THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Buteera, DCJ, Mulyagonja & Mugenyi, JJA

CRIMINAL APPEAL NO. 61 OF 2019

OTIM SIMON PETER
Alias OPOLOT ::APPELLANT

Versus

UGANDA ::: RESPONDENT

(Appeal from the decision of Mubiru, J. delivered on 8th February 2019 in Kampala High Court Criminal Session Case No. 1421 of 2016.)

JUDGMENT OF THE COURT

Introduction

The Appellant was indicted with two others for the offence of aggravated robbery contrary to Sections 285 and 286 (2) of the Penal Code Act. During the trial, the second accused person, Kyonga Emmanuel, was discharged as no case was made against him to answer leaving the Appellant and the 3rd accused person, Waguti Emmanuel, to continue under trial. After a full trial, the Appellant was convicted and sentenced to 21 years and 1 month' imprisonment while the 3rd accused person was acquitted.

Background

The facts presented by the prosecution were that in the evening of 5th February 2015, Julius Tumuhimbise, the complainant, was driving home with his friend Carol N. Mugerwa when he decided to stop at a market in

Kireka to shop, leaving the ignition key inside his car. After a few minutes, he received a call from Carol Mugerwa in which she informed him that unknown people entered the car, put her at gun point using a pistol and drove off with her until they forced her out of the car at the Northern Bypass. The car described as a Noah, Registration Number UAU 522P, had in it the complainant's HTC telephone with phone number 0703572672, Ms Mugerwa's HTC telephone, a driving permit, a UMEME ID No. 5020878, three ATM cards from the Housing Finance Bank, Centenary Bank and Barclays Bank, respectively, 3 Meggers (earth, installation and tester) and a pair of shoes.

Following police investigations, the Appellant was arrested with two co-accused and after a full trial he was convicted and sentenced as stated above. Dissatisfied with the decision, the Appellant now appeals against his conviction and sentence on nine grounds stated in his Amended Memorandum of Appeal as follows:

(1) That the Learned Trial Judge erred in law and in fact when he departed from a binding precedent and stare decisis of **SGT Shaban Birumba & Anor v. Uganda; Supreme Court Criminal Appeal No 32 of 1989,** in violation of Article 132(4) of the 1995 Constitution of the Republic of Uganda.

(2) That the Learned Trial Judge erred in law and in fact when he made a per incuriam decision convicting the Appellant of aggravated robbery contrary to the stare decisis in **SGT Shaban Birumba & Anor vs Uganda Supreme Court Criminal Appeal No 32 of 1989.**

(3) That the Learned Trial Judge erred in law and in fact when he found and held that the Appellant had a deadly weapon during

the robbery although the weapon was not recovered and produced at trial and relied on a description of the instrument as sufficient for Court to decide whether the weapon was lethal or not.

(4) That the Learned Trial Judge erred in law and in fact when he misapplied and misinterpreted sections 38, 39, 40 and 41 of the Evidence Act Cap 6 and rejected the judgment of **NAK Criminal Case Number 449 of 2014: Uganda versus Otim Simon** as evidence of vendetta between the Appellant and Kimalya.

(5) That the Learned Trial Judge erred in law and in fact when he in violation of the Brady rule allowed and permitted the prosecution to suppress exculpatory and favourable evidence of vendetta between the Appellant and Kimalya.

(6) That the Learned Trial Judge erred in law and fact when he discredited the Appellant's defence of vendetta between the Appellant and Kimalya that placed the Appellant on the defence of the Brady rule.

(7) That the Learned Trial Judge erred in law and in fact when he failed to properly evaluate the evidence on record and wrongly convicted the Appellant of aggravated robbery.

(8) That the Learned Trial Judge erred in law and fact when he failed to address himself to the major discrepancies, contradictions and inconsistencies in the prosecution case thereby occasioning a miscarriage of justice.

(9) That the Learned Trial Judge erred in law and fact when he imposed a sentence of 21 years and 1 month which is illegal, harsh and manifestly excessive.

Representation

At the hearing of the appeal on 17th August 2023, Mr. Mohammed Mbabazi and Ms Kaddu Loyce appeared for the Appellant on a private brief. The respondent was represented by Ms Sharifah Nalwanga, Chief State Attorney from the Office of the Director of Public Prosecutions.

Preliminary Objection

Counsel for the respondent relied on rule 66 (2) of the Court of Appeal Rules and, submitted that each of the nine grounds set out by the Appellant in his Amended Memorandum of Appeal was not distinct. It was her submission that grounds 1, 2 and 3 were similar and a replication of a complaint about the stare decisis doctrine, faulting the trial judge for not applying the decision in the case of **Sgt. Birumba & Another v. Uganda, SCCA No. 32 of 1989** to the facts of the case.

She further submitted that grounds 5 and 6 were similar as they were both about the Appellant's defence or evidence of a vendetta which he complained that the trial judge ignored to his prejudice. Counsel also pointed out that ground 7 was a general ground that fell short of specifying the error of law or the facts alleged to have been wrongly decided by the trial judge.

Further, that ground 7 was partly a duplication of ground 3. She referred to **Ntirenganya Joseph v. Uganda; CACA No. 109 of 2017** and **Benjamin Oteka v. Uganda; CACA No. 175 of 2018** to support her submissions and prayed that court strikes out these grounds for offending rule 66 (2) of the Rules of this Court.

The Appellant's Advocates did not respond to the objection, but in view of what appears to be prolixity of the grounds that were framed by counsel for the Appellant, we deemed it necessary to briefly address the objection.

Rule 66 (2) of the Rules of this court provides that:

> **(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided.**

We observed that in grounds 1, 2 and 3 of the memorandum of appeal, in different words the Appellant's complaint, as we understood it, seems to be that the trial judge failed to follow the law on what amounts to a deadly weapon as it was defined by the Supreme Court in its decision in **SGT Shaban Birumba & Anor v. Uganda** (supra). And that by doing so, the trial judge contravened Article 132 (4) of the Constitution which requires courts subordinate to the Supreme Court to follow is decisions.

The same complaint is repeated in ground 3, except that in that ground counsel actually states the decision of the court in the case of **Shaban Birumba** (supra). Counsel then proceeded to address court on all three grounds of appeal together.

We deemed it necessary to point out that the strength of an appeal is not determined by the number of grounds that are raised in the Memorandum of Appeal. Rather, it is about identifying the errors that were made by the trial judge succinctly, to enable this court address them with a view to correcting any injustice that may have been occasioned to the Appellant.

The framers of rule 66 (2) of the Court of Appeal Rules had a purpose for requiring that an Appellant frames the grounds of objection to the decision concisely without argument or narrative, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact that were wrongly decided by the trial court. While it may be true to state that the trial judge did not follow the decision in the case of **Birumba** (supra) and that by doing so, he did not comply with the requirements in Article 132 (4) of the Constitution, it is our considered view that counsel for the Appellant set out his arguments in respect of ground 3 as grounds 1 and 2 in the appeal. And that by doing so grounds 1 and 2 of the appeal offended rule 66 (2) of the Court of Appeal Rules.

Counsel filling appeals in this court must observe rule 66 (2) of the Rules of this court scrupulously. It is not only a waste of the court's time when counsel state numerous grounds but it may bring about confusion in the submissions leading to the court spending a long time to decipher what counsel meant to bring to its attention. For those reasons, we deemed it necessary to strike out grounds 1 and 2 of the appeal and consider ground 3, which succinctly addresses the points of mixed law and fact that the Appellant complained about. Grounds 1 and 2 are argumentative in that they ought to have been advanced to bolster the complaint in ground 3. They are therefore hereby struck out.

We further observed that in grounds 4, 5 and 6 the Appellant complains about the trial judge's decision to disregard his defence that one Kimalya waged a vendetta against him. That it was Kimalya that instigated his arrest which led to his trial for the offence that he was convicted and sentence for in the present appeal.

In grounds 4 and 5, counsel for the Appellant stated that the trial judge erred because he allowed the prosecution to suppress the evidence of an earlier case brought against the Appellant, **Uganda v. Otim Simon, Nakawa Criminal Case No 449 of 2014**. That the evidence about this case would have proved that there was a vendetta waged against the Appellant by Kimalya. Counsel then goes on, in ground 6 to state that the trial judge erred when he discredited the same evidence and so failed to comply with the *Brady rule*.

Once again, we are of the view that the complaints in grounds 4 and 5 should have been arguments advanced in respect of ground 6. It is for that reason that counsel actually addressed them together in his submissions. Ground 4 and 5 are narrative and argumentative and contrary to the provisions of rule 66 (2) of the Court of Appeal Rule. We therefore hereby strike them out.

We shall now proceed to address our minds to grounds 3, 6, 7 and 8, as well as ground 9 which was a complaint about the sentence imposed by the trial judge, if necessary. The grounds are addressed chronologically and the submissions on each of them is reviewed before its resolution.

Analysis

The duty of this court as a first appellate court is stated in rule 30(1) of the Court of Appeal Rules. It is to reappraise all of the evidence adduced before the trial court and come to its own decision on the facts and the law, taking into account the fact that it did not observe the witnesses testify. We therefore carefully considered all of the evidence that was placed before us, the submissions of counsel that were relevant to the

grounds that were retained, as well as the authorities that were cited, and those not cited that were relevant to resolve the appeal.

Ground 3

The Appellant's complaint in ground 3 was that the trial judge erred in law when he found and held that the Appellant had a deadly weapon during the robbery, although it was never recovered and produced at the trial. Further that he relied upon the description thereof as sufficient evidence to prove that it was indeed a deadly weapon.

Submissions of Counsel

It will be recalled that we found that grounds 1 and 2 were actually arguments in respect of ground 3. Counsel thus argued that the thrust of grounds 1, 2 and 3 was the interpretation and application of Article 132 (4) of the 1995 Constitution, which they opined were the twin birth of the doctrine of precedent and the *per incuriam* doctrine. Counsel then argued that the trial Judge did not follow the decision in the case of **Sgt. Shaban Birumba** (supra) when he found that it was sufficient to describe the pistol as seen by the victim and qualify it as a deadly weapon.

They relied on the decisions in **Attorney General v. Uganda Law Society; Constitutional Appeal No. 1 of 2006**, where it was held that under the doctrine of stare decisis, a court of law is bound to adhere to its previous decisions save, in exceptional cases where the previous decision is distinguishable or was overruled by a higher court on appeal or was arrived at *per incuriam* without taking into account the law in force or a binding precedent. Counsel further drew our attention to the decision in **Murisho Shafi & 5 Others v. Attorney General & Another Constitutional Application; No 2 of 2017** on the doctrine.

To counter the effects of the amendment of the Penal Code in 2007, counsel for the Appellant argued that Article 92 of the Constitution forbids Parliament from legislating to overrule decisions of the courts. They contended that there is a clash between legislative amendments and court decisions based on precedent which was resolved by **Human Rights Network & 4 Others v Attorney General; Constitutional Petition No. 56 of 2013**. It was therefore their submission that the 2007 amendment of the Penal Code is not law within the context of Article 92 of the Constitution and that **Sgt. Birumba** as a precedent is still considered good law; that it is binding on the Supreme Court and all Courts subordinate thereto until it is overruled by the Supreme Court.

It was also their contention that an imitation of a weapon cannot be a deadly weapon within the reading of section 286 of the Penal Code because the Penal Code Amendment provides that a deadly weapon includes an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument. That following the decision in the case of **Sgt. Birumba** (supra), a deadly weapon whether real or an imitation has to be tested to determine its capability and the need for testing was not extinguished by the amendment of section 286 of the Penal Code in 2007 but remained necessary. That in conclusion, the trial Judge erred when he did not follow the decision in **Sgt. Birumba's** case.

In reply, Counsel for the respondent argued that the decision in **Sgt Shaban Birumba** (supra) was overtaken by other precedents. That the decision in that case was delivered on 20th June 1991 before Article 132 (4) of the Constitution came into force. She emphasised that the same court already departed from their decision in that case.

Counsel then referred court to the decisions in **Haruna Turyakira & Others v. Uganda; SCCA No. 7 of 2009** and **Mumbere Julius v. Uganda; SCCA No. 15 of 2014**, and submitted that what was required of the prosecution was to adduce evidence to describe the items not produced as was the case in **Mutesasira Musoke v. Uganda; SCCA No. 17 of 2009**.

Counsel further submitted that the trial Judge correctly analysed the evidence, especially that of PW2 who testified that when they went past Victoria Pub, the assailant who was driving pulled out a pistol and pointed it at her and told her there was money in the car. That the assailant sitting in the back seat ordered her to keep quiet and hand over her bag to him. She reproduced the testimony of PW2 at page 12 of the record of appeal to that effect. Counsel then argued that the exhibit of a pistol was not recoverable because it was either destroyed or hidden by the Appellant who was in possession of it at the time of the robbery.

She prayed that this honourable Court finds that the trial Judge properly evaluated the evidence and relied on **E. Sentongo & P. Sentongo v Uganda; (1975) HCB 239,** as well as the latest jurisprudence of the Supreme Court in finding that a deadly weapon, according to the careful description of PW2, was used in committing the offence even though the same was not produced in evidence.

She went on to submit that the Appellant's arguments about the ratio in **Birumba's case** on what amounts to a deadly weapon was overtaken by the Penal Code (Amendment) Act, 2007 which amended s. 286 by substituting subsection (2) & (3) thereof. That the latter provides that "deadly weapon includes an instrument made or adapted for shooting,

stabbing or cutting and any imitation of such an instrument." She prayed that the Appellant's grounds 1, 2 and 3 be dismissed.

Resolution of Ground 3

There are 3 issues that fall for determination under this ground of appeal: (i) whether this court has the jurisdiction to determine whether the amendment of section 286 of the Penal Code in 2007 by replacing section 129 is not law within the context of Article 92 of the Constitution; (ii) whether the trial judge erred when he did not rely on the decision in the case of **Sgt Shaban Birumba** (supra) to decide whether a deadly weapon was used in committing the offence or not; and if so, (iii) whether his decision contravened the provisions of Article 134 (2) of the Constitution.

The part of the decision that the Appellant complained about was at page 5 of the trial judge's opinion (page 43 of the record of proceedings) as follows:

> *"Although the weapon mentioned was not recovered and hence not tendered in evidence, according to the decision in E. Sentongo and P. Sebugwawo v Uganda [1975] HCB 239, when the prosecution fails to produce the instrument used in committing the offence during trial, a careful description of the instrument will suffice to enable court decide whether the weapon was lethal or not. P.W.2 Carol N. Mugerwa testified that there was light inside the car emitted from the dash board and from the headlights of oncoming vehicles. By that light she was able to see the object held by the assailant driving the car to have been a pistol. She was seated in the front passenger seat, only a foot away from the assailant. She was firm even during her cross examination that what she saw was a pistol. The description suffices in the circumstances. Considering the evidence as a whole relating to this element and in agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that the assailants had a deadly weapon in their possession during the robbery."*

In **Shaban Birumba** (supra), the Supreme Court considered the relationship between the provisions of the old Firearms Act and "the old" Penal Code Act relating to a *"dangerous weapon"* and a *"deadly weapon."* The court specifically considered the import of Section 273(l)(b) and 273(2) of the old Penal Code and sections 31 and 32 of the Firearms Act, as well as the decision in the earlier case of **John Wasaja v. Uganda, Criminal Appeal No. 19 of 1975** and **Opoya v. Uganda [1967] EA 752.** With regard to proof of the crime of *'capital robbery'* under section 273 (2) of the Penal Code at the time, the court found and held that:

> *"It is clear from the same source that a dangerous weapon has the original meaning of capable of causing injury. The deeming provisions are artificial, however kindly the intention may have been to avenge the victim, duped by an imitation gun. The deeming provisions were deliberately replaced by a new definition in Section 273(2) clearly indicating that the weapon would be likely to cause death. The Court of Appeal was quite right to give the ordinary direct meaning to deadly weapon, and there is no need to apply any artificial meaning.* ***The death sentence is mandatory in cases where the death of the victim is likely. That seems a satisfactory situation, unless Parliament directs otherwise. Until then, we uphold Wasaja's decision.***
>
> ***On that basis, the final question is whether the pistol was a deadly weapon. It is unfortunate that the investigation of the case, did not include proof that the pistol was such a weapon, capable of causing death. By the time that the trial opened the gun was missing and the Court was unable to insist on proof. A pistol, though it may have been together with ammunition, yet it may not have been an operable gun. Consequently, the case fell within Section 273(b) and not 273(2) of the Penal Code.***
>
> *Consequently, we quash the convictions of each accused on each count and set aside the orders under Section 104(1) of the Trial on Indictments Decree. We substitute convictions for the lesser offence of robbery contrary to section 273(1)(b) on each count for each accused.*
>
> *{Emphasis added}*

According to this except, the decision of the Supreme Court in **Birumba's case** recognised the fact that Parliament in its legislative role had the power to amend the provisions of section 273 (2) of the Penal Code (1968) to include circumstances in which the death of the victim was not likely, that is, where an imitation of a dangerous weapon is employed to commit the offence.

The offence of robbery and its punishment at the time of **Birumba's case** were provided for in sections 272 and 273 (2) of the Penal Code Act as follows:

> **272. Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.**
>
> **273 (1) Any person who commits the felony of robbery shall be liable:**
>
> **(a On conviction by a Magistrate's Court, to imprisonment for ten years;**
>
> **(b) on conviction by the High Court to imprisonment for life.**
>
> **(2) Notwithstanding the provisions of paragraph (b) of subsection (1), where at the time of or immediately before or immediately after the time of the robbery an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death.**
>
> **In this subsection "deadly weapon" includes any instrument made or adapted for shooting, stabbing or cutting, and any instrument which when used for offensive purposes, is likely to cause death."**

The laws of Uganda were revised and published in 2000. The revised edition of the Penal Code shows that section 285 and 286 replaced sections 272 and 273 and were in exactly the same terms.

However, in 2007, the Penal Code Act was amended. Section 286 was amended and re-enacted by substituting subsections (2) and (3) thereof with the following:

> **(2) Notwithstanding subsection (1) (b), where at the time of or immediately before or immediately after the time of the robbery, an offender is in possession of a deadly weapon, or causes death or grievous harm to any person, the offender or any other person jointly concerned in committing the robbery shall, on conviction by the High Court, be liable to suffer death.**
>
> **(3) In subsection (2) "deadly weapon" includes—**
>
> **(a) (i) an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument;**
>
> **(ii) any substance,**
>
> **which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm; and**
>
> **(b) any substance intended to render the victim of the offence unconscious.**

In **Mutesasira Musoke v. Uganda, Supreme Court Criminal Appeal No 17 of 2009**, contrary to its decision in the case of **Shaban Birumba**, the court held that:

> *"In cases where an accused person is indicted for aggravated robbery, failure by the prosecution to exhibit in court the deadly weapon used in the robbery will not be fatal to the prosecution's case as long as there is other reliable evidence adduced to prove that a deadly weapon was used. See, for example,* ***Haruna Turyakira & others vs Uganda, Criminal Appeal No. 07 of 2009"****.*

We therefore find that the trial judge was correct when he relied on the law as amended in 2007 to find that PW2 identified the weapon that was used in the robbery as a pistol because she described it as such and explained

that the assailant and his gun were near her and she was able to see the gun in his hand. We therefore find that the fact that the gun was not recovered and adduced in evidence and/or test fired was irrelevant to the decision in the light of the decision of the Supreme Court in **Mutesasira Musoke v. Uganda** (supra). Further, that the amendment of section 286 (2) of the Penal Code Act in 2007 obviated the need to adduce the weapon in evidence and to have it test fired before evidence of its use could be relied upon by the court.

Counsel for the Appellant further contended that the decision of the trial judge which was not consistent with Supreme Court's earlier decision in **Shaban Birumba's case** (supra) contravened Article 132 (4) of the Constitution, which provides as follows:

> **(4) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; *and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law*.**
>
> *{Emphasis added}*

The courts subordinate to the Supreme Court are by virtue of the provision above bound to follow its decisions on questions of law. It is also our understanding that in as far as the offence of aggravated robbery is concerned, the decision in **Birumba's case** was about the determination by the Supreme Court whether the weapon that was used in committing the robbery was a deadly weapon within the meaning of section 273 (2) of the Penal Code Act. The Supreme Court found that within the meaning of section 273 (2) of the Penal Code, the gun that was used was not a deadly weapon because it was not fired at the scene. Neither was it test fired after it was recovered. It therefore did not meet the requirements of the that provision.

Contrary to that, in the instant case the court had to make a determination about whether the weapon that was identified by the victim (PW2) at the scene of the crime was a deadly weapon within the meaning of section 286 (2) of the Penal Code Act, after it was amended in 2007.

Although section 286 (2) was the equivalent of section 273 (2) of 1968 Penal Code, the subject of the decision of the Supreme Court in **Birumba's case** as well as **Wasaja's case** (supra)was, the amendment of section 286 in 2007 by substituting for subsections (2) and (3) with new provisions. The amendment introduced new elements into the earlier provision that made it different from that which was interpreted in the two decisions before. While a *"deadly weapon"* in section 273 (2) of the Act was defined to include *"any instrument made or adapted for shooting, stabbing or cutting, and any instrument which when used for offensive purposes, is likely to cause death;"* the term *"deadly weapon"* was by the amendment of section 286 (2) and (3) of the Penal Code in 2007 given a much broader meaning as follows:

> **(3) In subsection (2) "deadly weapon" includes—**
>
> **a) (i) an instrument made or adapted for shooting, stabbing or cutting, *and any imitation of such an instrument;***
>
> **(ii) any substance,**
>
> **which when used for offensive purposes is capable of causing death *or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm*; and**
>
> **(b) any substance intended to render the victim of the offence unconscious.**
>
> *{Emphasis added}*

The Supreme Court was thereafter no longer under an obligation to follow the decision in **Birumba's case** when making findings about what

constituted a "deadly weapon." By necessary implication therefore, this court and the lower courts were no longer under an obligation to follow its decisions on that point of law before the amendment of the Act. We are therefore unable to find that the trial judge made a decision that was in contravention of Article 132 (4) of the Constitution.

As to whether this court has the jurisdiction to determine whether the amendment of section 286 of the Penal Code in 2007 by substituting subsections (2) and (3) thereof did not result in a valid law within the context of Article 92 of the Constitution, we are of the opinion that the question falls within the ambit of the jurisdiction of this court provided for under Article 137 of the Constitution. It would require this court to interpret the two provisions and establish whether the acts of Parliament were inconsistent with or in contradiction of the provisions of Article 92 of the Constitution. It is therefore a question that cannot be answered by this court sitting as an appellate court.

Ground 3 of the appeal therefore fails.

Ground 6

In this ground, the Appellant complained that the trial judge erred in law when he discredited the Appellant's evidence that there was a vendetta between Kimalya and the Appellant that led the latter to tramp up charges against him.

Submissions of Counsel

Counsel for the Appellant contended that the prosecution suppressed material exculpatory evidence of the vendetta of Kimalya, an operative of

the "Flying Squad" against the Appellant. He explained that according to the Appellant's testimony, the charges brought against him were tramped up by operatives of the Flying Squad who had earlier tramped up similar charges against him.

Counsel explained that according to the Appellant's testimony, in 2009 the Appellant was released after bribing himself out of jail. Further, that in 2016, he was charged and the case was eventually dismissed. Counsel stated that the Appellant sought to tender in evidence of the judgment in the latter case but the prosecution objected arguing that the whole record had to be produced. Counsel then faulted the trial Court for sustaining the objection by rejecting the Judgement and ordering for production of the entire record. They also faulted the trial Judge for not looking at the judgment to make a determination as to its relevance and materiality. They added that irrespective of that omission, there was the evidence of DW2, the Appellant's wife, and DW3 the Appellant's co accused, alluding to the vendetta.

It was further submitted that the trial Judge in summing up for the assessors summarised the Appellant's alibi and the allegation of a vendetta by Kimalya, which the prosecution was required to disprove. Further, that the prosecution chose to suppress the evidence by a technical objection and ultimately concealed the evidence from the Court. Counsel argued that this conduct was in violation of the *rule* in **Brady v. Maryland; 373 US (1963),** a decision of the Supreme Court of the Unites States, *"the Brady rule."*. They submitted that it was stated in that case that suppression by the prosecution of evidence favourable to an accused person who has requested it violates due process where the evidence is

material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The Appellant's counsel then explained that in **Brady v. Maryland** (supra) Justice Douglas noted that the ruling was an extension of **Mooney v Holohan 294 U.S. 103,112**, where the Court ruled that non-disclosure by a prosecutor violates due process. They further referred to Articles 28 and 44 of the Constitution to support the submission that the Appellant was entitled to the right to fair trial. And that by virtue of Article 120 (3) (a) and (5) of the Constitution, the prosecution has an upper hand and could obtain more information than the accused. They are therefore required by law to avail the information obtained from investigations to the accused to enable him to prepare for his defence and create room for a fair hearing.

Counsel for the Appellant further argued that suppression by the prosecution of evidence favourable to the defendant who has requested it violates due process and that it is a type of prosecutorial misconduct. They also referred to the golden rule which dictates full disclosure of materials by the prosecution to avoid miscarriage of justice.

In conclusion, Counsel for the Appellant submitted that the office of the DPP violated the Brady rule when it objected to the tendering of the evidence of a judgment that proved the vendetta of Kimalya against the Appellant, which resulted in tramped up charges against him. That had the judgment been tendered in evidence and admitted by the court, the outcome of the trial would have been different.

In reply, Counsel for the respondent reiterated the submissions under the preliminary points of Law and added that these grounds were unfounded,

baseless and should be struck out as these matters were raised during the trial and appropriately disposed of by the trial Judge.

Referring to page 26 of the record of appeal, where the Appellant tried to introduce a previous Judgement in his defence to which the prosecution objected, Counsel submitted that the trial Judge based his decision on Section 41 of the Evidence Act to reject the evidence unless the entire record of proceedings was produced. She opined that the trial Judge considered both the prosecution and defence evidence as a whole. That the Judge, in summing up to the assessors, made it clear that the prosecution had the burden to disprove the Appellant's defence and that their sworn statements must be given due consideration alongside prosecution evidence. That the trial judge correctly found that the Appellant was placed at the scene of the crime.

In conclusion, she submitted that the *Brady Rule* was misplaced and inapplicable in this appeal and invited this Court to uphold the decision of the trial Judge.

Resolution of Ground 6

The Appellant's main complaint here was that one of his defences was arrest on charges tramped up Enoch Kimalya, an operative of the Flying Squad, an investigative arm of the Uganda Police. That the said Kimalya tramped up charges against his because there was a vendetta between the two which resulted from Kimalya making advances to his wife, who testified in favour of the Appellant as DW2. further, that because the Appellant's wife rejected Kimalya's advances, the latter set out to accuse him of diverse offences of theft of motor vehicles, including the present

case, in which the Appellant stated that Kimalya was present when he was arrested and it was he that instigated the arrest.

The Appellant complains that though he tried to adduce evidence about the said vendetta by tendering a copy of a judgment in respect of one of tramped up charges in respect of which the case was dismissed by court, the prosecution raised a technical objection upon which the judge declined to admit the judgment in evidence.

It is pertinent to note that in his judgment, the trial judge did not consider the Appellant's defence of a vendetta against him by Enoch Kimalya. He however referred to it as part of the Appellant's defence while he was summing up to the assessors. At page 39 of the record he stated that the Appellant denied participation in the offence and adduced evidence that he spent the day and night of the fateful evening at his brother in law's home, together with his wife. That he was falsely implicated in the crime by one Kimalya, with who he clashed over the latter's inappropriate advances to his wife. That this was the reason for Kimalya's persistently tramping up of charges against him.

The part of the proceedings that the Appellant complained about was at page 30 of the record of appeal where he testified that,

> *"I used to work abroad in Iraq and Afghanistan in 2007-2012. I was contracted by the US forces. I trained in Israel and the US at the sponsorship of Babylon Gates. In 2009 I had been arrested on my return home on a month's leave. The case was obtaining money by false pretence but I did not know the complainant. I bribed with shs. 10,000,000/- my way out as I had to return to work. In 2016 he alleged that I had stolen another car. I bribed Kimalya and Herbert policemen attached to Flying Squad with shs. 11.000.000/-. In 2019 he made another allegation that I had stolen a motor vehicle. The case was dismissed. That case was dismissed. He is still the one who raised an alarm when I was arrested."*

Counsel for the Appellant then applied to have a copy of the judgment in the case that was dismissed admitted in evidence but the prosecution objected on the ground that whatever he sought to tender in was only part of what would be required to prove that the case was dismissed. He thus demanded that counsel for the Appellant produces the entire court record.

The trial judge did not describe the document that the defence sought to produce. But it is important to deduce from his ruling why he declined, or whether he indeed declined to have the document admitted or not. On page 30 of the record, he ruled as follows:

> *"According to section 41 of the Evidence Act, Judgments other than those mentioned in sections 38, 39 and 40, (i.e. previous judgments relevant to bar a second suit or trial; certain judgments in probate matters and if they relate to matters of a public nature relevant to the trial) are irrelevant unless the existence of the judgment, is a fact in issue, or is relevant under some other provision of this Act. I find that the judgment sought to be introduced has not been justified under any of those provisions and does not name any of the witnesses who testified. The entire record of the court should be produced. The objection is sustained."*

The record after that shows that counsel for the Appellant consulted him and the notes of the trial judge on the record, at page 30, were as follows:

> *"Defence Counsel: I have consulted the accused and we have decided to withdraw the judgment. We shall proceed without it.*
>
> *Court: If that is the case let the trial continue."*

It is clear from the record that the trial judge did not deny the Appellant the opportunity to produce the judgment that he sought to aid him in his defence. Instead, he ordered his advocate to produce the whole record of the court. He referred to sections 38, 39, 40 and 41 of the Evidence Act to support his decision.

We considered the said provisions of the Evidence Act. The Appellant sought to produce a judgment in previous criminal proceedings against him to prove that Enoch Kimalya was in the habit of initiating criminal proceedings against him for robbery of motor vehicles. The prosecution could not deduce that fact from the judgment that he sought to produce and demanded that the whole of the proceedings be brought before the court. The trial judge ruled in their favour, for the reason that the judgment did not show the witnesses that testified against the Appellant in the previous case. It is thus inferred that Kimalya was not mentioned in the judgment and so the record was necessary to prove that the proceedings were initiated on the basis of evidence or an arrest that he initiated.

Further to that, section 38 of the Evidence Act provides for instances where a previous judgment may bar a second suit as follows:

> **38. Previous judgments relevant to bar a second suit or trial.**
>
> **The existence of any judgment, order or decree which by law prevents any court from taking cognisance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognisance of the suit or to hold the trial.**

The Appellant did not seek to prove that the current proceedings were in respect of the offence with which he was charged in the proceedings that he sought to prove were dismissed against him. We therefore, find that the judgement was not relevant to these proceedings.

The other provision that could have justified admission of the judgment is section 41 of the Evidence Act, which provides that:

> **41. Judgments, etc. other than those mentioned in sections 38 to 40, when relevant.**

Judgments, orders or decrees, other than those mentioned in sections 38, 39 and 40, are irrelevant unless the existence of the judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

It was not in issue in the proceedings whether the judgment that the Appellant sought to produce existed or not. Neither was the judgment relevant to the proceedings for any other purpose. But in addition to that, it was not the court that denied the Appellant the opportunity to produce it. Instead, in consultation with his Advocate, the Appellant chose not to pursue his defence on the basis of that judgment and in the premises, the trial continued.

We also observed that in order to prove that Kimalya initiated his arrest for the offence in these proceedings because of a vendetta, the Appellant stated on oath, at page 19-20 of the record that:

> *"I was arrested on 27th February, 2015 at about 9.00 pm. I was coming from an evening mass in Namugongo Shrine as a devout catholic. I was approaching Kyaliwajala Centre to board a taxi home. Someone in close proximity' raised an alarm saying thief, thief and within two seconds two gentlemen, P.W.1 and PW4 Kirunda Sula got hold of me tightly as the other gentleman Kimalya Enock continued to make an alarm. A mob with stones and clubs gathered wanting to lynch me I tried to plead with the people but they could not listen. l then I heard gunshots. I knew that Kimalya was responsible because he had caused my arrests previously."*

However, the evidence on the record about the Appellant's arrest does not show that he was arrested on the spur of the moment by someone making an alarm that he was a thief. Instead, in his testimony in chief, the Investigating Officer, Detective Sargent Watsemwa Sarah (PW3) explained that the Appellant was arrested after an elaborate tracking of his movements using the serial number of the phone that was stolen with the car. At pages 9 -16 of the record, she narrates the process of tracking using

the phone until they got to one Father Mpooza who was in constant communication with the Appellant on telephone. That the tracking led them to one Ibra who was used as a bait to lead them to the Appellant.

At page 10 of the record, the IO testified about how the Appellant was tacked down by police using the stolen telephones. She then testified about his arrest as follows:

> *"We went to Kireka and mobilised some more manpower. We proceeded to Gaz Petrol Station along Lubaga road. Ibra called and the person brought a key and we arrested him with the key. He is A2 Kyonga Emmanuel. We asked him where the car was but he refused to reveal and we took him to Kireka. On our way, Ibra broke down because we had told him the gravity of the offence. He told us that Simon was in Kyaliwajjala not Jinja. We proceeded to Kayaliwajjala near a market and it was a market day and we arrested Simon. He resisted arrest and wanted to stab D/AIP Kirunda with a knife. We overpowered him and he was arrested. It was at night between 9.00-10.00 pm. Ibra had told us that the person we would see him hand over an envelope to, would be Simon. As Ibra handed over the envelope from the priest had given him, (sic) Kirunda grabbed him. We took the suspects to Kireka Police Station. The Simon we arrested is AI Otim Simon Peter alias Opolot."*

However, Ibra did not testify. According to PW3, at page 15 of the record, after the Appellant was arrested, Ibra did not record a statement; instead out of fright, he disappeared. It cannot be surmised from the evidence of PW3 that Ibra was the same person as Kimalya whom the Appellant claims to have orchestrated his arrest on account of a vendetta against him. Instead, it is clear that the Appellant was lured to his arrest by one Ibra. It is therefore very clear that the Appellant was not arrested because Kimalya shouted that he was a thief to draw attention to the IO and Sula Kirunda, who were already investigators on the case to arrest the Appellant.

The testimony of D/AIP Kirunda Sula, PW4 also shows how he tracked the telephones that were stolen with the motor vehicle. That the tracking led them to Father Mpoza who was in touch with the Appellant by telephone. That this was reflected in his telephone records and it led them, through one Ibra, to arrest the Appellant. Kirunda's police statement about his role was admitted in evidence as **DEX2** but it was not part of the record that was placed before us.

However, the testimony of PW3 about the Appellant's arrest in the presence of Sula Kirunda who investigated the case with her was not challenged in cross examination. Instead, the Appellant admitted that indeed Sula Kirunda participated in the arrest and it was he that *"held him tightly"* as the nebulous Kimalya continued to make an alarm.

In view of the overwhelming evidence on the record about the circumstances that led to the arrest and what transpired when he was arrested, we had no reason to find fault with the trial judge for ignoring the allegations of a vendetta between Enock Kimalaya and the Appellant. There was therefore no need for us to deal with the *Brady rule* that counsel for the Appellant relied upon for it did not apply to the case.

Ground 6 of the appeal therefore also fails.

Grounds 7 and 8

The Appellant's complaint in ground 7 was that the trial judge erred when he failed to evaluate the evidence on the record and wrongly convicted him of aggravated robbery. Relatedly, in ground 8 the Appellant complained that the trial judge erred when he did not address the major discrepancies, contradictions and inconsistencies in the prosecution case, and as a result, he occasioned a miscarriage of justice.

Submissions of Counsel

Counsel for the Appellant dealt with grounds 7 and 8 together. They submitted that the thrust of both grounds was to determine whether the trial judge erred in the analysis of the evidence on the record before coming to his decision. They addressed two aspects of the evidence: i) identification of the pistol as a deadly weapon used by the assailant, and ii) identification of the assailant who committed the offence as the Appellant.

Counsel submitted that the testimony in chief of PW2 contradicted the statement that she made on 6th February 2015 (DEX1), a day after the incident. That in her statement she stated that the driver pulled out *"something like a pistol."* Counsel contended that this could have been anything. Further that she was not interrogated about this but 4 years later she described the pistol and the circumstances under which it was drawn. He asserted that PW2's memory about the event could not have improved or become clearer about the weapon after 4 years for her to describe it as *"a normal black pistol."*

Counsel for the Appellant also challenged PW2's testimony about the use of the gun. He wondered how the assailant pointed the gun at her with his right hand while in a right hand drive car. He charged that it was not possible to drive a right hand drive car and at the same time aim a pistol with the right hand at a person on the left hand side of the car, from Kireka to Northern Bypass within ten minutes, considering the traffic associated with Jinja Road at around 7.20 pm as alleged. That it would have only been possible if the assailant was using the left hand to aim the pistol at the victim.

Counsel further submitted that there were contradictions between the testimony of PW1 and PW2 about the phones that the two had in their possession at the time of the incident. That according to the particulars in the Indictment, three mobile phones were stolen. Further, that PW2 testified that her phones and those of PW1 were taken, at paragraph 25 on page 25 of the record. He contended that PW1 only mentioned one phone, with the number 0703572672, at paragraph 15 on page 4. Further, that she testified that she had an HTC phone with telephone number 0776573015, and a Nokia phone with number 07115730145, at paragraph 15-20 on page 6. That she also claimed to have had an extra phone in the pocket which she used to call PW1 to inform him about the robbery. He then posed a question about the mobile phone and telephone number PW2 used to call PW1 who did not state that he too had two phones.

Counsel then submitted that the contradictions and discrepancies in PW2's testimony referred to above were so pronounced that the trial judge ought to have addressed his mind to them before convicting the Appellant.

With regard to the identification of the Appellant, counsel argued that the evaluation of the identification evidence of PW2, Carol Mugerwa, by the trial judge was in proper. That the absence of an Identification Parade and the circumstances of identification being in the dark, PW2 being scared and the incident lasting 10 minutes coupled with PW2 being a single identifying witness cast doubt on the participation of the Appellant, especially because there was no corroboration of her testimony. Counsel then challenged the trial judge's reliance on the Appellant's background in crime and the peculiar and distinctive appearance of **PEX6**, the flick knife recovered from the Appellant, to link him to participation in the crime.

Counsel went on to submit that the tracking records of the phone were not tendered in evidence. That PW4's testimony was hearsay and there was no link between **PEX3** and **PEX4** as the complainant did not identify the car keys referred to in the testimony of PW3 as his. It was further submitted that most of the evidence relied on in court was hearsay as the owners of the stolen property were never called to testify and identify the same in order to pin the Appellant for the crime.

Relying on **Abdullah Bin Wendo v R** (supra), counsel concluded that it was not safe to rely on the evidence of identification of the Appellant by a single identifying witness PW2 without corroboration.

In reply Counsel for the respondent submitted that the single identifying witness not only identified the Appellant but also identified the pistol which was in his possession. That she also testified that she was able to recognize and point at the Appellant when she recognized him by face at the police station.

Counsel referred to the principles governing the evidence of a single identifying witness from the cases of **Abudala Nabulere & Ors v Uganda; Cr. Appeal No. 9 of 1978,** where the court relied on **Abdalla Bin Wendo & Another v R; (1953) 20 EACA 166** and **Roria v R (1967) EA 583**. She then submitted that the trial Judge properly and carefully considered the conditions and examined the circumstances under which PW2 made the identification, with no danger of mistaken identity. That the trial Judge was at liberty to safely convict without other corroborative evidence as long as he warned himself of the dangers of convicting on such evidence. She concluded that the learned trial Judge properly evaluated the evidence of identification and arrived at the correct conclusion and she prayed that grounds 7 and 8 fail.

Resolution of Grounds 7 and 8

From the submissions above, we understood the Appellant's grievances to be about 3 main pieces of evidence adduced by the prosecution, viz: i) contradiction between the statement made by PW2 about the weapon used a day after the incident (DEX1) and her testimony in court; (ii) inconsistency between the number of phones stated in the indictment and the evidence adduced by the prosecution; (iii) inconsistency between driving a right-hand-drive car, pulling out a pistol with the right hand and using it to threaten PW2 who sat in the passenger seat on the left.

With regard to the identification of the Appellant, counsel for the Appellant contended that (i) the circumstances in which she identified him were difficult and not conducive to reliable identification; ii) no identification parade was held to ascertain that PW2, a single identifying witness properly identified the Appellant during the robbery and the absence of corroboration of her testimony; iii) the trial judge relied on the recovery of a flick knife alleged to have been recovered from the Appellant when he was arrested and iv) he relied on phone call records used to track the Appellant that were not adduced in evidence. That this all led the trial judge to come to an erroneous conclusion that it was the Appellant that committed the offence.

Identification of the pistol

With regard to the contradiction between the description in PW2's police statement (DEX1) and her testimony in court, in her statement dated 6th February 2015, recorded with no punctuation at all, Carol Mugerwa stated thus:

"So he went to the pharmacy to buy drugs shortly after like 5 minutes two men came to the car and entered inside one sat at the driver's seat the second sat behind he greeted osibye otya nyabo I responded bulungi ssebo at first I thought it was a complainants friend whom he was expecting I asked him where he had left him but when I look behind he was not the one and when I looked in front it was also not the complainant and he started the vehicle immediately saying the complainant had told them we meet him at Victoria Pub when we reached he just drove past when I tried to open the door the one behind pushed my head then they told me to give them money they had got information that there was money in the car I told (them) they are in control of the car let them search it if they get any money they take the driver then pulled something like a pistol and told me if I don't give them money he was going to shoot me I started trembling and failed to open the bag I gave to the one seated behind then he insisted it was my bag I should open it when I tried to check ..."

Clearly, D/Sergeant Watsemwa who recorded the statement was in a hurry to get it over and done with. She could not have recorded any details she deemed unnecessary if she could not even punctuate the statement.

Nonetheless, while in court, at page 15 of the record of appeal, PW2 testified thus:

"I was busy on the phone and within two minutes after he had left the car keys in the ignition, two people came to the car and entered. I did not realise it was not Julius. The man behind the car sat and greeted me. I turned to answer and I realised the man at the back was a stranger and so was the one in the driver's seat. I asked where Julius was and they told me he had asked them to take me to Victoria Park. We went past Victoria Park. When I tried to raise an alarm the man seated with me pointed a pistol at me and told me there was money in the car. I told them it was not my car and they should search for the money. The one at the back ordered me to keep quiet and hand over the bag. They ordered me to open it and give them the contents. They took my phones and those of Julius and by that time we were at the by-pass. It was dark at the time. The driver advised that I should he abandoned since they had got what they wanted. The one at the back gave me back my bag. I was terrified as they handed me the bag and ordered me

out. I almost failed to open the door. I opened the door and almost fell out. They threw the bag at me. I was left stranded."

During cross-examination, she stated thus:

"In the car there was light from the dashboard and the light of moving vehicles. He pointed a gun at me as he ordered me to keep quiet. I am sure it was a gun. I was seated in the passenger seat at the front. ... I can recognise my statement to the police. I recognise the statement dated 6th February, 2015. I recognise the statement dated 24th September 2015. I do not recognise the third statement. I attempted to describe the person I saw in my first statement. In the statement dated 6th February, 2015 I did not describe the person I saw. The second was made before the parade."

The statements were then admitted in evidence as **DEX1** and **DEX2** with no objection from the prosecution.

Section 144 of the Evidence Act provides for the use of previous statements of the witness in cross examination as follows:

144. Cross-examination as to previous statements in writing.

A witness may be cross-examined as to previous statements made by him or her in writing or reduced into writing, and relevant to matters in question, without the writing being shown to him or her, or being proved; *but if it is intended to contradict the witness by the writing, his or her attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him or her.*

{Emphasis added}

Section 144 of the Evidence Act is clear about the manner in which previous statements can be used to contradict the testimony of a witness in court. The witness must be shown the particular part of the statement that the defence intends to prove as contradictory to the testimony in court.

In this case, we observed that counsel for the Appellant did not refer to any part of the statement before he brought it on board as evidence; neither did he show any part of the police statement to the witness. It is therefore not clear to us from the record why counsel for the Appellant prayed that it be admitted in evidence to support the Appellant's case. If the intention was to prove that the witness did not see or was not sure whether what was used to threaten her was a gun or not, then the efforts of counsel did not meet his intention. Instead, the statement served to prove that indeed, the witness did state that her assailant pulled out something like a gun and told her the if she does not give him money, he would shoot her. Her reaction to this was also recorded. She started trembling and failed to open the bag and then gave her bag to the other assailant seated in the back seat of the car.

Due to the fact that the prosecution did not produce the gun in evidence, at page 5 of his judgment (page 45 of the record of appeal) the trial judge laid out the legal principles that he was to rely upon to come to his conclusion about the weapon used as follows:

> *"The prosecution was further required to prove that immediately before, during or immediately after the said robbery, the assailants had a deadly weapon in their possession. A deadly weapon is defined by section 286 (3) of The Penal Code Act as one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. Where the weapon involved is a gun, it does not matter whether or not it is real or an imitation."*

He then in the next paragraph, at page 12 of this judgment, found that PW2 saw a pistol and the description that she gave of it was sufficient in the circumstances. We are unable to fault the trial judge for finding so because within the meaning of section 286 (2) of the Penal Code Act, it did not matter whether the object that was used by the assailant was an actual

pistol or an imitation thereof. The same principle would apply to whatever weapon used as long as it is *"made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument,"* as it is defined in section 286 (3) (a) (i) of the Penal Code Act.

With regard to the contention that there were inconsistencies in the number of phones that were stolen stated in the indictment, it was stated therein that the robbers stole a Noah motor vehicle containing three mobile telephones. As to whether Carol Mugerwa (PW2) had another telephone with which she called the Appellant after the incident, we carefully reviewed the testimonies of PW1 and PW2. At page 13 of the record, in his testimony in chief, PW1 stated that when he offered a lift to PW2, he had a new telephone (HTC) which he had just bought. That he asked PW2 to help him to install some applications, such as Facebook. PW2 confirmed this at page 15. In her exam in chief she stated that PW1 told her he had just bought a new telephone and gave it to her to install WhatsApp. She inserted a sim card, an Airtel line, and then asked him to install data first. PW1 explained, at page 14 of the record, that the number for this line was **0703-572672.**

Meanwhile, PW1 received a call that his son was unwell, as a result of which he got out of the car, leaving the key in the ignition, to go and buy him medicine. We do not think he could have received a call on the new telephone where PW2 was helping him install apps. This is especially so because in her testimony, at page 15 of the record, she stated that when he went back to buy medicine, she was preoccupied with the telephone when the robbers entered the car. PW2 later explained, in cross examination at page 17 of the record, that PW1 retained one telephone and it was on it that she called him after the robbery. She gave the telephone

number for it as **0772 ...** but could not recall the rest of the digits. She further explained that she had saved this number in her office telephone, whose number was registered as **0712-438795**. It is this telephone that she realised she still had in her skirt pocket after the robbers stole her other telephones and took off with the car.

With regard to the telephones that were referred to in the indictment, PW2 in examination in chief, at page 16 of the record, stated that she had two telephones that were stolen. One was a Nokia with the number **0711-5730145**, while the other was an HTC with the number **0776-573015**.

In conclusion, we established that PW1 had two telephones, one of which was new and stolen with the car and another that he had on him at the time the car was stolen. PW2 had 3 telephones, two in her handbag which she was forced to hand over to the robbers, though it was returned to her after the assailants took what they wanted from it, and another in her skirt pocket. The robbers therefore stole a total of 3 telephones. We therefore found no inconsistency between the indictment and the evidence that was adduced by the prosecution.

With regard to the contention that the assailant with a gun could not have driven a right hand drive motor vehicle and at the same time pulled out a pistol with his right hand and point it at PW2, in her testimony at page 6 of the record, PW2 described what happened thus:

> *"I managed to take a close look at one of the assailants, the one who was driving. He is A putting on a navy blue T-shirt with white and red stripes. He is the one who pointed the pistol at me. He held it with the right hand. It was a right hand drive car. The driver was to my right. It was automatic transmission car. He drew the gun from his right hand side and pointed it at me ordering me to keep quiet. He spoke luganda as he said "silika otuwe*

sente eziri mu motoka kuba batugambye nti mulimu sente mu motoka." He spoke fluent Luganda."

PW2 did not waver during cross examination. She maintained that the Appellant pointed a gun at her and ordered her to keep quiet. She was sure it was a gun. That she sat in the passenger seat at the front and could see him using the light from the dashboard.

In the arguments to counter this evidence, counsel for the Appellant contended that the assailant could not have pulled out the gun, maintained control of the car and pointed it at PW2 while demanding for money because at that time, 7.20 pm, Jinja Road is associated with heavy traffic. Counsel further contended that it would have been plausible for the assailant to achieve this if he held the gun with his left and not his right hand.

However, counsel for the Appellant during the trial did not challenge PW2's evidence about the assailant's ability to achieve this feat. It is also not known whether the car was moving or whether the assailant had stopped it in order to demand for the money at gun point. Neither was it shown that the Appellant was incapable of controlling an automatic transmission car with his left hand while he used the right to point a gun at the victim. What is clear from the testimony of the victim, both in chief and under cross examination is that the assailant drew a gun from his right hand side with his right hand and pointed it at PW2 who was sitting on his left while he demanded for money.

In the absence of cross examination on the Appellant's behalf to shake PW2's testimony, we are unable to fault the trial judge for finding her

testimony credible and concluding that indeed, a pistol or an imitation of one was used to threaten her during the robbery.

Turning to the contention that the trial judge relied on phone records that were used to track the Appellant which were not adduced in evidence, we note that PW4, Sula Kirunda, was the person who had the expertise to track phones and he testified about his role in the investigation at page 15 of the record. He stated that PW1 narrated the circumstances of the robbery to him, including that two HTC phones and one Nokia XI were stolen with the car. That he gave him the telephone line for the Nokia XI and it was an Airtel line. It is pertinent that we lay down the relevant part of PW4's testimony in order to facilitate a better understanding of our decision on this point. At page 25 of the record he stated thus:

> *"I obtained the card history which gave me the phone serial numbers. I got two numbers which had been inserted in that phone. One number was 0773-627819 and the other was 0778-107602 registered in the name of Galiwango Derek. I called the complainant and told him what I had found out. I had to get a printout of the call data to the two numbers. We secured a court order and proceed to MTN from where we obtained the data on 18th February,2015. On 22nd we obtained the information: outgoing, incoming and locations. We established the various areas and it showed that at the time of the incidence the person was on Kireka (sic) and on 18th it showed that the number 0773-627819 had moved up to Koboko. I began calling the associates. One was Fr. Mpoza. I tricked him to meet me and he told me he did not know the man as Galiwango but Simon Peter. It read that name when he dialled the number into his phone.*
>
> *I asked him what relationship he had. He said they had met in Luzira Prison where he had served time for a civil matter. I know Nambalirwa. When I proceeded further I got the serial number (for the) XI and the one using it was Nambalirwa. We began tracking her and she was arrested at Kirinya Road (at) near Joka's hotel where she operated a mobile phone I was tracking. I asked her who gave it and she said it was brought by a one Kiwalabye Richard. I found Kiwalabye who said it was Musomesa who had abandoned the phone when he brought it for charging. That had happened*

in May. I recovered it in July. I asked Kiwalabye to lead us to Musomesa. He led us to Kireka at a pool table and that is where we found Musomesa on 25th September, 2015. He acknowledged that it was him (sic) who gave the phone to Kiwalabye. He said a friend called Simon gave him the phone. He described Simon as dark, Itesot by tribe, youthful and that they had been friends for three years. The person he was talking about was Simon Peter whom initially I know as Galiwango David. He is A1. Musomesa is A3. A2 is Emma. Ibra had been sent by Simon Peter to represent him at Father Mpoza's. He also sent him to Emma to give him a vehicle key. A2 said he was cutting keys for Simon Peter. He was duplicating keys embedded on soap. He had done it on several other occasions and he was doing it for A1".

Counsel for the Appellant briefly cross examined PW4 about his investigation but he did not dwell on the substance of his investigation which comprised of tracking phones using their serial numbers and telephone lines/numbers. Instead he asked him about the information he got from the Accused No 2, Waguti Emmanuel, alias Musomesa who is alleged to have been a key cutter who did so for the Appellant.

Counsel for the Appellant did not really pursue that inquiry but instead turned to PW4's police statements. PW4 explained that he made two police statements. One on the 24th September 2015 and an additional statement on a date he did not state. He further stated that the additional statement was missing from the file. The original statement was admitted in evidence as **DEX2** at page 26 of the record but counsel for the Appellant did not make use of it.

The record provided to the court had neither of the two statements. Our inquiry from the Registrar whether **DEX2** which was admitted in evidence could be got from the lower court file returned the result that it was also missing. Nonetheless, there was no indication from the record before us, or the testimony of PW4 that he availed any of the telephone call records

that he obtained from MTN, the company that provided the two telephone lines that he used to track the suspects.

It is apparent to us that PW4 used data messages, as shown in the records of the MTN telephone network, after securing a court order to compel MTN to avail him the relevant records. A *"data message"* is defined by section 2 of the Electronic Transactions Act as *"data generated, sent, received or stored by computer means and includes, voice, where the voice is used in an automated transaction; and a stored record."* The same provision defines *"data"* as *"any electronic representations of information in any form."*

An electronic records system is then defined, *"to include the computer system or other similar device by or in which data is recorded or stored and the procedure for recording and storing of electronic records."* A telephone meets those requirements and section 8 of the Act provides for the admissibility of electronic evidence in court. It is therefore our view that a person adducing telephone call records as evidence in court must meet the standards set in section 8 of the Electronic Transactions Act.

Telephone call records may be the best evidence to place an accused person at the scene of a crime or to track them during the investigation thereof. However, in spite of the proliferation of cell phone use in the commission of violent crimes, there is a dearth of authority on the use of electronic evidence in the courts in Uganda. We were therefore unable to find authority on what would be required to use cell phone tracking evidence in a criminal trial in order to convict offenders. As a result, in a bid to understand what would be required of the prosecution in such cases, the court had recourse to an article published by three Senior

Lecturers from the Department of Police Practice, School of Criminal Justice, College of Law, University of South Africa. [1]

Hennie Lochner, Bernadine Benson & Juanida Horne, detailed how cell phone evidence can be best used as physical evidence in court. They explained that digital messages are information that is stored or sent in electronic or magnetic form. That when a cell phone is activated (whether by switching it on, making a call or receiving a call), it is done by means of a signal. The signal is seen as the activation of the cell phone on the cell phone network, which enables the network of the cell phone company to know where the cell phone is located and in which area of the network the cell phone is. This signal is invisible, but the data regarding the activation of the network is registered and stored on the cell phone network's system.

The authors further explained that using a computer programme, the cell phone network captures the data messages. Thus the data that is captured, the cell phone record, is done without the interference of any person and thus free of the will. They emphasised the fact that when physical evidence is used in cases, expert testimony will have to be used to relate the facts to the evidence. In a case where the cell phone signal is mapped, it is important that an expert testifies about it. The expert gives testimony about the processing of the data that appears on the cell phone statement and, therefore, represents the activities on the cell phone record.

The traditional view is that graphical representations and audio and video recordings are physical evidence that do not fall under documentary

[1] Making the Invisible Visible: The Presentation of Electronic (Cell Phone) Evidence as Real Evidence in a Court of Law; retrieved from https://www.researchgate.net/publication/266327334_ on 23/05/2024

evidence. Therefore, in Uganda, section 8 (2) of the Electronic Transactions Act provides that a person seeking to introduce a data message or an electronic record as evidence in legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. Section 8 (3) of the Act goes on to provide that the best evidence rule is fulfilled upon proof of the authenticity of the electronic records system in or by which the data was recorded or stored.

In its assessment of the evidential weight of a data massage or an electronic record, the court is guided by section 8 (4) of the Electronic Transactions Act which provides as follows:

> **(4) When assessing the evidential weight of a data message or an electronic record, the court shall have regard to—**
>
> **(a) the reliability of the manner in which the data message was generated, stored or communicated;**
>
> **(b) the reliability of the manner in which the authenticity of the data message was maintained;**
>
> **(c) the manner in which the originator of the data message or electronic record was identified; and**
>
> **(d) any other relevant factor.**

Authenticity is determined using the rules laid down in section 8 (5) (c) of the Act. We therefore find that with regard to the instant case, it had to be established by the prosecution that the cell phone records that PW4 testified about were recorded or stored in the usual and ordinary course of business of the service provider (MTN) by a person who was not a party to the proceedings and who did not record or store them under the control of the party seeking to introduce the record, the prosecution. Given the explanation by Hennie Lochner & colleagues, we came to the conclusion

that the production of the authenticated records from the network provider used by the particular cell phone to communicate would be sufficient for that purpose.

However, PW4 did not produce any cell phone records in evidence, though he testified that he obtained them from MTN in respect of telephone numbers 0773-627819 and 0778-107602. Neither did he produce a report detailing how he obtained the information that he testified about, which was also the basis of the investigating officer's testimony, Watsemwa Sarah (PW3).

Going back to the significance of cell phone records, Hennie Lochner and his colleagues posited that the most important document that is used when an invisible signal is documented is the cell phone record. It is the *'alpha and omega'* for an expert who specialises in mapping cell phone calls and is a true copy of the activities of the cell phone. Each entry that appears on the cell phone record contains information that can be analysed and mapped. Without it, no analysis and mapping can take place. The information about the calls that appeared on it, in a case such as the one now before court, ought to have been processed into physical evidence by mapping it and making it visible. Some of the information (for example the date and time of the calls, how long the cell phone was activated, the direction of the calls (incoming or outgoing) and the other parties involved, could have also been presented graphically.

The use of cell phone evidence in a criminal trial was demonstrated in great detail in **Njwa Petersen & 3 Others v. S (02/08) [2008] ZAWCHC 64 (1 December 2008)** which Hennie Lochner & colleagues referred to as authority in their article cited above. The case related to the untimely and

brutal death of a South African music icon, Abdul Mutaliep Petersen aka Taliep Petersen. The first accused was his wife. The other three accused were men she allegedly solicited to assist in causing her husband's death.

Through cell phone records, it was established that the 1st accused person hired the 'hit men,' granted them access to the house on the night of the murder so that it would appear to be a case of aggravated robbery in which she was a victim, which facilitated the shooting and killing of her husband. After analysis of the facts as related by various witnesses and the cell phone record evidence that was adduced and mapped in a presentation to the court, the trial judge found and held thus:

> *"383. The version furnished by Hendricks provides a logical framework for the calls. Each stage of his narrative is borne out by the cell phone records. The area where the respective parties find themselves when making or receiving the calls, such as the airport, or near the Luxurama, or in Athlone, is also consistent with Hendricks' version. Moreover, (there was a) flurry of cell phone calls immediately before the attack on 101 Grasmere Street, between those involved on the version of Hendricks, Accused No. 3 and Accused No. 4.*
>
> *384. I am, accordingly, of the view that the various cell phone records, and their collation and interpretation by the witness Schmitz, provide important support and corroboration for the evidence of Hendricks."*

As a result, Njwa Patersen, was convicted of both murder and aggravated robbery and sentenced to 28 years' imprisonment.

The Investigating Officer (PW3) in this case also testified about the use of the cell phone records in the arrest of the Appellant. However, we did not find it necessary to reappraise her evidence. Though she was the Investigating Officer in the case, her testimony was more detailed with regard to the manner in which the results of the cell phone tracking were used to facilitate the arrest. However, her testimony was geared towards

showing how he was arrested. It could not take the vital place of PW4's testimony about the cell phone records that led to the arrest for he was the star witness in the case.

We therefore find that in the absence of PW4's testimony in chief about his investigations on the cell phone network, including the cell phone records that he relied upon to come to his conclusions about the role of the Appellant in the crime, PW3's testimony remained hanging. It may also be inferred that in the absence of PW4's evidence about the phone tacking, in respect of which it would have been inferred that the evidence of the arrest was based on his testimony, corroborated by the testimony of PW3, her testimony was merely hearsay evidence and therefore inadmissible.

The investigators in this case appear to have had the evidence that would have, through cell phone records, placed the Appellant at the scene of the crime with mathematical precision. We also observed that there were obvious lapses, both in the investigation and the presentation of the evidence to the court, that have led us to the final decision in this case.

Before we conclude our findings on the issue of participation, for completeness it is important that we comment about the complaint that there was no Identification Parade to facilitate PW2 to ascertain whether the man the police arrested after tracking by the stolen telephones was indeed her assailant. We did not find it necessary to deal with this grievance because the identification of the assailant was linked to tracking him by use of cell phone records. Having found that the cell phone evidence was insufficient to put him at the scene of the crime, there was no need to examine the complaint about the absence of an Identification Parade because the chain of evidence leading to the arrest was broken

when the prosecution omitted to produce the cell phone records and/or the report of PW4.

We therefore find that there was insufficient evidence to prove that the Appellant was indeed the assailant that PW2 saw on the night of the robbery. We thus have no alternative but to acquit him of the offence of aggravated robbery.

Finally, we deemed it is important for us to reiterate the fact that mobile phones are powerful repositories of highly sensitive personal information. This includes intimate conversations, family photographs, location history, browsing history, biometric, medical, and financial data. Mobile phones, especially smart phones connected to the internet, reveal patterns of daily personal and professional lives and enable penetrative insights into actions, behaviour, beliefs, and a holder's state of mind. With the increased use of mobile phones among the population in day to day activities, most serious crimes involve use of such phones.

It is therefore crucial to the investigation, prosecution and adjudication of serious crimes that investigators, prosecutors and judicial officers are consistently educated about the use of these new technologies in investigation, prosecution and adjudication over both serious and other crimes, as well as its prevention. Training also needs to address the import of the various laws that now apply to the use of Information Technology so that criminals are given no leeway to remain ahead of the criminal justice system in the knowledge of its use. It is only then that the criminal justice system in Uganda will address the gaps that led to the failure in the prosecution of this case.

Determination

The upshot of this decision is that the conviction of the Appellant for aggravated robbery and his sentence of 21 years and one months' imprisonment are hereby quashed. The Appellant shall be set free forthwith, unless he is held on other lawful charges.

We so order.

Dated at Kampala this 28th day of June 2024.

Richard Buteera
DEPUTY CHIEF JUSTICE

Irene Mulyagonja
JUSTICE OF APPEAL

***Monica K. Mugenyi**
JUSTICE OF APPEAL

**This judgment was signed before this Judge ceased to hold that office.*