THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: WAMBUZI – CJ, ODER, TSEKOOKO, KANYEIHAMBA, AND MUKASA – KIKONYOGO, JJ.S.C.)

CRIMINAL APPEAL NO.31 OF 1999

BETWEEN

1. MUKHWANA HUDSON }
2. JAMES WAMWIMI } :::::::::::::: **APPELLANT**

AND

UGANDA :::::::::::::::: **RESPONDENT**

(An appeal from the decision of the Court Appeal at Kampala (OKELLO, MPAGI-BAHIGEINE AND TWINOMUJUNI, JJ.A.) in Court of Appeal Criminal Appeal No.62 of 1998)

REASONS FOR THE JUDGMENT OF THE COURT.

On 5/11/1999, the appellants were convicted in the High Court by Kania, J., of the offence of robbery contrary to sections 272 and 273(1) (b) of the Penal Code and were each sentenced to a term of imprisonment for seven years, 6 strokes of the cane and ordered to pay Shs.250,000/=as compensation to James Wakhama, the victim of the robbery. Their appeal to the Court of Appeal was dismissed on 28th April, 1999. They then appealled to this Court.

On 7th March, 2000, we heard the appeal, dismissed it and promised to give our reasons later. We now give our reasons.

The charge laid against the appellants was that the two appellants together with other persons on 26th day of March, 1995, at Buwasiu village in Mbale District robbed James Wakhama of Shs.180,000/= and diverse shop goods and used a deadly weapon, namely, a gun on the said James Wakhama.

The prosecution case was that James Wakhama (PWI) operated a small shop at Buwasiu village, Bunamulunyi Parish, Buwabwala sub-county, Mbale District. He used to sleep in the shop. At mid-night of 26th March 1995, James Wakhama who was sleeping with a girl friend in his shop was invaded by a gang of robbers. He first heard footsteps outside his shop. He got out of bed. Then the robbers hit a window of the shop which collapsed and fell inside the shop. The robbers flashed torches into the shop through the open window. James Wakhama saw two of the robbers, each armed with a gun. The two robbers ordered Wakhama to lie down. He obeyed and lay down. One of the robbers jumped through the window into the shop and proceeded to open the door of the shop to let in the rest of the robbers. After entering, these robbers demanded for money from Wakhama as they harassed and assaulted him and his girl friend. They made him lie down. They stepped on him. They were flashing torches inside the shop and from outside the shop. Because of the bright light from the torches, Wakhama was able to recognize three of the robbers who included the two appellants. These robbers came from a neighbouring parish of Bukhabusi. So he knew these robbers. Wakhama also

recognized the voice of the first appellant as he ordered Wakhama to lie down. Wakhama had known members of the gang very well because they all come from a neighbouring Parish of Bukhabusi. The robbers realised that Wakhama had recognized them so they wanted to kill him. One of them ordered that Wakhama should be shot. Instead of shooting him, the robbers assaulted him and tied him as well as his girl friend. The robbers put Wakhama in polythlene paper and left him for dead. They then left. The whole episode, lasted two hours. After they had left, Wakhama was able to move, untie his girl friend who in turn untied him. He then got outside and made an alarm. About 30 minutes after the robbers left the house, there was a gun shot in the distance and it is presumed that this was done by the robbers.

A number of people answered the alarm. Among the first to answer the alarm was Robert Wakabenga (PW4) who found Wakhama lying or hiding in a banana plantation. Wakhama informed Wakabenga that the first appellant was one of the robbers. Wakhama was accompanied to Magale Police Post where he made a report of the robbery before he was taken for medical treatment.

The following day, police from Magale Police Post arrested the appellants together with other persons. The two appellants together with one Anthony Matege were charged with the offence of capital robbery. Matege died before the trial of the appellants started in the High Court. Therefore a nolle prosequi was entered in respect of his case.

At the trial, the two appellants made brief unsworn statements. The first appellant claimed by way of alibi that he was sleeping in his home at the time of the robbery. The

second appellant denied any knowledge of the offence. Both appellants admitted that they were arrested on 26th March,1995, the day after the robbery.

The two assessors believed the evidence given by Wakhama. The first assessor advised conviction for simple robbery. The second assessor advised conviction for capital robbery. The learned trial judge addressed himself to the relevant law and the facts, he believed the prosecution case, disbelieved the appellants and found that the prosecution evidence proved only the offence of simple robbery. He therefore acquitted the appellants of robbery C/S 272 and 273 but convicted them of the offence of simple robbery C/S 272 and 273(I) (b) of the Penal Code and sentenced them each as stated earlier.

The appellants appealed to the Court of Appeal on the sole ground – that the trial judge erred in law and fact when he made a finding that the offence of simple robbery had been proved beyond all reasonable doubt. The Court of Appeal dismissed the appeal and upheld the decision and orders of the trial court.

The appeal before us is also founded on one ground which, with leave of the court, was substituted to read that the learned Justices of Appeal erred in law by upholding the finding of the trial judge that the offence of simple robbery had been proved beyond reasonable doubt. In reality this ground of appeal was the same ground which was argued in the Court of Appeal which that court rejected.

In arguing the ground of appeal, Miss Eva Kawuma, counsel for the appellant, repeated the arguments which she had raised in the court below. She conceded there was theft.

She contended that the evidence of Wakhama, a single identifying witness was 'not strong enough' to justify conviction of the appellants. She referred us to tests of credibility of evidence applicable to evidence of a single identifying witness as set forth in the cases **of Roria vs. Republic** (1967) EA 583 and **Abdallah Bin Wendo vs. R**.(1953) 20 EACA 166. She argued that medical evidence did not establish any injuries on Wakhama. With respect, we think that this argument has no merit. Violence need not be proved by evidence of injuries. In any case Mr. Wakhama, the complainant, did not claim that he sustained any injuries during the incident. She further argued that the appellants' alibis were not disproved. In summary she argued that the trial judge and the Court of Appeal should not have believed Mr. Wakhama, the single identifying witness. Miss Betty Khisa, Principal State Attorney, supported the decisions of the two courts below.

The Court of Appeal dealt with the complaint raised by Ms Kawuma in that court in the following words:

> *"The only complaint that was raised at the hearing of this appeal was that the evidence of PWI, the sole identifying witness, contained numerous grave contradictions which rendered it unreliable. It was argued for the appellant that though from that evidence the conditions under which the identification was made appeared to be favourable to correct identification, the said lack of credibility of the witness rendered the seemingly favourable conditions unlikely. Ms Kawuma, learned counsel who appeared for both appellants on state brief, pointed out the contradictions in the evidence of PWI.........*

The Court of Appeal considered the complaints raised by Ms Kawuma.

> *"We could not agree that there was any grave contradictions in the evidence of PWI, the sole identifying witness. Firstly, when PWI said that when the torch lights were flashed into the room, he saw two people with guns outside, he never said that he identified who they were at that time. According to the witness, he identified his assailants when they entered the house. He was able to identify them with the aid of the torch lights that were being flashed from both inside and outside the house. He also stated that he recognised the first appellant's (AI) voice when he spoke. He had known AI from childhood……………………….*
>
> *Secondly, we do not agree that failure of PWI to recall the colour of the Jacket which he had testified was won by the second appellant on the night of the robbery and also on the day the witness gave evidence was a grave contradiction. This could be explained away on lapse of time. Besides, the witness had never before in his evidence described the colour of the Jacket. In our view, that failure does not affect his identification of the appellants made under those favourable conditions.*
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> *Thirdly, we do not agree that knowing the parishes from which the appellants come but not knowing the village from which the second appellant come is a contradiction. A parish could have several villages.*

Fourthly, the submission that there was a contradiction between the evidence of PW4 and PWI over whether there was a bright moonlight in the fateful night is without say any basis. Whereas PW4 described the state of the moonlight as not bright, PWI did not at all describe the state of the moonlight. He merely testified that there was moonlight about which both agreed on. There was no contradiction in the evidence of these witnesses."

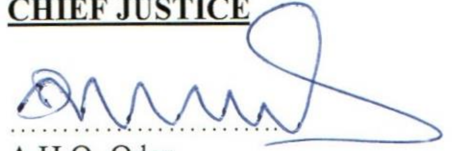
We note that both assessors had no hesitation in accepting the evidence of Wakhama. Likewise the trial judge found no difficulty in doing so. We think that the conclusions of the learned Justices of Appeal are based on ample evidence in this case. We have not been persuaded that the learned Justices erred to justify any interference by us. It was for these reasons that we dismissed the appeal on 7th march, 2000.

We note that the trial judge failed to impose a Police Supervision order as required by S.123 (1) of the Trial on Indictments Decree, 1971 (TID). The Court of Appeal glossed over this omission. We would like to urge counsel especially State Attorneys who appear in appellate courts that they (counsel) are under a duty to draw such omissions to the attention of the court for correction. In this case we have discovered this on our own.

We have powers under S.8 of the Judicature Statute, 1996 to make this order which the trial court should have imposed but normally an accused person should have an opportunity to address the court on the issue. We accordingly remit the case to the trial court and order that the court shall comply with the provisions of section 123 (1) of the TID, 1971 and make the required order of police supervision.

Delivered at Mengo this....9th....day of....May....2000.

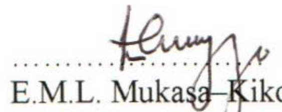
S.W.W. Wambuzi
CHIEF JUSTICE



A.H.O. Oder
JUSTICE OF THE SUPREME COURT

J.W.N.Tsekooko
JUSTICE OF THE SUPREME COURT

G.W. Kanyeihamba
JUSTICE OF THE SUPREME COURT



E.M.L. Mukasa-Kikonyogo
JUSTICE OF THE SUPREME COURT