THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT FORT PORTAL

[*Coram: Egonda-Ntende, Bamugemereire & Mugenyi, JJA*]

CRIMINAL APPEALS NO. 497 and 501 of 2017

(*Arising from High Court Criminal Session Case No.0042 of 2012 at Masindi*)

BETWEEN

Isingoma Godfrey==========Appellant No.1
Kasaija Rogers *alias* Kadogo==========Appellant No.2

AND

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

(*An appeal from the Judgement of the High Court of Uganda [Rugadya Atwoki, J] at Masindi delivered on 29th July 2017*)

JUDGMENT OF THE COURT

Introduction

[1] The appellants were indicted of 2 counts of aggravated robbery, 1 count of rape and one count of attempted murder. Both appellants were convicted of the 2 counts of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act, and 1 count of rape contrary to section 123 and 124 of the Penal Code Act.

[2] The particulars of the offence in respect of count 1 were that the appellants and others still at large on the 5th day of August 2011 at Kinubi village, Mparo Division, Hoima district, robbed one Anna Tukahirwa of

shs.70,000.00, one radio cassette Sonicon, 2 mobile phones and 2 handbags containing personal documents and at the time of the robbery used a deadly weapon to wit a panga. The particulars of offence in respect of count 2 were that on the 5th day of August at Kinubi village, Mparo Division, Hoima district the appellants with others still at large robbed Doreen of Shs.70,000.00 and at the time used a deadly weapon to wit a panga. The particulars of count 3 were that the appellants on the same date and at the same place as above had unlawful sexual intercourse with Tukahirwa Anna.

[3] The appellants were tried and convicted of the said offences and sentenced to 30 years' imprisonment on each count to run concurrently.

[4] Dissatisfied with the decision of the trial court the appellants appealed to this court against both conviction and sentence. They set forth the following grounds:

> '(1) The learned trial judge erred in law and fact when he held that the appellants were properly identified hence occasioning a miscarriage of justice.
>
> (2) The learned trial judge erred in law and fact when he sentenced the appellants to manifestly harsh and excessive sentences of 40 years imprisonment on 2 counts of aggravated robbery and 30 years imprisonment on one count of rape.'

Duty of a First Appellate Court

[5] We shall start by reminding ourselves of the duty of this court as a first appellate as we consider this appeal. And we shall do so ground by ground, setting out the submissions of counsel as we consider the ground in question to be concise.

[6] The duty of a first appellate is set out in Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I 13-10 and has been restated by the Supreme Court in numerous decisions including Bogere Moses v Uganda [1998] UGSC 22 and Kifamunte Henry v Uganda [1998] UGSC 20.

[7] We must evaluate the evidence and the law adduced in the court of first instance afresh and reach our own conclusions of fact and law, bearing in

mind that we did not have an opportunity to see and hear the witnesses in person.

Ground 1

[8] The complaint in ground 1 of this appeal is that the learned trial judge erred in concluding that the appellants had been properly identified as the perpetrators of the offences in question. Mr Samuel Muhumuza, learned counsel for the appellants, submitted that PW1and PW2 had identified appellant no.1 at the scene of crime and he was wearing a yellow shirt while PW4 testified that when he saw the appellant no.1 on the ground after his arrest by the police he was wearing a pink shirt. PW1 and PW2 testified that the other assailant was wearing a red shirt. There was contradiction between these witnesses as to what colour of shirt the appellant no.1 was wearing. He further submitted that these witnesses contradicted themselves with regard to whether the assailants were putting on masks or not.

[9] Regarding appellant no. 2 counsel submitted that though PW7 had testified that he had tracked him using phone records no evidence was adduced to show that this was the case. Neither did the people who allegedly led the police to the appellant no.2 testify. The phone in question was not exhibited. Counsel for the appellant submitted that it was an error for the learned trial to rely on the testimony of PW7 to convict the appellant no.2.

[10] Learned counsel for the appellants further attacked the identification parades that were organised by PW6 and PW7, who were investigating officers, contrary to the guidelines laid down in R v Mwango S/O Manaa (1936) E.A.C.A. 29; Ssentale v Uganda [1988] E. A. 365; and Stephen Mugume v Uganda Criminal Appeal No. 20 of 1995 (unreported). No regard should therefore be had to such evidence.

[11] Ms Angutuko Immaculate, Chief State Attorney in the office of the Director, Public Prosecutions, submitted for the respondent. She contended that the appellant no. 1 had rightly been identified by the prosecution witnesses, PW2, PW3, PW4 and PW6. This evidence rebutted the appellant's alibi that he had been arrested elsewhere.

[12] She submitted that PW6 was not the investigating officer and therefore there was no reason why she could not conduct an identification parade.

[13] Turning to the identification of appellant no. 2 she submitted that there was circumstantial evidence as adduced by PW7, D / Sgt. Atiku, who took over the investigation of the file and arrested appellant no.2, following a successful phone tracking investigation, which was sufficient to support the conviction of the appellant no.2. This was evidence of recent possession of stolen property, to wit, a phone.

[14] Ms Angutuko concluded that the appellants had been properly identified and were rightly convicted by the learned trial judge.

[15] The evidence upon which the learned trial judge relied upon to arrive at the conclusion that the appellants had been properly identified was the testimony of PW1, PW2, PW3, PW4 PW6 and PW7. The learned trial judge relying on this testimony concluded that it had rebutted the appellant no.1's alibi, that he had not been arrested at the scene of crime but had been arrested earlier in the evening by police patrol vehicle and was on that vehicle when at about 3.00am they reached the crime scene.

[16] PW4, Anna Tukahirwe, was not able to identify the assailants that forced their way into her home at about 2.00am on 5th August 2011. She testified that the assailants were wearing masks at the time they confronted her. She testified that in addition to stealing her hand bag, money and phone they raped in her turns. Two held her while the third raped her and did so in turns. It would appear most of the time they spent in this house was spent in her room. One of them did go to the other room where PW1 and PW2 were sleeping and demanded for money. PW1's hand-bag was in PW4's room and she took them there, only to find that the money that had been in her hand-bag, Shs.70,000.00 was missing. She was returned to the room she was staying and ordered to cover herself. She stayed in hiding though she was able to hear the commotion and noise emanating from PW4's room.

[17] PW1 maintained that she recognised 2 of the assailants who were before court. Appellant no.1 was arrested by the police, and she saw him, in the hands of the police, outside their home when she got out. PW3, who slept in the same bed room with PW2, saw one of the assailants arrested by the police when they got out of the house. He was wearing a pink shirt. Similarly, PW3 when he approached the scene of crime when the police had

arrived, he saw one person, held by police, who he referred to as one of the assailants, who was wearing a pink shirt.

[18] It appears only one witness, PW1, Doreen Mugabi, claims to have identified appellant no.1 while in the house during the attack. PW4, the victim of the rape did not recognise any of the assailants. Neither did PW2 who only saw the appellant held by the police when they came out of the house after the police arrived. PW3, a neighbour also found the appellant no. 1 already in police hands when he got out of his house and approached the scene of crime.

[19] There are, however, major gaps in the prosecution case which have not been satisfactorily explained. The officer or officers who arrested appellant no.1 did not testify. Neither did any witnesses who were present at the time of the arrest of appellant no.1 testify. This crucial evidence is missing. PW1, PW2 and PW3 found the appellant no.1 already arrested by the Police when they exited their houses. It is only PW1, who claims to have recognised him in the house during the robbery and that he was wearing a yellow shirt.

[20] The appellant no.1 testified in his defence that he was arrested earlier in the evening between 10.00 to 11.00 pm by police officers in a police patrol car who kept him on the patrol car as they moved around town until they arrived at the scene of crime around 3.00am in the morning. He denied that he had been involved in the crimes in question as he was in police custody at the time on a police patrol car.

[21] The prosecution never produced any evidence to challenge this version of events which they could easily have done and as they were obliged to do to show how the appellant no.1 had been arrested. The arresting officer did not testify. Neither did the officers that booked him in custody at Hoima Police Station.

[22] Much as PW1 claimed to have identified the appellant no.1 during the time the assailants were in the house it is noteworthy that the reason advanced for being able to do so may not stand up to scrutiny. She stated that it is because the assailants spent over one hour in the house and that is why she identified two of them. However, most of this time must have been spent in the room of her sister, PW2, who was being raped serially while she had been forced

to hide in the room where she slept. There is evidence from PW4 who was in the house and was raped by the assailants that the assailants were wearing masks which made it impossible for her to recognise them. This is therefore the classical case of one identifying witness in what must have been rather difficult circumstances to correctly identify the perpetrators.

[23] The only feature about the appellant no.1 that PW1, the only identifying witness, was that he was wearing a yellow shirt. No particular features of the face or body are mentioned. Given that the assailants were wearing masks it may not be surprising that there is no particular feature about them that this witness would remember. The offences in question were committed at night. Much as there was torch light used by the assailants, obtaining conditions were not favourable to correct identification. In fact, 2 of the 3 witnesses present in the house at the time the robbery and rape were committed were not able to recognise the assailants. The testimony of PW1 must therefore be viewed with the greatest caution. Abudalla Nabulerere v Uganda [1978] UGSC 5; Abdalla Bin Wendo and Another v R. (1953), 20 EACA 166 and Roria v. R. [1967] EA 583 applied.

[24] What was required was other evidence that would demonstrate that the testimony of PW1 was reliable and free from error. No such evidence was offered by the prosecution though it had been stated in the summary of the case, annexed to the indictment that it existed.

[25] The stolen properties recovered the night the offences were committed were not produced in evidence. The weapon used in the commission of this crime, which was a panga, and had allegedly been recovered from the assailant arrested at or near the scene, was not produced. Neither were the exhibits slips produced to show that the recovered articles had been handed over for custody in the Police Exhibit Storeroom. There is no direct evidence regarding the recovery of the said exhibits, their storage and what happened to them. There is no evidence led to establish where they were recovered from; from whom they were recovered; and whether or not they were actually delivered to the police station. Appellant no.1 in his testimony explained as already noted above, was that he was not arrested at or near the scene of crime. His explanation is not improbable. It is a reasonable explanation as to how he arrived at the scene of crime on a police patrol vehicle. The prosecution has failed to rebut this evidence by calling the

arresting officer. The failure to call the officers that arrested the appellant no.1 may well raise an adverse inference to the case for the prosecution that this evidence may not have been favourable to their case.

[26] In Bukenya and others v Uganda [1972] EA 549 the Court of Appeal for East Africa set the following principle:

> 'It is well established that the Director has a discretion to decide who are the material witnesses and whom to call but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on indictments Decree, S.37). Thirdly while the Director is not required to call a superfluity of witnesses if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution case,'

[27] This decision was cited with approval in Kato Kyambade v Uganda [2017] UGSC 32 by the Supreme Court.

[28] We are satisfied that the evidence against appellant no. 1 falls short of what amounts to a case proved beyond reasonable doubt.

[29] The case against appellant no.2 revolves around the testimony of PW1, PW6, Det. IP Atto Miriam, who organised an identification parade, and PW7, Detective Sargent Otiku, the investigating officer.

[30] PW6 conducted an identification parade on the 1st December 2011 and produced Police Form 69 that contains the particulars of the identification parade. At the parade appellant no.2 was identified by PW1 that he was the

second assailant on 5th August 2011 when they were robbed and her sister was raped.

[31] As already noted above PW7 was the investigating officer. The relevant testimony is fairly short, and we shall set it out *in extensio*.

> 'After checking through the property, I found a mobile phone belonging to the victim with serial no. on the receipt was 3596037175797. When I took the receipt to MTN for track I found the head set was being used by phone No. O775974OO2 registered in the names of Tumwesige Godfrey whom I tracked. He was a resident of Kigorobya and I arrested him. Tumwesige informed me the phone was sold to him by Muhumuza Stephen whom we looked for and arrested him. Muhumuza also informed me the phone was sold to him by Kasaija Rogers alias Kadogo whom I looked for. Upon arresting him he could not explain to me how he got the phone. I held him responsible. When an identification parade was organized by me, Kasaija was identified as being one of the assailants. I then charged them jointly and brought them to court. Unfortunate part in this case is the exhibits which were recovered and exhibited, they went missing. I have managed to trace for them but because of sickness I could not. That is all I know about this case.'

[32] The receipt that led this witness to MTN to trace the hand-set that was apparently in use was not exhibited. The call data provided by MTN that connected the hand-set to this phone number -0775974002- was not exhibited. Mr Tumwesige Godfrey who used this number and hand-set in question was not called to testify. Neither was Mr Muhumuza Stephen who was alleged to have sold the phone to Mr Tumwesige called to testify. It was alleged that Mr Muhumuza had said that he had bought the phone from the appellant no.2.

[33] The testimony of PW7 was largely hearsay and cannot be the basis to lead to the conclusion that the appellant no.2 was in possession of recently stolen property belonging to the PW4. The phone was never produced in evidence. Neither were any receipts showing it had been delivered to the exhibit store room and received by the storeman.

[34] The appellant no.2 in his sworn testimony denied participating in the commission of the offences he was charged with. He stated that on 5th August 2011 he was at Pacwa village where he was operating a grinding mill. On the 28th December 2012 he had an altercation with 'boda boda' rider over change and that is how he was taken to Hoima police station, detained and subsequently charged with the offences in question. He denied participating in an identification parade or selling any phone to anyone.

[35] Prosecution exhibit no.2 which was the identification parade report dated 1st December 2011, allegedly signed by the appellant no.2 was never put to the appellant during his cross examination since he had denied participating in the parade.

[36] The prosecution never explained why it was unable to call witnesses that were supposed to prove that the respondent had been in possession of recently stolen property. It is again possible to draw an inference that such witnesses may not have testified in favour of the prosecution. Bukenya and others v Uganda [1972] EA 549 and Kato Kyambade v Uganda [2017] UGSC 32 followed.

[37] There is no circumstantial evidence that connects the appellant to the commission of the offences in question.

[38] PW1 may have been a truthful witness but one cannot discount the very real possibility that she was mistaken in her identification of the appellants. She was not familiar with the appellants not having ever met them before. In light of the testimony of PW4 the conditions obtaining at the time the offences were committed did not favour correct identification.

[39] There is no other evidence to connect both appellants to the crimes much as there was other evidence claimed to have been gathered by the police. There is no explanation why that evidence was not adduced in court. An adverse inference can be drawn from this failure that such evidence as they did not call would have tended not to support their case.

[40] We are satisfied, parting company with the learned trial judge, that the prosecution failed to prove its case beyond reasonable doubt. We would allow ground 1 of the appeal.

[41] It is unnecessary to consider ground 2 which was about sentence.

Decision

[42] This appeal is allowed. The conviction of the appellants on all 3 counts is quashed. A verdict of acquittal is returned on all counts. The sentences are set aside. We order the immediate release of the appellants unless they are held on some other lawful charge.

Other Remarks

[43] We take leave of this appeal with a significant amount of trepidation. The appellants were arrested about 12 years ago in 2011. It has taken the wheels of justice this long to find them innocent of the charges raised against them. For all this time they have been in detention. If this were a lone case one would assume that lessons have been learnt. Unfortunately, that is not the case. In this session alone 2 appeals collapsed as the appellants had served their sentences of 17 years and 18 years' imprisonment respectively. This is merely the cusp of a state of lethargy devouring the justice system. It behoves those responsible for the administration of justice in every way in this country and us to make haste in dealing with this crisis. It is a national scandal of epic proportions.

Signed, dated and delivered at Fort Portal this 16th day of October 2023

Fredrick Egonda-Ntende
Justice of Appeal

Catherine Bamugemereire
Justice of Appeal

Monica Mugenyi
Justice of Appeal

15/10/2023
Both appellants [illegible] court [illegible]
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16/10/2023