THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.60 1999

KUTEGANA STEPHEN :: APPELLANT

VERSUS

UGANDA ::RESPONDENT

CORAM: HON MR. JUSTICE C.M. KATO, JA
HON MR. JUSTICE G.M. OKELLO, JA
HON LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

JUDGEMENT OF THE COURT

The appellant, Steven Kutegana, was indicted for the offence of robbery contrary to sections 272 and 273(2) of the Penal Code Act, of the High Court, Jinja (Onega J.). On 23.5.99 he was convicted and sentenced to death. He now appeals against conviction and sentence.

The prosecution case was that on 6.10.95 at around 10.00 pm, when the complainant got out of house to collect his bed-pan, he saw the appellant standing at the corner of the house. The appellant was with another man whom the complainant could not identify. The appellant held a machete and a torch in his hands. He immediately moved towards the complainant, and ordering him to maintain silence, he cut him on the head with the machete. He then forced him back into the house, demanding money, which the complainant gave him. In all, the appellant took shs.670,000. After inflicting yet more wounds on his head and shoulders, the appellant covered him up in his bed and left him for dead. The complainant was unconscious.

When he regained his consciousness, he managed to crawl out to his neighbors, who reported the matter to the LCs. The appellant was arrested the following day, from his brother's house. The complainant was hospitalised. His injuries were classified as grievous harm.

It was the prosecution's case that the appellant was properly identified by the complainant, as the conditions were favorable to correct identification.

At the trial, the appellant set up an alibi that he was at his home throughout and never went anywhere. This was rejected by the court. He was convicted as charged.

The memorandum of appeal comprises two grounds:

> **"(1) That the learned trial judge erred both in law and fact to convict the appellant based (sic) on the identification of a single witness in the circumstances of this case.**
> **(2) That the 'earned trial judge wrongly erred in law and fact when he disregarded the appellant's alibi."**

Regarding ground No.1, Mr. Cranimer Tayebwa for the appellant argued that though the learned judge was aware of the principles applicable to identification by a single witness, and so correctly addressed the assessors, he however did not apply them to the facts of the case. He submitted that the judge should not have believed the complainant's evidence which was full of inconsistencies regarding the moonlight, which coupled with the fact that the complainant was bleeding in the face, must has rendered visibility difficult. He could therefore not see properly.

In reply, Mr. Simon Semalemba, State Attorney supported both the conviction and sentence. He submitted that the learned judge correctly applied the principles governing identification by a single witness as stated in Abdala Nabulere Vs Uganda, 1979 HCB 77. The conditions favoured a correct identification. He pointed out that learned judge relied on the fact that there was full moonlight.

It was conceded that the learned judge was alive to, and properly addressed his mind and also directed the assessors regarding the test to be applied while assessing the evidence of identification by a single identifying witness set down in **Abdullah Bin Wendo and Another V R (1953) 20 E.A.E.A; and Roria v Republic (1967) E.A. 583.**
The judge was also aware of the guidelines to follow as set down in **Nabulere's case (Supra).**

The contention is that he did not apply the test nor did he follow the guidelines. The respondent submits that he did.

The learned judge when considering the complainants evidence observed:

> **"…..the witness PW1 told the court he had known Kutegana right from childhood. His father was his friend. He knew even his voice. On the day in question he came to his home in the morning, they discussed the business of fish basket - Ebilara and the accused went away saying he would come back later in the evening. In cross-examination he said in the evening when the accused came back he was putting on the same shirt he was in on the morning. At the time of robbery the accused spoke to him asking him about the money he used to lend people... PW1 told the court there was full moonlight on the night on issue. He first saw the accused from the corner of a house about 2 1/2 metres away. The accused then rushed at him caught his hand and cut him while asking for money. The colleague of the accused kept on flashing a torch to enable them see. There was therefore light coupled with the voice of the accused to enable him identify the accused.'**

The learned judge then finally concluded:

> **"I have carefully addressed my mind to the entire evidence on record. I do not see any major inconsistencies of the prosecution witness (sic). Whatever inconsistencies might be there in my view minor ones, which may occur due to normal human lapse of memory….."**

The learned judge examined the circumstances in which identification came to be made viz the length of time the encounter lasted, the distance between them, and the light. There was moonlight outside and in the house there was a torch which the appellant's colleague was flashing. He also considered the previous familiarity of the complainant and the appellant. It is the sum total of these factors which affected his decision.

We therefore think that there cannot be any doubt that the learned judge properly applied the principles aforesaid and reached the correct conclusion. The first ground of appeal fails.

As regards Ground No.2, that the learned judge disregarded the appellant's alibi, Mr. Tayebwa argued that the prosecution never rebutted the alibi and therefore never succeeded in putting the appellant at the scene of crime. Mr. Semalemba contended that the judge considered the appellant's strange behavior and concluded that he was telling lies. He pointed out that the lies told by an accused can be used against him to corroborate his guilt.

The learned judge analysed the issue as follows:

> **"The accused tried to put up a defence of alibi saying he was at his house throughout. He even denied having gone to the house of the victim on the day in question. He even denied knowledge of the people known to be his mother, grandfather and other close relatives and friends. He even at first denied knowledge of Mukanya with whom he said he was arrested together for the offence only to admit he knows him later saying the pronunciation (sic) the prosecution made was different from the one he knew. These are strange behaviors, in our law could be interpreted to point to the guilt of the accused."**

It is settled law that the burden of proving an alibi does not lie on the prisoner but on the prosecution to prove guilt of the prisoner beyond a reasonable doubt. **Sekitoleko v Uganda (1967) E.A 531.** It is the duty of the court to direct its mind properly to any alibi set up by an accused, and it is only when the court comes to the conclusion that the alibi is unsound that it would be entitled to reject it **R v Thomas Finel (1916) 12 Cr. App. R.77.**

We find that the appellant's defence consisted of unexplained inconsistencies which amounted to blatant lies. The evidence of the complainant placed the appellant at the scene of crime. His evidence was sufficiently corroborated by the deliberate lies told by the appellant. The judge was therefore entitled to reject it and rightly held that they were a pointer towards his guilt. This ground of appeal also fails.

We find no merit in this appeal. It is accordingly dismissed.

Dated this 30th day of November 2000.

HON MR. JUSTICE C.M. KATO,
Justice of Appeal

HON MR. JUSTICE G.M, OKELLO,
Justice of Appeal

HON LADY JUSTICE A.E.N. MPAGI- BAHIGEINE,
Justice of Appeal