THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA SITTING AT MBARARA

CRIMINAL APPEAL NO. 678 OF 2015

TWINAMATSIKO SEPRIAN :::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

(Appeal arising from the decision of the High Court of Uganda at Kabale before Hon. Justice Michael Elubu delivered on the 30th day of May, 2014 in Criminal Session Case No. 48 of 2012).

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF COURT

The appellant was charged and convicted of Aggravated Robbery contrary to section 285 and 286(2) of the Penal Code Act and sentenced to 22 years imprisonment. The appellant was dissatisfied with the findings of the trial court and filed an appeal in this court on the following grounds;

1. The Learned Trial Judge erred in law to have convicted the Appellant without sufficient evidence to sustain the charge.

2. The Learned trial Judge erred to sentence the Appellant to 22 years imprisonment which was a harsh sentence.

Background

The facts of the case as accepted by the learned trial Judge are that on 13th of November 2011 at Kisumu Village, the Appellant and others (who remained at large) robbed Semahoro Gideon and Mukundufite Henry of cash Ug. Shs. 200,000/= and Ug. Shs. 300,000/= respectively and used ropes and knives upon the victims. The attackers met one Semahoro Gideon while on his way back home, grabbed him, threw him down, tied him with a rope, stabbed him on the ear with a knife and stole from him 200,000/=. Semahoro raised an alarm which was answered by Mukundifite Henry and when he reached at the scene, he was also grabbed and robbed of Ug. Shs. 300,000/= but managed to ran away while raising an alarm. Mukundufite went to the home of Twede Esau and informed him of the robbery and they went back together to the scene to rescue Semahoro and when the attackers saw them, they ran away leaving the rope behind. Sematarо Gideon and Mukundufite Henry managed to identify the Appellant.

Representation

At the hearing of the appeal, Ms. Nuwagye Jacent appeared for the appellant while Ms. Alleluya Glory, a State Attorney, appeared for the respondent.

Appellant's submissions

Counsel submitted that the conviction of the appellant was based on evidence of a single identifying witness amongst difficult conditions of identification given that the offence was committed at night. Corroboration is independent evidence that tends to connect the accused to the commission of the offence and gives support to the evidence of the single identifying witness which, in this case was not there. Counsel submitted that in the absence of evidence to corroborate the evidence of a single identifying witness, the trial Judge ought to have warned himself of the dangers of convicting on

uncorroborated evidence of a single identifying witness. The Learned Judge did not warn himself of such a danger and thus erred in convicting the appellant of the offence of aggravated robbery.

Counsel also argued that the Learned Judge made a gross error when having sentenced the appellant to 20 years imprisonment, he went on to state in his judgment that the appellant had been sentenced to 22 years imprisonment after deducting the period spent on remand and that this error occasioned a miscarriage of justice to the appellant.

Respondent's submissions

In reply, counsel for the respondent submitted that the appellant was properly identified since PW1 knew him from birth and recognized him with the help of the moonlight. That the learned trial Judge warned himself of the danger of convicting on evidence of a single identifying witness. The factors surrounding the commission of the offence were favorable to proper identification and as such the learned trial Judge did not commit any error.

Counsel submitted that the learned trial Judge took into account all the mitigating and aggravating circumstances of the case and sentenced the appellant to 20 years imprisonment. The stating of 22 years imprisonment as the sentence passed upon the appellant instead of 20 years was a mathematical error. Counsel invited this court to invoke its powers to rectify it. Subject to correcting the sentence passed upon the appellant from 22 years to 20 years imprisonment, learned counsel for the respondent prayed for the dismissal of the appeal.

Consideration of the Appeal

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate all the evidence, draw inferences therefrom, and reach its own conclusion on the evidence, bearing in mind that it did not see the witnesses testify. (See **Pandya v R [1957] EA p.336**

and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997. In the latter case, the Supreme Court held that;

> *"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the 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 review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

We have kept these principles in mind in resolving this appeal. The offence of aggravated robbery is provided for under sections 285 and 286 (2) of the Penal Code Act and it provides;

> *"285. Definition of robbery.*
>
> *Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.*
>
> *286. Punishment for robbery.*
>
> *(1) Any person who commits the felony of robbery is liable— (a) on conviction by a magistrate's court, to imprisonment for ten years; (b) on conviction by the High Court, to imprisonment for life.*
>
> *(2) Notwithstanding subsection (1) (b), where at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any*

other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death.

(3) In subsection (2), "deadly weapon" includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death."

Therefore, to prove the offence of aggravated robbery c/s 285 and 286 (2) of the Penal Code Act, the prosecution has to prove the following elements of the offences:

1. There was theft of property.
2. Use of actual violence at, before or after the theft or that the accused caused grievous harm to the complainant.
3. The assailants were armed with a deadly weapon before, during or after the theft.
4. The accused participated in the robbery.

In determining the above issues, court has to bear in mind the established principles of the law that the burden of proof is on the prosecution to prove all the elements of the offence beyond reasonable doubt. The burden never shifts save in a few cases provided for by the law. Even where the accused sets up a defence, the burden does not shift to the accused to prove his innocence. The burden still remains upon the prosecution to prove that nonetheless, the offence was committed by the accused. We shall proceed to re-evaluate the evidence on record for the offence of aggravated robbery in relation to the appellant.

To prove the 1st element of theft of property, the prosecution relied on the evidence of PW1, the complainant, who testified that on 13th November 2011 at 8:30pm, he was on his way home when he found 7 people assaulting Semahoro and they grabbed him too and the appellant stabbed him with a knife. They stole Ug. Shs. 300,000/=

from PW1 who stated that he recognized them by moonlight. After making an alarm, Twende came to PW1's rescue and the assailants ran away. PW1 had known the appellant from birth as he was born in the next village. PW3 also testified that Henry (PW1) came to his home at about 8:30pm shouting for help and when he went to the scene, he found Semahoro with a rope around the neck and Henry had a stab wound on his head but he did not recognize the assailants because he found them running away.

In his defence, the appellant testified that on the day the offence was committed, he met Mukundufite and he arrested him but he did not know why he was being arrested. He was taken to police and was remanded to prison.

The appellant's argument in this appeal is that he was not properly identified by the single identifying witness and court ought to have warned itself of the dangers of convicting on evidence of such a single identifying witness.

From the evidence on record, we note that the appellant was convicted on evidence of a single identifying witness being PW1.

The leading case in dealing with evidence of a single identifying witness is the decision of the former Court of Appeal of East Africa of **Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166** cited with approval in **Roria v. R. (1967) EA 583** in which it was held that:—

> *(a) The testimony of a single witness regarding identification must be tested with the greatest care.*
>
> *(b) The need for caution is even greater when it is known that the conditions favoring a correct identification were difficult.*
>
> *(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.*

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

In the present case, the appellant was identified by PW1 who testified that there was moonlight at the time the offence was committed and he knew the appellant personally since he was born in the neighboring village. The learned trial Judge held that;

> *"PW1, Mukundifite Henry, was a sole identifying witness. The Law is that a single witness can prove a fact. But respecting identification, where there is a sole identifying witness the court must proceed very cautiously evaluating the conditions under which identification is made. It is especially crucial where the identification was done at night and during a violent encounter. The witness in such a case may be truthful but mistaken.* ***See Roria Vs R [1967] EA 583 and Abdulla Nabulere and Ors Vs Ug Cr App No 9/1978)***
>
> *I warn myself of this danger"*

From the above excerpt, we do not agree with the appellant's counsel assertion that the learned trial Judge failed to warn himself of the dangers of convicting on the evidence of a single identifying witness. In addition, there were conditions favoring proper identification as there was moonlight and the appellant was personally known to PW1 since his childhood. An appellate court will only interfere with the findings of fact of a trial court if there is no evidence to support a particular conclusion. It is our considered view that there were proper conditions for identification of the appellant and we find no reason to interfere with the findings of the learned trial Judge. Ground one of the appeal therefore fails.

Review of sentence

It is trite law that an appellate court should not interfere with the discretion of a trial court in imposing a sentence unless the trial court acted on a wrong principle or overlooked a material factor or where the sentence is illegal or manifestly excessive or too low to amount to a miscarriage of Justice See: **Kyalimpa Edward v. Uganda SC Cr. App No. 10 of 1995, and Kyewalabye Bernard v. Uganda Criminal App. No. 143 of 2001.**

While sentencing the appellant, the learned trial Judge stated that;

> *"The convict shall be treated as a first offender. The convict is a youthful man. The convict is said to have acted under peer pressure. The court finds however that the convict took a leading role in the commission of the offence in a gang. It was him who wielded the dangerous weapon and took the knife to the head of the victim. The convict could have killed the victim. This offence is rampant and court must punish such lawlessness. The court must deter those of a like mind. The court notes that maximum sentence is death and the guidelines for a sentencing point of 35 years. (Sic)*
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> *This court finds that the circumstances and the nature eliminates the possibility of community service. Further, the mentioned mitigating factors, the court finds a sentence of 20 years appropriate. It is reduces by the 3 years spent on remand and convict shall serve 22 (twenty-two) years in prison."*

The sentencing order of the learned trial Judge is ambiguous. We do not agree with counsel for the respondent that the 20 and then 22 years was a mathematical error. We therefore set the sentence imposed by the learned trial Judge aside and go ahead to re-sentence the appellant under Section 11 of the Judicature Act.

The appellant was a first offender and a 19 year old young man at the time the offence was committed. He was said to have acted under peer pressure. He however was the leader of the gang that committed

the offence of aggravated robbery. He stabbed the victim on his head which could have caused his death and as such, there is need to deter such acts in society. We consider the sentence of 15 years appropriate in the circumstances of this case. We deduct the 3 (three) years spent on remand and sentence the appellant to 12 years imprisonment from the date of conviction.

Dated this 20th day of November 2020

Hon. Justice Elizabeth Musoke, JA

Hon. Justice Stephen Musota, JA

Hon. Lady Justice Remmy Kasule, Ag. JA