

MAWANDA EDWARD, to whom we shall herein refer as the appellant, was convicted by the High Court sitting at Kampala, of robbery with aggravation contrary to ss. 272 and 273 (2) of the Penal Code Act and was sentenced to death. On appeal, the Court of Appeal quashed that conviction and set aside the death sentence, and substituted therefor, a conviction of simple robbery, and a sentence of imprisonment for 10 years, with orders for police supervision for 3 years, corporal punishment of six strokes, and compensation to the complainant in the sum of shs 100,000/=. The appellant being dissatisfied with that decision appeals to this Court against both conviction and sentence.

JUDGEMENT OF THE COURT

*(Appeal against conviction and sentence by the Court of Appeal
(Manyindo DCJ, Kato and Berko JJ.A) at Kampala, dated 24th
November, 1998, in Criminal Appeal No. 28 of 1996)*

UGANDA RESPONDENT

AND

MAWANDA EDWARD APPELLANT

BETWEEN

CRIMINAL APPEAL NO. 4 OF 1999

CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA
AND MUKASA KIKONYOGO, JJ.S.C.

IN THE SUPREME COURT OF UGANDA
HOLDEN AT MENGO

The undisputed facts of the case may be stated briefly. In the night of 13.1.93 at Namungoona village, Zone B, in Lubaga Division, one Numani Gita, who gave evidence at the trial as PW1, and his wife, Hasifa Nabankema, who also gave evidence as PW3, (to whom we shall herein refer as Gita and Hasifa respectively), were attacked in their bedroom by about three men, who assaulted them and stole diverse goods from them. In the early morning hours of 14.1.93, in the neighbouring zone, LDU personnel on patrol intercepted first, one Mulekezi carrying a large bag containing diverse items, and later two other men. One of the two was alleged to have been carrying a radio cassette, and the other had nothing. The latter escaped. The former was the appellant. Mulekezi and the appellant, with the area RCI Chairman, Samuel Lugemwa, who gave evidence as PW2, and the LDU personnel and other people who had gathered, went to Gita's home. There, Gita and Hasifa identified items brought with the suspects, as property stolen from their house earlier in the night. Eventually, Mulekezi and the appellant were jointly indicted for robbery. Before trial, however, Mulekezi was apparently mysteriously released from custody, and the DPP had to enter a nolle prosequi in respect of him. The appellant was therefore tried alone.

There were eight grounds of appeal filed. When the appeal came up for hearing before us, Mr. Nsibambi, counsel for the appellant, combined grounds 1,3,4 and 5 to argue that the Court of Appeal erred in failing to re-evaluate the evidence as a whole and in convicting the appellant of simple robbery when there was no, or not sufficient, evidence proving his guilt. Although he sought to argue ground 2 separately, namely that the Court of Appeal failed to evaluate the defence of alibi, much of its substance was covered by his argument of the combined grounds and we shall consider it in that context. Counsel's arguments on these grounds may be broken

It is important to note that their Lordships did not go further to satisfy themselves that the concession was justified having regard to the evidence. Mr. Nsibambi argued his contention in the alternative. He submitted, first, that the appellant's counsel in the Court of Appeal did not, as a matter of fact, concede that the appellant participated in the robbery. According to him, what was conceded was that evidence showed that a simple robbery was committed. In the alternative, Mr. Nsibambi submitted that in criminal proceedings counsel cannot legally

used" (emphasis added)

The only point that was argued before us was whether there was proof that a deadly weapon was used or threatened to be

conceded that he participated in the robbery.

in the robbery. During the hearing before us, however, it was

"The appellant, in his unsworn statement denied participating

Appeal. Their Lordships said:-

The second contention arises from the following passage in the judgment of the Court of

bearing on the other two.

of alibi. We shall consider the second contention first, because the answer to it has much And the third is the substance of ground 2, namely that the court failed to consider the defence basing its decision on concession by counsel, that the appellant had participated in the robbery. proved that a radio cassette had been stolen. The second is that the Court of Appeal erred in erroneously based on his alleged recent possession of a stolen radio cassette when it was not down into three main contentions. The first is that the appellant's initial conviction was

appellant's participation in the robbery having been conceded. We do not doubt at all, that the outright acquittal. Also, the reply by counsel for the respondent was evidently premised on the Apparenty, unlike in the memorandum of appeal, counsel did not in his submission pray for

ensure his immediate release"

and substitute conviction for simple robbery and a sentence that would

" allow the appeal, quash the conviction and set aside the sentence

robbery." But all the three recorded him as concluding his submissions by praying the court to the robbery. The most that he is recorded as saying is that "there was ample evidence of simple contain any unequivocal statement by the appellant's counsel that the appellant participated in of counsel's submissions recorded by each of the three learned Justices of Appeal, do not express concession to the effect that the appellant participated in the robbery. The separate notes was by his counsel. We have carefully examined the record and found that there wasn't any appellant, at any stage, personally made the concession. Whatever concession was made, it Neither the Court of Appeal, nor the learned Principal State Attorney suggested that the

never

entitled to rely on the concession.

absence of the appellant challenging the participation in the Court of Appeal, that court was Ms Khisa, Principal State Attorney, maintained that the concession was made and that in admit having committed the offence. In the instant case, however, that was not done. In reply appellant, the court ought to involve such appellant personally, to ascertain that he in fact does maintained that because, where it occurs, such a concession would be very prejudicial to the instant case, it was a misdirection on the part of the Court of Appeal, to rely on it. He concede commission of an offence by his client, and that if there was such a concession in the

Mr. Nsibambi's second submission on this issue raised a more fundamental question, namely: can an advocate's concession on appeal, that the client committed the offence in question, be legally binding on the client to the extent that the court can convict or confirm a conviction, on strength of that concession? As a general rule, whatever counsel says to the court, is deemed to be said on instructions of his client and is therefore binding on the client. That is true of a statement of fact as well as an argument. In our view, however, a statement amounting to admission that the client committed the offence in issue, must be treated differently. The criminal justice system in this country is still based on the old principle, now entrenched in article 28 (3) (a) of the Constitution, that a person charged with a criminal offence shall:

participation in the robbery was unequivocally conceded.

case, to say that the record supports the conclusion relied on by them that the appellant's respect to the learned Justices of Appeal, we are unable, in the circumstances of the instant stance taken on any pleading that is inconsistent with the concession. With the greatest would be to ascertain, and record in unequivocal terms, the content of the concession, and the where the court is faced with such a concession, and intends to rely on it, the proper course withdrawn. That left the issue shrouded in uncertainty. We agree with Mr Nsibambi, that the first ground of appeal, nor the principal prayer in the memorandum of appeal, was that the conviction be quashed, the sentence be set aside and the appellant be set free. Neither not evaluated the evidence and had arrived at a wrong decision; and the principal prayer was conceded. However, in the first ground of appeal, the complaint was that the trial judge had conclusion, which is now complained of, that the appellant's participation in the offence was appellant's counsel, by what he said and what he did not say, led the Court of Appeal to the

It is pertinent to observe that in the instant case, the Court of Appeal omitted to evaluate the evidence, and opted to base its decision on the equivocal concession, notwithstanding that it had

uncontestable issues, he must not, particularly in a criminal case, assume the role of judge. officer of court, has a duty to refrain from misleading the court or wasting its time by contesting satisfied that the evidence proved or did not prove the appellant's guilt. While counsel, as an on record. It did not exonerate the court from its duty to re-evaluate the evidence, in order to be the appellant's own admission, the said concession remained counsel's opinion of the evidence his guilt was assumed to have been conceded by his counsel. That was an error. In absence of appellate court, after re-evaluating the evidence, that he had been proved guilty, but because of Appeal convicted the appellant of simple robbery not because it was satisfied, as a first offence should be treated like a change of plea. In the instant case the position is that the Court verdict, as happened in the instant case, an alteration of his position to admit commission of the challenge it by appealing to a higher court. Where, however, he has opted to challenge the quashes the conviction. The convicted person has the option to accept the verdict or to presumption of innocence ceases, and he is deemed guilty unless and until a higher court appeal as well, should the situation arise. Of course where a person is convicted, the the principle is primarily applicable to original trials, it provides guidance for handling an

advocate engages in plea bargaining, the ultimate plea must be by the client himself. Although himself to plead guilty. His advocate cannot enter the plea on his behalf. Even where the That principle is applied strictly. For an accused person to be convicted on a plea, it must be

until that person has pleaded guilty" (emphasis added)

"be presumed to be innocent until proved guilty or

the common case of Manager, Bank Building Contractors v Republic (1968) 50143 supports the view that a plea entered by counsel is invalid in the absence of a case of not dispense with.

We agree with that criticism . In our view, however, it should have constrained the Court of Appeal all the more, to re-evaluate the evidence and make its own findings of fact on the ingredients of the offence, and in particular, in view of the defence of alibi , on the issue of the appellant's participation in the offence. Even if the Court of Appeal had been correct in its view that the appellant's participation was conceded by counsel , its duty to be satisfied that the concession was consistent with the evidence, would have remained . The omission to re-evaluate the evidence was an error of law and as this Court has held in a number of its decisions, that makes it imperative for us now to re-evaluate the evidence (see KIFAMUNTE HENRY VS UGANDA Criminal Appeal no. 10 of 1997 (unreported) and BOGERE MOSES AND ANOTHER VS UGANDA Criminal Appeal No. 1 of 1997 (unreported). In the circumstances , we have to consider the evidence on record adduced to implicate the appellant in the commission of the offence.

Attorney, Mr. Birreije

noted, and criticised , unsatisfactory features in the judgment of the trial court. One such feature, was highlighted in the following passage in the judgment of the Court of Appeal

"There are many unsatisfactory features in the "Judgment" of the learned trial Judge. The law requires judgment to contain the point or points for determination, the decision on the point or points and reasons for the decision (see S. 85 of the Trial on Indictment Decree.) The judgment in this case was just a reproduction of the summing-up to the assessors. The Judge did not make any finding of fact on any of the ingredients of the offence beyond the direction she gave to the assessors. This point was conceded by the learned Principal State Attorney, Mr. Birreije"

When the same witness resumed giving evidence under cross-examination a year later, on 22.11.95, he claimed that he could clearly identify the attacker who slapped him and hit him with the block, and that it was the appellant, who also had the knife and who demanded for

could not recognise them because it was night"

except I heard a gun being fired.....I did not recognise anybody. I

because I had been forced to lie facing down. I did not see anything

knife. I did not look at it carefully to see how long or big it was

"I did not recognise the person who hit me with the block. They had a

the attackers. He said :

Gita first gave evidence-in-chief, on 17.11.94, he repeatedly stated that he did not recognise witnessed the robbery and who would have identified the robbers were Gita and Hasifa. When We agree that there was no credible evidence of identification. The only persons who

item was proved by the evidence of Hasifa and that of Lugemwa.

evidence of appellant's possession of the radio cassette, and maintained that the theft of the proved to have been stolen property. Ms Khisa conceded that the conviction was based on the the item allegedly found in the appellant's possession, namely a radio cassette, was not and the first appellate court, to apply the doctrine of recent possession of stolen property, when ignore it. On the latter, he submitted that it was a misconception on the part of the trial court, property. He submitted that the former was so unreliable that the trial court had decided to two sets, namely evidence of identification, and evidence of recent possession of stolen On the evidence adduced to implicate the appellant, Mr. Nsibambi pointed out that it was in

the money. But in further cross-examination he said :- "I told Court I could not see the attackers. I am not changing my story". The evidence of Hasifa, who testified in court on 23.1.96, was similarly inconsistent. In one breath she stated that she could not see because the attackers, each of whom had a torch, were flashing their torches in their (victim's) eyes, and in another breath she claimed to have recognised the appellant, whom she did not know before the incident, in the light from the torch of his colleague. These inconsistencies were not, and probably could not be, explained. Be that as it may, it is clear from the evidence of the two eye witnesses that the conditions pertaining at the time of the robbery, made it difficult for them to identify their attackers. The factors which ordinarily facilitate identification were either absent or of no help. The two witnesses were suddenly awakened from sleep and immediately roughed up, getting hardly any opportunity to observe their attackers. It was night time and the only light in their bedroom was torch light, which could have assisted the witnesses to see, but which seems to have blinded them instead. Although the attackers did talk when they were demanding for money, we cannot infer that this helped the witnesses to identify the appellant whom they did not know and whom, therefore, they had not seen (or heard) before. We find that the conditions at the material time, did not favour correct identification. The possibility that Gita and Hasifa claimed to have identified the appellant as an afterthought, or out of vague memory of seeing him at their home after being intercepted, cannot be ruled out. The learned trial judge who saw and heard the two witnesses did not believe them. We are in agreement with her, that it would be unsafe to rely on the identification evidence by the two witnesses. It has to be ignored, leaving for consideration only the evidence on the aspect of recent possession of stolen property.

"We talked to the men and asked them where they had got the property from. They said they stole the radio. I took the man where I had parked the vehicle. By that time so many people had surrounded us. Haji escaped, only Mawanda remained. He took us

be. Lugenwa said in examination—in-chief,

the evidence is not as clear as should.

appellant was holding a radio cassette. On the crucial part concerning the appellant's reaction, told them their names. One of them was Mawanda, the appellant. According to Lugenwa, the team to the alleged colleagues whom they found walking to the main Hoima Road. Mulekezi was stolen from, and intimated that he had been with two colleagues. He led Lugenwa and his about the property, Mulekezi said he has stolen it. He agreed to show them where the property at a nearby park with a bag full of property which they suspected to be stolen. On being asked whom he knew because he resided near his house, with a report that they had intercepted him patrol with the LDU, the LDU personnel, with whom he had been, brought to him Mulekezi Lugenwa testified that at about 4 a.m on 14.1.93 as he was returning to his house after night

of intercepting the appellant with the radio cassette. We shall consider the latter first. Chairman Lugenwa and LDUs. On the other hand, Lugenwa testified on the circumstances were brought back to their home after Mulekezi and the appellant were intercepted by RCI Gita and Hasifa testified on the items stolen from them during the robbery and those which robbery, namely a radio cassette. The evidence to consider is in two parts. On the one hand, intercepted in the neighbouring zone, in possession of one of the items stolen during the That aspect, is the prosecution case that very soon after the robbery, the appellant was

On analysis of the prosecution evidence, however, it becomes apparent that, much as it contains statements that are prejudicial to the defence, it is not entirely credible, let alone sufficiently weighty. Thus, what is first presented by Lugemwa as an admission in which the appellant

unsubstantiated”.

The appellant's defence was that he did not take part in the robbery. On the night in question he stayed at Nsambya. In the morning of 14.1.93 at about 8 a.m., while travelling in a public vehicle on his way to collect school fees from his brother-in-law at Nansana, he was stopped at a road block. He said that because he was still a student, he did not have an ID or a tax ticket on him, and that for that reason he was detained at the spot and was not allowed to go back on the vehicle to continue his journey like the others. Later he was taken to the police. He denied being found with a radio cassette. The learned trial judge without indicating any reasons, accepted that the prosecution had established its case under the doctrine of recent possession, and rejected the defence of alibi merely as *“the usual rogue's defence easily fabricated and*

him “ (emphasis added)

“I never knew the 2 men before. We took them to complainant's home within 30 minutes At first they denied but Mulekezi insisted they stole . Since complainant remembered the radio cassette Mawanda was holding was his cassette it was proper to arrest

In cross examination however, the same witness said:

already day break – about six o'clock am.”

to where they stole them from; Namuni's homeit was

participated, that the radio cassette was stolen, it turns out, in cross-examination of that witness that it was an allegation by Mulekezi which the appellant denied. Secondly it is not clear from Lugemwa's evidence whether the appellant was the person who led Lugemwa and his team to Gita's home. It is just as possible that it was Mulekezi who led them. Needless to say, that if it had been proved beyond reasonable doubt that the appellant had confessed to Lugemwa that he stole or participated in the theft of the radio cassette; and that he had led Lugemwa and his team to the home from where the radio cassette was stolen, that would have gone a long way to prove the appellant's guilt. But it was not so proved. Lugemwa's evidence on who confessed to the theft of the radio cassette and who led the team to Gita's house, is equivocal if not vague. Furthermore, although under S. 28 of the Evidence Act, the confession of an accused person implicating a co-accused, may be taken into consideration as against that co-accused. Mulekezi's confessions, cannot be taken into account against the appellant under that section, because Mulekezi was not tried jointly with the appellant. His confessions, to the extent they implicate the appellant, would have to be treated as inadmissible hearsay. Besides, even where such a confession is taken into account, it cannot be the basis of a conviction. It is only taken into consideration in support of other substantial evidence. (See MUSA LINDA VS R (1960) EA 470; and EZERA KYABANAMAIZI VS R. (1962) EA 309)

Lastly we turn to Mr. Nsibambi's submission that the prosecution did not prove that the radio cassette allegedly found in possession of the appellant, was stolen during the robbery at Gita's house. Both Gita and Hasifa named the property that was stolen during the robbery, and the property brought back to their house after interception of Mulekezi and the appellant. The radio cassette was not mentioned by either witness among the items stolen during the robbery or the

items returned to the house. Even Lugemwa did not initially include it among the items identified by the complainant, when he arrived with the suspects. He testified :

“ When we knocked at the door the complainant immediately identified the properties and the people who we were with that they had stolen them. There was a wall clock- it was new – I cannot describe it now, it was a long time ago. All I know is that there was a clock, a hurricane lamp, clothing which I do not remember but for men and women . that is all I can remember. They were in a bag with wheels ...complainant recognised clock, clothing, lamp and bag”(emphasis added)

It was only in cross examination, as noted earlier in this judgment, while justifying the arrest of the appellant, that Lugemwa said that the complainant had “remembered” the radio cassette. In his own evidence, Gita did not confirm this . It is also in passing that Hasifa made mention of a radio . When explaining how she recognised the appellant she said :

“ I only recognised accused while his colleague was kicking me accused was grabbing the radio”

She did not go on to say that he took the radio or that it was a radio cassette. In the end, therefore, it is only those two incidentally adduced pieces of inconclusive evidence that stand against the appellant. We do not think , in the circumstances , that this constituted sufficient evidence to prove beyond reasonable doubt, that a radio cassette was stolen during the robbery and that the appellant was found in recent possession of it, thereby destroying the defence of alibi . We think , therefore , that it would not be safe to uphold the conviction on basis of that evidence alone.

Before taking leave of the case, we are constrained to observe that most, if not all, the weaknesses in the prosecution case which we have pointed out in this judgment, resulted from bad handling of the case. The learned trial judge, in her judgment, quite rightly criticised those responsible for the inordinate delay in prosecution of the case. For the trial of a criminal case starting 1 year and 10 months after commission of the offence, to last another 1 year and 4 months, from 11.10.94 till 15.2.96, with only three witnesses giving evidence, suggests that there is something wrong with the system and those administering it. We think, however, with respect that the learned trial judge, being in overall charge of the proceedings, has to take some of the blame, for permitting the hearing to be so dragged out. That, however, is only one aspect, which obviously had a negative impact on the memory of witnesses. The other is the amateurish manner in which witnesses were led to give evidence. A few more guided questions may well have resulted into better quality evidence. Lastly the handling of the exhibits was pathetic, to say the least. In the proceedings it is recorded on the first day of hearing, after PW1 gave evidence in chief, that the prosecuting State Attorney obtained adjournment because exhibits were not in court, and the Police had "just gone to get them". When hearing resumed with the same witness on 6.12.94, the record shows only two items produced in evidence, namely a wall clock as Ex. P1; and a bag with two wheels missing, as Ex. P2. Almost a year later on 22.11.95, after cross-examination of PW2, the State Attorney once again obtained adjournment because exhibits were not in court. It is not clear whether that refers to exhibits already produced or additional ones. Thereafter, however, there is no record of any more exhibits having been produced in evidence. Indeed when the appellant was given opportunity to reply to the State Attorney's submissions, his own counsel having

apparently abandoned him, he explicitly drew the trial court's attention to the fact that no radio cassette had been exhibited. We would have thought it very unlikely for him to make that bold assertion and the court accepts to record it, if in fact the radio cassette had been produced in evidence. However, when reviewing the evidence in her judgment, the learned trial judge referred to a radio cassette Sanyu as Ex P2, the zipper bag on wheels as Ex P3 and other (clothing) as Ex P4-7. There is no trace, on the record of proceedings, of a radio cassette having been produced in evidence and having been marked as Ex P2. The disparity is puzzling.

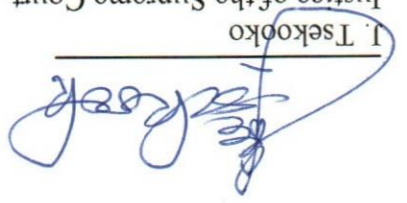
Be that as it may, we find that the evidence on record is not sufficient to support the conviction Grounds 1,2,3,4 and 5 therefore succeed, and in view of that, it is unnecessary to consider grounds 6 and 7 which relate to sentence. Ground 8 was not argued as such, because counsel considered it rather as an accompaniment to the first five grounds.

In the result we allow the appeal, quash the conviction, and set aside the sentence. We order

that the appellant be set free unless he is held for any other lawful reason.

DATED at Mengo the 25th day of February 1999

I Tsekoko
Justice of the Supreme Court



A. Karokora
Justice of the Supreme Court

