THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON. LADY JUSTICE L.E.M.MUKASA-KIKONYOGO, DCJ.***

HON. LADY JUSTICE A.E.N.MPAGI-BAHIGEINE, JA.

HON. LADY JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO.204/03

BETWEEN

BEINGANA KANONI WILLY::::::::::::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

***[Appeal from the judgment of the High Court Kabale High Court Circuit(*Mugamba P)**

dated 6th November 2003 in HCCS No. 0128/02]

JUDGMENT OF THE COURT

This is a first appeal from the judgment of the High Court (Mugamba J) in which the appellant was convicted of simple robbery and sentenced to 15 years imprisonment.

The facts as found and accepted by the trial judge are the following.

On the 28th June 2001, at night the complainant, Batare Christopher (PW3) was approaching the gate of his house when he was ambushed by two men. They stole his mobile phone and some money. He was assaulted by the assailants and he fought with them. He managed to recognize the appellant with the help of the security light at his gate.

He raised an alarm and the attackers ran away. The people who answered the alarm arrested the appellant about 500 metres away from the scene. He had a pistol. He was taken to the police where he made a charge and caution statement in which he admitted being at the scene.

At the trial his defence was an alibi which was rejected by the trial judge who convicted him of simple robbery and sentenced him to 15 years imprisonment – hence the instant appeal. The appeal is premised on only one ground that:

The learned judge erred in law and fact when he convicted the appellant on the basis of the uncorroborated evidence of a single identifying witness.

Mr Tishekwa who represented the appellant submitted that the evidence of PW3 needed corroboration since he was the only identifying witness. He cited the case of ***Nabulere &another v Uganda [1979] HCB 77*** for the legal proposition that the greatest care must be taken when treating the evidence of a single identifying witness to ensure that such evidence is free from any possibility of error. He also pointed out that there was no independent evidence from an independent source implicating the appellant. He cited the case of ***R.v Baskerville (1916) 2K.B. 658*** to support his argument.

He claimed that there was no credible evidence of the appellant's participation in the commission of the offence. He further stated that the appellant's alibi was never destroyed and his charge and caution statement was retracted and yet the court relied on it to convict the appellant. He cited the case of ***Festo Andrea Asenua &another V Uganda Criminal Appeal No1/98(SC)*** (unreported) for that legal proposition.

He invited court to allow the appeal, quash the conviction and set aside the sentence.

In reply, Mr Byansi, learned Principal Sate Attorney, did not agree. He submitted that much as the conviction was based on the evidence of a single identifying witness, no error was committed. He pointed out that the court considered the position of the law before convicting the appellant.

On the authorities that were cited by counsel for the appellant, the learned the learned Principal State Attorney submitted that what is required is for the court to exercise caution. He summarized the prosecution's evidence and the circumstances that were prevailing at the time. These were:-

1. The victim knew the appellant very well and the appellant confirmed it.
2. There was light at the victim's gate.
3. The proximity between the appellant and the victim and
4. The attack took time and there was a lot of scuffle and they were talking.

He claimed that these circumstances taken together enabled the victim to identify the appellant and he was sufficiently placed at the scene of crime.

He invited court to dismiss the appeal.

The prosecution's case depended on the visual identification of the appellant by PW3. The attack took place at night.

It now trite law that when visual identification of an accused person is made by a witness under difficult conditions like at night such evidence should not ordinarily be acted upon to convict the accused in absence of other evidence to corroborate it.

The problem of cases which depend on identification only, like the instant appeal, has been a subject of judicial consideration in a number of authorities. In the case of ***Roria v Republic [1967] EA 585*** at page 584 the Court of Appeal for East Africa said:

"A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardener LC said in the House of Lord in the course of a debate on S. 4 of the Criminal Appeal Act……'There may be a case in which the identity is in question and if any innocent people are convicted today I should think that nine out of ten- if there are as many as ten- it is a question of identity'

The danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such evidence of identification should not never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification".

The conditions which are considered favourable for correct identification without any possibility of error have been laid down in a number of authorities such as ***Abdalla Bin Wendo v R (1953) 20 EACA 166; Abdalla Nabulere &others v Uganda [1979] HCB77; Moses Kasana Uganda [1992-93]HCB 47*** and ***Moses Bogere &another v Uganda – Criminal Appeal No.1/97(SC)*** (unreported).

The following conditions were set out in the above authorities:

(i) Whether the accused was known to the identifying witness at the time of the offence.

(ii) The length of time the witness took to identify the accused.

(iii) The distance from which the witness identified the accused. The source of light that was available at the material time.

As for putting an accused person at the scene of crime, the Supreme Court in the case of ***Bogere (supra)*** the Supreme Court gave guidelines in the following passage from the judgment:

"We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evidence of the prosecution evidence alone, but must base itself upon evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted."

We shall use the above guidelines to determine the only ground of appeal. The conditions that were prevailing at the time of the attack that could be said to have aided correct identification were the following:

1. The identifying witness and the appellant knew each other before the incident.
2. There was security light at the residence of the identifying witness.
3. the identifying witness talked to the appellant and his companion before they demanded money from him
4. There was a scuffle between the appellant and the identifying witness before the he fled the scene of crime and
5. The appellant was arrested about 500 metres from the scene of crime.

The above conditions if believed were sufficient in our view to enable the identifying witness to recognize the appellant.

The appellant denied the offence and his defence was alibi. He stated that on the material day, he returned from Kigali and at about 8.30 p.m he went to visit one Issa whose home was towards National Teachers College. On his way he met four men who arrested him and started beating him. He was able to recognize one of the men-PW3. He further stated that there was no grudge between him and PW3. He suspected that PW3 beat him because he (the appellant) refused to sell him a plot of land and also refused to let his premises to him.

The issue is which version should be believed. PW3 sustained injuries and he was examined by Dr Tumuhimbise (PW7). The doctor found many bruises and swellings of different sizes

on his left hand and the left side of his neck. The injuries were suggestive of flogging with something like a whip.

Habib Kapere (PW4) was the defence secretary of Rutenga Cell where the offence was committed. He answered the alarm that was being raised. He found someone whom he did not recognize at the time being beaten and was under arrest. A pistol had already been removed from him and the same was handed over to the witness. The witness also saw injuries on PW3.

The witness further testified that he reported the matter to Kabale Police Station and D/CPL Turyamutangirira (PW5) visited the scene and found the appellant being assaulted by a mob. We think the appellant lied to court when he stated that he was assaulted by PW3 and three other people. The injuries which were found on PW3 when he was examined by PW 7 could not have been sustained when the witness was assaulting the appellant. On the other hand the testimony of PW4 and PW5 are to the effect that the appellant was assaulted by a mob soon after being arrested with a pistol. The sequence of events is such that the appellant's version of events cannot possibly be true. There was no evidence that PW3 was one of those people who arrested the appellant and assaulted him.

It is more likely that when the appellant and his companion ran away from the scene of crime he was arrested and assaulted by the people who answered the alarm. The facts and circumstances of the case are such that the evidence of identification was free from any possibility of error. A conviction could be based on it.

We are satisfied on the evidence as a whole that the appellant was placed at the scene of crime on the material day and his appeal against conviction is dismissed. We uphold the conviction. Since there was no appeal against sentence, the same will be upheld.

The learned judge did not complete sentencing the appellant. ***Section 11*** of the **Judicature Act** gives this court the same powers as the court of first instance. Accordingly in exercise of those powers we shall complete the exercise of imposing the remaining sentence and orders.

Section 286 (4) of the **Penal Code Act** provides as follows:

"Notwithstanding section 126 of the Trial on Indictments Act, where a person is convicted of the felony of robbery the court shall, unless the offender is sentenced to death, order the person convicted to pay such sum by way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person, and any such order shall be deemed to be a decree and may be executed in the manner provided by the Civil Procedure Act."

The provisions of the above section make it mandatory that unless the convicted person is sentenced to death, the court must make an order for compensation. The section is mandatory and the amount of compensation is within the discretion of the court. The complainant testified that the appellant and his companion demanded money from him. He had the sum of Shs 2, 700/= which he handed over to them. They also assaulted him. He was examined by a doctor and he must have received treatment for the injuries. In the circumstances we consider the sum of Shs 20,000/= adequate compensation to the complainant.

Another piece of legislation is ***section 124*** of the Trial on Indictments Act which provides for police supervision for a period not exceeding five years from the date of the expiration of the sentence. The section is also mandatory. The appellant will be subjected to two years of police supervision after serving his sentence.

Dated at Kampala this 20th day of May 2009.

L.E.M.Mukasa-Kikonyogo

Deputy Chief Justice

A.E.N.Mpagi-Bahigeine

Justice of Appeal

C.K.Byamugisha

Justice of Appeal