THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORTPORTAL

CRIMINAL APPEAL NO. 04 OF 2021

(ARISING FROM FPT-00-CR-CO-135-2019

MPAMIZO ROBERT==========APPELLANT

VERSUS

UGANDA==========RESPONDENT

BEFORE HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The appellant being aggrieved and dissatisfied by the judgment and orders of the trial Chief Magistrates Court passed on 2nd and March 2021 by which the appellant was convicted on 2 counts of attempted murder c/s 219 of the Penal code act, 1 count of doing grievous harm c/s 219 of the Penal Code Act, and 1 count of assault occasioning actual bodily harm c/s 236 of the Penal Code act and sentenced to 10 years on counts 1 and 2; 5 years on count 2; and 1 year's imprisonment on count 4 appealed to this Honourable Court against both the convictions and sentences.

Facts of the Case:

On the night of 25/3/2019 when PW1 Kedress was sleeping she heard a bang on the door and woke up and switched on the solar lights. PW1 was staying with Barbra Akanyetaba. PW1 opened the door and saw the appellant who cut her on the forehead, shoulder and hand and she fell down and he also cut her on the buttocks and legs. He also cut the hand of Barbra Akanyetaba and the left foot of Akakunda and also cut the granddaughter of PW1 Akamumpa Dephine on the head. The appellant left the scene through the back door. The appellant

raised an alibi and stated that on the night in question he was sleeping at his home. He woke up the next morning at 7.00am and found people gathered in the trading center and the police arrested him. The appellant brought his wife DW3 to support his alibi.

Grounds of appeal:

The memorandum of appeal contained the following grounds:

1. **That the learned Chief Magistrate erred in law and in fact when he failed to evaluate the evidence before him relating to the identification of the appellant at the scene of crime and this occasioned injustice to the appellant.**
2. **That the learned Chief Magistrate erred in law and in fact when he failed to consider the evidence of grudge between the family of the appellant and the complainant's family which occasioned a miscarriage of justice to the appellant.**
3. **That the learned Chief Magistrate erred in law and in fact when he disregarded the grave inconsistencies and contradictions in the prosecution case and consequently arrived at a wrong decision.**
4. **That the learned Chief Magistrate wrongly convicted the appellant against the weight of the evidence showing the appellant was innocent.**
5. **That the sentences passed on the appellant by the learned Chief Magistrate were manifestly excessive and unfair in the circumstances.**

Representation:

The appellant was represented by Counsel Bwiruka Richard of Kaahwa, Kafuuzi, Bwiruka & Co. Advocates who filed written submissions while the respondent filed no submissions.

Submissions for the appellant:

Ground 1: That the learned Chief Magistrate erred in law and in fact when he failed to evaluate the evidence before him relating to the identification of the appellant at the scene of crime and this occasioned injustice to the appellant.

The appellant disputed the participation of the appellant in the offence. Whereas PW1, PW2 and PW3 claimed to have identified the appellant with the aid of solar light, DW2 who was the first person to come to the scene said the house had no solar electricity and he used a torch to see the victims who had been injured. The court must satisfy itself that the conditions were favorable for a correct identification ***(Bogere Moses and another versus Uganda, SCCA 1/1997).*** The appellant raised an alibi which was supported by DW3 his wife who was with him on the night of 25/3/2019. There is doubt as to whether the victims identified the appellant.

Ground 2: That the learned Chief Magistrate erred in law and in fact when he failed to consider the evidence of grudge between the family of the appellant and the complainant's family which occasioned a miscarriage of justice to the appellant.

There is evidence from PW1 of a grudge between the family of the appellant and the complainant who allegedly accused her of witchcraft. This grudge was confirmed by PW1. I was referred to the case of ***Haji Musa Sebirumbi versus***

Uganda, Criminal Appeal No. 10 of 1989 which relied on the case of ***Bumbakali Lutwama and others versus Uganda, Criminal Appeal No. 35 of 1989*** where the court observed that had the learned trial judge given proper consideration to the allegations of grudges, he might not have so easily concluded that the prosecution witnesses were not influenced by the grudges in question.

<u>Ground 3:</u> That the learned Chief Magistrate erred in law and in fact when he disregarded the grave inconsistencies and contradictions in the prosecution case and consequently arrived at a wrong decision.

PW2 testified that when she opened the door to answer an alarm, the attacker cut her head and did not see the accused cutting but at the same time PW1 claims that the accused cut 4 people and yet he found them already cut. According to PW1 the attackers used a door but according to PW4 they used a hole. The grave contradictions pointed to deliberate untruthfulness.

<u>Ground 4:</u> That the learned Chief Magistrate wrongly convicted the appellant against the weight of the evidence showing the appellant was innocent.

DW1 stated that on the fateful night he was at home where he slept and woke up at 7.00am and proceeded to the trading centre where he was arrested. The appellant raised alibi which was supported by his wife DW3. This coupled with the doubtful evidence of identification and the evidence of grudge created doubt as to whether the appellant committed the offence.

<u>Ground 5:</u> That the sentences passed on the appellant by the learned Chief Magistrate were manifestly excessive and unfair in the circumstances.

The sentences totaled to 18 years to run consecutively, which was manifestly excessive and unfair. The convict had 8 children and there was a long standing grudge. He was a first offender aged 37 years.

Duty of First Appellate Court:

The first appellate Court is mandated to subject the proceedings and Judgment of the lower Court to fresh scrutiny and if necessary make its own findings. In ***Bogere Charles vs Uganda, Criminal Appeal No. 10 of 1996***, the Supreme Court held that ***"The appellant is entitled to have the first appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and reconsider the materials before the trial Judge. Thereafter, the first appellate Court must make its own conclusion, but bearing in mind the fact that it did not see the witnesses. If the question turns on demeanor and manner of witnesses, the first appellate Court must be guided by the trial Judge's impression."***

CONSIDERATION OF THE APPEAL:

Ground 1: That the learned Chief Magistrate erred in law and in fact when he failed to evaluate the evidence before him relating to the identification of the appellant at the scene of crime and this occasioned injustice to the appellant.

The trial magistrate observed that PW1 had told court that when she heard a bang on the door she put on the solar lights and when she opened she saw the accused, who started cutting her. PW1 told court that she knew the appellant because the appellant lived in the neighbouring village. PW2 also told court that she knew the appellant Mpamizo who was their neighbour; she was able to see

the appellant because of the solar light. PW3 knew the appellant called Mpamizo because she had grown up seeing the appellant. PW3 heard her mother making an alarm that Mpamizo was cutting her. PW3 held the appellant to stop him from cutting the mother and was able to see him because of the solar light and recognized him. The trial magistrate cited the case of ***Abdulla Naburere and Another versus Uganda, Criminal Appeal No. 9 of 1979*** which quoted the case of ***Abdullah Bin Wendo and Another versus R [1953] EACA at page 166*** citing the relevance of lighting during the incident, familiarity of the assailant to the victim, distance between them, length of time the victim had to observe, and the opportunity to hear the assailant. The trial magistrate noted that all 3 witnesses told court that they knew the accused person before the incident and properly identified the accused since there were factors favouring correct identification. The trial magistrate considered the evidence of DW2 and found that it had been discredited and noted in respect of DW3 the wife of the appellant that she had testified that she could do anything for the sake of her husband. After observing that it was the duty of the prosecution to destroy the alibi of the accused, the trial magistrate found that the evidence of PW1, PW2 and PW3 had placed the accused at the scene of crime as the person who committed the offence. I am aware that where prosecution is based on the evidence of indentifying witnesses, and more so where the conditions were not favourable to correct identification, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity **(see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)*.** In my careful re-evaluation, the trial magistrate properly evaluated the evidence before him relating to the identification of the appellant at the scene of crime and reached a proper decision that did not in any way occasion any injustice to the appellant. I am satisfied that in the circumstances, there was no

possibility of error in their identification and recognition of the accused. Ground 1 of the appeal fails.

<u>Ground 2:</u> That the learned Chief Magistrate erred in law and in fact when he failed to consider the evidence of grudge between the family of the appellant and the complainant's family which occasioned a miscarriage of justice to the appellant.

The trial magistrate considered the issue of the grudge between PW1 and the accused where the grudge between PW1 and the accused where the accused's family was accusing PW1 of witchcraft. It was the evidence of PW3 that the parents of the accused accused PW1 of bewitching the family of the accused and it was why the accused attacked them. This grudge made it more likely that the accused could commit the offence. The trial magistrate therefore rightly considered the existence of the grudge in favour of the prosecution given that the prosecution evidence had properly placed the accused at the scene of crime as the person who had committed the offence.

I find that that the learned Chief Magistrate did consider the evidence of grudge between the family of the appellant and the complainant's family and resolved it in favour of the prosecution and his approach did not, given the nature of the evidence, occasion any miscarriage of justice to the appellant. This ground of appeal fails.

<u>Ground 3:</u> That the learned Chief Magistrate erred in law and in fact when he disregarded the grave inconsistencies and contradictions in the prosecution case and consequently arrived at a wrong decision.

It is trite law that that grave contradictions unless satisfactorily explained may, but will not necessarily result in the evidence being rejected and minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually be ignored **(see *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002*** and ***Uganda v. Abdallah Nassur [1982] HCB*****).** The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case.

It was submitted that PW2 testified that when she opened the door to answer an alarm, the attacker cut her head and she did not see the accused cutting but at the same time PW2 claims that the accused cut 4 people and yet he found them already cut.

PW2 stated as follows: ***"I then moved from my room to where my grandmother was, as I moved the accused cut me and ran away. It was at night. I was able to see him. There were lights. The solar light of our bedroom was on. I went to my grandmother's bedroom. The accused was still on the bedroom, when I pushed the bedroom door that is when he cut me".*** I did not find any contradiction or major contradiction in this evidence.

It was submitted that according to PW1 the attackers used a door but according to PW4 they used a hole. Upon my revaluation however, PW1 in cross examination stated that the attackers had dug a hole to enter the house. PW4 also stated that the person dug a hole behind the house which was the point of entry. There was no contradiction.

Ground 3 also fails.

<u>Ground 4:</u> That the learned Chief Magistrate wrongly convicted the appellant against the weight of the evidence showing the appellant was innocent.

It was submitted that DW1 stated that on the fateful night he was at home where he slept and woke up at 7.00am and proceeded to the trading centre where he was arrested. That the appellant raised alibi which was supported by his wife DW3. That this coupled with the doubtful evidence of identification and the evidence of grudge created doubt as to whether the appellant committed the offence.

I find that the trial magistrate having properly analysed the evidence of identification and found it free from the possibility of error, it thereby destroyed and disproved the alibi as well the evidence of grudge. The learned trial magistrate properly convicted the appellant. This ground of appeal also fails.

<u>Ground 5:</u> That the sentences passed on the appellant by the learned Chief Magistrate were manifestly excessive and unfair in the circumstances.

It was submitted that the sentences of 10 years, 5 years, 2 years, and 1 year on counts 1, 2, 3, and 4 respectively, that totaled to 18 years to run consecutively, was manifestly excessive and unfair. The convict had 8 children and there was a long standing grudge. He was a first offender aged 37 years.

It is a part of our law that sentences can be structured as concurrent (to be served at the same time) or consecutive (to be served one after the other). On the basis of our law, a consecutive sentence is the norm while a concurrent

sentence is an exception to be determined by the court as stipulated by section 175 (1) of the Magistrates Courts Act (MCA). Section 175 (1) of the MCA directs that where there are various sentences, the sentences shall run consecutively unless the court otherwise directs that they shall run concurrently Section 175(1) of the Magistrates Courts Act states that: ***When a person is convicted at one trial of two or more distinct offences, the court may sentence him or her, for those offences, to the several punishments prescribed for them which the court is competent to impose, those punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that the punishments shall run concurrently.***

Sentencing is a matter in which a judicial officer exercises discretion and furthermore judicial discretion should be exercised judicially. More specifically, Judicial Officers have the discretion to decide the manner in which the sentences given will be served – whether concurrently or consecutively. The general rule is for the court to impose a consecutive sentence and a convict will only concurrently serve sentences arising out of distinct offences if the court so directs and it is expected that the court should state the reasons. In ordering a consecutive sentence, the total sentence must be proportionate to the offence and the circumstances surrounding each case. (**Magala Ramathan versus Uganda, SCCA No.01 OF 2014).**

The maximum punishment for attempted murder is life imprisonment. For doing grievous harm it is 7 years. For assault occasioning actual bodily harm it is 5 years. The trial court heard and considered the aggravating factors presented by the prosecution and the mitigating factors presented on behalf of the appellant. The mitigating factors were that the appellant was a parent with 8

children and he was remorseful and had religiously attended court while on bail. That there was a long standing grudge between the two families which had culminated in the commission of the offences. The aggravating factors were that one victim lost an arm. A baby lost a left foot. They sustained permanent injuries which have disabled them. He cut the head and arm of 2 other victims. They were women alone. The trial court after hearing and considering the aggravating factors presented by the prosecution and the mitigating factors presented on behalf of the appellant observed that the appellant had mercilessly cut off the left arm of PW1 and the left foot of the baby and cut on the head and arm of other two girls who were helpless in the house being women alone. The trial court found it fair, just and in the interests of justice that the convict is given reformatory and deterrent sentences for the serious offences he committed. The court stated that it would not impose the maximum sentence of life imprisonment on count 1 and count 2.

In pronouncing the number of prison years for each count and that the sentences would run consecutively, the trial court mentioned the justification for the sentence – reformatory and deterrent. I therefore find that the trial court judicially exercised its judicial discretion and find no reason to interfere with the sentences awarded to run consecutively. This ground also fails.

The entire appeal fails for lack of merit and it is hereby dismissed. The conviction and sentence of the trial court are upheld. It is so ordered.

Vincent Wagona

High Court Judge / Fort Portal

Date: 08/04/2024