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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

**AT GULU**

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**Coram: Hon Justice Mukasa-Kikonyogo, DCJ  
Hon Justice S.B.Kavuma, JA  
Hon Justice A.S. Nshimye, JA**

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**CRIMINAL APPEAL NO. 50/2006**

**{ ARISING FROM THE JUDGMENT OF HON JUSTICE AUGUSTUS KANIA  
OF 1/12/2006 IN H/C CRIMINAL SESSION NO. 20/2006 SITTING IN ARUA }**

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**ADAMA JINO :::APPELLANT**

**VS**

**UGANDA:::RESPODNNET**

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**JUDGMENT OF THE COURT**

The appellant was convicted of 3 counts of aggravated robbery c/s 285 and 286(2) of the Penal Code Act and sentenced to death. He appealed against both convictions and sentences.

**Briefly** the appellant and others not arrested, on 9<sup>th</sup> October 2003 at Riki Trading Centre in Arua District robbed three people namely Epiphan Mutubale, Andama Makalindo and Dradria Christopher of their various properties like shop goods, a bicycle and cash. During the said robberies, they fired a gun.

There was also a fourth count alleging robbery of Asendua’s property which at the end of the trial was found not proved and dismissed.

The appellant's defence of alibi that he spent the alleged day in Arua trading centre was rejected. His appeal is based on two grounds namely:-

5       (1)     *That the trial judge did not properly evaluate the evidence on record on the issue of identification and corroboration to support the conviction.*

          (2)     *That the sentence imposed was excessive in the circumstances of the case.*

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Mr Henry Komakech Kilama represented the appellant on State brief while Mr. Sam Oola a Principal State Attorney appeared for the State. Learned counsel for the appellant submitted that the learned trial judge did not consider factors that could raise doubt on the guilt of the appellant .

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He cited the Supreme Court case of **Walakira Abas, Sgt Kizito Joseph and Munakanira John V Uganda cr. Appeal 25 of 2002** in which their Lordships held that the Court must evaluate not only material that supports the accuracy of identification, but also material that tends to raise doubt on it.

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He pointed out that the witnesses who said knew the appellant did not say that they reported his identity to the authorities immediately. He distinguished this case from the case of **Mundu V Uganda Supreme Court Criminal Appeal N0. 28/2001** in which the victim whose jaw was injured, could not speak to mention immediately his assailant, but did so after recovery.

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Witnesses in this case, therefore had no excuse for not reporting immediately like in Mundu case (supra). He prayed that the appeal be allowed because the appellant was not properly identified.

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**On sentence**, he referred us to the Supreme Court case of **Attorney General Vs Suzan Kigula & 417 others Constitutional Appeal N0.3/2006**. He pleaded that in the event we upheld the convictions, this Court ought to consider mitigating factors justifying handing out a lesser sentence than that of death.

Counsel pleaded that the appellant.

1. ***Was a first offender capable of turning a new leaf.***
2. ***Was on remand for 3years and two months before conviction.***
3. ***Has a wife and 4 children.***

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10 In reply Mr. Oola Sam a Principal State Attorney opposed the appeal. He supported the finding of the learned trial judge that the appellant was properly identified.

He referred us to the case of **Uganda Vs George Wilson Simbwa, Supreme Court case N0. 37/1995** in which the Supreme Court was dealing with an appeal from the High Court as a first appellate Court. Among other considerations, it reiterated its duty as a first appellate court to give the evidence on record as whole, that fresh and exhaustive scrutiny which the appellant is entitled to, and draw its own conclusion of fact. Counsel argued us to do the same in this case. He referred us to the evidence of identifying witness P.W.2 **Dradria Christopher** who grew in the same village as appellant. He also referred us to the evidence of P.W. 7, P.W. 8, P.W.9, P.W.10 and P.W.11.

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25 He contended that P.W.7 had met the appellant in a group of people at Riki Trading centre where the incident happened. P.W.8 a cousin to the appellant said that at 8:00pm two hours before the incident, the appellant took tea from the hotel of her father.

30 After hearing gun shots, P.W.8 decided to return to the scene and on the way met people and heard the voice of the appellant asking whether it was true, only one person was shot.

Another piece of evidence was evidence of P.W.10 who said the appellant and some two people took a bicycle frame N0. F621182 for sale. P.W.10 sold the frame to P.W.9. The same was recovered from the home of P.W.9 by P.W.11 N0. 30797 D/C

Bobi Thomson. The frame was identified by P.W.2 as having been a frame of his stolen bicycle. It had a gun shot damage.

5 P.W. 11 narrated the conduct of the appellant. He had disappeared from the area of his usual residence. On the day he was arrested by P.W.11, he was found hiding under a bed in the house of his nephew. The appellant had raised an alibi that he had not been at Riki Trading centre.

10 The learned trial judge found that the appellant had been placed at the scene of crime by prosecution witnesses from direct and circumstantial evidence. Counsel invited us to find no merit in ground one.

On sentence, he submitted that it was true Court is now required to take into account  
15 mitigating factors but, considering the circumstances of this case, the court passed an appropriate sentence. He prayed that the sentence of death be maintained.

Mr Komakech replied that there was no proof that anybody died before or after. In  
20 hiding under the bed, the appellant was scared by people who had knocked at the door. He reiterated his earlier prayer that the appeal be allowed.

As a first appellate Court, we have reminded ourselves of our duty under Rule 30 of  
25 the Rules of this Court to re-evaluate the whole evidence and come to our own conclusion. See also **Supreme Court decision Kifamunte Vs Uganda (1999)2 EA, Charles Bitwire Vs Uganda SCCA N0. 23 of 1995**

We have read the record and authorities referred to us by both counsel. The issue here  
30 is whether the trial judge came to a correct decision on the identification of the appellant.

P.W.8 Aisha Chandiru told Court on page 35 of the record that she was a cousin to the appellant. This was so because the appellant was a son to her aunt. Two hours before the robbery at Riki Trading Centre, she served him and his companion with tea on

credit. She closed the tea room at 9:00pm and decided to go home via her sister Agnes' home.

5 At 10:00pm she heard gunshots in the trading centre. Fearing for her father, she and Agnes decided to go and find out what was happening. On the way they heard voices of people coming from the trading centre. They stepped aside to let them pass. Among the voices, she heard and recognised that of the appellant shouting and wondering whether Kalea had only shot one person.

10 The following day, the appellant went to her tea room and paid for the tea he had taken on credit the previous evening. He did not see him again until he saw him in prison compound through a prison fence.

**On identification** there is the evidence of P.W.2 Dradria Christopher. He testified that  
15 on 19/10/2003 at 10:00pm he went to Riki trading centre to buy sugar. He found the shop owner called Ali locking the shop and said that it was late. A group of about 8 people arrived and three of them confronted the witness and others. Ali ran away and one of the strangers fired at him. They demanded shop keys hoping that P.W.2 was the owner. After slapping and hitting him with a gun he surrendered his bicycle. He and  
20 others around were made to lie down. His personal property was stolen. The lock of Ali's shop was shot at to give way. The lock of his bicycle was also shot at, to unlock. The assailants put their loot on P.W.2's bicycle. The witness and others were after one hour locked in Ali's shop before the robbers went away. The door of the shop was left open for the said period of one hour. The assailants had torches. He was able to  
25 recognise the voice of the appellant and one Santo. The witness knew them very well, because they grew together in the same village. With the light from torches, he was able to recognise the appellant when he was entering another shop and was the commander of other assailants.

30 He immediately told the story to those who came afterwards. Thereafter, he reported the matter to the police and made a statement to the police. He was able to identify in Court the bicycle frame N0. F621182 as that of his bicycle one robbed from him by the appellant and his group. Among other identification marks, it had a bullet damage mark. During cross examination, he said he had known the appellant since

childhood for a period of over 20years. They belong to the same clan. He also answered that he was with the assailants for about 1 hour before they were locked up in Ali's shop.

5 Counsel for the appellant faulted the judge for not considering whether a report naming the appellant was made to the authority immediately or not. We see nothing on record to suggest that he did not report immediately and we would not fault the trial judge in that regard. The trial judge was confronted with evidence of a single identifying witness.

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We find that the trial judge was conscious of the need for corroboration of the evidence of a single identifying witness in that on page 19 of his judgment he stated.

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***“ The need for corroboration notwithstanding this court has the power to act on the identification evidence of a sole identifying witness if the judge after warning the Assessors and himself/herself finds that the identification was positively made without the possibility of a mistake or error. The tests and conditions for deciding that identification was made positively without error or mistake have been laid down in the case of Abdalla Bimwendo Vs R [1953] 20 EACA 166, Roria Vs (1967) EA 583 Abdalla Nabulere Vs R. [1979] HCB 77. These tests are:***

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- (1) ***Whether the accused was known to the witness before the offence.***
- (2) ***The condition of the lighting.***
- 25 (3) ***The distance from which the identification was made.***
- (4) ***The length of time during which the accused was identified”.***

Later on page 22 the learned judge concluded as follows:-

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***“Though the accused was a very well known person to the witness being village mates, the accused was exposed to the witness at a close distance for up to an hour and there was according to P.W.2 Dradia Christopher torch light, I find that for many reasons the conditions of usual identification were difficult. The witness admitted that all the assailants were dressed in***

5 ***black and they all appeared dark. There is also evidence on record that all the assailants wore head gear therefore making identification difficult. When the witness is supposed to have identified the accused when the witness was already locked up in a shop with the window open, his evidence is that he was lying down on the floor having been warned to stay lying down at the pain of death or being shot. I find these conditions under which the sole identification witness made the visual identification difficult and acting on such evidence requires corroboration”.***

10 We also find that the conditions surrounding identification of the appellant were difficult thus requiring corroborative evidence from, elsewhere.

In agreement with counsel for the respondent we find that the following witnesses provided corroborative evidence.

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1. P.W.8 a cousin of the appellant who knew him very well and served him and his companion with tea on credit at Riki trading centre two hours before the robbery thus placing the appellant in the vicinity of the scene of crime.
- 20 2. The same witness recognised the voice of the appellant among a group which was moving from Riki trading centre after gun shots and robbery.
3. The appellant went to the tea room of P.W.8 the following morning to pay for the tea he had taken on credit the previous evening. To us that means that before the robbery he did not have money to pay for the tea. After the robbery he had money he robbed and was in position to pay.
- 25 4. P.W.2 stated that his bicycle lock was shot to unlock. A damage of the bicycle frame which was recovered and exhibited in court had a bullet damage which corroborates P.W.2’ testimony.
- 30 5. P.W.10 told Court that the appellant took the above frame to him and offered it for sale. The appellant was therefore in possession of a recently stolen property.

According to the evidence of P.W.11, the arresting officer, following a knock at the door, the appellant was found hiding under the bed of his nephew. We agree with counsel for the state that this was not conduct of an innocent person. See **Remigious**  
5 **Kiwanuka Vs Uganda SCCA 41/1995 page 8**. His conduct provided corroborative evidence.

We are of the view that the learned trial judge properly evaluated the evidence and came to a correct decision that participation and the identification of the appellant was  
10 proved beyond reasonable doubt. His defence of alibi collapsed. We are unable to fault the judgement of the learned judge. The appeal against conviction is accordingly dismissed.

Regarding sentence, we accept the appeal in mitigation made by counsel for the  
15 appellant that in the process of robbery, though gunshots were fired, there was no loss of life.

Secondly the appellant appears to us to be sorry/repentant. It is our view that an opportunity for him to reform and turn into a good citizen would not be wasted. The  
20 death sentence is set aside.

Taking into account the period of 3 years and two months he was on remand before conviction, he is sentenced to 15 years imprisonment. On each count, sentences to run concurrently from 1/12/2006.  
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**Dated at Gulu this 23<sup>rd</sup> day of June 2010**

30 **L.E.M MUKASA KIKONYOGO**  
**DEPUTY CHIEF JUSTICE**



**S. B. K KAVUMA**  
**JUSTICE OF APPEAL**

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**A.S. NSHIMYE**  
**JUSTICE OF APPEAL**