THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**CRIMINAL APPEAL NO. 16 OF 2003**

BUTAMANYA KABAALE APPELLANT

VERSUS

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UGANDA RESPONDENT

CORAM: HON. JUSTICE L.E. MUKASA-KINKONYOGO, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA.
HON. JUSTICE A.S. NSHIMYE, JA

[*Arising from the conviction and Death Sentence of the Learned Judge of the High Court of Uganda, at Kampala, The Hon. Justice J.B. Katutsi in his Judgment dated 21/1/2003, in Kampala Crim. Session Case No. 19 of 2002*]

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**JUDGMENT OF THE COURT**

This appeal is brought by Butamanya Kabaale, hereinafter, to be referred to as the appellant. He is appealing against the judgment of the High Court in Cr. S.C. No 19/2002 delivered at Kampala on 21/09/2003. The appellant who was A3 in the High Court, together with Adiga Mohamad, A1 and Ssembwere Fred A2, were indicted for robbery with aggravation contrary to Section 272 and 272 (2) of the Penal Code Act.

The appellant was found guilty as charged and sentenced to death. Both his co-accused, Adiga, A1, and Ssembwere, A2, were found not guilty and acquitted.

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The brief facts of the case as accepted by the High Court are that, in the night of the 21st of February 2001, at Katalaganya village, in Nakasongora District, at about 11:00 PM, PW1, Ssembatya, and his wife were sleeping their house when they were attacked by a gang of assailants including the appellant. The said assailants forcibly entered PW1's house and shot his wife in the leg and stole Uganda Shillings 700,000/=, a mobile phone, a torch and a wrist watch therefrom. A gun was fired during the robbery. The robbery was reported to the police. As a result of their inquiries, the appellant and his co-accused were arrested, charged and prosecuted.

All the three accused denied the charge and set up pleas of alibi. They also denied having known each other before the incident. They met and came to know each other after their arrest. At the close of the trial, and after the summing up, one assessor was of the opinion that the prosecution had failed to prove the offence of aggravated robbery. He, therefore, advised the court to convict A1 with illegal possession of arms and the remaining two namely A2 and A3 with simple robbery. The second assessor, on the other hand, advised the learned trial judge to acquit both A 2 and A 3, because the prosecution had failed to prove the charge brought against them.

After a careful perusal and consideration of the evidence adduced by the parties, the learned trial
10 judge found no evidence to connect A 1 with the charge. He also considered the prosecution's case too weak against A 2 and accordingly, acquitted both of them. Contrary to the opinion of the assessors, the learned trial judge found the appellant guilty as charged. He convicted him of robbery with aggravation and sentenced him to death, hence this appeal.

The appeal is based upon the following three grounds:

1. **"The learned trial judge of the High Court erred in law and fact when he convicted the appellant on evidence of the prosecution's case which had not established the ingredients of the offense charged."**

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2. **"The learned trial judge of the High Court erred in law, when he summed up to the assessors and gave judgment by which he convicted the appellant, without giving the appellant's advocate the opportunity to make arguments and submissions on the appellant's case".**

3. **"The learned trial judge erred in law and fact when he failed to judiciously evaluate the prosecution's evidence against the appellant as being insufficient to support a conviction".**

The appellant, hence, prayed this court to allow the appeal, quash the conviction and set aside the death sentence passed on him.

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The appellant is represented by Mr. Atuhairwe whilst Ms. Ogola, Senior State Attorney is representing the state. Both counsel argued the appeal in accordance with the grounds as set out in the Memorandum of Appeal.

On the first ground, it was the contention of the learned counsel for the appellant, that the prosecution evidence was insufficient to establish the elements of the offense of Robbery with aggravation. It did not even connect the appellant with the charge. There was not even an iota of evidence to link the appellant with A 1, who was found in possession of the gun which at first, was suspected to have been the weapon used in the commission of the alleged crime.

Counsel for the appellant also pointed out that, the evidence of identification was rather weak. It was also contended for the appellant that, theft was not proved. There was not a single exhibit produced in court. PW1's wife allegedly shot at was never called to give evidence. There was
10 nothing also to connect her with the robbery charged against the appellant. This being a Capital case, counsel argued further, required a very high standard of proof which was not met. The prosecution evidence was very weak. The conditions of identification were difficult and poor. PW 2 who claims to have identified the appellant was traumatized. There were also contradictions in the evidence provided by the prosecution witnesses. With regard to the other two grounds, counsel took issue with the learned trial judge's failure to give counsel opportunity to address the court in submission. To him, that was tantamount to violation of the appellant's constitutional rights under Article 28 of the Constitution of Uganda. It was also his submission that, the learned trial judge failed to judiciously evaluate the evidence. Had he done so, he would have found the appellant not guilty. Mr. Atuhairwe therefore prayed the court to allow the appeal
20 and quash the conviction and set aside the death sentence.

Mrs. Ogola, Senior State Attorney, did not agree with Mr. Atuhairwe. She supported both the conviction and the sentence of the High Court. She submitted that, the learned trial judge judiciously considered the evidence adduced before him and came to the correct decision. As far as she was concerned, all the ingredients of the offense were proved. There was theft of property, including a torch, money and other items. The failure to produce exhibits was explained by the fact that the arrests of the appellant and co-accused were effected a week after the alleged incident. She also pointed out that there was evidence to the effect that, a deadly weapon was used although it was not possible to be traced. She further argued that, the appellant was
30 connected with the charge because he was identified with the person who was armed with the gun and found with it. A 1 and A 2 were acquitted not because they were not identified but

because no gun was used. Further, she also argued that the evidence of PW 1 and PW 2, was sufficient to establish the elements of the offense charged. The two witnesses were well acquainted with the appellant. There was sufficient light to enable the two to identify him. The evidence, as far as counsel was concerned, was sufficient to establish the ingredients of the robbery with aggravation.

Regarding the court's refusal to permit counsel to make submissions, she submitted that counsel for the appellant was given opportunity to make submissions but opted not to do so. He stated, **"I have nothing to say"** when called upon to make submissions. She asked the court to dismiss the
10 appeal and uphold the judgment of the High Court.

We listened to the submissions of the learned counsel for both parties, carefully perused the evidence on the record and relevant provisions of the law as well as the applicable authorities. We shall now proceed to determine the issues raised in the memorandum.

This being the first appeal, it is the duty of this court, to submit the evidence to a fresh exhaustive examination and, evaluation to make its findings as well as draw its own conclusions in order to determine whether the findings of the trial court can be supported.

20 **Rule 30 (1) (a) reads as follows:**

> **"On an appeal from the decision of the High Court, acting in exercise of its original jurisdiction, the court may reappraise the evidence and draw inferences of facts".**

However, in so doing, it is a rule of caution that this court must make due allowance for the fact that the trial court unlike the appellate court, has had the advantage of hearing and seeing the demeanor of witnesses. Case in point is, **Peters vs. Sunday Post**, **1958 EALR 424** and **Selle vs. Associated Motors Boat Company, 1968 EA 123.** In the latter case, Sir Clement had the
30 following to say

**"an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are settled".**

Briefly put, the court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowances in this respect". See also Pandya's case .

For convenience we propose to start by evaluating ground number 2 separately. We shall then evaluate grounds, one and two together, as there is considerable overlapping between them. It is true as submitted by counsel for the appellant the courts of law are charged to administer the law in accordance with the Constitution. The learned trial judge was criticized for violating the provisions of Art 28 of the Constitution which provides as follows:

> **"In determining of Civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing by an independent and impartial Court or tribunal established by law".**

As the record stands before court, it is nowhere indicated that the learned trial judge denied the appellant's counsel permission to make submissions. Be that as it may, even if he did, failure to make submissions would not be detrimental to a case if a party adduced sufficient evidence to support his or her claim. Denial to make submissions, in our view, is not the type of violation envisaged under **Article 28 of the Constitution of Uganda.** Parties can do without submissions. Although they assist the court, to summarize the issues, for determination, submissions would not bolster a weak prosecution's case or strengthen it where the ingredients have not been established in accordance with the relevant provisions of the law. By the time submissions are made, the evidence in the case is already adduced. As the records stands in the instant case, the omission to make the submissions by the advocate for the appellant, did not prejudice his case. The learned trial judge did not base his decision to convict the appellant on the basis of the absence of submissions. Ground two must fail.

With regard to ground one and three, the learned trial judge was criticized for his failure to judiciously evaluate the evidence which resulted in the wrong decision. Had it not been for that

omission, he would not have convicted the appellant on the basis of the prosecution's evidence which was insufficient to establish robbery with aggravation.

The elements of the offense are very clear and are as follows:

Theft, violence before or at the time or immediately after with the use of a deadly weapon, the robbery apart from violence, requires use of a deadly weapon against the victim or threaten the victim with it or cause injury or grievous harm or death. It was the contention of counsel for the appellant that, theft was not proved. This in our view is incorrect. As it was rightly pointed out
10 by counsel for the state, there was evidence to show that a torch, cash and other items were stolen from PW 1's house. The difficult part was to prove the ingredients in this case and establish correct identification of the assailants and the deadly weapon. In this case PW 1 and PW 2 testified that one of the assailants, apparently A 2, was armed with a gun. They both heard shooting which they did not witness. The gun found with accused A 1, although a deadly weapon, was not shown to have been used in the commission of the alleged robbery. Worse still, A 1 in whose possession the gun was found, had no connection with the robbery and was acquitted. That, therefore, left no deadly weapon in this case. The appellant, although allegedly armed with a knife, was never seen using the said knife. Both PW 1 and PW 2 testified that PW 1's wife was shot at and sustained bullet wounds in her thigh. However, no medical evidence was
20 adduced to establish that the alleged gunshot wound and injury was, indeed, caused by the gun in question. Again, the injury sustained was not classified as grievous harm. The court was not told how PW 1's wife sustained her injury and she was never called to testify at trial. On the evidence adduced before court, aggravated robbery was not proved. There was however, a simple robbery of PW 1's property and only violence without a deadly weapon was shown. For the aforesaid reasons, there was no proof of the use of a deadly weapon during the alleged commission of the offense with which he was charged.

Turning to the identification, the law relating to identification has long been settled. In this case, the learned trial judge addressed it and clearly stated the correct position of the law. In his summing up to the assessors, his comments included the following:

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> "**Evidence of identification must be carefully analyzed. A witness might be honest yet mistaken. The circumstances under which identification is claimed must**

**be carefully looked into to make sure that it was conducive for proper identification**".

Following the acquittal of A 1 and A 2, the learned trial judge proceeded to evaluate the evidence in respect of the appellant as follows:

> "**I now turn to A 3 Butamanya. In his evidence Sebuyungo Peter testified that at the material time he was staying at the compound of PW 1 in a small grass thatched house near the main house of PW 1. Thugs banged the door of his hut open and ordered him to put on lights. When he refused to oblige they got out removed some grass from the roof of the hut in which he was staying and made a torch out of this grass. He was standing behind the broken door and with the help of the burning grass torch plus moonlight he shore he was able to recognize A 3. He knew A3 very well. A3 was a defense secretary of the area. He was putting on a black jacket and a cap on his head. In his statement to police he swore he mentioned the fact that of the thugs he had recognized A 3 Butamanya. This was after 2 days of the robbery. He was not challenged on this nor was the police statement challenged. The fact that there was moonlight was not challenged. I have warned myself of the danger of relying on the evidence of visual identification. A witness might be honest and yet mistaken. In order to avoid this danger I have put several questions to myself. Was the light sufficient to enable the witness to identify the accused? If the only light that came from the burning grass torch and the moonlight, was that sufficient to enable the witness to identify the accused, even allowing for the accepted fact that the witness knew the accused very well? Did the witness make a real and true identification? To these question I leave in Scintilla of doubt in answering them in the affirmative. But only that. There is the evidence of Sentaka Bosco (PW3). He swore that while at the shop of Senyange accused found him there, and calling his aside, asked him to go with him to the home of PW1 to carry something**".

The outlined principles governing identification have been enunciated in a number of authorities including **Abdu Lubowa v. Uganda**, **1975 HCB 304**, a case which is similar to the present. In said case, it was held by the East African Court of Appeal as it then was constituted that:

> " **before evidence of a single identifying witness can be accepted as free for possibility of error, where the conditions favouring correct identification are difficult, there should be some other evidence be it circumstantial or direct, pointing to the guilt of the accused**".

We agree and accept Mrs. Ogola's submission that the learned trial judge to a considerable extent evaluated the issues involved in this case. However, we do not consider it safe to rely upon the identification of PW 2 to convict the appellant. He may have been honest but mistaken. The learned trial judge addressed this but in view of the fact that A 1 and A 2 were acquitted by the

trial judge on the basis of the same evidence which in itself weakens the prosecution's case. Apart from the claims of PW 2 that he knew the appellant before, no other evidence was adduced to rebut the appellant's denial of association with the other two co-accused. As already stated, the charge of robbery with aggravation has not been established. It has not been proved

that the appellant had used a deadly weapon or caused death or grievous harm to anyone at the scene of the alleged crime. In those circumstances, the proper conviction could have been simple robbery with violence under **Section 272 and 273 (1) (b) of the Penal Code Act** instead of the
10 capital offense. However, because of the unsatisfactory and suspect identification and absence of substantial corroborative evidence as well as absence of recovery of any stolen property, poor identification raised doubt in our minds which should be resolved in the appellant's favour.

As a result of the foregoing, the appeal is allowed, the conviction is quashed and the Death Sentence is set aside.

Dated at Kampala, Uganda this 9th day of February 2009.

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L.E.M Mukasa-Kikonyogo
**HON. DEPUTY CHIEF JUSTICE**

Amos Twinomujuni
**HON. JUSTICE OF APPEAL**

A.S. Nshimye
**HON. JUSTICE OF APPEAL**

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