THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: B Cheborion, JA, C. Gashirabake, JA, O. Kihika, JA.)

CRIMINAL APPEAL NO. 0215 OF 2020

(Arising from Criminal Session No. HCT-00-CR-CS-177/2013)

BETWEEN

ZIRABA MOHAMMED.....APPELLANT

AND

UGANDA.....RESPONDENT

(Appeal from the Judgment of the High Court of Uganda Holden at Soroti, by Batema N.D.A, J. delivered on 13th April 2018)

JUDGMENT OF COURT

Introduction

1.] The appellant was charged with 5 counts of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act. The appellant was convicted and sentenced to 20 years' imprisonment to run concurrently on counts 1 and 2. The trial Judge deducted the 5 years spent on remand and ordered that the appellant serve a sentence of 15 years. The appellant was acquitted on counts 3,4 and 5.

2.] The appellant being aggrieved with the decision of the High Court lodged an appeal in this court. The appeal is premised on two grounds set out in the Memorandum of Appeal as follows;

1. *That the learned trial Judge erred in law and fact when he held that the prosecution had proved the ingredient of participation of the Appellant in the robbery.*

2. *The learned trial Judge erred in law and fact when he sentenced the appellants to 20 years' imprisonment to run concurrently which sentence is harsh and excessive in the circumstances*

Representation

3.] At the hearing of the appeal, the appellant was represented by Mr. Allan Mooli. The respondent was represented by Mr. Simon Ssemalemba, Chief State Attorney.

Ground one

That the learned trial Judge erred in law and fact when he held that the prosecution had proved the ingredients of participation of the appellant in the robbery.

Submissions for the appellant

4.] It was submitted for the appellant that the prosecution bears the burden to prove beyond reasonable doubt that there was the theft of the property belonging to the victim, the theft was accompanied by the use of violence or threat of use of violence, possession of a deadly weapon during the theft and participation of the accused person as the ingredients of aggravated robbery.

5.] It was conceded by counsel for the appellant that the trial Judge properly evaluated the facts that there was the theft of property belonging to the victim, that theft was accompanied by the use of violence or threat of violence, and possession of a deadly weapon during the theft. The contention however was that the trial Judge did not properly evaluate the evidence regarding the participation of the appellant beyond reasonable doubt.

6.] Counsel submitted that the prosecution case was hinged on one single identifying witness PW1, Kitimbo Stephen who is the victim in counts 1 and

2. It was submitted that PW1 testified that in April 2013, he and other businessmen left Soroti at 7:00 p.m., and they reached the scene of the robbery at 1:00 a.m. between Kachumbala and Nakaloke, because the road was under construction. PW1 further testified that the appellant and others jumped out of the bush with pangas and stopped them. The appellant and the others ordered PW1 and the other businessmen to come out of the motor vehicle. The assailants told them to lie down and they tied them with ropes. PW1 further testified that they took him with the other occupants of the Motor Vehicle Fuso Fighter Lorry UAQ 948L, down the swamp and tied them on trees. PW1 told the Court that the appellant was putting on an army uniform. Additionally, PW1, testified that the assailants were harsh and that one of them took his Shs. 65,000. He further testified that they took off with their motor vehicle. Thereafter the driver was able to untie himself and rescue them. The vehicle was intercepted by Police at Iganga where PW1 met the appellant. PW 1 testified that he identified the appellant that night since there was moonlight. That at 7:00 a.m. he met the accused person under arrest at Iganga Police and that he was putting on a T. shirt and not an army uniform.

7.] It was submitted that this court should be cautious while considering the evidence of a single witness. Counsel relied on **Abudala Nabulere & 2 Others vs. Uganda, CACA No.9 of 1978,** and **Walakira Abas, Sgt. Kizito Joseph and Munakanira John vs. Uganda, SCCA, No.25 of 2002.**

8.] Counsel further submitted that in the instant appeal, it is clear that the only identifying witness is PW1 who is the victim of the robbery. PW2 Inspector of Police Eradu Julius testified that he met the truck already impounded at Nakalama. One of the occupants jumped off and ran away. The appellant remained sitting in the truck and he was arrested. It was further submitted that PW2 testified that the appellant said there were four in the robbery. The

appellant stated that the one who jumped off the motor vehicle was a "born of Kaliro." PW2 told the Court that he could not tell whether the appellant was the driver.

9.] It was submitted that the appellant admitted being arrested from the said lorry but in his defence, he argued that he boarded the truck around the Mbale clock tower on his way to Jinja. When he boarded the truck, he found 4 people in the said vehicle. The appellant further testified that he found a sit in the driving cabin behind the driver. The appellant stated that he did not recognize the colour and make of the truck since it was dark. The appellant further testified that he slept off as the truck moved and was awoken by shouts ordering them to get down from the driver's cabin. The appellant then realized that he was the only one remaining in the truck. He obeyed and stepped down. When he came down, he saw policemen who asked him many questions about the truck but he told them he knew nothing and that he did not know his fellow passengers. It was submitted that the appellant's evidence pokes doubt as to whether indeed PW1 identified the appellant as one of the assailants of the robbery.

10.] It was submitted for the appellant that the robbery took place at around 1:00 a.m., and the victim as a single identifying witness was not familiar with the appellant. The quality of the lighting which was from the moon points to the poor quality which increases the danger of mistaken identity. It was submitted that the risk of mistaken identity could only have been minimized or cleared through an identification parade which was not conducted.

11.] Counsel for the appellant submitted that the conduct of the appellant was that of an innocent person, the appellant did not run when the truck was intercepted by police, unlike the other occupants. Counsel relied on **Rex vs. Tubere s/o Ochen (1945) 12 EACA 63**, where the East African Court of

Appeal held that the conduct of an accused person before or after the offence in question might sometimes give an insight into whether he or she participated in the crime. It was submitted that because there were poor factors of identification, the conduct of the appellant of not running away and the admission of PW1 that he was shown the appellant after arrest at the police station, it was their submission that the prosecution failed to prove the ingredients of participation beyond reasonable doubt. Counsel submitted that it is trite that in **Kooky Sharma and Another vs. Uganda, SCCA No. 44 of 2000**, where the court held that the accused person should be convicted on the strength of the prosecution evidence and not on the weakness of his or her defence.

Submissions for the respondent

12.] It was submitted for the respondent that the learned trial Judge rightly found that the appellant had participated in the robbery. It was additionally submitted that the conditions for identification were favorable for PW1 to positively identify the appellant as one of their assailants. PW1 testified that there was sufficient moonlight. PW1 testified that the appellant was the one commanding the group to tie the victims. This offered enough time for PW1 to observe the appellant. Counsel submitted that the conditions laid down in **Nabulere vs. Uganda, Criminal Appeal No. 09 of 1978**, were fully satisfied. It was the evidence of PW3 that when the appellant was arrested, he revealed that four people participated in the robbery. The appellant told them that the victims of the robbery were left safe and alive in Kachumbala. This corroborated the evidence of PW1 who stated that they were robbed in Kachumbala and none of them was hurt.

13.] It was submitted that what the appellant revealed to PW3 was relevant and admissible within the meaning of S 29 of the Evidence Act and therefore amounted to "*other evidence*" that pointed to the guilt of the appellant.

Consideration of Court

14.] We are mindful that as a first Appellate Court, our powers are spelt out in **Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10.** The Appellate Court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses firsthand. This duty was stated in **Selle & another v Associated Motor Boat Co. Ltd.& others, (1968) E.A 123.**

15.] Considering the burden of proof and standard of proof in Criminal cases and based on the presumption of innocence enunciated in Article 28(3) of the Constitution of the Republic of Uganda 1995, an accused person can only be convicted by a court of law on the strength of the prosecution case and not on the weakness of the defense case.

16.] PW1, Kitimbo Stephen testified that as businessmen they hired a truck to transport their produce from Soroti, on the fateful day at 1:00 am between Kachumbala and Nakaloke road, they were attacked by the appellant and other assailants. PW1 and the other businessmen were moving in a Truck Motor Vehicle Fuso Fighter, Registration No. UAQ 948L. PW1 testified that the appellant and the other assailants jumped out of the bush with pangas and asked them to get out of the truck. The appellant ordered the other assailants

to tie them to different trees. PW1, was able to see the appellant because there was sufficient moonlight. Afterward, the appellant and the assailants drove the truck away.

17.] PW3, Inspector of Police, Eradu Julius, testified that they met the truck already impounded at Nakalama but one of the occupants jumped off the vehicle and disappeared. The appellant was arrested from the truck.

18.] The appellant conceded that he was arrested from the stolen truck. However, he stated that he was looking for transport to return to Jinja when he got the truck at the clock tower in Mbale and they gave him the lift. When they started the journey he slept off only to be awakened by voices in Swahili telling them to come out. When he woke up, the other occupants in the truck had run away.

19.] It was the appellant's submission that the conditions were not favorable for proper identification. The test of proper identification was explicitly outlined in **Abudala Nabulere & 2 Others versus Uganda, Supreme Court Criminal Appeal, No. 09 of 1978,** as follows;

> *"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 mistaken identity is reduced but the poorer the quality, the greater the danger."*

20.] According to the evidence on record, the robbery took place at 1:00 a.m. The appellant and other assailants took PW1 and the other businessmen to the nearby bush and tied them to trees. The journey from the truck to the trees to where they were tied, was sufficient time to recognize the appellant.

The appellant was the one who was issuing commands to the other assailants, this engagement was sufficient for proper identification. Additionally, PW1, stated that he was aided by the moonlight. We therefore agree with the finding of the lower Court that the conditions were favorable for proper identification.

21.] Turning to whether it was fatal not to conduct an identification parade as alleged by counsel for the appellant, the Supreme Court in **Mulindwa Samuel v. Uganda, Supreme Court Criminal Appeal No. 41 of 2000,** held that,

> *"Regarding identification parade, we, with respect, are unable to agree that the failure to hold one was fatal to the appellant's conviction. The object of an identification parade is to test the ability of a witness to pick out from a group the person, if present, whom the witness has said that he has seen previously on a specific occasion. Where identification of an accused person is an issue at his trial, an identification parade should usually be held to confirm that the witness saw the accused at the scene of the crime. However, where other evidence sufficiently connects the accused with the crime, as was the case in the present appeal, failure to hold an identification parade is not fatal to the conviction of the accused person."*

22.] The identification parade is not a mandatory requirement for the identification of an appellant. This means the failure to conduct it may not be detrimental to the prosecution case where there is other cogent evidence that connects the appellant to the crime. See **Baluku Samuel and Another vs. Uganda, SCCA, No.21 of 2014.**

23.] In this case, there was cogent evidence to connect the appellant to the crime. PW1 testified that he saw the appellant at the scene of the crime. PW1

properly described how the appellant was dressed. He also identified him because of the moonlight and the fact that he was the one who was commanding the others to tie the victims to the trees. The evidence of PW1 is corroborated with the evidence of PW3, who testified that the appellant was found in the robbed truck Motor Vehicle. Fuso Fighter, Registration No. UAQ 948L, which the appellant conceded too. We therefore find that the fact that the appellant was found in the stolen truck, is cogent evidence to prove the participation of the appellant. Additionally, PW1 stated that the robbery happened at around 1:00 a.m. and PW4 stated that he received a call at 4:00 a.m. that there was a robbery along Soroti Road. The proximity in time is evident that the appellant was part of the robbery it is not convincible that, the appellant started traveling from Mbale at 10:00 p.m. only to reach Nakalama the place of arrest at 4: 00 a.m. It is more logical that it would take them that long from Kachumbala to Nakalama because of the ongoing construction work. In our view, this evidence was sufficient to connect the appellant to the crime. It was therefore not fatal that the identification parade was not conducted.

24.] This ground therefore fails.

Ground 2

The learned trial Judge erred in law and fact when he sentenced the appellants to 20 years' imprisonment to run concurrently which sentence is harsh and excessive in the circumstances.

25.] It was submitted had the learned trial Judge properly considered the mitigating factors, he would have arrived at a lesser sentence other than the sentence of 20 years. Counsel relied on **Adama Jino vs. Uganda, Court of Appeal, Criminal Appeal No. 50 of 2006,** where the Court of Appeal

reduced the sentence of the Appellant who was charged with 3 counts of aggravated robbery from life imprisonment to 15 years of imprisonment. The court took into account the fact that though gunshots were fired at the time of the robbery, no life was lost. It was submitted that the sentence of 20 years was harsh in the circumstances taking into account the mitigating factors.

Submissions for the respondent

26.] Counsel for the respondent submitted that the sentence passed down against the appellant was neither harsh nor excessive in the circumstances. It was submitted that the trial Judge while sentencing took into account the mitigating factors namely that the victims of the robbery were not physically injured, the goods stolen were recovered, and the fact that the appellant had spent 5 years on remand which he deducted from the sentence of 20 years. Counsel prayed that this Court refer **Mutebi Ronald & Anor vs. Uganda, Criminal Appeal No. 259 of 2019**, where the court held that a sentence of 30 years was neither harsh nor excessive.

It was submitted that this sentence was neither harsh nor excessive and this appeal should be dismissed and sentence upheld.

Consideration of Court

27.] The Supreme Court has laid down the principles upon which an appellate Court should interfere with the sentencing discretion of the trial Court, in **Kyalimpa Edward vs. Uganda; Supreme Court Criminal Appeal No.10 of 1995,** the Court relied on **R vs. Haviland (1983) 5 Cr. App. R(s) 109** and 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 the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Ogalo s/o Owoura vs. R (1954) 21 E.A.C.A 126 and R vs. MOHAMEDALI JAMAL (1948) 15 E.A.C.A 126.

28.] In **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal N0.143 of 2001** it was held:

The appellate court is not to interfere with a sentence imposed by a trial court that has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence.

29.] From the record and the submissions, it is not clear what principle the appellant is faulting the trial Judge. The appellant alleged that the Court did not take into consideration the mitigating factors. However, in his own words, the trial Judge held that;

"The Maximum sentence would be death on each count. I have considered the fact that the victims of the robbery were not physically injured, the goods stolen were recovered, and the fact that the accused has spent 5 years on remand. I sentence the accused to imprisonment of 20 years on count one and 20 years on count 2. I deduct the period spent on remand of 5 years and I order that he serves 15 years concurrently."

30.] In our own analysis of the above holding, we find that the trial Judge properly considered the mitigating factors. We cannot therefore fault him.

31.] This ground fails

32.] Consequently, the appeal fails.

33.] The decision of the lower Court is upheld.

We so Order

Dated at Kampala this 1st **day of** Nov **2023**

.....

CHEBORION BARISHAKI

JUSTICE OF APPEAL

.....

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL

.....

OSCAR JOHN KIHIKA

JUSTICE OF APPEAL