REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KATO, JJ.S.C.)

CRIMINAL APPEAL 52 OF 2000

BETWEEN

SGT. MUSOKE WILLIAM:::::::::::::::::::::::::::::::: APPELLANT

AND

UGANDA ::RESPONDENT

[Appeal from judgment of the Court of Appeal at Kampala (Manyindo DCJ, Mpagi-Bahigeine and Berko, JJ.A.) dated 29th November, 2000 in Criminal Appeal No. 59 of 1999]

JUDGMENT OF THE COURT

This is a second appeal. It arises from the decision of the Court of Appeal dismissing an appeal by Sgt. Musoke William, the appellant, against his conviction, by the High Court, for capital robbery and murder. Upon conviction, the High Court sentenced him to death in respect of the first court to robbery.

In the High Court, the appellant and three other persons were tried by Onega, J, on an indictment containing five counts. In counts 1 to 4, they were indicated for robbery with threatened use of a gun against diverse persons in Bunafu village on the night of 7/1/1995. In the fifth count the appellant alone was indicted for the murder of Matovu Siliveste.

The prosecution case was that on the night of 7/1/1995, the appellant together with Mutwalibu Katende, Maganda Ali and Mutalya Azedi at Bunafu village, in Iganga District robbed Mudhungu Patrick (PW1), Rose Mwendeze Muwanika (PW2), Tadeo Inensiko (PW3), Nyiro Vincent (PW4), among other persons. In the course of the robbing, Matovu Siliveste, father of Mudhungu, was shot dead by the robbers. The appellant was arrested the following morning near Iganga railway station in possession of some of the properties robbed from Bunafu village. This connected him to the robberies and the murder. The other suspects were arrested later in the day.

During the course of the trial in the High Court, Mutwalibi Katende jumped bail. The appellant and the remaining two accused each set up alibi as their defence, namely that each was not at the scene of the crime when the offences were committed. The learned trial judge believed the prosecution evidence in respect of the appellant and Muganda Ali and convicted them. He acquitted Mutalya Azedi. The two appealed to the Court of Appeal. That court upheld the conviction of the appellant but allowed the appeal of Muganda whom it acquitted and set free. The appellant has now brought the present appeal to us. It is based on four grounds of appeal. These grounds are an amalgamation of two memoranda of appeal. The first dated 25/2/2000 and containing three grounds was filed by Kakooza & Kawuma, Advocates. The second from which only ground three concerning the appellant's defence of alibi was lifted from the memorandum dated 10/9/2002 filed by Messrs Ddamulira & Muguluma, Advocates. The appeal was argued

by Mr. Ddamulira Muguluma while Mr. Vincent Okwanga, a Principal State Attorney, representing the Respondent, opposed the appeal. Mr. Ddamulira Muguluma argued grounds 1 and 2 together and grounds 3 and 4 separately.

Grounds 1 and 2 are formulated this way -

1. That the learned Justices of Appeal erred in fact and law by finding that the charge of murder had been proved beyond reasonable doubt

2. The learned Justices of Appeal erred in fact and law by finding that the charge of aggravated robbery was proved beyond reasonable doubt.

We must point out that in the trial court, Miss Nassiwa, who represented the appellant and who appears to have put up a strong fight for her clients, in effect, conceded the fact of the occurrence of robbery and that of the murder. Her contention was that her clients, the appellant inclusive, never participated in the commission of the crimes.

Earlier on in her submissions in support of no case to answer and later in her final address in the High Court, Miss Nassiwa, did not raise the issue of non-proof of any ingredient of either robbery nor of murder. According to the record, her contention was in her own words, that -

> "If there was robbery and deadly weapon was used, the prosecution did not adduce evidence to prove the accused committed the offence" (of robbery).

Her contentions were on identification. In the Court of Appeal the two complaints raised before us now never formed part of the appeal nor were they argued. Therefore and,

with respect to Mr. Damulira Muguluma, it was misleading for learned counsel to argue that the Court of Appeal erred in fact and law to find that robbery and murder were proved beyond reasonable doubt. In the Court of Appeal, the arguments by Mr. Ssengoba who represented the appellants there and argued the appeal, were substantially similar to those of Ms Nassiwa, namely, that conditions did not favour correct identification. Because of the approach adopted by Mr. Ssengoba in arguing the appeal in the court below, that court rightly concerned itself only with reevaluating the evidence relating to identification and then concluded that the evidence of Mudhungu (PW1) and Nyiro (PW4) was,

> **"Enough to connect the first appellant with the offence."**

That clearly shows that the Court of Appeal was satisfied with the evidence on identification of the appellant.

In the High Court the learned trial judge found that the offences of robbery and murder had been committed.

This is how he put it:

> **"To start with robbery there is ample evidence on record to show that there were a series of theft and that a deadly weapon was used. Both the defence counsel and the prosecution agree on this. Patrick Mudhungu, Inensiko Tadeo, Rose Mwendeze and Nyiro Vincent all told court how their various properties were robbed. Some of the items robbed were found hidden in the bush while others were found with A1 (i.e. Appellant). All the witnesses clearly told court that they heard gunshots Mzee Matovu was killed by a gun. It is therefore obvious that there was theft and that a deadly weapon was used. In**

this way the only ingredient in issue is as to whether or not the accused (sic) or any of them participated in the robbery."

This finding by the learned judge was not challenged in the Court of Appeal. In the memorandum of appeal in that court nothing is mentioned about this finding. Therefore the Court of Appeal was not moved to consider that finding, or rather the findings because the judge made a further finding that the deceased was killed by use of a gun.

After the two findings, the learned trial judge then went into detailed evaluation of the prosecution evidence relating to identification and held that the evidence of **Nyiro** (PW4) and **D. Kahigidha** (PW6) prove that the appellant was at the scene of crime. The judge then considered the evidence of **Fundi** (PW5) and Malinga (PW8) which he found to link the appellant to the robbery. **Inensiko** testified that his microphone was robbed that night. The judge believed **Nyiro** that the appellant was with **Inensiko's** microphone at night and that when the appellant was arrested it was still in his possession.

We have had to reluctantly allude to evidence on identification because of the approach adopted by Mr. Ddamulira Muguluma when arguing grounds 1 and 2.

We must point out, with respect to Mr. Damulira Muguluma, that in his address to us while arguing grounds 1 and 2 he did not in effect argue these two grounds. He merely used evidence on identification to challenge uncontested findings of the fact of murder and that of robbery and those arguments on identification are relevant to ground three which we shall discuss presently. On the basis of the evidence of **Inensiko** and **Nyiro** which we need not quote here, we are satisfied that if the issues of whether murder and or robberies were committed had been raised and argued in the Court of Appeal, that court would have found that robberies and the murder had been committed. Consequently grounds 1 and 2 have no merit and the same must fail.

In ground 3 the complaint is that the learned Justices of Appeal failed to properly evaluate the evidence on the record and as a result came to erroneous judgment. Mr. Damulira Muguluma argued that **Mudhungu** (PW1) and **Nyiro** (PW4) upon whom the Court of Appeal relied did not see the appellant at the scene of crime. Counsel contended that **Mudhungu** (PW1) claimed belatedly in his evidence to have seen the appellant. Counsel argued that the witness did not have enough time to identify the appellant. He also contended that the evidence of **Nyiro** (PW4) is inconsistent concerning whether or not he was able to see the shooting of the deceased. He argued that Nyiro is not a truthful witness.

Mr. Ddamulira Muguluma in effect argued that the prevailing circumstances did not favour correct identification. He further contended that the goods claimed to have been found in possession of the appellant upon his arrest belonged to the cyclist who gave him a lift on a bicycle. Learned counsel also contended that neither **Nyiro** nor P/C Kesinge identified the properties properly. Counsel argued that the Court of Appeal did not evaluate this evidence properly.

Mr. Okwanga relied on **Isongoza W. Vs Uganda**, Supreme Court Criminal Appeal 6/98 (unreported) for the view that as the appellant was arrested while in possession of stolen property and as he did not satisfactorily explain how he got in possession of the property, the appellant must be the thief. When court expressed concern about the procedure adopted in production of exhibits in the trial court, the learned Principal State Attorney opined that the trial judge erred in not marking the exhibits when they were tendered in court, but contended that the irregularity is not fatal to the prosecution case because it did not occasion a miscarriage of justice to the appellant.

In the trial court, the issue of identification of the appellant and his co-accused as well as whether the gun produced in court was the gun used in the commission of the crimes were canvassed. It was argued that the trial judge failed to resolve the inconsistency

between the evidence of **Fundi** and Sgt. Malinga about whether the gun produced in court was the gun found on the appellant. This is because whereas **Malinga** testified that the gun could fire, **Fundi** stated that it could not fire. True the learned trial judge did not allude to the introduction in evidence of the exhibits. But he was firm in his findings that the properties found at Musitta tree where **Nyiro** was released and the properties found in possession of the appellant upon his arrest were properties which had been robbed by the appellant and his group. The judge also found that the evidence of **Nyiro** established that the appellant is the gunman who carried the gun with which the murder was committed.

As already noted, the complaints raised for the consideration of the Court of Appeal were the defence of alibi and the contradictions and insufficiency in prosecution evidence. In the Court of Appeal Mr. Ssengoba in matter of fact concentrated on the issue of identification of the appellant and did not raise any complaint about production of exhibits in court. The Court of Appeal considered the complaints argued there and re-evaluated the evidence of Mudhungu, of **Nyiro** (PW4) of **Fundi** (PW5) and of **Malinga** (PW8) before holding that the evidence of **Nyiro** placed the appellant at the scene of crime and that the evidence of **Fundi** corroborated that of **Nyiro**. The Court of Appeal also concluded that the appellant was correctly identified and that, therefore, his alibi was destroyed. So the court confirmed his conviction. We have reviewed the evidence of these witnesses but we have not been persuaded that the Court of Appeal erred in its conclusions.

The claim by **Fundi** that the gun could not fire is a little puzzling. But the appellant solved that puzzle. The appellant claimed he took his gun from the armoury and took two full magazines on 7/1/95. Upon his arrest he was found armed with a gun with the two magazines; one full, the other without seven bullets. His expatriation at that time was that he fired these missing seven bullets in self defence after **Fundi** had shot at and injured him. The courts below did not believe this version of his. **Malinga** on the other

had testified that there was shooting before he went to the scene where the appellant was arrested. Whatever the case, clearly the appellant's evidence established that the gun found in his possession was functional. The appellant must have known it was functional before he carried it. In any case **Nyiro**, a key witness who was believed by the two courts below, testified that at night the appellant fired his gun. In these circumstances there can be no doubt that the gun with which the appellant was found upon his arrest could fire.

We have alluded to the handling of exhibits by Sgt. Malinga and P.C. Kisiige (Pw9). The evidence of the latter about the exhibits was not challenged and although the trial judge's procedure of the production and marking of the exhibits is irregular and unsatisfactory, this did not prejudice the appellant nor does it occasion any miscarriage of justice. Accordingly we find no merit in ground 3 which must fail.

The fourth and last ground of appeal is that the learned Justices of Appeal erred in fact and law for having rejected the alibi set up by the appellant.

Mr Ddamulira Muguluma contended that the Court of Appeal erred when it stated that the appellant's defence did not amount to an alibi.

Mr. Okwanga contended that there was no alibi raised and that if there was any then the identification of the appellant at the scene destroyed his alibi.

It is true that at first the Court of Appeal held that -

> **"The defence of the appellant did not amount to an alibi."**

However after the court summarised the appellant's defence, it considered his defence as an alibi although the court was not clear when it said -

> **"He (Appellant) was therefore in the Magamaga Barracks on the night of 7/1/95. The incident took place at night. Therefore he was in position to participate in the offences. He was seen at the scene of the robbery by both PW1 and 4".**

Here the judgment of the learned Justices appears confusing some how, but they went further and stated -

> **"The trial fudge did not only believe the evidence of PW1 and PW4, but he found the defence of the first appellant remarkable and improbable."**

We agree with this last conclusion. Ground four has no merit and it fails.

There are two matters upon which we desire to comment. First, as pointed out earlier, Mutwalibi jumped bail before he could give his defence. The trial judge proceeded with the trial and heard the defence of the other accused persons ***No Nolle prosqui*** was entered by the Director of Public Prosecutions in respect of Mutwalibi yet the judge made no findings in respect of his case. That is erroneous. The DPP should have entered a nolle. As it is, the trial of Mutwalibi was not concluded. Secondly, the trial judge erroneously deferred passing sentence on the appellant on counts 2,3,4 and 5. He should have passed sentences on all counts and then deferred execution of these four sentences. We make these comments for the guidance of other trial Judges. Otherwise these irregularities have no material effect on the case.

In conclusion we find no merit in this appeal. It must fail. It is dismissed.

Delivered at Mengo the 19th day of May 2003

A.H.O ODER
JUSTICE OF SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF SUPREME COURT

A. N. KAROKORA
JUSTICE OF SUPREME COURT

J. N. MULENGA
JUSTICE OF SUPREME COURT

C.M. KATO
JUSTICE OF SUPREME COURT