investigations. Counsel for the appellants further submitted that at the trial, the 1st appellant called two witnesses to prove his *alibi*; a health worker to show that he sustained injuries in a road traffic accident and his sister to show that he spent the night of the crime at his parent's home. That in spite of this evidence the trial judge dismissed the *alibi* because of a minor contradiction in the 1st appellant's defence. Counsel contended that this was unfair and it occasioned an injustice to the 1st appellant.

Counsel for the appellants further submitted that the 2nd and 3rd appellants also raised defences of *alibi,* but that the trial judge in convicting them focussed more on the minor contradictions instead of concentrating on where the appellants spent the night of 29th April 2019. Counsel then referred court to the decision in **Buhingiro v Uganda [2018] UGSC 2,** where it was held that where the prosecution adduces evidence that the accused was at the scene of the crime, and the defence not only denies this but also adduces evidence showing that the accused was elsewhere at the material time, it is incumbent upon the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. That it is a misdirection by the court to accept one version and hold that because of that acceptance *per se,* the other version is unsustainable.

It was counsel's further contention that the trial judge did not properly evaluate the evidence on record before convicting the appellants. She asserted that the appellants did not participate in the commission of the

offence and if the trial judge had properly evaluated the evidence of *alibi*, she would not have convicted them on the basis of such shallow evidence.

In reply, Counsel for the respondent contended that the trial judge extensively analysed the evidence of participation of the appellants, as well as their defences and came to a conclusion that the prosecution proved its case against them beyond reasonable doubt. Counsel went on to scrutinize the evidence adduced to show that the appellants were positively identified by the victim (PW3) and his father (PW4). She submitted that further to that, PW2 testified that when he conducted the ID Parade all the three appellants were separately identified by the victim and his father. Counsel asserted that since the crime was committed at night, the trial judge was alive to the fact that identification was in issue. She thus took into account the appellants' defence of *alibi* but still came to the conclusion that all three assailants were placed at the scene of the crime.

Counsel for the appellant referred to the decision in **Opolot Justine & Another v Uganda; Court of Appeal Criminal Appeal No. 155 of 2009,** where it was held that *"a person cannot be in two places at the same time."* That the court in that case also came to the conclusion and stated the principle that since the trial judge believed the prosecution witnesses and found that the appellants were placed at the scene of crime, the judge had no option but to reject the appellants' *alibi*. That in such a case, it was not necessary for the prosecution to adduce any further evidence to disprove the *alibi* where the suspects are placed at the scene of the crime.

She prayed that this ground of appeal also be dismissed and that the conviction be upheld.

Resolution of Ground 2

In **R v Chemulon Wero Olango (1937) 4 E.A.C.A. 46**, it was observed that the duty on the person setting up the defence of *alibi* is restricted to accounting for so much of the time of the transaction in question as to render it impossible to have committed the imputed act; and that the time at which the *alibi* is first disclosed is very important. Thus in **Festo Androa Asenua & Kakooza Joseph v Uganda, Criminal Appeal No. 1 of 1998** the Supreme Court adopted the position of the Court of Appeal for Eastern Africa in **R v Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145,** where the decision in **R v Ahmed bin Abdul Hafid (1934)1 EACA 76**, at page 77 was cited with approval; that the defence of *alibi* should be disclosed at the earliest possible opportunity. The court in **Sukha Singh** (supra) stated thus:

> *"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness the proceedings will be stopped."*

Regarding the weight of the burden of proving an *alibi*, the Court in **Androa Asenua** (supra) stated that by setting up an *alibi*, an accused person does not thereby assume the burden of proving its truth so as to raise a doubt in the prosecution case. The suspect only needs to state the *alibi* with certainty and in a credible manner. It remains incumbent upon the prosecution to disprove it, either with evidence on the record or by investigating it and bringing other evidence to discredit it, if it has been stated before the trial.

Counsel for the appellants contended that the trial judge erroneously rejected the appellants' *alibis* though there was no evidence that they were investigated. We observed that the trial judge considered all three *alibis* set up by the appellants, at page 78-79 of the record of appeal as follows:

> *"I rejected the alibis set up by all the accused persons for the following reasons:*
>
> *a) In respect of (A1) Ssetumba Dw1, his own account of what happened contradicted the evidence of his sister (Dw2). While he told court that his sister Nalukwago came to the hospital with a neighbour; a one Namuddu Annet on a boda boda, his sister stated that she came alone and used a taxi for which ride she paid 500 shillings. Dw1 (A1) Ssetumba stated that he was arrested from home by the police after 4-5 days, but his sister said he left home after two days and walked away from home on his own at about 10 pm on the day he left. I found the sum of their evidence unreliable.*
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> *(b) In respect of (A2) Muyingo Andrew, his evidence contradicted his own witness, evidence. (A2) stated that he spent the whole day with his landlord burning bricks and then went and slept, while his witness (Dw6): Nsubuga Godfrey stated that they burnt the bricks the whole night on April 29, 2019 from 6:00 am to 6:00pm. I also found their evidence unreliable.*
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> *c) Dw5: (A3) Sserwanga Robert in his testimony acknowledged that he knew Kamya Pw4 since child hood and they grew up in the same village, he also acknowledged that he had known Sozi Pw3 for about three years. These acknowledgements augmented the evidence of the prosecution that put (A3) at the scene of crime."*

Since it is our duty to put all the evidence before the trial court to fresh scrutiny and come to our own decision on the facts, we considered the evidence of identification that was adduced by the prosecution and each of the *alibis* set up by the appellants separately, in order to establish whether the trial judge's findings above were correct. We took into consideration the law on *alibis* that we set out above.

The implicating evidence of the prosecution was adduced through the victim, Julius Ssozi (PW3) and his father Godfrey Kamya who testified as

PW4. The testimony of PW3 was short and concise so we reproduced it here, verbatim. At page 17 of the record the victim testified as follows:

> *"I stay at Bulaga. They cut my legs and scalp and I am unable to work again. This was April 29, 2019. On that day, I had returned from work at 9pm, I closed my house and slept. While asleep, I heard like there was wind entering in the house. I got scared and jerked up, whereupon I saw people in my house with pangas and they had put on the light. They told me I should give them money or they will hack me. These people were Frank Robert and Snipper. Those are the people. Robert (A3) is the one in a kitenge, the one in the middle is Snipper, (A2) the last one is Frank (A1). I saw them when they put on the light and in the village there is a place, a corner where they always watch films and I know them. Frank (A1) asked me for money. When he asked for money, I wanted to make an alarm but they cut my head here (points to right side of his head).*
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> *When they cut me, I fell on my bed and made an alarm, I struggled to free myself with my legs but they cut my legs. They all cut my legs. They continued cutting then my father heard the noises coming from where I was staying and he made an alarm. My father is Kamya Godfrey. When he made an alarm, one of them asked where is the wallet? The phone? I don't know who of them asked another answered, the one in a kitenge (A3), that here they are; from that point I don't know. I stopped understanding. I next begun to understand when I was in Rubaga hospital. I sustained injuries in the head, legs and in my chest."*

In cross examination, PW3 explained that he had seen the appellants before the incident because they were residents of the same area/village. And that when he woke up, the light in his room had been turned on and he saw all of the appellants with *pangas*. That he was summoned to the Police when he was still admitted in hospital to identify them. He denied that he was shown photographs of the suspects before he identified them at the ID Parade.

In further cross examination he explained that he used to see the appellants as he went past a library with a television. That the appellants

used to sit outside that library watching films on the television. That he did not know their names but he had seen them before the attack. That he got to know their real names after he identified them at the Police Station because the Police Officer told him the name of each of the persons that he identified at the point of identification. He maintained that before the attack, he knew the assailants by their facial features.

Godfrey Kamya, PW4, stated that in the night of 29th April 2019 at about 2.30 pm, after he heard people whom he thought were fighting outside his house, he woke his wife up. That he stood at a window and because the security lights in the compound were on, he saw a man with a *"spoilt eye"* whom he knew by the name of Snipper holding a *panga.* He added that he and his wife made an alarm and they moved to the sitting room. And that while there, through the glass window, he saw his friend A1 (Ssetumba Frank), peeping from the boys' quarters. That when he and his wife and daughter increased the intensity of their alarm, Snipper (A2) run to the glass window where they stood and smashed it with a *panga*, and said to them in Luganda, *"You fools keep quiet."*

PW4 further testified that he saw the first appellant and the 3rd appellant through the window before he left the house. That the 3rd appellant was known by the name of *Bola.* That the 1st appellant had a *panga* and the 3rd appellant was carrying the property that they took from the victim's room. That thereafter, he went to the victim's room and found him on the bed with cut wounds on the head, face, arms and legs. He made arrangements to take him to hospital.

In cross examination, PW4 explained that the distance between the main house and the boys' quarters where his son slept was 2 ½ metres. He

emphasised that the 2nd appellant was commonly known as Snipper while the 3rd appellant was known as *Bola*. Further, that he did not know their real names before but he got to know them at the ID Parade. He maintained that he knew the 1st appellant by the name of Frank and had known him as a child growing up in the area because his parents' home was in the neighbourhood. He insisted that the 1st appellant was his friend because he used to see him before the incident and his parents too were his friends. He denied that he was shown pictures of the suspects before the ID Parade.

PW4 further explained that there were security lights in his compound and they were all lit at the time of the incident. That his wife and he were able to observe the activity outside because the windows in the house had nets, not curtains. That the window that was smashed was in his bedroom, but that even when they moved to the sitting room they continued to observe what was happening outside through the window and he clearly saw the assailants, even as they run away.

The suspects were subjected to ID Parades whose reports were admitted in evidence as **PEX2** and **PEX3**. **PEX2** shows that on 14th May 2019, at Wakiso Police Station, AIP Okello Patrick carried out an ID Parade. That in it he employed 12 persons to help in the identification of the suspects, Ssetumba Frank, male adult aged 26 years and Muyingo Andrew, male adult aged 23 years, who were charged with the offence of aggravated robbery committed on 29th April 2019. The witnesses who attended were Kamya Godfrey and Ssozi Julius.

The results in **PEX2** were that Kamya Godfrey identified Ssetumba Frank since he was born in the area and on the night of the robbery he was able to identify him because there was enough light to do so. He also identified

Muyingo Andrew by his left eye which had a defect, as he smashed the window of his house with a panga, because there was enough light for him to do so. The report further stated that Ssozi Julius was able to identify Ssetumba because there was enough light at the scene and he knew him before the incident. He was also able to identify Muyingo by the same light because he had seen him in the area before the incident.

PEX3 shows that an ID Parade was conducted in which Obima Charles informed the suspect, Sserwada Robert the 3rd appellant, that he was to be subjected to it in respect of aggravated robbery that occurred on 29th April 2019. The parade was conducted on 14th May 2019 and 8 persons were used by the police among whom the suspect was placed. Godfrey Kamya and Julius Ssozi were the witnesses to identify the suspect. The results show that Godfrey Kamya was able to identify the suspect as the assailant that he saw on the night of the robbery as he went away from the boys' quarters where the victim was attacked. He said he did so because the suspect resided near his home and he used to pass by his abode on his way home. Ssozi was also able to identify him as the last assailant who entered his room. He said he used to see him before the incident watching films at a shop in the neighbourhood.

The reports were produced by PW2, AIP Okello Patrick. He related what was established at the two parades where the PW3 and PW4 identified the suspects, Ssetumba Frank, Muyingo Andrew and Serwanga Robert. He explained the process of each of the two Parades and the number of people that were used to carry out each Parade. He was never cross examined about the process by any of the two lawyers that represented the appellants in the lower court.

Ssetumba Frank, the 1st appellant raised his *alibi* in his statement to the police at Bulaga Police Post on 6th May 2019 and it was admitted in evidence as **DEX4**. In it he stated that on 28th April 2019, while he was riding a *boda boda*, he met with an accident at about 11.30 pm at Buloba. That he was taken to a clinic nearby for treatment after which he went to his parents' home. And that because he was still unwell following the accident, on the 29th April 2019 he was still at his parents' home.

In his sworn testimony, the 1st appellant stated that on 28th April 2019, while he was riding on a *boda boda* on Mityana Road at a place called Kiwumu, on the road going to Buloba, he met with an accident and sustained injuries on his legs and his heel was ripped open. That he called his parents and his mother sent his sister to go and help him. That he received treatment at a hospital whose name he did not know after which, at about 10.00 pm he was discharged, the same night that he met with the accident.

He further testified that he went home with his sister, Nalukwago Carolina. Further, that on 29th April 2019 he was still at his parents' home where he stayed for about 4 or 5 days. That Police officers went to the home and arrested him on allegations that he was one of the persons that committed the crime that is the subject of this appeal. He did not state the date on which he was arrested. He further testified that treatment notes were given to him at the clinics that he attended for his injuries. The documents were admitted by court for purposes of identification.

The 1st appellant was cross examined about his *alibi*. He said he did not report the accident to the Police. Further that he did not recall the registration number of the motor cycle that he was riding; neither did he

recall the name of its owner. About the medical treatment, he stated that he went to 3 different clinics. He recalled that one of them was Mukisa Clinic, as he stated in his first statement to the Police. He called 2 witnesses in his defence; his sister Nalukwago Caroline (DW2) and a health worker at one of the Clinics, Najjuma Deborah (DW3).

Nalukwago Caroline testified that on 28th April 2019, when she returned home she was told that her brother, Ssetumba, met with an accident and she should go and help him. That this was at about 9.00 pm. That she did go to help him and after he got treatment, they returned to their parents' home. She further testified that Ssetumba spent 2 days at their parents' home, the 28th and 29th April 2019, but she did not know how he went back to his place. That it was at about 10.00 pm that he told her that he was leaving and he walked out. She further testified that on 29th and 30th April 2019, Ssetumba went to Mirembe Clinic but she did not accompany him. That after he left their parents' home, she next saw him on 30th April and 1st May 2019 when he went home to visit, but she did not recall how long the visit was.

Nalukwago was not cross-examined by the prosecution but the trial judge asked her some questions to which she responded as part of her testimony. It appears the questions were aimed at clarifying the days on which the 1st appellant was said to have been at his parents' home. The answers that DW2 gave show that she was unable to account for the whereabouts of the 1st appellant on the night of 29th April 2019. This is because whereas she testified that the 1st appellant spent the 28th and 29th April 2019 at their parents' home, in the same breath she testified that he returned to the their home on 30th April or 1st May, two days after he left. Her evidence would suggest that he left his parents' home on the 29th April 2019 at 10

pm and returned on 30th April 2019. This left part of the night of 29th April 2019, the date on which he was identified at the scene of crime, unaccounted for.

Najjuma Deborah (DW3) testified that she was an enrolled midwife and a member of staff at Amazing Grace Family Clinic. She testified that she had a treatment book from the Clinic where patients were registered, which included records for 28th April 2019. That she received a patient called Ssetumba Frank whose diagnosis was that he had a traumatic injury sustained in a road traffic accident. She admitted that she did not administer treatment to him but one Nanyunja Rebecca did. That it was the latter that wrote notes in the treatment book. She further testified that from this book she filled a form which was admitted in evidence as **DEX5**. She explained that the patient went to the Clinic at 8.00 pm and after treatment his relatives went to the Clinic and took him away. The appellant could not have gone for treatment at 8.00 pm before he met with the accident, which he said occurred at 11.30 pm.

In cross examination, Najjuma explained that she copied records from the treatment book which she entered in **DEX5,** the discharge form, on the instructions of Nanyunja. But the book was not admitted in evidence because she was not the person who made the record from which she extracted **DEX5**. But even if it had been admitted, DW3 said she did not know where Ssetumba was on 29th April 2019. She therefore could not account for his whereabouts at the time that the offence was committed in the night of 29th April 2019.

On the basis of the testimonies of DW2 and DW3, the testimony of the 1st appellant about a road traffic accident was improbable and therefore

unbelievable. His own testimony about the said accident was even more so because though he said he was riding a *boda boda*, he did not know whose it was. Neither did he know its registration number nor was he sure about the places where he received treatment for the alleged accident. The two witnesses that he called to corroborate his *alibi* did not help to make his case. Instead, they contradicted his evidence and each other.

With regard to the 1st appellant therefore, we came to the conclusion that the identification evidence adduced by the prosecution put him at the scene of the crime. And that though the prosecution did not investigate his alleged *alibi*, the totality of the evidence that they produced was not shaken by the *alibi* that he raised, both in his first statement at the Police Station and his testimony in court.

Muyingo Andrew, the 2nd appellant, testified at DW4. In his sworn testimony, at page 54 of the record, he stated his *alibi* for the first time as follows:

> *"Before my arrest, I was a builder and made bricks. I used to live in Bulooba Kasero in Wakiso District. On April 39, 2019, (sic) I spent the day at home. My Land lord had bricks and the whole day we were organising those bricks. I later went to my house and slept. The next day, 30th, we got up early and heaped the bricks and burnt them. The heap was of one door. I stayed there in Bulooba. We had a house we were building so I was either building or making bricks."*

He set out to discredit the evidence of the ID Parade when he stated, at page 36 of the record, that the victim's father (PW4) took photographs of him before the parade and pointed out that he was the only person at the parade with one eye.

The 2nd appellant called one witness to corroborate his *alibi*. He was Nsubuga Godfrey, his landlord (DW6). He testified that in the night of 29th

April 2019, he was with the 2nd appellant firing his *tanuru* (heap of bricks). That they started at 6.00 pm and spent the whole night burning bricks. He maintained this in cross examination. As observed by the trial judge, this contradicted Muyingo's testimony that on the 29th he spent the day at home. That after helping his landlord to organise his bricks, he went home and slept. He further testified that on 30th April 2019, they got up early and heaped the bricks and burnt them. DW6 therefore did not account for the whereabouts of the 2nd appellant at 2.30 pm on 29th April 2019 because by the 2nd appellant's own testimony, he was not with DW6 for the whole of that night as he wanted court to believe.

It is very clear from their testimonies that PW3 and PW4 identified the 2nd appellant, both on the night of the robbery and at the ID Parade. PW4 in particular saw him at close range when he smashed the window of his house. He also knew him before the incident as *Snipper*. The victim also identified him both at the scene of crime and at the ID Parade. The *alibi* that he spent the night of 29th April 2019 burning bricks was therefore an afterthought.

We therefore find that though the prosecution did not investigate Muyingo's *alibi*, the evidence adduced was sufficient to counter the alleged *alibi* for he was without a doubt placed at the scene of the crime. The trial judge therefore made no error when she discounted his *alibi* and convicted him of the offence.

Sserwanga Robert, the 3rd appellant's *alibi* was simply that in the night of 29th April 2019, he was at his home sleeping at the time the crime was committed. He did not call any witness to corroborate his own testimony. In cross examination he admitted that he knew Kamya Godfrey since childhood because he grew up with him in the same village.

With regard to his *alibi*, we have no doubt at all in our minds that both PW3 and PW4 positively identified Sserwanga at the scene of the crime. That the police took his photograph does not address the fact that he was positively identified by PW3 and PW4 at the scene of crime. In addition, because he only disclosed his *alibi* during his testimony in court, the police could not have investigated it. We find that the absence of investigations did not discredit the evidence that was adduced by the prosecution which put the 3rd appellant at the scene of the crime. The *alibi* was therefore an afterthought and the trial judge properly discounted it in order to convict him of the offence.

Ground 2 of the appeal therefore also fails.

Ground 3

The appellants' grievance in this ground was that the trial judge erred in law and fact when she sentenced each of them to 25 years' imprisonment, which sentence was illegal, manifestly harsh and excessive in the circumstances.

Counsel for the appellants contended that while sentencing them, the trial judge failed to consider the time spent on remand. And that in addition, she did not properly take into account the mitigating factors and she also departed from the rule of uniformity in sentencing. Counsel referred to Article 23(8) of the Constitution as well as the decision of the Supreme Court in **Rwabugande Moses v Uganda (**supra) whose requirements she contended the trial judge did not follow while sentencing the appellants.

Counsel referred to **Kiwalabye Bernard v Uganda SCCA No. 143 of 2001** on the circumstances under which an appellate court can interfere with

the sentence imposed by the trial court. She went on to submit that in **Aharikundira Yustina v Uganda, SCCA No. 27 of 2005**, consistency in sentencing was emphasised as a vital principle in the process. She drew our attention to the decision in **Abelle Asuman v Uganda, Criminal Appeal No. 66 of 2016,** where a sentence of 18 years' imprisonment was upheld and **Etoma Tom v Uganda; Criminal Appeal No. 404 of 2016,** where a sentence of 35 years' imprisonment was reduced by this court to 20 years. She prayed that a more lenient sentence be imposed on the appellants.

In reply, Ms. Nabisenke for the respondent conceded to the appellants' submission on the trial judge's failure to deduct the time the appellants spent on remand from their sentences. Regarding the issue of consistency in sentencing, it was counsel's contention that the sentence passed by the trial judge was consistent with the current sentencing regime for the offence of aggravated robbery.

Ms Nabisenke then referred us to the decision in **Kigozi Livingstone & Another v Uganda, Court of Appeal Criminal Appeal No. 365 of 2016**, where it was held that with regard to the offence of aggravated robbery the tendency of this court has been to sentence offenders to terms of imprisonment ranging from 12-25 years. She also referred to **Olupot Sharif & Another v Uganda; Criminal Appeal No. 730 of 2014**, where this court reduced a sentence of 40 years to 32 years' imprisonment for the same offence; and **Ojangole Peter v Uganda; SCCA No**, **34 of 2017**, where the Supreme Court found a sentence of 32 years to be appropriate for aggravated robbery. She also drew our attention to the decision in **Guloba Rogers v Uganda; Criminal Appeal No. 57 of 2013**, where the

appellant was sentenced to 35 years' imprisonment for aggravated robbery.

Counsel further contended that the appellants did not only set out to rob the victim, they also injured him grievously as he was found unconscious in a pool of blood with cuts on his head, face and other body parts. She prayed that the sentence be upheld but the period of 1 year, 6 months and 17 days that the appellants spent on remand be deducted therefrom.

Resolution of Ground 3

It is a well settled principle that this court is not to interfere with a sentence imposed by a trial court exercising its discretion unless the sentence is illegal or this court is convinced that the trial judge did not consider an important matter or circumstance which ought to be considered when passing sentence. Further, that the court may interfere with such sentence if it is shown that it was manifestly harsh or excessive or so low as to amount to an injustice. **[See Livingstone Kakooza v Uganda, SCCA No.17 of 1993]**

The appellants' complaints in this appeal are twofold: i) that the sentence is illegal because the trial judge did not deduct the period spent in custody before sentence, contrary to Article 23 (8) of the Constitution, and ii) that the sentence of 25 years' imprisonment imposed upon each of them was manifestly harsh and excessive in the circumstances of the case.

Starting with the legality of the sentence, we accept the submission that following the decision in **Rwabugande Moses v Uganda** (supra) sentencing courts are required to deduct the period spent on remand before the sentence, in compliance with Article 23 (8) of the Constitution. And that where the judge does not do so, he/she imposes an illegal sentence. In this

case, while sentencing the appellants the trial judge observed and held thus:

> *"The offence of Aggravated Robbery is rampant. The victims suffer for long, it affects their ability to earn, their health and their esteem. It is an offence that is also a moral vice of people who want to gain by harming others.*
>
> *I see no remorse shown by any one of the 3 convicts and I have no reason to offer any leniency.* ***I therefore sentence each accused person; Ssetumba Frank, Muyingo Andrew and Sserwanga Robert to twenty-five (25) years of imprisonment each. The respective periods they have each spent on remand is inclusive of this Sentence."***
>
> *{Emphasis added}*

We note that the trial judge was aware that the period spent on remand must be taken into account on sentencing accused persons. However, though she sentenced the appellants on 4th December 2020 after the decision in **Rwabugande** (supra) on 3rd March 2017, the sentence that she imposed does not show that she deducted the period spent in custody before conviction, as it was required of sentencing judges in the decision of the Supreme Court in that case.

The expression that *"The respective periods they have each spent on remand is inclusive of this sentence,"* leaves the sentence capable of various interpretations. Is it that the prisons authorities should deduct the sentence, or that the trial judge did not deem it necessary to discount the period spent on remand by the appellants?

It is an important principle in sentencing that the court should impose a clear and unambiguous sentence. In **Kibaruma John v Uganda, Criminal Appeal No. 225 of 2010; [2016] UGCA 52** it was held that:

"A sentence of court should always be clear and unambiguous. An accused person is entitled to know with certainty the punishment that court has imposed upon him or her."

The Supreme Court affirmed the decision of this court in **Umar Sebidde v Uganda, Supreme Court Criminal Appeal No 23 of 2002, [2004] UGSC 84,** where it was stated that it is the duty of the court to pass a *"definite and clearly ascertainable sentence."*

We therefore have no alternative but to set aside the sentence of 25 years' imprisonment that was imposed upon each of the appellants by the trial judge because it was not only illegal but also ambiguous. We will now proceed to consider whether the sentence that was imposed was harsh and excessive in the circumstances of the case, and if so, impose our own sentence, pursuant to the powers vested in this court by section 11 of the Judicature Act.

In support of their grievance that the sentence was harsh and excessive in the circumstances, counsel for the appellants proposed that a more lenient sentence of 18 years' imprisonment would be more appropriate because the appellants were young persons at the time they committed the offence. Further that they were first-time offenders who were capable of reform.

In order to persuade court about the sentence to be imposed on the appellants, counsel for the respondent cited higher sentences that had been imposed by the courts in order to establish a range of 25 to 32 years' imprisonment for aggravated robbery. On the other hand, counsel for the appellants referred us to one case in which the sentence for a similar offence was reduced from 35 years to 20 years' imprisonment by this court. We must therefore review sentences that have been imposed for similar offences in order to come to an appropriate sentence for the appellants,

after taking into consideration the aggravating and mitigating factors that were stated before they were sentenced by the trial court.

In **Olupot Sharif & Ojangole Peter v Uganda, Court of Appeal Criminal Appeal No. 0730 of 2014**, this Court reduced a sentence of 40 years' imprisonment handed down to the appellants to 32 years' imprisonment for the offence of aggravated robbery. In that case, the appellants stole Shs. 800,000/=, a weighing scale and a radio from the victim and in the course of doing so, they shot him dead. The 2nd appellant appealed to the Supreme Court in **Ojangole Peter v Uganda, Criminal Appeal No. 34 of 2017, [2019] UGSC 20**. The Supreme Court found that both the trial court and this court considered the aggravating and mitigating factors and after doing so they found the sentence of 32 years appropriate. The court held that at that level they were unable to reconsider the same factors for the sentence that was imposed was legal. The sentence was upheld.

In **Baingana Godfrey & 3 Others v Uganda, Court of Appeal Criminal Appeal No. 29 of 2013**, this court substituted a sentence of 35 years with that of 20 years' imprisonment against the 4th appellant for the offence of aggravated robbery. The court took note of the brutal manner in which the offence was committed and described it as short of causing death to the appellant. The 4th appellant in that case together with others hit the complainant with an iron bar until he was unconscious and stole his motorcycle, mobile phone, shoes and Shs. 7,000,000/=.

In **Okoth Julius & 2 Others v Uganda, Court of Appeal Criminal Appeal No. 015 of 2014**, the 3rd appellant and others at large broke into shops and fired a gun to scare off the residents. They stole two motorcycles, a car battery, shaving machines, phone chargers and a phone. One of the

stolen motorcycles was recovered from the 3rd appellant's home. This court upheld the conviction of the 3rd appellant for the offence of aggravated robbery and confirmed a sentence of 17 years' imprisonment against him.

In **Olupot Sharif & Ojangole Peter** (supra), the aggravating factor was that the victim was shot dead, so this Court sentenced the appellant to 32 years' imprisonment. In **Baingana Godfrey & 3 Others** (supra), the aggravating factor was the brutal manner in which the offence was committed. The assailants hit the complainant with an iron bar until he was unconscious. This court reduced the sentence from 32 years to 20 years' imprisonment for the 4th appellant.

The case of **Okoth Julius & 2 Others** (supra) can be distinguished from the instant case in that no violence was meted out to the victim while in the instant case, the victim almost lost his life. It is evident from the cases reviewed above that on the whole, extreme violence meted out on the victim leading to grievous injury or death attracts a harsher sentence than cases where there is no violence, injury or death. However, the sentence also depends on the mitigating factors that may include recovery of the items stolen.

We have considered the aggravating factors that the appellant broke into the victim's house, they hacked at him with *pangas* and he sustained serious injuries for which he was hospitalised and sustained a disability in his leg that rendered him incapable of carrying on his trade as a driver. None of the stolen items, including important documents like his National Identification Card and Driving Licence were recovered, putting him to great inconvenience. We have also considered that the appellants were still

youthful and aged 27 years, 23 years and 23 years, respectively. They were therefore still capable of reforming.

Although the sentences that we reviewed above might suggest that a sentence of 25 years' imprisonment for aggravated robbery without taking into account the period spent on remand was on the high side, given the brutal circumstances under which the offence was committed, we would consider it appropriate. We therefore maintain the sentence of 25 years as the starting point and hereby deduct the period of 1 year and 7 months that the appellants spent on remand and sentence each of them to 23 years and 5 months' imprisonment. The sentences shall commence on the 4th December 2020, the date on which they were convicted.

Dated at Kampala this 26th day of September 2023.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

Monica K Mugenyi
JUSTICE OF APPEAL