**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA SITTING AT MASAKA**

**CRIMINAL APPEAL NO. 11 OF 2011**

**1. MIRIYO KWEMALAMALA**

**2. SSERUNKUMA SANDE :::::::::::::::::::::::::: APPELLANTS**

**VERSUS**

**UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

*(Arising from the judgment of Justice Lugayizi in Masaka High Court Criminal Session Case No. 015 of 2009)*

**CORAM: HON. JUSTICE EGONDA NTENDE, JA**

**HON. JUSTICE HELLEN OBURA, JA**

**HON. JUSTICE STEPHEN MUSOTA JA**

**JUDGMENT OF THE COURT**

The appellants were indicted and convicted of the offence of Aggravated Robbery C/S 286(2) and (3) of the Penal Code Act and sentenced to 18 years imprisonment.

**Background**

On 2nd August 2008 at Lwensu village in Sembabule district, the appellants found the complainant on her way from her kitchen with food and a candle. They blew out the candle, grabbed her and forced her into her bedroom. They put her on her bed, tied her up with her hands behind her back using her petticoat. They demanded for money which she said she did not have and they threatened to kill her. She managed to bite one of them on his thumb. They cut her with a knife at the back of her neck from which she started bleeding and got very scared. She told them where the money was and they took 417,000/=. She identified them by the candle light and she also knew them from her village. The two appellants left the complainant tied up and took her sack of ground nuts. She later managed to untie

herself and raised an alarm which brought some of her neighbors to her rescue. The appellants were subsequently arrested, indicted, tried and convicted of the offence of Aggravated Robbery and sentenced to 18 years imprisonment.

The appellants were dissatisfied with the decision of the High Court and filed this appeal on the following grounds;

1. That the learned trial Judge erred in law and fact when he found that the Appellants had been positively identified, whereas not.
2. That the learned trial Judge erred in law and fact when he meted out a manifestly harsh and excessive sentence on the appellants.

**Representation**

At the hearing of the appeal, Mr. Henry Kunya and Mrs. Nabirye Sarah Lumu appeared for the appellants on state brief while Ms. Ann Kabajungu appeared for the respondent.

**Submissions of the appellants**

Counsel for the appellants submitted that whereas the complainant testified that she recognised the appellants with the help of a *tadooba* and their voices, there is nothing on record as regards the voice identification and what was exactly said by the assailants to enable her confirm her evidence. In addition, when she raised the alarm, PW2 responded but she never disclosed the identity of the assailants at the first instance to him. PW2 confirms this in his evidence when he testified that he asked her what the trouble was and she said she had been attacked and she was naked. There was no mention of who the attackers were and she refused to go to the chairman LCs office and the police to report the matter despite the advice of PW2. PW1 also testified that she reported the matter to the police the following morning and told the police the identities of her attackers.

Furthermore, PW1 testified that the incident took place for about 3 hours which was inconceivable for a robbery to take place for that long. Learned counsel further submitted that since it was dark, it is not possible that PW1 managed to identify the assailants even though

she had a small lamp. That the trial court did not warn itself about the danger of convicting on the evidence of the single identifying witness as was held in the case of **Abdallah Nabulere and others Vs Uganda [1979] HCB 77.**

On ground two, counsel submitted that the aspect of the mitigating factors which had been raised by the appellants were not appreciated by the learned trial judge when he handed down an18 year imprisonment sentence on the appellants. He cited the case of **Kimera Zaverio Vs Uganda CACA No. 427 of 2010** and submitted that there was ambiguity in the sentence that the learned trial Judge passed. That considering the items that were stolen, the 417,000/= and a sack of groundnuts, the sentence of 18 years is harsh and excessive in the circumstances. He prayed that this court re-evaluates the evidence on record and allow this appeal accordingly.

**Submissions of the respondent**

Counsel for the respondent submitted that the appellants were properly identified. PW1 testifies that she knew the appellants for more than 8 years and on the night of the robbery, she had a *tadoba* which she was holding on top her head. Although the appellants blew out the lamp, she was able to identify them before they did that. That she also interacted with them during their demand for the money when she talked with them. So apart from the visual identification there was also the audio identification.

That upon the attempt to arrest the 2nd appellant, when he saw PW4 and another person he had gone with, he abandoned the bicycle he was riding and ran away. Counsel submitted that it is true the trial court did not properly execute its role in evaluating the evidence and prayed that this court reappraises the evidence and reaches its own decision.

In regard to the 2nd ground of appeal, that the trial judge imposed a sentence of 18 years on each of the appellants and stated that the time that the appellants had so far spent on remand will be deducted from the sentence. Counsel conceded that it was ambiguous and as such illegal and invited court to re-sentence the appellants. Counsel

argued in aggravation that the appellants attacked a 50 year old woman and robbed her of 417,000 and a sack of ground nuts and the circumstances of the robbery were that it was violent and there was use of a deadly weapon (a knife) on her neck which is a vulnerable part of the body.

This is a first appeal and this court takes cognisance of the established principles regarding the role of a first appellate court. The cases of **Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997** and **Pandya v. R [1957] EA 336,** and **Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997** in essence have established that a first appellate court must review/rehear the evidence and consider all the materials which were before the trial Court, and come to its own conclusion regarding the facts, taking into account that it has neither seen nor heard the witnesses; and in this regard, it should be guided by the observations of the trial court regarding demeanour of witnesses.

**Rule 30** of the **Judicature (Court of Appeal Rules) Directions SI 13-10** is also relevant. It provides that;

> *30. Power to reappraise evidence and to take additional evidence*
>
> *(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*
>
> *(a) Reappraise the evidence and draw inferences of fact; and*
>
> *(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*

We have had the above principles in mind in resolving this appeal. We shall resolve the grounds in the way in which the parties have argued them.

Ground 1 is on the issue of the conviction for aggravated robbery without proper identification of the appellants.

What we have to determine is whether the conditions under which the appellants were identified favored correct identification.

PW1 testified that she was able to identify the appellants by the *tadooba* she was holding before they blew it out. In addition, that she also recognised their voices since she had known them for about 8 years. She testified that;

"As I entered the house I held a lamp (wick lamp) over my head. I had put my food down to open the door when some people came and pushed me down. They held my mouth and blew out the wick lamp. They pushed me into my tea room. However, before the lamp was blown out I had recognized the attackers; and I also knew their voices."

PW2 testified that he heard the alarm made by PW1 and answered it. She said she had been attacked but refused to go to the police or LC chairperson that night. PW2 decided to report the matter himself to the LC Chairman.

PW3, a policeman, testified that PW1 went to the police station at around 8pm on a Sunday and reported the case against the 2nd appellants. He arrested the 1st appellant but does not know when the 2nd appellant was arrested. PW4 testified that he participated in arresting the 2nd appellant at a shop near his other home at Kawanga.

On the defence side, DW1, the 2nd appellant, testified that on that day, he was at home when he heard an alarm in the neighbourhood. His wife and children were in the sitting room when his wife told him she heard people shouting in the neighbourhood. He ran out and found PW2 and one Sali at the scene. They had just arrived and PW1 explained to them what had happened to her. PW2 asked her if she recognized the assailants and she said no. Later on he was arrested for having committed the offence.

DW2, the 1st appellant testified that he had migrated to Kawanga and had taken a while without living in this neighbourhood. That the LDU told lies when he said he met him and he abandoned his bicycle and

ran away. That it was his son who was riding a bicycle and he later recovered it from police.

It has been reiterated time and again in a series of decisions by this Court and its predecessors, that where prosecution is based on evidence of a single identifying witness the Court must exercise great care so as to satisfy itself that there is no danger of basing conviction on mistaken identity. It was stressed in the case of **Abdulla Nabulere and another v. Uganda [1979] HCB 77** that;

> *"Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time, the victim had to observe and even the opportunity to hear the assailant are factors to look out for.*

The Court said;

> *"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. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."*

DW2 testified at trial that he is not the one who was riding a bicycle and that it was his son. The appellants' counsel also argued that the trial Judge failed to warn himself on the danger of convicting on evidence of a single identifying witness. The conditions the trial Judge considered favorable were the wick lamp and the voices of the assailants which PW1 said enabled her to properly identify the appellants. We however find that the conditions for identification were wanting. First, PW1 testified that she was pushed down while at the door with the wick lamp on her head. It obviously fell down and was put out either by the assailants or the wind. All this happened when she was at her house door after which the assailants took her inside which she says was totally dark.

She raised an alarm and PW2 came to her rescue but she did not disclose to him as having recognized the assailants. DW1 was actually among the people who answered the alarm, according to his evidence, but all this time, PW1 did not disclose that she recognized the assailants. We do not, in this respect, find as the learned trial Judge did. We find that there was a misdirection on his Lordship's part to hold that there were conditions for proper identification. There was also no other corroborative evidence to support the prosecution case. The allegation that DW2 was found riding a bicycle which he abandoned and ran off was disputed by DW2's evidence when he said he was not the one on the bicycle but it was his son. This evidence was never disputed by the prosecution.

The learned trial Judge based his finding on isolated evaluation of the prosecution evidence alone which was contrary to the decision of **Bogere Moses and Another v. Uganda (SC) Criminal Appeal No I of 1997** (unreported). In that case, it was held among other things that,

> *"Court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused was at the scene of crime and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time. It is incumbent on the Court to evaluate both versions judiciously and give reasons why .... the other version is accepted ..... "*

The general rule in criminal cases is that the burden of proof lies on the prosecution to prove its case. (See **Woolmington Vs DPP 1935 ALL ER 460).** In the instant case, prosecution failed to prove proper identification.

The learned trial Judge did not consider the alibi raised by both appellants and in the same manner, the prosecution did not disprove the alibi as raised by the appellants. Ground one of the appeal therefore succeeds.

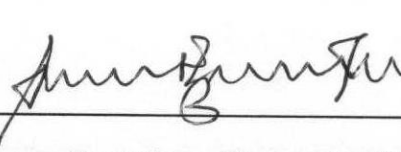
Having resolved the 1st ground the way we have, it automatically resolves the 2nd ground concerning the harshness and excessive

sentence. Sentencing the appellants was erroneous in the circumstances. The sentences that were based on a wrong conviction are set aside

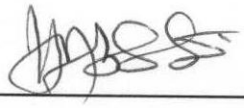
This appeal therefore succeeds. We set aside the conviction and sentence of the trial court. We order immediate release of the appellants unless they are held on other lawful charges.

We so order.

Dated this ..30th.... Day of .....July..... 2018



**Hon. Justice Egonda Ntende, JA**



**Hon. Justice, Hellen Obura, JA**

**Hon. Justice, Stephen Musota JA**