

REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA  
AT MENGO

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

CRIMINAL APPEAL NO. 20 OF 2000

BETWEEN

KWOBA YOSAMU ..... APPELLANT

AND

UGANDA ..... RESPONDENT

*[Appeal from the decision of the Court of Appeal at Kampala (Manyindo  
DCJ, Engwa and Kitumba, JA) dated 14<sup>th</sup> December, 1999 in Court of Appeal  
Criminal appeal No. 4 of 1999]*

JUDGMENT OF THE COURT This appeal is against the decision of the Court of

Appeal which dismissed the appellant's appeal against his conviction for Capital robbery  
on two counts by the High Court which sentenced him to death.

The allegations laid against the appellant at his trial in the first count were that he  
and others on 31<sup>st</sup> of December, 1994, at Kayanga village in Iganga District robbed  
Oljja Wandera of one radio cassette, a bicycle and shs.100,000/= and at or immediately  
before or immediately after the robbery used a gun on the said Oljja Wandera. Similar  
allegations of robbery in the second count relate to robbery of Omondi Charles except  
that in this instance the appellant and his accomplices threatened to use a gun on Omondi  
Charles the victim of the robbery and stole different items.

The case for the prosecution was that on the night of 31<sup>st</sup> December 1994, the  
appellant and other persons while armed with a gun and sticks attacked Kayonga village.  
They first attacked Oljja Wandera (PWI) in his shop between 8 p.m. and 9.00 p.m. At  
that time four people entered the shop disguised as customers. Some people who were  
around the shop fled from the scene presumably after realising that the four were robbers.

In his sworn defence, the appellant denied the offences. He explained that he had been a radio repairer for two years. That prior to 31<sup>st</sup> December 1994, he had repaired a number of radios. He admitted that he was arrested at the taxi park by Haji S. Mugwa (PW3) on 1<sup>st</sup> January 1995 while in possession of a Panasonic Radio, not Mekosonic, which was red in front but grey at the rear and which he was carrying in a red bag. He

On 2<sup>nd</sup> January 1995, the appellant was arrested by Haji S. Mugwa (P.W.3) at Bugiri taxi park while in possession of a Mekosonic Dynamic radio cassette and a black bag. He claimed that the radio belonged to him. He could not produce to his arresters Omondi (PW2) visited Bugiri police station where Wandera identified the black bag as his property and Omondi identified the radio cassette.

On the same day at 10.00 p.m., robbers attacked the shop of Charles Omondi (PW2) another shopkeeper of the same village. While inside the shop he heard people who were outside the shop saying that thieves had arrived. He locked all the doors of the house. The robbers ordered him to open the shop. When he did not respond, there was heavy gunfire, which was followed with banging to open the door of his shop by the robbers. The robbers entered and robbed from him a Mekosonic Dynamic radio cassette No.8922BJ, his and his wife's clothes and diverse household properties. Omondi lay quietly in hiding until the robbers had left. He did not recognize any of the robbers. After the robbers left he came out. Many people had gathered. The robberies were reported to Bugiri Police post.

The four people dressed in civilian clothes entered the shop and slapped Ollija Wandera who never recognized them. They then robbed diverse shop goods, which included a Hitachi radio cassette and a black bag. The bag bore some red stripes. After the robbery a voice of one of the robbers called out the name Kwoba, one of the robbers who was inside the shop. One of the unidentified robbers shot Ollija Wandera in the left shoulder. Wandera fell down and became unconscious. He regained consciousness when the police, to whom a report was made, reached the scene.

Mrs. Eva Luswata Kawuma, Counsel for the appellant, contended that the prosecution failed to prove that theft had been committed, that a deadly weapon was used during the robberies and that the appellant was identified as one of the robbers. Learned counsel argued that in his defence the appellant had explained how he came into possession of the radio cassette and the bag, and that Mugwa (PW3) contradicted himself about the name of the radio found in the possession of the appellant when he was

all reasonable doubt.

As formulated in the supplementary memorandum of appeal the complaint in the ground of appeal is that the learned Justices of Appeal erred in law in upholding the finding of the trial judge that the offences of aggravated robbery had been proved beyond

appeal.

At the conclusion of the trial the assessors advised for conviction on both counts. The learned trial judge believed the prosecution and disbelieved the appellant whom he convicted on both counts. He appealed to the Court of Appeal against his convictions. The convictions were upheld by the Court of Appeal. The appellant has now appealed to this court against the decision of the Court of Appeal. There is only one ground of

other radios.

intended to deliver it to Bagitano Paul. He had delivered some two other radios to the respective owners on 31<sup>st</sup> December 1994. He testified that before he was arrested, he disagreed with a conductor of the taxi who wanted to store the radio in the boot of the taxi. Because of the disagreement, the conductor reported him to Mugwa (PW3) who arrested him for disorganizing other passengers. When Mugwa asked for the receipt in respect of the radio, the appellant had none. Thereafter Mugwa and a group of other people assaulted the appellant alleging that he was a thief. He, the radio and the bag in which he had packed the radio were handed to the police who eventually charged the appellant with the present offences. He testified that the bag and the radio found in his possession were new and different from the ones produced in court during his trial. He claimed that he had taken the police to his radio workshop where the police saw many

She submitted that there was a break in the chain of evidence of exhibits which were not marked by the police. After the court drew her attention to the irregularity in record of the memorandum of agreed facts she said that S.64 of the Trial on Indictments Decree, 1971, was not complied with in recording the memorandum of the evidence of P/C Menya and such non-compliance occasioned injustice.

Mr. Michael Wamasebu, Principal State Attorney, appearing for the respondent, supported the judgments of the trial judge and of the Court of Appeal. He submitted that the issue of use of a deadly weapon should not be raised before us because it was conceded at the trial that a deadly weapon was used and the issue was never argued in the Court of Appeal. He argued that in any case there was evidence of use of a deadly weapon which evidence was not challenged in the courts below. The two courts below accepted and acted on that evidence.

With respect, we agree with the learned Principal State Attorney that there was ample evidence of use of deadly weapon. The evidence of Olijja Wandera (PW1) and Charles Onyango (PW2) already referred to in this judgment proves the use of a deadly weapon, a gun, during the robberies.

In regard to the two exhibits, the learned Principal State Attorney submitted in effect that the exhibits were sufficiently identified. He said that each of the exhibits had peculiar identification marks. The radio had a serial number and bore the initials "C. O.", which stand for the name of the owner, Charles Omondi (PW2). The same radio had a defective mechanism which holds radio cells and its antenna was also defective. He asked us to uphold the finding of the trial judge that the inconsistency in the evidence of Mugwa about the name of the radio cassette is minor.

Subject to what we say later about non-compliance with S.64, we accept the arguments of the Principal State Attorney in regard to the peculiar features of the radio. The break in the chain of the evidence of transmission of exhibits from the moment Mugwa handed them over to Bugiri Police Post to their production in court, occasioned

by the exclusion of the evidence of P. C. Menya for non-compliance with S. 64 of the TID by the trial judge, does not affect the evidential value of the radio and the bag. The two items were robbed on the night of 31<sup>st</sup> December 1994. Two days later, i.e., on 2<sup>nd</sup> January 1995, the appellant was found in possession of the same two exhibits, which were handed to the Bugiri Police by Mugwa on the same day. Apparently the owners of the exhibits, namely Wandera and Omondi visited the police station and identified the two items as some of the property which was robbed from them. Although the appellant maintained in his sworn evidence that the items found on him were different from the ones produced in evidence, the assessors and both the trial judge and Court of Appeal believed the prosecution version and rejected the appellant's version. We are thus faced with the situation where the two courts below have made concurrent findings of fact based on the assessment of evidence that the radio and the bag produced in evidence are indeed the same items which were found in possession of the appellant upon his arrest. At the trial the two exhibits were produced without objection. In these circumstances we have not been persuaded that either court erred in making the finding. We agree with the learned trial judge that the inconsistency in the evidence of Mugwa about the name of the radio is minor.

Mr. Wamasebu quite properly conceded that the trial judge did not comply with the provisions of S. 64 of TID. The learned Principal State Attorney however contended that the non-compliance did not occasion injustice and that the admission by the appellant's counsel of the statement of evidence of constable Menya as recorded by the trial judge mitigated the injustice, if any.

The provisions of S. 64 (1) and (2) in so far as are relevant read as follows: -

"(1) If an accused person who is legally represented pleads not guilty,

the court shall as soon as is convenient hold a preliminary

hearing in open court in the presence of the accused and his advocate

and of the advocate for the prosecution to consider such matters as

will promote a fair and expeditious trial.

(2) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and by his advocate and by advocate for the prosecution, and then filed "

A preliminary hearing is intended to promote a fair and expeditious trial. According to subsection (2) the following steps are mandatory. The court must:-  
 (a) Prepare a memorandum of the matters agreed in the presence of the accused and his advocate.

- (b) The memorandum must
  - (i) be read over and
  - (ii) be explained to the accused.
- (c) The explanation must be made in a language understood by the accused.

(d) The memorandum must be signed:-

- (i) by the accused,
  - (ii) by his advocate, and
  - (iii) by the advocate for the prosecution.
- (e) Then it must be filed as part of the record.

The record of the trial on 15<sup>th</sup> January 1999 so far as relevant shows the admitted statement of No.28499 P. C. Menya A. to be:-

"I do recall very well that on 2<sup>nd</sup> January 1995 I was on duty

late shift 2 with P. C. Seruwagi around 2.30 p.m. one man

called Sulait Mugwa Local Defence at the same time Chairman

RC III Kapyaga Sub-county here in the office with one suspect

called Kwoba Yosamu suspected to have stolen one radio

cassette Mekosonic and 1 black bag and the exhibits were also

handed in. As I was on later I rearrested the suspect and detained

We reject the argument of counsel for the appellant that the lacuna in the evidence regarding transmission of the exhibits is fatal to the conviction.

Be that as it may, the exclusion of the admitted evidence leaves ample evidence that the stolen property was found in the possession of the appellant.

In this case the recorded memorandum was damning to the accused. It should have been explained to him as required by S.64 (2). In the circumstances, we cannot, with respect, accede to Mr. Wamasebu's view that the admission by Mr. Liga as to the correctness of the statement purporting to be a memorandum of agreed facts mitigated any injustice that could have been occasioned by the failure by the learned trial judge to comply with the requirements of S.64(2) of the TID. We accordingly hold that the evidence of P. C. Menya was improperly admitted and is not part of the record. Trial judges must comply with the mandatory requirements of section 64(2) whenever a preliminary hearing is held.

After recording that, the learned trial judge proceeded to select two assessors who assisted him in the trial. There is nothing whatsoever showing that the learned judge explained the memorandum to the accused at all and in a language he understands. It is apparent that neither the appellant nor his advocate signed the memorandum. Nor did the State Attorney. These are mandatory requirements under the provisions of subsection (2). These provisions do not authorise an advocate for the accused to admit, as did Mr. Liga admit in the instant case, the correctness of the "statement" on behalf of the accused. Recently, in the case of Mawanda Edward vs Uganda, Supreme Court, Criminal Appeal No.4 of 1999 (unreported), we pointed out that in a criminal case it is improper for counsel for an appellant to concede criminal responsibility on behalf of an appellant.

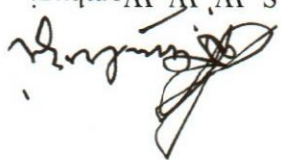
Mr. Liga: That is correct we admit the statement".

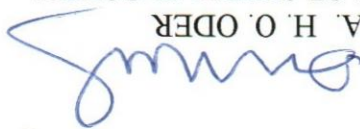
exhibit.

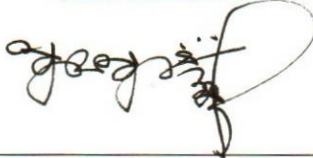
Later on the suspect was transferred to Iganga CPS together with the him in cells and the exhibits were exhibited attached to the file.


There is ample evidence to support the conviction of the appellant. Accordingly the ground of appeal fails and the appeal on both counts is dismissed.

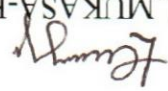
Dated at Mengo 23rd-----this day of November-----2000

  
S. W. Wambuzi  
Chief Justice

  
A. H. O. ODER  
JUSTICE OF SUPREME COURT

  
J. W. N. TSEKOOKO  
JUSTICE OF SUPREME COURT

  
J. N. MULENGA  
JUSTICE OF SUPREME COURT

  
L. E. M. MUKASA-KIKONYOGO  
JUSTICE OF SUPREME COURT

*Reserving for Appellant  
Sumbulamba SH for state  
independent road project*