

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Mulyagonja & Mugenyi, JJA

CRIMINAL APPEAL NO. 141 OF 2018

5 **NAKALYAKA FABIANO:.....: APPELLANT**

VERSUS

UGANDA :.....: RESPONDENT

*(Appeal against the decision of Elubu, J, delivered at Iganga on
31st January 2017 in Jinja High Court Criminal Session Case No.
10 113 of 2013)*

JUDGMENT OF THE COURT

Introduction

15 The appellant was indicted on two counts, aggravated robbery contrary to sections 285 and 286(2) and murder contrary to sections 188 and 189 of the Penal Code Act. After a full trial, he was acquitted on the count of aggravated robbery but convicted of murder. He was sentenced to 31 years' imprisonment.

Background

20 The facts that were accepted by the trial judge were that on 12th August 2012, at around 8:30pm at Bugonza Village, Namugongo Sub County in Kaliro District, the deceased, Anthony Kasajja, was in his shop with his brother, Lagwe Ronald, and other people who had come to while away the evening at the shop. The appellant and two others parked their motorcycle

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a short distanced away from the shop and one of them got off and walked into the shop. He said he wanted to buy chewing gum but the deceased did not have any, so the man returned to the motorcycle. The other two men, one of whom was the appellant, then walked to the shop which was lit by lamps. The appellant ordered everyone to lie down demanding that the deceased hands over money to them. Kassajja resisted the order but the appellant told him that he would die if he did not give them money.

One of the men that remained outside the shop then entered it with a gun and cocked it, at which Kassajja lay down. A third man entered and turned off the lamp after which Ronald Lagwe seized the opportunity to ran out of the shop, making an alarm, as he fled. He heard gun shots going off as he fled. The assailants shot at him but he got away, though one of them unsuccessfully tried to block his way and stop him.

When Lagwe got home he informed their father, Kakaire Chrysostom, about the attack and the two returned to the shop. They were informed that Kassajja was shot at and injured but he was rushed to Kaliro Hospital. He was transferred to Iganga Hospital but on the way there, Anthony Kasajja informed his father that Fabiano, the son of Leo, was one of the assailants that attacked them. At Iganga Hospital, Kakaire Chrysostom was advised to take his son to Mulago Hospital because his injuries could not be managed at Iganga. However, just before they set off, Kasajja died.

The appellant was arrested when he went to the Police to report that villagers were threatening to kill him. He was subsequently charged with aggravated robbery and murder but was acquitted of the aggravated robbery and convicted of murder for which he was sentenced to

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imprisonment for 31 years. He now appeals against both conviction and sentence on the following grounds:

1. The learned trial judge erred in law and fact when he failed to evaluate the evidence on record as regards identification or participation of the appellant thereby occasioning a miscarriage of justice to the appellant.
2. In the alternative but without prejudice to the above, the learned trial judge erred in law and fact when he sentenced the appellant to 35 years' imprisonment which sentence was manifestly harsh and excessive in the circumstances.

The appellant prayed that this court allows the appeal, quashes the conviction and/or sets aside the sentence and substitutes it with one deemed more appropriate. The respondent opposed the appeal.

Representation

When this matter came up for hearing on 17th August 2023, Ms. Shamim Nalule represented the appellant. The respondent was represented by Ms. Sharifah Nalwanga, Chief State Attorney in the Office of the Director of Public Prosecutions who was holding the brief for Ms. Immaculate Angutoko, Chief State Attorney.

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, SI 13-10. 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

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