THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Coram: **Hon Justice A.E.N Mpagi Bahigeine, JA**
Hon Justice S.B.K Kavuma, JA
Hon Justice A. S. Nshimye, JA

CRIMINAL APPEAL N0. 3 OF 2003.

(ARISING FROM HIGH COURT CRIMINAL SESSION N0. 0075/2001 SITTING IN FORT PORTAL)

1. **KYOMUHENDO DAVID**
2. **BALINDA CLOVIS ::::::::::::::::::::::::::::::APPELLANT**

VERSUS

UGANDA:: RESPONDENT

JUDGMENT OF THE COURT

Both appellants were tried and convicted, by the High Court sitting in Fort portal, of robbery with aggravation c/s 272(2) and 273(2) of the Penal Code Act and sentenced to death on 31.12.2002 by Hon Justice V.T. Zehurikize.

The following are the brief facts of the case. During the night of 9.9.2000, in Kitiru village, Buhesi, Kabarole District, the victim one Celelia Timbigamba aged 68 years was sleeping when she heard a stone bang at her door, which gave way. The appellants entered and robbed the victim of 3 mattresses, a radio, 11 chairs, cushions, plates, bowels, cash 70,000/= and other house hold properties and during or immediately after threatened to use deadly weapons to wit pangas on the said victim.

Neighbors gathered in response to an alarm and were told names of the robbers by Celecia Timbigamba (PW2). Reports were made to the area chairman, Gombolola Headquarters and Police. In collaboration with Gombolola Askaris and Gombolola intelligence security officer, A1 was arrested at Rubona. Stolen mattresses, a Panasonic black radio, a tray and a dish were recovered from his house.

In the evening the 2nd appellant was also arrested by the LDU of Kibona and taken to the Police. They were both forwarded to Fort portal Police with the exhibits, where they were indicted of aggravated robbery.

A full trial was conducted in which 6 prosecution witnesses testified against the appellants. In similar defences both appellants denied knowledge and participation in the crime. Nonetheless the learned trial judge accepted the prosecution evidence and rejected the appellants' defences. They were convicted, as indicted and sentenced to death, hence this appeal.

In their joint memorandum of appeal, they put forward 3 grounds of appeal namely:-

(1) ***The learned trial judge erred in law and fact in finding that the offence of Robbery with Aggravation had been proved beyond reasonable doubt.***

(2) ***The leaned trial judge erred in law and fact in rejecting the appellant's defences and convicted them on contradictory, inadequate and uncorroborated prosecution evidence***.

(3) ***That the learned trial judge erred in law and fact when he passed the death sentence based on wrong conviction.***

At the hearing of the appeal, both appellants were represented by Mrs. Mulangira while, the State was represented by M/s Tumuhise Rose, a Principal State Attorney.

Counsel for the appellants preferred to argue grounds 1 and 2 together because they were intertwined. Learned counsel submitted that out of the 4 ingredients the trial judge outlined, the prosecution had to prove, she would deal with only the 3rd and 4th ingredients namely;

(3rd) that a deadly weapon was used or threatened to be used or the offender caused death or grievous harm to any person.

(4th) The participation of the accused persons.

In her submission, she criticized the finding of the trial judge that he was satisfied beyond reasonable doubt that the appellants participated in the robbery. She referred us to the evidence of the complainant P.W.2 in which the witness said, she was able to recognize the appellants by the light of the torch, but wondered why the witness could not say how they were dressed. She argued that it was not established whether the light was enough and for how long she was with the appellants. In her view, visibility must have been very poor. She also referred us to the evidence of P.W.2 where she said that, when she heard a bang, she hid under a bed. Counsel argued that if the witnesses hid, then how was she able to identify A2, a person she did not know before?

In her further submission, counsel stated that the witness ran out so frightened that she could not even raise an alarm. She pointed out that none of the stolen property was found in the house of A2. With regard to A1, she submitted that there was no conclusive evidence that the property was found in his house. She argued that the principle of recent possession does not apply to this case. On use of a deadly weapon, she submitted that the panga was not exhibited. Therefore its use was not proved.

Counsel further argued that no medical evidence was adduced to show that the complainant was injured in the process and that the prosecution evidence was contradictory.

Counsel prayed that the appeal be allowed, conviction quashed and sentence of death be set aside.

In reply, the learned Principal State Attorney supported the conviction and sentence. She submitted that identification was proved by the evidence of P.W.2 & PW3, who said that the light from torches was bright.

Secondly, the witness knew the appellants before. She submitted that the witnesses recognized the voices of the appellants whose voices and physical appearances were familiar. She went on to say that several pieces of stolen property were found in the house of appellant N0. 1.

She asked us to subject the evidence of P.W 2, PW3, and PW4, to a fresh scrutiny and find that those witnesses properly identified the appellants. She finally prayed that the appeal be dismissed and the conviction and sentence be maintained.

After hearing both sides and reading the record, we have reminded ourselves of the duty of this Court as a first appellate Court. That is, to subject all the evidence which was adduced in the trial court to a fresh appraisal and come to our own conclusion see **Pandya V R[1957] EA 336, Bogere Moses V Uganda SC Cr. Appeal N0.1/1997 and Mwesigira & another V Uganda CACA 221/2003.**

The learned judge, in his judgment properly stated the ingredients of the offence of Robbery with aggravation. That is to say, that the prosecution must prove beyond reasonable doubt the following.

a) ***That there was theft.***
b) ***That it was accompanied with violence.***
c) ***That a deadly weapon was used or the offender caused death or grievous harm to any person.***

d) ***The participation of the accused persons.***

During the hearing, counsel for the appellants did not challenge proof of the 1st and 2nd ingredients namely that there was theft and secondly that it was accompanied with violence. We shall therefore concentrate on the last two, namely:

(a) Whether there was proof of use of a deadly weapon.
(b) Whether the appellants participated in the commission of the offence.

We shall first deal with the issue of a deadly weapon namely a panga which , in a nutshell, it covers ground one of the appeal.

The learned trial judge, after stating the law that a panga is a deadly weapon, relying on the case of the **Supreme Court, Kwesimba Vs Uganda SCCA N0. 14/95** had this to say on page 5 of his judgment.

> "***In the instant case the relevant prosecution witness namely P.W.3, P.W.2 and P.w.4 all testified that one of the attackers had a panga and it was the panga which was used to cut P.W.3 on the head. Even P.W.1 found that the instruments used to inflict the injuries he found on P.W.3 was a sharp instrument"***

According to the evidence of P.WI Chris Barbra of Kiyombya Health Unit, he found the following injuries on Bonabana Mary.

(a) A cut wound on the front of the head.
(b) Multiple bruises on the back and chest.
(c) A cable beating on the left jaw involving left shoulder.

Most of the prosecution witnesses were emphatic that it was A1 who was holding a panga and a torch. He is the same person who is alleged to have cut Bonabana Mary on the Head.

If we may quote from the evidence of P.W.3 Bonabana

"When they came from my mother's bedroom, they came to my bedroom and started beating me. They were beating me with something. It was not a stick. They had a panga. It was a big one which butchers use. They also hit me with a panga on the head. I bled. It is AI who had a panga and he cut me."

Then some where in the medical evidence P.W.I Chris Barbra stated.

"the wound was 6 inches long and with 10 stitches. It was already stitched"

P.W.3 explains on page 8 of the record that she first went to Dr. Kule who must have stitched her and it was a Friday. Thereafter, she was taken to Kiyombya Health Centre. The attack was on 9.9.2000 and she was examined on 12.9.2000.

It is clear that the victim was examined 3 days after the incident. The shape of the wound could have changed from its original because of the treatment and stitching of Dr. Kule. We are of the view that it was a serious omission on the part of the prosecution not to have called Dr. Kule who saw the fresh wound on the head before it was sutured.

There are injuries like cable beatings, the inflicting weapons of which were not accounted for, in particular the injury on left jaw and shoulder which suggest beating by a cable. The Police did not show that there was any effort to recover the panga allegedly used. It is difficult for us to apprehend that A1 could have been holding a torch, a cable and a panga at the same time yet in the evidence of P.W.3 Bonabana quoted above, she talks of ***"they were beating me with something. It was not a stick"*** The witness did not say who was beating her with that "something". It could not have been A1 because she said A1 hit her with a panga on the head.

As some of the injuries suggest use of other weapons other than a panga, we are unable to say for certain that the evidence proved the use of a panga to the exclusion of other weapons or instruments. A doubt is cast in our mind which favours the appellants. Therefore, we hold or find that the ingredient of use of a deadly weapon was not proved beyond reasonable doubt.

We, however, agree that the trial judge properly evaluated the evidence on identification. We are satisfied that, the prosecution witnesses properly recognized the appellant by the light from the torch. A1 was not living far away while A2 was a village mate of the victims.

We partly find merit in the appeal in that the prosecution failed to prove aggravated robbery but proved simple robbery.

The appeal against the conviction for aggravated robbery is allowed. The conviction is quashed and sentence of death set aside. We substitute therefore with a conviction for simple robbery c/s 272(1) and 273(1) of the Penal Code Act. The appellants are each sentenced to 15 years imprisonment to ran from 31.12.2002

Dated at **Kampala** this 28th day of July 2009.

A.E.N MPAGI BAHIGEINE,
JUSTICE OF APPEAL

S.B.K KAVUMA
JUSTICE OF APPEAL

A.S NSHIMYE
JUSTICE OF APPEAL