THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

CRIMINAL APPEAL NO. 120 OF 2010

1. OKUCU JOEL
2. OKELLO OKORI TOM.....APPELLANTS

VERSUS

UGANDA.....RESPONDENT

(An appeal from the decision of the High Court at Lira before His Lordship Hon. Justice Byabakama Mugenyi Simon dated 7thJuly, 2010 in Criminal Session Case No. 0092 of 2008)

CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE F.M.S EGONDA- NTENDE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

IUDGMENT OF THE COURT

This appeal arises from the decision of His Lordship Byabakama Mugenyi Simon J, (as he then was) in High Court Criminal Session Case No. 0092 of 2008 delivered on 7th July, 2010 at Lira.

The appellants were convicted of one count of aggravated robbery contrary to *Sections 285* and *286 (2)* of the Penal Code Act and two counts of attempted murder Contrary to *Section 204* of the Penal Code Act (CAP 120). They were each sentenced to 25 years on count one and 8 years imprisonment on counts two and three. Each of them was ordered to pay 750,000/= (Seven Hundred fifty thousand shillings) to the complainants as compensation. Being dissatisfied with the decision of the High Court they appealed to this Court on the following grounds;-

1. *The trial Judge erred in law and fact when he failed to properly evaluate the evidence thereby reached the wrong conclusion that the appellants were properly identified at the scene of the crime.*

2. *The trial Judge erred in law and fact when he failed to properly evaluate the evidence thereby reached a wrong conclusion that there was sufficient evidence to support the offence of attempted murder.*

3. *The trial Judge erred in law and fact when he failed to properly evaluate the evidence and thereby reached the wrong conclusion that the inconsistencies and contradictions were minor and convicted the appellant on insufficient evidence thereby occasioning a miscarriage of justice.*

In the alternative

4. *The trial Judge erred in law and fact when he passed very harsh sentences in the circumstances to a term of 25 years on count one and 8 years for each of the counts 2 and 3 together with an order for payment of 1.500.000/= (One million and five hundred thousand shillings) thereby occasioning a miscarriage of justice.*

Brief Background.

The facts as accepted by the trial Judge are that on the 22nd day of February 2006, the victims were at their home when they were attacked by two armed men with a gun while the other had a powerful torch. The time was 9:00 pm. Awongo Jimmy (PW1) was inside the house while his wife Awongo Eseza (PW2) was outside. PW2 upon seeing the assailants ran inside the house and

she tried to close the door behind her but she was shot and seriously injured. PW1 tried to hide the money he had on him but one of the assailants grabbed it and fled from the scene. The two appellants were arrested more than a year later. They gave sworn evidence. The 1st appellant set up an *alibi*. He testified that he was at *Wansolo* landing site in *Apac* District on the day of the incident and was away for 8 months from 19th December, 2005. Further that, he did not know the victims till when he was arrested on 6th June, 2007. The 2nd appellant also set up an *alibi* that he was at his home the whole day of the incident and that he did not know anything about the victims until his arrest on 24th August, 2007. Based on the above facts both appellants were convicted and sentenced as stated above.

Representations

The appellants were at the hearing of this appeal represented by learned Counsel *Ms. Harriet Namata* while *Ms. Rose Tumuheise* learned Counsel from the Office of the Director Public Prosecutions represented the respondent.

The Appellant's case

Counsel for the appellants argued grounds 1 and 3 together. She submitted that, there were inconsistencies in the prosecution case. She attacked the evidence of PW1 and PW2 as unreliable, arguing that their claim of having properly identified the 2nd appellant by the way he was dressed, cast strong doubts on the correctness of the identification as other witnesses who were also at the scene of crime at the same time were unable to identify the accused persons as the assailants. She further argued that, PW2 and PW3's testimony as to the source of light was contradictory whereas PW2 testified that she had not recognised the attackers until a one Kyambadde flashed a torch at them,

PW3 testified that the source of light was moonlight. PW1 also testified that the 2nd appellant fired a gun shot at the lamp but it remained giving light with which he was able to identify the assailants. She concluded that, there were serious contradictions on matters of identification which the trial Judge erroneously treated as minor hence arriving at a wrong decision.

In the absence of a medical examination report detailing and clarifying the nature of injuries, Counsel argued that the offence of attempted murder had not been proved.

Counsel further contended that, the complainants delayed to report the case to the police. She submitted that the case was reported after 1 year and 4 months which was not proper.

In the alternative, Counsel submitted that, the sentence of 25 years imprisonment was harsh and manifestly excessive. She asked Court to take into account the mitigating factors and reduce the sentence of 25 years on count one to 13 years imprisonment and maintain the 8 years imprisonment on count two and three, upon which the period the appellants had spent on remand should be deducted.

Counsel abandoned the 4th ground.

Respondent's reply

Ms. Tumuheise opposed the appeal and supported the conviction and sentence. She argued grounds 1, 2 and 3 together. She submitted that the appellants were properly identified at the scene of the crime by PW1, PW2 and PW3. She argued that the evidence of the three witnesses is corroborative of each other. She submitted that the trial Judge had followed the law as set

out in *Abdulla Nabulere & Others v Uganda, Criminal Appeal No. 9 of 1978 reported in (1979) HCB.*

Counsel argued that, the appellants were well known to the witnesses since they were from the neighbouring village, they could not have been mistakenly identified. She contended that, there was sufficient light that night which enabled the witnesses to properly identify the appellants as the assailants. The sources of light included 2 torches, a lamp in the house and moonlight. At the time of the incident the distance between the witnesses and the assailants was 1 ½ meters and the whole incident lasted for approximately ten minutes. She asked Court to uphold the trial Judge's finding that the accused persons were properly identified at the scene of crime, as the ones who had inflicted the near fatal injuries upon the victims, and robbed them.

Counsel further argued that, the inconsistencies pointed out by the appellants were minor as they did not go to the root of the case. She added that, the delay in reporting the matter to the Police did not cause a miscarriage of justice. She conceded that prosecution did not produce at the trial the medical examination report. The gun used in the crime was also not produced. She argued that the above omissions were not fatal to the case as prosecution had adduced other sufficient evidence to prove that the appellants participated in the commission of the crime and that the victims had suffered near fatal injuries as a result of the attack.

In respect of sentence, counsel contended that the sentence of 25 years in the case of aggravated robbery is neither illegal nor harsh and excessive in the circumstances of the case. She asked Court to confirm the sentence.

In rejoinder, Ms. Namata contended that, the inconsistences were grave. She argued that PW2 made a statement to the Police on 27th June, 2007 but did not mention in it that any robbery had taken place that night. Likewise PW1's statement did not allege to robbery.

Resolution of issues

We have carefully considered the submissions of both Counsel and the evidence on record. This is a first appeal and as such this Court is required under *Rule 30(1)* of the Rules of this Court to re-appraise the evidence and make its inferences on issues of law and fact. See:*Pandya Vs R [1957] E.A 336, Bogere Moses and another Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.*

We shall, in accordance with the above authorities, proceed to re-appraise the evidence and to make our own inferences on both issues of law and fact.

On ground 1 the appellants faulted the trial Judge for failing to properly evaluate the identification evidence thereby reaching the wrong conclusion.

The law regarding identification was set out in *Abdalla Nabulere and Another Vs Uganda [1979] HCB 77* where the Supreme Court held that, where the conditions favouring correct identification were favourable, the Court should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witnesses with the accused. All these factors go to the quality of the identification evidence.

From the evidence on record, the victims were attacked at night. PW1, PW2 and PW3 testified that favourable conditions existed that night for proper

identification of the assailants, as there was moonlight, 2 torches and a lantern. Both PW1 and PW2 testified that, they were in close proximity with the appellants about 1 ½ meters and that they knew the appellants well before the incident as they all lived in the neighbouring parish and used to buy bread from the complaints' home.

PW1, Awongo Jimmy in examination in chief testified as follows;-

> *"I know the accused, the first one is Okucu. He is from the neighbouring parish but the same sub-county. I have known him for many years. I know the second accused as Okello Okori. He is also from the same sub-county*
>
> *"I saw Okucu (A1) holding a gun and Okello (A2) with a torch. There was a lantern lamp placed on top of the four carton of wheat flour. It emitted light because I was using it to do the bakery. There was another lantern at the bakery which was about 5 meters from where I was in the main house. When I saw them about 1 ½ meters from me. Okello was flashing his torch inside the house. It was bright torch. Okucu shot the lamp. He entered the house. I saw them when the door opened."*

In his cross examination he stated as follows;-

> *"When the assailants opened the door Okucu was in front and Okello was behind. It is correct Okucu is taller than Okello. Okucu was dressed in a raincoat that stopped at the knees. The raincoat had a head top that particularly covered his head. The face was not covered."*

PW2, Awongo Eseza also testified in her examination in-chief as follows;-

> *"I know both accused. The taller one is Okucu Joel alias Ocen Patrick while the other is Okello Okori. They live in another village but usually passed by*

our home going to Kayago. At times they would come to our home to buy bread. I have known them for five years...

....Then Kyambadde, my brother asked, rushed to my rescue with a torch. His torch was on. His torch was on. The distance between me and these was about one meter. Kyambadde asked me why I was scared. I had not recognised these people. Kyambadde flashed his torch at the two people. I recognised Okello Okori who was leading and having a long torch that uses four battery cells. I recognised the second person as Okucu. He shot a bullet downwards. Kyambadde's torch was bright since we were using it at the bakery. Okello's torch was not on. There was a big lattern in the bakery and there was also a bright moonlight. The lantern in the bakery was about 4 meters from where I stood."

In cross examination at she stated as follows;-

"...Kyambadde flashed his torch directly at the assailants' faces. The beam of the torch was wide and covered their entire bodies..... There was a lantern inside the house as well. There was also a lantern in the bakery."

PW3, Okot Stephen in his examination in-chief testified as follows;-

"I know both accused. The first is Okucu Joel. We are in the same Sub County. I have known him since my childhood. The second one is Okello Okori. We studied in the same school. I have known him for a long period of time. I used to see him often...

On the night of 22-2-06 I was at home preparing to go to bed when I heard an alarm outside. Immediately there was a gunshot. I got outside as more gunshots rang out. There was moonlight outside and a light in the bakery.

This was Awongo's bakery. I peeped carefully towards the bakery and saw Okucu holding a gun. He was firing at the door of Awong's house. Okello Okori was flashing at Okucu with a torch. The torch was very bright. I was standing about 10 meters from the two."

In their defence, each of the appellants put up an *alibi.* The 1st appellant testified that, he was at *Wansolo* landing site in Apac District on the day of the incident while the 2nd appellant told court he was at home the whole day of the incident. However, the trial Judge disbelieved their *alibi* and found that PW1, PW2, and PW3 had properly identified the appellants and placed them at the scene of crime. In his judgment at page 51 of the Court record, he stated thus;

"PW1, PW2 and PW3 all identified the accused persons. There was light from the moonlight, the torch and lantern lamps...considering the evidence of identification of the witness, the accused persons were positively identified as the assailants. They even described how they were dressed. The accused were known to the identifying witnesses. They stood short of distance."(Sic)

From the above evidence, we agree with the learned trial Judge that the appellants were placed at the scene of crime having been positively identified by PW1, PW2 and PW3. It is clear from the record that the witnesses were familiar with the appellants. We also find that there was enough lighting coming from the 2 torches, the moonlight and the lantern before it was blown out by the gun shot which aided proper identification of the appellants. They were in close proximity with each other the night of the incident. PW1 testified that the assailants were about 1 ½ meters from him, PW2 stated that

they were about 1 meter away from her while PW3 stated that his house was in the same courtyard with that of PW1 and PW2.

We agree with the finding of the learned trial Judge that there were favourable conditions for identification which satisfied the factors set out in *Abdalla Nabulere and Another Vs Uganda (supra)*, minor contradictions notwithstanding.

We find that the trial Judge properly evaluated the evidence on record regarding the appellants' identification and came to the correct conclusion that both had been positively identified as the assailants by the prosecution witnesses. Therefore ground 1 of the appeal fails.

On ground 3, which was argued together with ground 1, Counsel for the appellant submitted that there were contradictions in the nature of the injury suffered by the complainants because PW1 testified that she was hit on the thigh and the stomach yet PW2 stated that she was only hit on the buttocks and thigh. She argued that the trial Judge treated these contradictions as being minor and therefore reached a wrong conclusion. We note that the trial Judge in his Judgment at page 65 of the court record observed that PW2 was shot at and her intestines were protruding and that some of the bullets hit her on the upper hip.

The law on contradictions and inconsistencies was well settled in *Alfred Tajar vs Uganda [EACA] Criminal Appeal No. 167 OF 1969 (unreported)* where the court observed that major inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness. We find that the trial Judge was

justified when he treated the contradictions and inconsistencies in the prosecution case as minor and ignored them.

On ground 2, the appellant faults the trial Judge for finding that there was sufficient evidence to support the offence of attempted murder thereby arriving at a wrong conclusion.

PW1, PW2 and PW3 testified that the appellants had a gun and they shot at the complainants. PW1 testified that when he was woken up, by his wife telling him that she had just been shot and he saw her intestines protruding. He fought the assailants and managed to hit the muzzle of the 1st appellant's gun with the metal following the attack. He added that the 1st appellant shot at the lantern lamp which was emitting very bright light. Furthermore, that when the assailants left he observed a wound on the buttocks and thigh of his wife, PW2 who was immediately rushed to a clinic in Namasale which referred them to Mbale Hospital where she was admitted for some time.

PW2 who was pregnant at the time, testified that when the appellants attacked her home, the 1st appellant shot a bullet in the air and ordered them to lie down but due to too much fear, she ran inside the house and pushed the door with her back but the 1st appellant shot more bullets. She then realized that her intestines had come out. She lost consciousness and only regained it as she was being lifted and put in a vehicle. She was taken to a clinic in Namasale and was later transferred to Mbale Hospital where she was admitted. She underwent 8 operations on the right thigh which was fitted with a metal and as a result she limps and walks with a stick.

PW3 also testified that when he peeped carefully towards the PW1's bakery, he saw the 1st appellant holding a gun commonly held by the police and he

was firing at the door of the complainants' house. He ran to a neighbor's home which was 200 meters away and when he returned, he found PW2 lying unconscious and covered in blood. He then rushed to Namasale on a motorcycle to organize transport to take PW2 to Hospital.

PW4, No. 24071 Detective Sergent Ogwal Denis, testified that when he went to the scene of crime, he recovered a hurricane lamp with a bullet hole as well as an iron bar and they were both exhibited as EXH. PE I & EXH- PE II respectively. He also added in his cross examination that he recovered a bullet which was extracted by the Doctor from PW2.

In his Judgment at page 59 of the Court record, the trial Judge found that the evidence of the gunshots was not challenged in cross examination. He also found that evidence of PW1 and PW2 that the attackers were armed with a gun was corroborated by PW3. He added that court observed the hole of the gun shot on the hurricane lamp which was exhibited as prosecution Exhibit PEI and found that the available evidence sufficiently proved that the attackers were in possession of a deadly weapon which they used.

We note from the Court record that only two items were exhibited at trial namely, a hurricane lamp with a bullet hole and an iron bar. Although PW4 stated that he recovered a bullet which had been extracted from PW2, it was not exhibited at trial. We also take note of the fact that the gun which the appellants allegedly used during their attack was also not recovered and as a result it was not exhibited. However, from the testimonies of PW1 and PW2 which were corroborated by that of PW3 and PW4, we find that although the gun used to commit the offence was never recovered there was sufficient

evidence to prove that the appellants had a gun and used it against the victims during their attack.

We find that there was sufficient evidence from the prosecution to prove that PW2 was shot by the 1st appellant and as a result sustained near fatal injuries that caused permanent disability which the record shows was visible at the trial. We find that the evidence on record pointed irresistibly to the guilt of the appellants as found by the trial Judge.

Counsel for the appellants argued that the complainants' delay to record statements at the Police raised the possibility of a frame up. We note that, the crime was committed on the 22nd day of February 2006 but the Police statement was recorded by PW1 on the 6th of June, 2007 a year and 4 months later. This delay was questioned at the trial and the complainants explained why they delayed to make statements. PW1 in cross-examination informed Court that he reported to Alemere Police Station on the 23rd of February, 2006 but did not make a statement immediately because he had taken the wife, PW2 to hospital, where she was admitted for several months. He also explained to the Court that, the Police at Alemere failed to track and arrest the suspects immediately after the commission of the crime. D/SGT Ogwal, PW4 informed Court that the delay in investigating the case was occasioned by the complainant's preoccupation to save his wife's life. He further stated that when PW1 sighted the 1st appellant in town in June 2007, he reported to Police and he was immediately arrested. According to D/SGT Ocan, PW5, having arrested the 1st appellant, the 2nd appellant was tracked down and was also arrested on the 24th of August, 2007.

In the judgment of the trial Court the Judge explained why it took so long for the appellants' to be apprehended and brought to justice. Our finding is that PW1 reported the crime to the Police on 23rd February, 2006 the day following

the night of the incident. However he was unable for reasons stated above to go back to the Police to record a full statement.

It is the duty of the Police to investigate all crimes whether or not they have been reported to them. It was their duty to follow up and record statements from all potential witnesses. The delay to record a statement at the Police Station cannot be attributed to the complainants alone. We find that no prejudice was caused by the delay to have Police statement recorded from a complainant who had reported the crime immediately after it had occurred.

On the whole, we find that the complainants delay to record a Police statement was sufficiently explained by the prosecution and accepted by the trial Judge. We find no ground to fault the Judge's finding on this issue.

Ground 4 is an alternative ground in respect of sentence. While passing sentence, the learned trial Judge stated as;-

> *"Both convict are said to be first offenders. Okucu Joel is said to be 33 years of age, and he is still a young man. He appears remorseful. Okello Tom is 24 years also young. Their Counsel have prayed for leniency in that they ought to be given an opportunity to rejoin society and make a noble contribution once they are reformed. They have been on remand for 3 years now. Given their age and the other mitigating factors, Court will exercise leniency by not imposing the maximum penalty prescribed by the law.*
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> *Considering all the factors of this case and taking into account the period spent on remand I pronounce sentences as follows:*
>
> *Okucu Joel: Sentenced to 25 years imprisonment on Count 1*

- *8 years imprisonment on count II*

- *8 years imprisonment on count III*

Okello Tom: sentenced to 25 years imprisonment on count I

- *8 years imprisonment on count II*

- *8 years imprisonment on count III*

The said sentences are to run concurrently in addition each of the convict is to pay compensation of Shs 750,000/= (Seven Hundred and fifty thousand shilling) 1,500,000/= (Five million and five hundred thousand shillings) in total to the complainants Awongo Jimmy and Eseza Awongo as per Section 286 (4) of the Penal Code Act. Right of appeal against conviction and sentence explained."

We find that the trial Judge did not comply with *Article 23 (8)* of the Constitution while passing custodial sentence, which provides as follows;-

"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment."

In *Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*, it was held that, taking into account the period referred to by *Article 23 (8)* of the Constitution is necessarily an arithmetical exercise. Therefore the period the appellants in this case spent in pre-trial detention ought to have been deducted from the sentences. Since the trial Judge did not do so, the sentences imposed are a nullity.

Having found so, we invoke the provisions of *Section 11* of the Judicature Act (CAP 13), which grants this Court the same powers as that of the trial Court in circumstances such as we now find ourselves, to impose a sentence we consider appropriate in the circumstances of this appeal.

There are aggravating factors in this case. The appellants premeditated the robbery. They used a gun, a deadly weapon while committing the offence. The first complainant lost a lot of money which was never recovered. The second complainant suffered serious injuries. She also suffered a miscarriage.

However, there are mitigating factors in favor of the appellants. They were both first offenders. They were relatively young aged 33 and 24 years respectively at the time of the commission of the offence. They were remorseful. The first appellant had spent 3 years and 1 month on remand. The second appellant had spent 2 years and 11 months on remand.

In *Aliganyira Richard Vs Uganda, Court of Appeal Criminal Appeal No. 19 of 2005*, the appellant was convicted of aggravated robbery and sentenced to suffer death. On appeal, this Court reduced the sentence to 15 years imprisonment.

In *Muchungunzi Benon & Another Vs Uganda, Court of Appeal Criminal Appeal No. 0008 of 2008,* this Court upheld a sentence of 15 years imprisonment for the offence of aggravated robbery.

In *Tumusiime Obed & Another Vs Uganda, Court of Appeal Criminal Appeal No. 149 of 2010*, the appellant was convicted of aggravated robbery and sentenced to 16 years imprisonment. On appeal to this Court, it was reduced to 14 years.

In arriving at the appropriate sentences, we have considered the aggravating and mitigating factors in this case and the range of sentences in offences of similar nature.

We impose 20 years for aggravated robbery from which we deduct 3 years and 1 month the 1st appellant spent in pre-trial detention. He will therefore serve a sentence of 16 years and 11 months in prison. In respect of the 2nd appellant we deduct 2 years and 11 months, the period he spent in pre-trial detention. He will therefore serve a sentence of 17 years and 1 month in prison.

We impose 15 years for attempted murder from which we deduct 3 years and 1 month the 1st appellant spent in pre-trial detention. He will therefore serve a sentence of 11 years and 1 month in prison. We deduct 2 years and 11 months the period the 2nd appellant spent in pre-trial detention. He will therefore serve a sentence of 12 years and 1 month in prison.

Both sentences to run concurrently in respect of each appellant from 7th July, 2010 the date of conviction.

We have found no reason to interfere with the order of compensation which we uphold.

We so order.

Dated at **Gulu** this.....12th.....day of .....January.....2018.

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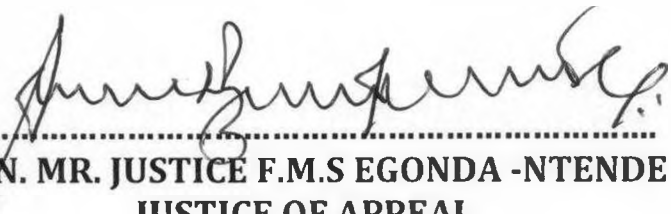
HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL



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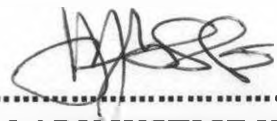
HON. MR. JUSTICE F.M.S EGONDA -NTENDE
JUSTICE OF APPEAL



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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL