THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBALE

(Coram: Obura, Bamugemereire & Madrama, JJA.)

CRIMINAL APPEAL NO. 0151 OF 2012

OBORE WILLIAM:::APPELLANTS

VERSUS

UGANDA::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Mbale before Musota, J (as he then was) in Criminal Session Case No. 0097 of 2011 delivered on 16/04/2012.)

JUDGMENT OF THE COURT

Introduction

The appellant was indicted, tried and convicted of the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act by the High Court (Musota, J, as he then was) on 16th April 2012. He was sentenced to 20 years' imprisonment. The particulars of the offence were that on the 6th day of January, 2011 at Kanyumu Trading Centre in Kumi District the appellant robbed Olupot Anthony of a motor cycle registration number UDN 468D and at, immediately before or immediately after the said robbery, threatened to use a deadly weapon to wit a firearm (pistol) on the said Olupot Anthony.

Background

The brief facts of this case as gleaned from the evidence of the victim are that on 6th January, 2011 at 12.00 noon, the appellant hired the complainant (victim), a motorcycle rider to take him to Kanyumu Trading Centre in Kumi District. Both the appellant and the victim left Pallisa for their destination abode a motorcycle registration No. UDN 468D, a Bajaj Boxer, red in colour. When they reached Kanyumu Town Council, the appellant purported to look around

for his wife but claimed to have failed to find her there. He then asked the victim to take him on the Ngora route which he obliged. When they reached Oyalaituk swamp, the appellant asked the victim to stop so that he could ease himself. The victim stopped and the appellant went to ease himself and returned wearing a black coat. He bent down and picked a pistol from his boots and also pulled out a knife from his jacket. He then he told the victim in Swahili to choose between his life and a motorcycle. The victim who was frightened left the motorcycle and its keys and fled. When he stopped to look behind, he saw the appellant riding away on his motorcycle. After about 30 minutes, another motorcycle rider came and upon the victim narrating the ordeal to him, they tried to follow the appellant but to no avail. The victim then went to Kanyum Police Station at around 3.00-4.00 pm and reported the matter. He also informed the owner of the motorcycle.

The appellant was subsequently arrested and on 12th March, 2011, the victim identified him during an identification parade. He was consequently indicted for the offence of aggravated robbery, tried, convicted and sentenced as aforementioned.

Being dissatisfied with the decision of the trial court, the appellant has appealed to this Court against both conviction and sentence on the following grounds;

1. ***"That the learned trial Judge erred in law and fact when he failed to properly evaluate evidence on identification and wrongfully convicted the appellant of the offence of aggravated robbery."***
2. ***"That the learned trial Judge erred in law and fact when he sentenced the appellant to twenty (20) years of imprisonment which sentence was without justification."***

Representation

At the hearing, Ms. Agnes Wazemwa represented the appellant on State Brief and Ms. Hajat Fatinah Nakafero, Chief State Attorney who was holding brief for Mr. Joseph Kyomuhendo, Chief State Attorney appeared for the respondent. The appellant attended Court via video link from Prison. Counsel for the appellant sought leave for enlargement of time within which to

file the Memorandum of Appeal and validation of the copies on court record which was filed out of time. Both parties filed written submissions which they adopted as their address to this court and the submissions have been considered in this judgment.

Appellants' Submissions

The appellant's counsel submitted that the duty of a first appellate court is now settled as was held by the Supreme Court in **Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997** and **Pandya vs R (1957) EA 336** and **Charles. B. Bitwire vs Uganda Supreme Court Criminal Appeal No. 23 of 1985.**

On ground 1 of the appeal, counsel submitted that it is trite that the burden of proof in criminal cases rests upon the prosecution which must prove each and every ingredient of the offence beyond reasonable doubt as held in **Woolmington vs DPP (1935) AC 462 and Miller vs Minister of Pensions 1947 ALL ER 372** and also reflected in **S. 101 of Evidence Act.** Counsel added that he rationale for the high standard of proof, beyond reasonable doubt, is to avoid the incarceration of innocent persons who may fall victim, if anything else than the requisite standard is accepted.

Counsel argued that in this case, the prosecution failed to prove the most important ingredient of the offence of aggravated robbery that is the participation of the appellant. She pointed out that it is trite that when dealing with evidence of identification by eye witnesses in criminal cases, the court ought to satisfy itself from the evidence that the conditions under which the identification is claimed to have been made were not difficult and to warn itself of the possibility of mistaken identity. Court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold conviction unless it is satisfied that mistaken identity was ruled out. In so doing, counsel added that the court must consider the evidence as a whole namely, the evidence of factors favouring correct identification together with those rendering it difficult.

Counsel relied on **Abdallah Nabulere & Anor vs Uganda (1977) HCB 77,** where the Court among other things, stated the factors that affect the quality of identification evidence, namely; the length of time, the distance, the light and familiarity with the accused.

Turning to the instant case, counsel submitted that the victim had never known the appellant before the incident and that no sufficient evidence was led to explain the time the appellant spent with the victim to enable him clearly and sufficiently identify the appellant. She further submitted that PW3, PW4, and PW5 did not arrest the appellant themselves but only received him from the mob. She then argued that there was a mistaken identity by the victim and the mob since the appellant was accused of stealing the motorcycle on 6th January 2011, was arrested two months later on 11th March, 2011 and the identification parade was conducted on 12th March, 2011. Counsel argued that whereas the incident occurred in broad day light, the abrupt threat to the victim's life could have frightened him and he would not be able to remember the assailant, moreover two months after the incident. She criticised the learned trial Judge for his finding that all factors favoured proper identification of the appellant.

On a separate but related note, counsel contended that the evidence on identification was based on hearsay. She did not elaborate much on this point.

As regards the alleged stolen motorcycle No. UDN 468D, counsel contended that there was no evidence to prove that the appellant had it in his custody as alleged and that apart from the victim, no other prosecution witness saw the appellant take the same. She added that no one even knew the appellant before he was arrested. She faulted the learned trial Judge for having found that there was corroboration in the evidence of the spare parts recovered from the appellant's hut yet PW2 testified that he had marked parts of the alleged stolen motorcycle with its number plate. She argued that apart from exhibiting the spare parts that were recovered, there was no evidence adduced to confirm that they were marked with the number plate of the motorcycle.

Counsel also criticised the learned trial Judge for relying on the confession of the appellant which, according to the evidence of the appellant and DW3, was procured through torture by the police at the time of arrest. She argued that the confession was not voluntarily made as required by law.

On the alleged use of a deadly weapon, counsel submitted that no deadly weapon was recovered from the appellant's home after a search was conducted. He faulted the learned trial Judge for acknowledging that the deadly weapons were not recovered but elected to ignore the fact that the failure to exhibit it renders the allegations baseless.

Counsel contended that no one knew the thief since the trial Judge also agreed that the identification parade was not properly conducted. According to counsel, there was no evidence on record to prove participation of the appellant in the commission of the offence of aggravated robbery which means the prosecution did not discharge its burden to prove that the appellant is the person who used the deadly weapon to steal the motorcycle. She urged this Court to find that the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on identification of the appellant.

On ground 2, counsel referred to **Kiwalabye Bernard vs Uganda, Supreme Court Criminal Appeal No. 142 of 2001,** where it was held that the appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion on sentence, unless the exercise of discretion is such that it results in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstance which ought to be considered while passing a sentence or where the sentence imposed is wrong in principle.

Counsel then submitted that in the instant case, the appellant is not the one who stole the motorcycle and therefore subjecting him to a sentence of 20 years in prison was illegal and

amounted to a miscarriage of justice. He prayed this Court to allow the appeal and set aside the conviction and sentence of the trial court in the interests of justice and fairness.

The Respondents Submissions

On ground 1, counsel submitted that there was proper identification of the appellant by PW1. He added that while counsel for the appellant correctly pointed out the law in regard to identification, she failed or deliberately ignored to apply it correctly to the facts of this case. He submitted that PW1 is the only person who saw the appellant and therefore he was a single identifying witness. Counsel alluded to the principle on a single identifying witness as laid down in **Abduallah Bin Wendo vs R (1953) 20 EACA 166,** which we shall set out later as we resolve ground 1 of the appeal.

Counsel submitted that the conditions that existed at the time the victim met the appellant favoured positive identification. He asserted that the victim who testified as PW1 first interacted with the appellant at midday, and the two parted ways at around 2:00pm, which gave the victim ample time of two hours to identify the appellant. He added that the victim and the appellant met and negotiated the transport fare, and then sat on the same motorcycle meaning that all this happened at very close range. Furthermore, that when the victim and the appellant reached Oyalaituk swamp, the appellant stopped him and pretended to be answering nature's call but came back with a coat and then brandished a gun at him. It was counsel's submission that the victim also used this opportunity to identify the appellant.

Counsel argued that, contrary to the contention of the appellant that the victim had never seen the appellant, the prevailing conditions like the day light between 12:00pm and 2:00pm, the two being together at very close range for a long time, all made it possible for the victim to identify the appellant. He submitted that the learned trial Judge analysed the evidence on identification of the appellant and arrived at a proper conclusion.

Counsel submitted that there was further corroboration of the evidence by the testimony of PW3 Sergeant Kadambi who told court that the appellant had told him how he stole the motorcycle in question and sold it in spare parts and the appellant led him to his home from where he recovered the said spare parts. Counsel pointed out that when the spare parts were presented in evidence it was not challenged. The learned trial Judge, in his judgment, found that although the admission of the appellant did not amount to a confession, the evidence was admissible since it led to the recovery of the exhibits that the appellant said belonged to the robbed motorcycle. The learned trial Judge concluded that the recovery of the motorcycle spare parts was proper inference that the appellant took part in robbery of the motorcycle.

In reply to the appellant's submission on the weapon used, counsel submitted that the failure to recover or tender the deadly weapon that the appellant allegedly used to rob the victim of the motorcycle is not fatal. According to counsel, what matters most is the evidence of the victim that described the weapon used as a pistol and this was not discredited.

As regards ground 2, counsel submitted that the sentence of 20 years' imprisonment was neither excessive nor harsh but lenient given that the appellant was convicted of aggravated robbery which is a very serious offence that attracts a maximum sentence of death. He used a deadly weapon and stole a motorcycle which was never recovered and that deprived the victim and PW2, the owner of the motorcycle of their source of livelihood. Counsel asserted that upon the learned trial Judge considering both the aggravating and mitigating factors, he found that the latter outweigh the former.

In support of his argument that the sentence is lenient, counsel relied on **Guloba Rogers vs Uganda Criminal Appeal No. 57 of 2013** where this Court sentenced the appellant to 35 years' imprisonment for the offence of aggravated robbery and **Ojangole Peter vs Uganda Criminal Appeal No.34 of 2017,** where this Court confirmed a sentence of 33 years' imprisonment for the offence of aggravated robbery.

Counsel concluded his submission by contending that the learned trial Judge adhered to the proper sentencing principles and correctly arrived at the 20 years' imprisonment, which he prayed should be maintained.

Decision of Court

We have carefully perused the record of appeal and considered the submissions of both counsel as well as the law and authorities relied on plus others that we find relevant. It is the duty of this Court to re-appraise the evidence adduced at the trial and draw its own inferences of fact. See **Father Narsensio Begumisa & 3 Others vs Eric Tibebaga [2004] KALR 236, Supreme Court.** This position was earlier well expounded by the Supreme Court in **Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997** and the gist of it is that the first appellate court has a duty to review the evidence of the case and to consider the materials before the trial Judge and it must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on the manner and demeanor, the appellate court must be guided by the impressions made on the Judge who saw the witnesses.

The appeal has two grounds. In ground 1 the trial court is faulted for its failure to properly evaluate the evidence on identification and wrongfully convicting the appellant of the offence of aggravated robbery. In ground 2, the trial court is criticised for sentencing the appellant to 20 years' imprisonment without justification.

On ground 1, it was submitted for the appellant that the prosecution failed to prove the most important ingredient of the offence of aggravated robbery which is participation of the appellant. It was the argument of counsel that there was no proper identification of the appellant because the victim did not know him prior to the incident and they spent a short

period of time together and these factors affected the quality of identification as guided by the decision in **Abduallah Nabulere & Anor vs Uganda (supra).**

The evidence of identification was also challenged for having been based on hearsay.

Conversely, it was argued for the respondent that there was proper identification of the appellant by the victim. Further, that this evidence was corroborated by that of PW3 who testified that the information the appellant gave him led to the recovery, from the appellant's home, of the spare parts of the motorcycle which he said he stole.

The principle to be followed when dealing with the evidence of identification was well laid down in **Abduallah Bin Wendo vs R (supra)** where the East African Court of Appeal held as follows;

> *"subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether be it circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from possibility of error."*

In **Abdallah Nabulere & Anor vs Uganda (supra),** among other things, factors that affect the quality of identification were enumerated. It was held that;

> *"Where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with*

the accused. All these factors go to the quality of identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality, the greater the danger."

We have perused the record of proceedings in this case and particularly the judgment of the learned trial Judge as relates to identification of the appellant where he stated as follows;

"Although PW1 testified that he did not know the accused before, it should be noted that this incident took place at 2: 00 pm in broad day light. PW1 spent a long time with the accused.

According to PW, the accused approached him and hired him to take him to Kanyum allegedly to pick his wife. They talked to each other bargaining the journey fare. PW1 took the accused to Kanyum. At Kanyum the accused got off the motorcycle and looked for his wife. He pretended not to have seen her. He asked PW1 to carry him towards Ngora. All along PW1 was looking at the accused. When they reached a swamp he told PW1 to stop so that the accused could ease himself." PW1 saw him go to the bush and come back with a jacket. He saw the accused pull a pistol from the gumboots and the knife from the jacket. The accused asked PW1 to choose between the motorcycle and his life. Throughout this encounter, PW1 was close to the accused person and I believe he was able to identify the accused person. All factors favored correct identification of the accused person. ***Although PW1 was a single identifying witness I am satisfied that he was able to identify the accused and in the circumstances, no mistake could have arisen.***" [Emphasis ours].

Upon looking at the evidence of identification by PW2 on record that the learned trial Judge relied on and was guided by the principles laid down in **Abduallah Bin Wendo vs R (supra)** and the factors stated in **Abdallah Nabulere & Anor vs Uganda (supra)**, we would find no reason to fault the learned trial Judge's finding that all factors favoured correct identification of the offender. However, we only wish to correct the impression that the victim observed the offender for two hours. While it is true that the incident took place in broad day light and the victim was in close proximity to the offender for two hours, we however wish to point out that the victim was not observing the offender throughout the entire span of two hours. Although the distance between the stage at Kumi Road where the journey started and the scene of crime is not stated in the evidence, it appears some time was spent on the journey and a bit

of time was also spent at Kanyum where the offender was said to have got off the motorcycle to look for his wife. During the journey, the victim rode the motorcycle while the offender was seated on the motor cycle behind him. It is therefore not true that the offender was under the observation of the victim for the entire period of two hours.

The learned trial Judge found the evidence of PW3 who said the appellant admitted stealing the motorcycle and volunteered to take him to his home where the exhibited spare parts were recovered corroborated the victim's evidence. Our own reevaluation of the evidence on record indicates that the appellant in his unsworn evidence does not deny recovery of the exhibits from his house but explains that those spare parts were for his father's motorcycle. He called a witness (DW2) who testified that he sold a motorcycle to the appellant's father although he never stated whether or not the recovered spare parts were for that motorcycle. All that his evidence proved was that the appellant's father had a motorcycle.

We are of the view that the evidence of PW3 would only be admissible if it led to the recovery of exhibits which are proved to be for the stolen motorcycle, in which case, it would corroborate the victim's evidence. However, a close scrutiny of the evidence in chief of PW 2 as relate to how he arrested the appellant and about the spare parts that was recovered does not in our view prove that any of those spare parts were for his motorcycle. We found it imperative to reproduce the relevant part of the evidence of PW2 here below for a proper appreciation of this point.

> *"My brother rang me and told me the boy he gave the motorcycle it was stolen from him (sic). I and the rider reported to police.* ***Police told me to arrest the person who gave the rider the customer****. I am the one who arrested the accused.* ***The people/boys who work on Mbale stage told me they knew the passenger who hired my motorcycle. I was told he is Obore from Karanata. I was told by Oyiti.*** *I searched in Karapala village. I then reported to Wembley Mbale. They came to arrest him he ran away. I came back to Usupa. After some time, I investigated and I found him in Karapala town council standing wearing boots talking to somebody I arrested him and raised an alarm. I took him. People answered the alarm. Someone asked what was hiring at 2.00 - 3.00 p.m. in March 2011.*

A young man asked me and I said the accused stole my motorcycle and he said he heard of it. He got 2 motorcycles and we boarded and took the accused to Karuge police. ***The Police investigated. Police came with spare parts of motorcycles. My motorcycle has never been recovered.***" [Emphasis ours].

In cross-examination, when asked about the spare parts, PW2 then stated as follows;

"*I was not there when Police got the spare parts. I saw the parts.* ***They were many and could have been of my motorcycle e.g. starter cap and indicator. Only that. I used to mark them i.e. No. of the motorcycle. If there is no mark they would not be mine."*** [Emphasis our].

It is evident from the highlighted parts of the evidence of PW2, both in chief and in cross-examination, that he was not sure whether the recovered spare parts were for his motorcycle. In his evidence in chief he stated generally that Police investigated and came with spare parts of motorcycles without indicating that his were among them. Then in cross-examination, PW2 said there were many spare parts and only the starter cap and indicator could have been of his motorcycle. We note that the starter cap was not among the spare parts recovered as testified by both PW3 and PW5. PW2 also stated that he used to mark his with the number plate of the motorcycle and if there was no mark on those spares they would not be his.

In our view, the above evidence of PW2, who was best suited to identify the spare parts that were recovered was too weak to lead to an inference that some of the recovered spare parts were for his stolen motorcycle. We have also looked at the evidence of PW3 who recovered the spares and PW5 who received and exhibited them at the police station but we failed to find any indication that some of the recovered spare parts were marked with the number plate of the alleged stolen motorcycle. We also note that among the recovered spare parts there was no starter cap which PW2 said could have been for his motorcycle. As for the victim, he did not even allude to those spares in his evidence.

The learned trial Judge evaluated the evidence of PW3 and found as follows;

"Circumstantial evidence also pointed at the accused person as the one who robbed PW. I. There was an inference from the evidence of PW.3 No. 29136 Sgt Kadambi who said that when he re-arrested the accused he admitted stealing the motorcycle and volunteered to take him to his home where the exhibited spare parts were recovered. Although this admission did not amount to a confession since PW3 is by law not allowed to record a confession, this evidence is admissible since it led to the discovery of exhibits the accused said belonged to the robbed motorcycle. The recovery of motorcycle spare parts is a proper inference that the accused took part in the robbery of the motorcycle. Walusimbi & 3 Ors v. Uganda SC.Cr. App. 28/1992. Although the accused said his father owned a motorcycle it was not shown that the exhibits belonged to the accused's father".

Our reappraisal of the evidence on record as a whole clearly shows that the spare parts were not for the stolen motorcycle. We therefore find the evidence of PW3 of no probative value in terms of proving participation of the appellant in the offence. The alleged admission of the offence by the appellant was indeed not a confession as rightly found by the learned trial Judge and it is clear to us that the recovery of some spare parts from the appellant's house did not help the prosecution case since the owner of the motorcycle who should have identified them was merely speculative that two of them could have been for his motorcycle. We therefore find that the learned trial Judge erred by relying on the evidence of PW3.

Having so found, it means the evidence of the single identifying witness is not corroborated by an independent evidence since the evidence of identification as given by PW4 was rightly found to be inadmissible by the learned trial Judge. The question would then be whether the evidence of the single identifying witness alone was cogent and could support a conviction. In **Abdallah Nabulere & Anor vs Uganda (supra)**, this Court which was then the apex court in this country emphasized the need for the trial court to exercise caution when faced with the evidence of a single identifying witness. It cited with approval the decision in **Abduallah Bin Wendo vs R (supra)** which succinctly stated that position and observed that there is no requirement in law or practice for corroboration.

In the instant case, the learned trial Judge did not warn himself for two reasons; firstly, he found the conditions favourable for correct identification and concluded that in the circumstances, no mistake could have arisen. Secondly, he found that the evidence of the victim was corroborated by that of PW3 who recovered the spare parts from the appellant's house.

However, we have carefully reappraised the evidence of PW2 on how the appellant was arrested as earlier reproduced above and we curiously noted some disturbing flaws. We believe if the learned trial Judge had properly evaluated that evidence he would have still found the need to caution himself of the danger of relying on the evidence of PW1 as a single identifying witness, despite the fact that conditions favoured correct identification.

PW2 testified that when he was informed that his motorcycle had been stolen, he reported the matter to the police and he was told to arrest the person who gave PW1 the customer. The people/boys who work on Mbale stage then told him they knew the passenger who hired his motorcycle as being a one Obore from Karanata. He later said it was a one Oyiti who told him. PW2 further testified that he reported the matter to Wembley Mbale but when they went to arrest the appellant he ran away. After some time, PW2 investigated and found the appellant in Karapala town council talking to someone. He arrested him and raised an alarm which people answered. A young man who told him that he had heard about the theft of his motorcycle assisted him to get two motorcycles which they used to take the appellant to Karuge police.

It is noteworthy that the investigation was done by PW2 who arrested the appellant two months and 5 days after the offence was committed. PW2 relied on the information given by a one Oyiti of Mbale stage that it was a one Obore from Karanata who had stolen the motorcycle. We must bear in mind that according to the evidence of the victim, on the fateful day the appellant came at a stage on Kumi Road in Palisa town from where they set off for the ill-fated journey that resulted into theft of the motorcycle. It is not clear from the evidence

of PW2 where Mbale stage is exactly located and how the said Oyiti came to know that it was Obore from Karanata who stole the motorcycle thus leading to the arrest of the appellant. To our minds, this lends credence to the complaint of the appellant that the evidence of the initial identification by PW2 was based on hearsay because the said Oyiti was never called to testify as to how he got to know that it was Obore who stole the motorcycle. PW1 on his part neither knew the appellant nor his name before his arrest and identification in the botched identification parade. We need to observe that although the evidence of identification parade was found to be inadmissible, we curiously note that when the victim was asked how he came to identify the appellant he said; *'I selected him for he was the shortest.'*

This, in our view, points to some manipulations to make the victim identify the appellant from among the persons with whom he was paraded. It adds to the doubt created by the circumstances surrounding the appellant's arrest. We cannot rule out speculations and mere suspicion which, in our view, necessitated corroboration of the evidence of the single identifying witness with an independent evidence. The learned trial Judge impliedly recognised the need for corroboration but found it where none existed as discussed above.

We also note that in cross examination, PW2 testified that two people whom he named as Mulabi and Malinga were arrested in respect of his motorcycle. He said Mulabi was suspected to be a friend of the appellant while Malinga was arrested by Pallisa police. Malinga was the person originally riding the motorcycle according to the evidence of PW2 in chief. It is not stated in the evidence whether those two suspects were also paraded before PW1 for identification but it appears they were released on police bond earlier.

Based on the above highlighted flaws in the prosecution evidence, we would be inclined to find that the learned trial Judge erred when he failed to properly evaluate the evidence and hurriedly concluded that although PW1 (the victim) was a single identifying witness he was satisfied that he was able to identify the appellant and in the circumstances, no mistake could have arisen.

Otherwise, on another note, we agree with the learned trial Judge's finding that the failure to recover the weapons alleged to have been used in the robbery would not water down the prosecution evidence that they were used against the victim. We wish to observe that if courts were to summarily hold that where weapons used in aggravated robbery are not recovered and exhibited the offence would not be proved, many offenders would go scot free and continue to ravage society.

The learned trial Judge in this case found instructive the provision of section 286 (3) of the Penal Code Act which widened the definition of a deadly weapon to include; any instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument; and any substance, which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing any fear in a person that it is likely to cause death or grievous harm. He then said it was no longer necessary to test a gun by a ballistic expert before qualifying it to be a deadly weapon and we entirely agree with him.

Be that as it may, we find merit on ground 1 of the appeal because, the evidence on record leaves some doubt on participation of the appellant which must be resolved in his favour. We therefore find that prosecution failed its duty to prove the appellant's participation in the offence beyond any reasonable doubt. We conclude that the appellant is not guilty of the offence of aggravated robbery. Had the learned trial Judge carefully and critically evaluated the evidence as pointed out above, he would have so found.

Consequently, this appeal succeeds on ground 1 and the appellant's conviction is quashed. Consequently, the sentence is set aside. The appellant is hereby acquitted of the charge of aggravated robbery and we order for his immediate release unless held on other charges.

Before we take leave of this matter, we note with deep regret that the appellant has been in prison for over 11 years now from the time he was arrested. His appeal that was filed in 2012 was heard over 9 years later and this acquittal is coming after he has served close to 10 years

from the date of his conviction! Obviously the appellant has suffered great injustice. Well aware of the setbacks that this Court has suffered in the past, we still make a humble appeal to the registry of this Court to fix appeals for hearing on the basis of 'first in first out' to avoid such embarrassing scenarios.

Dated at Mbale this 24th day of March 2023

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Hellen Obura

JUSTICE OF APPEAL

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Catherine Bamugemereire

JUSTICE OF APPEAL

.....

Christopher Madrama

JUSTICE OF APPEAL