

It was the prosecution case that on the night of 3/6/1994, at about 11.00 a.m., Mazima Banard (PW1) and his wife B. Kyogabirwe (PW2), both victims of the robbery, were sleeping in their shop when a torch light was shone into the house cum shop through a ventilation of a window of the house. The front wooden door of the shop was then hit hard with a stone. The door gave way and broke into pieces. Mazima got out of bed. There was a lighted hurricane lamp in the house. Two men entered the house and the one who was armed with a panga reached for Mazima. The light from the lamp enabled Mazima to identify the appellant as one of the intruders who was armed with a

Banard.

The indictment alleged that on the 3<sup>rd</sup> of June, 1994, at Bubandabunzi village, in Bushenyi District, the appellant and Mwebaze robbed Mazima Banard of shs.200,000/= and a weighing scale and at or immediately before or immediately after the time of the said robbery the appellant used a deadly weapon, to wit a panga, on the said Mazima this court against the decision of the Court of Appeal.

The appellant, Karekona Stephen, who was tried and convicted and sentenced to death for capital robbery, unsuccessfully appealed to the Court of Appeal. He has now appealed to

JUDGMENT OF THE COURT.

[Appeal from the decision of the Court of Appeal at Kampala (MANYINDO, DCJ, OKELLO AND ENGWAU, JJA.) in Court of Appeal Criminal Appeal No.10 of 1998]

UGANDA.....RESPONDENT  
AND  
KEREKONA STEPHEN.....APPELLANT  
BETWEEN

CRIMINAL APPEAL NO. 46 OF 1999

(CORAM: WAMBUZI, CJ; TSEKOOKO, KAROKORA, MULENGA AND KANYEIHAMBA, JJS.C.)

AT MENGO  
IN THE SUPREME COURT OF UGANDA  
REPUBLIC OF UGANDA

*Judgment of the Court*

At the trial the appellant denied the offence. He raised an alibi to the effect that on the night of the robbery he was at his home where he and his wife and children slept from 6.00 p.m. to 5.00 a.m. and that he never attacked nor robbed Mazima whether alone or in the company of the deceased. He claimed that he knew all these people. He contended that the following morning at 5.00a.m. he was arrested from his home by Bitakwata

deceased) died on 16/4/1995 before the trial of the case. They subsequently took Mwebaze and the appellant to Kankanzu Sub-county headquarters from where the two robbers were taken to Bushenyi Police Station and were Mwebaze's home, found Mwebaze there and arrested him and brought him to the scene. Mwebaze and that the latter had fled from the scene. Nikiyanira and Bitakwata went to discovered that shs 200,000/= and a weighing scale had been stolen. Mazima informed After the appellant was tied up, Mazima and the rest of the people checked the shop and

Nikiyanira was followed to the scene by Pastor Bishanga and Leo Bitakwata (PW4), the area village LCI Chairman. They both found the appellant at the scene and helped in arresting him and tying him up. The appellant had by then cut Mazima in the right hand side ribs, at the back and on the right hand little finger.

found Mazima still holding the appellant. But Mazima held the appellant as they both struggled for sitting room and disappeared. The appellant used the panga to inflict wounds on Mazima. The two continued to struggle until they ended up in the sitting room. The struggle lasted 30 minutes. Nikiyanira, (PW3), who was the then LCI Secretary for defence had meantime been attracted to the scene by the earlier loud bang on the door. He reached the scene and panga and a torch. Mazima had known the appellant for four years. A lighted torch, which the appellant had dropped onto the ground and light from it also, helped Mazima further to identify the appellant. Mazima also recognised the second intruder to be Mwebaze. Mazima grabbed the appellant and held him. Mwebaze retreated into the sitting room and disappeared. But Mazima held the appellant as they both struggled for the panga. The appellant used the panga to inflict wounds on Mazima. The two continued to struggle until they ended up in the sitting room. The struggle lasted 30 minutes. Nikiyanira, (PW3), who was the then LCI Secretary for defence had meantime been attracted to the scene by the earlier loud bang on the door. He reached the scene and

1. The Learned Justices of Appeal erred in law when, having found that the trial judge was "fundamentally wrong" when he accepted the prosecution case in isolation before turning to consider the appellant's defence, nevertheless went ahead to use the said trial judge's record of proceedings to confirm the conviction of the appellant.

The appeal before us is based on five grounds: We will first consider grounds 1 and 2 together. These two grounds which are related were formulated as follows:

The appellant appealed to the Court of Appeal and listed five grounds of appeal. But during the hearing he abandoned grounds one and five. The first ground in the Court of Appeal complained about the failure by the trial judge to evaluate the evidence of both the prosecution and the defence thereby coming to a wrong decision. We allude to this because that ground which was unsuccessfully argued in the court below has been also argued in this court.

At the trial the appellant's Counsel improperly dragged into evidence the fact that because of the purchase of the land, Mrs Regina Rwevaso, had previously accused the appellant of some offence of robbery for which the appellant was arrested, charged and remanded in custody from 1987 till March 1994 when the case was dismissed whereupon the appellant was discharged.

(PW4), Mazima (PW1) and other people and that upon his arrest Mazima, Bitakwata and Mazima Regina Rwevaso had earlier competed for the purchase of certain piece of land. The appellant had outbid Regina and purchased it. He claimed that because of that Mazima and others had told lies against the appellant. He testified that all the prosecution witnesses, whom he knew well, told those other people searched his home but did not find anything incriminating him with the robbery. Despite that, these people beat him up before taking him to the sub-country headquarters. He testified that all the prosecution witnesses, whom he knew well, told lies to the court because of a grudge between him and Mrs Regina Rwevaso, an aunt of Mazima. Regina Rwevaso had earlier competed for the purchase of certain piece of land. The appellant had outbid Regina and purchased it. He claimed that because of that Mazima and others had told lies against the appellant.

2. The Learned Justices of Appeal erred in law when, having found that the trial judge's remarks concerning the previous charges against the appellant were bad and prejudicial and may have clouded his judgement, nevertheless went ahead to confirm the appellant's conviction rather than order an acquittal or a retrial.

Submitting on the first and second grounds, Mr. Tusasirwe, counsel for the appellant, made a novel proposition. He contended that because the Court of Appeal had found that the trial judge's approach in evaluating the evidence was wrong in that the judge first believed the prosecution case before he considered the defence case, the Court of Appeal itself erred in acting on the whole record of proceedings including the judgement of the trial judge in order to uphold the conviction and sentence of death. Learned counsel argued that since the Court of Appeal held that the approach adopted by the trial judge was erroneous, the same court of Appeal should have simply set aside the conviction and should have acquitted the appellant. Learned counsel appears to contend that any defect in the judgement of the trial judge vitiated the whole record in such a way that the Court of Appeal should not have relied on any evidence found on the record to uphold the conviction of the appellant. He contended that in this case the principles of natural justice were violated by the two courts. Counsel cited Okethi Okale and others Vs Republic (1965) EA 555, General Medical Council Vs Spackman (1943) AC627 and Annabamunthodo Vs Oilfields Workers Trade Union (1961) AC945 to support his arguments.

Mrs. Lwanga, Principal State Attorney, supported the judgements and orders of both Courts below. She conceded, as she had done in the Court of Appeal, that the trial judge erred in that he first accepted the prosecution case before he considered the defence case. She further conceded that the trial judge erred when he took into account against the appellant the previous criminal charges. Learned Principal State Attorney contended that even through the Court of Appeal found that the trial judge had erred in the two instances, the Court of Appeal itself re-evaluated the evidence of Mazima (PW1), his wife Kyogabirewe (PW2), Nikyandra (PW3) and Leo Bitakwata (PW4), believed it and found that the evidence implicated the appellant in the commission of the robbery. She

*It is my view that both PW1 AND PW2 told this court the truth when they testified that a weighing scale and shs.200,000/= were stolen from their shop on 3<sup>rd</sup> June, 1994. I also believe the evidence of PW3 and PW4 who testified to the effect that those items were actually stolen.*

*"In his sworn statement, the accused denied any knowledge of the theft. He also challenged the evidence relating to the missing weighing scale and the money especially since none had been recovered.*

Judge:-

In its judgement which gives rise to complaints in the instant appeal, the Court of Appeal alluded to the complaint raised before it as ground 2 that the trial judge considered the prosecution case in isolation of the defence case, believed it and made a finding that the person who stole cash and the weighing scale from the complainant had common intention with the appellant. The Court of Appeal further observed that only after that finding did the trial judge consider the defence and decide whether or not the appellant took part in the robbery. The Court then referred to contentions of counsel for the appellant regarding the erroneous approach made by the trial judge and to the views of the Principal State Attorney who supported the conviction. The appellant's counsel and the Court of Appeal criticised the following passage from the judgment of the trial judge:-

We are unable to appreciate the relevance of the cases of General Medical Council and Anbammunthodo cited by Mr. Tusasirwe in the present proceedings since the appellant during the trial testified in support of his case. His testimony is evidence of the fact that the principles of natural justice were followed, which is what the two cases are about.

submitted that the issue in this appeal is whether the errors committed by the trial judge had led to a miscarriage of justice. There was none here. She submitted that in the cases cited by counsel for the appellant were distinguishable from the case before us.

We agree with these principles of the law relating to the burden of proof in that in criminal trials the burden of proof always remains on the prosecution and never shifts to the accused. However we note that the opening paragraph in the quotation from the trial judge's judgment, the that trial judge refers to and was conscious of the evidence of the appellant. We agree that the style of assessment of evidence by the trial judge in this case was unsatisfactory, but this case is no where near the position in Okethi Okale case. We think that Okethi Okale case is distinguishable.

*"That it is fundamentally wrong to evaluate the case of the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. No single piece of evidence should be weighed except in relation to all the rest of the evidence."*

555 approvingly and adopted the following passage from the last case:-  
156 of 1964 (sic) and OKETH OKALE AND OTHERS VS REPUBLIC [1965] EA.  
The Court below referred to Ndege Maramwa vs Republic FACA Criminal Appeal No. counsel that the approach adopted by the learned trial judge was fundamentally wrong. The Court of Appeal agreed with the criticism of the trial judge made by appellant's

*"In the instant case, therefore, the burden is upon the prosecution to prove that the accused was the one who carried out the theft or that he participated in it execution."*

therefore equally guilty of that theft .....  
See: Auguston Orete and others Vs Uganda (1966) EA 430. The accused is

22 of the Penal Code Act.  
I also find that it was during the robbing activity in which the accused was executing a common intention with the accused within the meaning of Section that the weighing scale was stolen from PW1's shop by someone who was involved that the money and weighing scale were stolen. Alternatively, I find

Moreover the trial judge had apparently disbelieved Joyce Awenda and held that, "This is a case in which reasoning has to play a greater part than actual evidence."

The Court of Appeal for East Africa observed that the widow's testimony that when she arrived at the scene the four appellants ran away implied that she did not have much opportunity to observe the assailants of the deceased. The Court further held that this created grave doubt about her ability to observe the appellants. This together with conflicts in her testimony made her an unreliable witness.

On appeal, counsel for the appellants criticised the evidence of Joyce Awenda and contended that there were inconsistencies in her evidence. He submitted that the evidence of Joyce Awenda contained sufficient contradictions such as would create a reasonable doubt, and he criticised the judgment of the learned trial judge, which made no reference whatsoever to the contradictions.

The only issue at the trial was the identity of the appellants. The learned judge accepted the evidence for the prosecution, convicted the four appellants and sentenced them to death.

In the Okethi Okale case, the case for the prosecution was that at about 8.30 p.m., on December 9, 1963 the deceased left his house at Kakola sub-Location, to see his brother, Barnabas Omolo, who lived in the same sub-location, about one quarter of a mile away. The deceased did not see his brother, and on his return journey home he was attacked by certain people and received a head injury. Joyce Awenda, the widow of the deceased and found the four appellants beating her husband. It was a moonless night but she claimed to have recognised the appellants at the scene while they were beating the deceased who was lying on the ground. According to her the four men ran away when she arrived at the scene. The only other relevant evidence in support of the prosecution's case was what appeared to be the evidence of a dying declaration.

Mr. Tusasirwe attempted to argue that once a trial judge's judgment is found to contain an error, that error should vitiate all the proceedings so that an appellate court should not act on the proceedings except to quash the orders. P. Loizean & Gobine Vs R(Supura) is authority for the proposition that such record remains valid until an appellate court declares the trial a nullity and orders of the trial Court are set aside. Mr Tusasirwe was unable to provide any authority in support of his theory. We are unable to envisage a possible situation in which an appellate court, and least of all a first appellate court, can

Vs R (1956) 23 EACA 566.

We would here observe in reference to Mr. Tusasirwe's theory that the Court of Appeal in the present case should not have relied on the record of the trial court because of the alleged misdirection by the trial judge, that in Okethi Okale case itself the Court Appeal relied on the record of the trial court proceedings to re-assess the evidence adduced during the trial in order for the Court of Appeal to hold that the judgment of the trial judge was wrong. The relevant difference between Okethi-Okale and the present case on this point is that whilst the appeal in Okethi Okale succeeded because of misdirections by the trial judge on grave inconsistencies in the prosecution case which made the evidence unreliable, the appeal of the appellant in the present case failed in the court below because that court found that the evidence against the present appellant was overwhelming. Moreover it is trite that until the proceedings of a lower court are declared by a higher court to be null and void, the proceedings remain valid for all purposes: R.M. Naker vs R (1956) 23 EACA 528 and Phillibert Loizean and Another

those in Okethi Okale case. The East Africa Court of Appeal held that this is a novel proposition in criminal trials, that in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. Further that it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed during the evidence or in counsel's speeches. The theory put forward by the trial judge in Okale case was inconsistent with the evidence of Joyce Awenda and therefore the Court of Appeal allowed the appeal. Clearly the facts in the present case are different from



This means that the Court of Appeal has to consider the evidence on the record and decide whether the decision of the trial judge is in conformity with the evidence adduced during the trial. If it is not in conformity, the Court of Appeal makes any appropriate order. Moreover it must be appreciated that failure to comply with the provisions as to the preparation of a judgment will be fatal to a conviction where there is insufficient material on the record to enable the appellate court to consider the appeal on its merits: See **Willy John Vs R (1956) 23 EACA 509.**

*"On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the High Court or to remit the proceedings to the High Court with such directions as may be appropriate, or to order a trial, and to make any necessary, incidental or consequential orders."*

Moreover by Rule 31(1) of the Rules of the Court of Appeal, 1996,

**D. R. Pandya vs R (1957) 5A336. And S. M. Ruwala vs R (1957) EA 358.**

This provision gives the Court of Appeal power to reassess the evidence received and recorded by a trial judge of the High Court. Thus in a case where there is conflict in evidence, as was the case in **Okethi Okale** case, the first appellate court has to re-evaluate the evidence on record and draw its own inferences and, if it is of the opinion that the judgment of the trial court cannot be supported, that judgment will be set aside:

*"29 (1) On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the Court may---*  
*(a) re-appraise the evidence and draw inferences of fact";*

be precluded from re-evaluating the evidence on the record of a trial court simply because of a misdirection in the judgment by the trial Court. In the case of the present Court of Appeal, hearing of appeals, such as the one under consideration, is regulated partly by rule 29 of the Rules of that Court. That rule states:-

This is the pith of the defence case as we shall show presently. It should be noted that that paragraph appearing in the judgment of the trial judge is preceded by his summary of the prosecution evidence on the first issue which was whether there was theft on 3<sup>rd</sup> June, 1994 as testified to by Mazima and his wife, the first and second prosecution witness, who witnessed the robbery. The criticism has some substance in that the learned trial judge did not go into details by way of evaluation of the evidence of the appellant before

*"In his sworn statement, the accused denied any knowledge of the theft and the money especially since none had been recovered. He also challenged the evidence relating to the missing weighing scale"*

In the opening paragraph from the judgment of the trial judge quoted by the Court of Appeal, the trial judge refers to the defence evidence in the following words--

Now turning to the complaint that the trial judge first believed the prosecution case before he considered the evidence for defence, we think, with respect, that the misdirection is not fatal to the conviction.

As we have stated above, Rule 29(1) is the basis for saying that the Court of Appeal as a first appellate Court is entitled to critically evaluate the evidence on the record and make its own conclusions on the case bearing in mind the fact the appellate court did not enjoy the opportunity of seeing witnesses testify. See our decisions in Bogere Moses vs Uganda - Supreme Court Criminal Appeal 1 of 1997 (unreported), and (Kifamunte Henry Vs Uganda, Sup. Court Criminal Appeal No. 10 of 1997) (unreported). Needless to say, one of the purposes of an appeal is to enable an appellate court to review the evidence and the judgment based on that evidence in order to ascertain whether objections to the judgment are sound or baseless. If the objections are sound, the appellate court will correct the error giving rise to the objection by either reversing the judgment or upholding the judgment on the basis of reasons which may be different from those in the judgment, the subject of the appeal.

the judge found that the appellant was involved in the theft of the money and weighing

scale.

Also it is correct to say that the judge should not have referred to previous prejudicial allegation of robbery against the appellant so as to conclude that the appellant "has a propensity towards the wrong side of the law". In his evidence already summarised in this judgment, the appellant stated that on the material night he, his wife and children slept in his house from 6.00 p.m. until 5.00 a.m. Mazima and Bitakwata (PW4) LDUs and other people went to the home of the appellant at 5.00 a.m. He challenged them about their presence without LCs in his village as they hailed from a different village. The four members of the group searched his house because he was suspected to have broken into Mazima's shop. The search took an hour but nothing implicating the appellant in the robbery was recovered during the search. Thereafter they took the appellant whom they subsequently assaulted. He denied the offence and claimed that the prosecution witnesses testified against him because of the grudge with Regina, which we have already referred to.

As we said in cases like **Kifamunte** (Supra) and **Bogere** (Supra), once an accused person raises an alibi as his defence, the evidence of the prosecution should be evaluated alongside that of the defence before the trial judge decides to accept one side in preference to the other. No one piece of evidence should be relied upon in isolation. In this case the prosecution evidence shows that the homes of Mwebaze and the appellant were searched the following morning after the robbery but none of the stolen articles was recovered there. The learned trial judge should have referred to this evidence of the appellant before he concluded that the appellant had participated in the robbery.

However the learned trial judge later clearly stated that the burden of proof rests on the prosecution when he considered the defences of alibi and the alleged grudge. There the learned trial judge, correctly though belatedly, referred to the fact of the appellant having been arrested and held, also correctly, that this evidence destroyed the defence of alibi and the allegations of grudges having been the cause of prosecution evidence

against the appellant. The judge found that the alibi was false. Although the judge did not evaluate the appellant's claim that he was arrested at his house and was not taken to the scene, the judge found that the appellant was in fact arrested at the scene.

In these proceedings, the decision during the trial depended on credibility of witnesses. The trial judge had to decide whether the appellant who admitted the arrest was arrested at the scene as stated by the prosecution witnesses or whether he was arrested at his home as stated by the appellant himself. The trial judge who saw and heard the witnesses and the appellant testify in court found as a fact that the appellant was arrested at the scene during the robbery. The Court of Appeal has made similar findings on the same evidence.

Although we agree that the approach of the learned judge in the assessment of the evidence was unsatisfactory, we nevertheless accept the concurrent findings by the two courts that the appellant must have been arrested at the scene. There is ample evidence to support this. We are not persuaded that he was arrested at his home and taken to the scene or to the sub-country headquarters before being taken to the police. Neither have we been persuaded that the two courts erred in their conclusions.

Accordingly we think that the Court of Appeal was right in holding that there was evidence to support the conviction. This conclusion disposes of grounds 1 & 2, which must fail. We will refer to the other grounds briefly.

The complaint in ground three is that the Court of Appeal made an error of mixed law and fact when it found that theft as an ingredient of robbery had been proved. Mr Tusasirwe contended that the evidence proving theft was inconclusive. The basis of this argument was that because Mwebaze's home was searched the following day after the robbery and none of the items (money and weighing scale) stolen during the robbery were found there, therefore, theft as an ingredient of robbery had not been established. Counsel surmised that, the appellant could have been at the home of Mazima just for beating Mazima.

Mrs. Lwanga, learned Principal State Attorney, objected to this ground of appeal because it was not raised and argued in the Court of Appeal. She submitted, and we agree with her, that non-recovery of stolen items is no basis for the contention that there was no robbery. In her view the evidence of Mazima and his wife which was not challenged established theft. We think that the issue of theft is mixed law and fact and therefore correctly raised before us though not in Court of Appeal. In any case the Court of Appeal considered the matter. We accept the contentions of the Principal State Attorney that whether or not theft had been committed is a matter of fact. The two courts below made concurrent findings of fact that theft had been committed. We have not been persuaded by Mr Tusasirwe that either or any of the two courts erred either in law or in fact in the findings of theft. Therefore ground three must fail.

The complaint in the fourth ground of appeal is that the learned Justices of Appeal erred in law when they rejected the appellant's defence of alibi and allegations of grudges. Counsel for the appellant contended that if the Justices of Appeal had examined the evidence they would have found that the defence evidence was credible. Counsel cited Bogere vs Uganda (S.C), Criminal Appeal 1 of 1997 (unreported) and S. Nyanzi vs Uganda Supreme Court Criminal Appeal No 16 of 1998 (unreported), to support his arguments. Mrs Lwanga submitted that the evidence of prosecution witnesses, Mazima, his wife Kyogabirwe, Y. Nikyanira (PW3) and Leo Bitakwata (PW4) which was believed by courts below shows that the appellant was arrested at the scene of the crime. Therefore the defences were rightly rejected. We agree. The first, second, third and fourth prosecution witnesses testified that the appellant was arrested at the scene of robbery. The appellant denied this and claimed that he was arrested from his home and taken to the scene. Here again the question of where the appellant was arrested and in what circumstances is a question of fact and depends on credibility. The Court of Appeal accepted the findings of the trial judge that the appellant was arrested at the scene of crime in the process of committing the offence. The trial judge and the Court of Appeal were entitled on the basis of the evidence available to make these findings. We think that the two cases cited by counsel for the appellant are not helpful to the appellant. Indeed

we disposed of this ground while discussing grounds 1 & 2. Accordingly ground four

must fail.

The complaint in the fifth ground is that the Court of Appeal did not subject the evidence to fresh and exhaustive scrutiny. Mr Tusasirwe contended that the Court of Appeal should have found on evidence available, that the person arrested at the scene is different from the appellant. Mrs Lwanga contended that this argument in reality is covered in the arguments advanced in arguing the other grounds of appeal. We agree with the learned Principal State Attorney and we find no merit in this ground. The Court of Appeal in fact considered the evidence before it concluded that there was ample evidence implicating the appellant. Ground five must therefore fail.

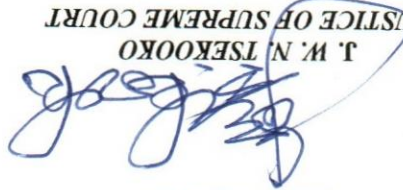
In the result this appeal must fail and it is dismissed.

Delivered at Mengo this...*15th* day of...*August* 2000.

S. W. W. WAMBURI  
CHIEF JUSTICE



J. W. N. TSEKOOKO  
JUSTICE OF SUPREME COURT



A. N. KAROKORA  
JUSTICE OF SUPREME COURT



J. N. MULENGA  
JUSTICE OF SUPREME COURT



G. W. KANYEIHAMBA  
JUSTICE OF SUPREME COURT

