THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 131 OF 1999

CORAM: HON. MR. JUSTICE C.M. KATO, JA.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.

MATOVU ANDREW ……APPELLANT

VERSUS

UGANDA ……..RESPONDENT

(Arising from the judgment of High Court of Uganda at Kampala (before Hon. Katutsi J) dated 19/11/99 in Original HCCS No. 25/98

JUDGMENT OF THE COURT:

The appeal is against conviction and sentence of death for murder imposed on the appellant by the High Court on 10/11/99.

The state's case against the appellant is that on 14/06/96 the appellant and two others attacked the home of Dr. Philda Tradia, PW2 who was at that time an Advisor to the Economic Commission for Africa and shot her night watchman John Ruberakurura dead. The robbers robbed her at gun point money, her wrist watch and a number of household properties which included a video, another radio, time big radio, two cameras, neck tie, T/Shirts, a Computer and other assorted clothes. The robbers used her motor vehicle to ferry their loot. The matter was reported to the police and Local Defence Unit. The following day PW2 was invited to the Katwe Police Station and she identified the vehicle and a computer that were stolen. A few days thereafter the appellant was arrested by LDUs. His arrest resulted in the arrest of the other robbers.

The appellant led the police to his home in Tower Zone, Makindye where two TV sets, two video decks, several video tapes, radio cassettes, several radio cassettes tapes, a fan and men's clothes were recovered. He led the police to his second home in Tower village which was about 500 metres from his first home where the police recovered a video camera stand, a camera, a fan, a TV set and clothes. PW2 and her husband went to Katwe Police Station and identified the properties and claimed them as their properties. Both PW2 and her driver, Dick Waswa Kafero, PW5, said that they were able to recognise the alleged robbers. The appellant was picked at identification parade by PW5.

At the trial, the appellant testified on oath that before his arrest he was selling cabbage in the market. He was picked at midnight of 20/07/96 by LDUs who were looking for a disco compact which had been stolen. They searched his house, but nothing was found. The LDUs went with him to search other homes. He was taken to the police station and left there. The following day the police took him to his house and searched there and recovered TV set, one fan, clothes and a radio. These things belonged to him. The police again took him to his sister's home and searched the place but found nothing. He was returned to the police station. A week later he was taken to the office of PW2. The police told PW2 that he was the one who robbed her. PW2 at first said she had never seen him. The police, however, urged PW2 to say he was the one and PW2 said Okay. Later he was taken to an identification parade consisting of twelve people. The man picked two of them. He was not happy with the identification parade and so he refused to sign the identification parade form. He said he did not know any of the co-accused.

The learned judge found that the appellants' co-accused were not clearly and mistakenly identified. He therefore found them not guilty and acquitted them. He however, held that the appellant was properly identified at the scene and that he participated in the robbery and convicted him. He also found him guilty of the murder of the watchman and convicted him.

The five grounds of appeal were argued together by Mr. Sseguya who appeared for the appellant both at the High Court on state brief and in this court on a private brief. It was the contention of Mr. Sseguya that the appellant was not positively identified at the scene. He argued that if PW2 identified the appellant at the scene, she ought to have taken part in the identification parade.

Since she did not do that, her evidence of identification should not have been believed by the learned trial judge.

The identification evidence came from two witnesses. The first one was PW2. Her evidence was that she recognised the appellant as the person who beat her up and pointed a pistol at her face and threatened that he would shoot her unless she showed them where her husband's money was. She said she looked at the robbers for a long time. She said the appellant had a tassel of hair under his chin. In court she pointed that to the court. She also said the two of attackers took her into the bed room. She was told to switch on the lights which she did. The appellant was one of those who were in the bed room. According to her the whole episode took about two hours.

The evidence of PW2 clearly showed that there were electric lights in the bed room. The appellant was close to her when demanding money and pointing a pistol at her face. Though PW2 was apparently in state of fair, she was able to identify the appellant. We agree that the conditions in the bedroom were conducive for proper identification. In our view the fact that she was not used in the identification parade is not fatal to the prosecution's case. The appellant said that she came to the police with PW5 when the identification parade was held. Since PW5 had already picked him up, her identification of him at the parade would have served no useful purpose as she had already seen him.

The second identifying witness was PW5. He said that after the robbers had ransacked the house, they attempted to start his mistress's vehicle, but could not. The robbers then returned to the bed room and untied him and took him out at gun point to replace the tyre that had had a puncture. The flood lights in the house enabled him to recognise the appellant when he was replacing the tyre. After replacing the tyre he was taken back to the house and tied again.

We think that the time taken by PW5 to remove the punctured tyre and to replace it with another one was long enough for him to recognise the appellant. The presence of the flood lights made the conditions favourable for correct identification. Besides he was able to pick him at an identification parade. The fact that he also picked a volunteer as well does not detract from the fact that he was able to identify the appellant. It would have been fatal if the evidence had been that only one person participated in the crime, or if he had said that the other person he picked

was the appellant. There is no evidence that the appellant complained to PWI that the identification was not properly conducted. His evidence that he was dissatisfied with it was clearly an afterthought.

The evidence of identification required corroboration only where conditions for correct identification are difficult. Here we are satisfied that the conditions for correct identification were favourable. No discrepancies and contradictions in the evidence of the identifying witnesses have been pointed out to us and we did not find any on the record.

There is evidence that some properties were recovered from the appellant. Other properties were also recovered from the other accused persons. These properties were returned to PW2 by the police. The appellant maintained at the trial that all the items recovered from his house belonged to him. Since the properties released to PW2 were not brought to Court at the trial, it cannot be said with certainty that those were the properties recovered from the appellant's house. They could well have been the properties recovered from the other accused persons. Therefore the properties allegedly recovered from the appellant's house cannot be relied upon, on the doctrine of recent possession, to connect him with the offence. That might have been the reason why the learned trial judge did not rely on that doctrine. There is, however, other evidence on record, which connects him with the offence. We therefore find no merit in the appeal. It is accordingly dismissed.

Before we take leave of this case, we wish to comment on one irregularity that came to our notice. Though the learned trial judge convicted the appellant on two counts of murder and aggravated robbery, he did not pass sentence for the charge of murder. He merely suspended the sentence when no such sentence had been passed. We wish to point out that it is necessary to pass sentences on all the counts for which convictions have been recorded. Accordingly, under Section 12 of the Judicature Statute, the appellant is sentenced to death for murder in respect of Count two. The Order of the trial judge suspending sentence on this count remains.

Dated at Kampala this 6th day of November 2000.

C.M. Kato
Justice of Appeal.

J.P Berko
Justice of Appeal.

S.G. Engwau
Justice of Appeal.