THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT THE KAMPALA

(CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE, KISAAKYE, JJ.S.C.)

CRIMINAL APPEAL NO. 26 OF 2009

BETWEEN

BEIGANA KANONI WILLY:: APPELLANT

AND

UGANDA:: RESPONDENT

[An Appeal from the judgment of the Court of Appeal at Kampala (Mukasa-Kikonyogo DCJ, Mpagi Bahigeine and Byamugisha, JJ.A), dated 19th May, 2009 in Criminal Appeal No 204 of 2003]

JUDGMENT OF THE COURT

This is a second appeal. It is against the decision of the Court of Appeal which upheld the appellant's conviction for simple robbery contrary to **sections 272** and **273 (1) (b) of the Penal Code Act** and the sentence of 15 years imprisonment.

In addition to the sentence that had already been passed by the High Court, the Court of Appeal made the following orders against the appellant. Payment of compensation to the victim amounting to Shs 20,000/= in accordance with section **284 (4) of the Penal Code Act** and police supervision of the appellant fro two years serving his sentence of imprisonment in accordance **with section 124 of the Trial on Indictments Act.**

The appellant was indicted for aggravated robbery contrary to **sections 272 and 273 (2) of the Penal Code.**

The prosecution evidence as accepted by High Court and the Court of Appeal is as follows:

On the 28th June 2011, at around 9.00 pm at night the complainant, Bitare Christopher (PW3) was approaching the gate of his house when he was ambushed by two men. They stole his

mobile phone and some money. He was assaulted by the assailants and he fought with them. He managed to recognize the appellant with the help of the security light at his gate.

He raised an alarm as did people from his house. The attackers ran away. The people who answered the alarm arrested the appellant about 500 meters away from the scene.

He had a pistol. He was taken to the police station where he made a charge and caution statement in which he admitted being at the scene.

In his own defence the appellant set up the defence of alibi.

He testified he was on his way to visit a friend when he was attacked by Christopher Bitare (PW3) and three others. Later, others joined and beat him up alleging that he was a thief. He lost consciousness.

The learned trial judge rejected his defence. However, he found that the pistol which was alleged to have been used at the time of the offence was not proved to be a deadly weapon. Accordingly, the learned trial judge acquitted him of aggravated robbery but convicted him of simple robbery contrary to **sections 272 and 273 (1) (b) of the Penal Code** and sentenced him to 15 years imprisonment.

The appellant appealed to the Court of Appeal on the sole ground that:

> **"The Learned trial Judge erred in law and fact when he convicted the appellant on the basis of the uncorroborated evidence of a single identifying witness".**

The Court of Appeal found that the evidence of identification was free from error and the conviction was rightly based on it.

The appellant's appeal was accordingly dismissed.

Dissatisfied with the decision of the Court of Appeal, the appellant filed his appeal to this Court on three grounds. During the hearing of appeal, counsel for the appellant dropped the third ground of the appeal which was against sentence.

The following are the two grounds that remained:

1. **The Learned Justices of Court of Appeal erred both in law and fact when they upheld the High Court finding that the appellant was correctly identified as the one who committed the offence.**
2. **The Learned Justices of the Court of Appeal erred both in law and fact when they failed to judiciously re-evaluate the evidence on record and came to a wrong conclusion of upholding the conviction of the appellant.**

During the hearing of the appeal in this Court the appellant was represented by Mr. Moses Kugumikiriza and Mr. Vincent Wagona, Principal State Attorney, represented the respondent.

Counsel for the appellant argued both grounds of appeal jointly and the Principal State Attorney made his reply in a similar manner. In this judgment, we shall handle the grounds of appeal following the order both counsel argued them.

The complaint by the appellant's counsel in grounds 1 and 2 is that the justices of Appeal erred in fact and in law when they failed to properly re-evaluate the evidence and concluded that the appellant was correctly identified as the one who committed the offence.

Appellant's counsel submitted that the Justices of Court of Appeal were alive to the law on identification and quoted the relevant authorities on the subject. But they were re-evaluating the evidence, they did not apply the law to the facts.

The appellants' counsel argued that considering the conditions that were prevailing at the offence was committed, there was a possibility of error in identifying the appellant. He submitted that PW3 was lying when he testified that he heard them saying that they had arrested a thief with a pistol and the court should not have believed his evidence.

Appellant's counsel criticized the prosecution for failing to call as witnesses any of the people who were inside the appellant's house and made an alarm when they heard him also making an alarm. He further attacked the prosecution for failing to adduce the evidence of the person who picked the gun.

In reply, the Principal State Attorney opposed the appeal and supported the judgments of the High Court and Court of Appeal. He contended that the Court of Appeal properly re-evaluated the evidence and came to the right conclusion. The learned Principal State Attorney submitted

that the appellant was well known to PW3, there was light, there was a short distance between the two people and the appellant was arrested very near the scene of the crime. He submitted that the appellant in his own defence put himself at the scene of the crime. In his charge and caution statement he admitted that he committed the offence. The two courts below, therefore rightly rejected his alibi.

In rejoinder counsel for appellant submitted that High Court and the Court of Appeal in convicting the appellant took into account his charge and caution statement that was not voluntarily made and wrongly used it to corroborate the evidence of PW3.

This is a second appellate court and as such we are not required to re-evaluate the evidence unless the first appellate court failed to re-appraise the evidence and drew wrong inferences of facts and did not properly consider the judgment from which the appeal arose. However, when this court finds that there was evidence to support the decision of the first appellate court, it is not open to this Court, to go into the sufficiency of that evidence or the reasonableness of that finding. In such circumstances, the second appellate court has not right to interfere with the decision of the two lower courts on the concurrent findings of facts**. See: Kifamunte Henry Vs Uganda S.C Criminal Appeal No 10 of 1997, [1999] KALR 50, r. Mohamed. Ali Hashan Vs R (1941) 8 EACA 93, and R Vs Hassan Bin Said [1942]9 E.A.C.A 62.**

The complaint by the appellant's counsel is that the Court of Appeal did not properly re-evaluate the evidence. The Justices of appeal were alive to the law of identification by a single witness but did not apply it to the facts.

In their judgment, the learned Justices of Court of the Appeal considered the problem which courts encounter when a case depends on identification by a single identifying witness. Relying on **Roria Vs Republic [1967]** E.A 585, they reiterated the position of the law that though a conviction can be based on the evidence of a single identifying witness, the Court has the duty to satisfy itself that it is safe in all circumstances to act on such identification.

The Court of Appeal further reminded itself of the conditions considered favorable for correct identification as laid down in the following authorities.

Abdalla Bin Wendo V R (1953) 20 EACA 166; Abdalla Nabulere & other V Uganda [1979]; Moses Kasana Uganda [1992-93] HCB 47 and Moses Bogere & another V Uganda – criminal Appeal No. 1/97 (SC) (unreported)

The conditions are:

(i) Whether the accused was known to the identifying witness at the time of the offence.

(ii) The Length of time the witness took to identify the accused.

(iii) The distance from which the witness identified the accused.

(iv) The source of light that was available at the material time.

We agree with the statement of the law.

PW3, the victim of the robbery was the only eye witness. According to his testimony, he saw the appellant and another person near the gate of his house, where there was electric lights.

On that point he testified as follows:

"I arrived there at 9.00.p.m. At my gate I found the accused and another person. I knew the accused before but I did not know his companion. Accused stayed at a building facing my shop. At my gate there are big electric lights so I recognized the accused. I asked them whether they were my visitors. I was in front of them. Accused there upon moved about 3 meters and got a pistol and pointed it at me. He asked me to sit on the ground and I complied. He told me to hand over my cell phone to his companion. I did so. He further asked me to hand over all the money I had on me to his companion. I had shs. 2,700/= which I handed over as told. His companion had a cable wire. Accused told his friend that the money I had handed over was too little so he should beat me up to disclose where the rest of the money was. The companion beat me up very badly. Accused said that if I did not hand over more money they would kill me. I raised an alarm then and those inside the gate raised alarm. Accused's companion told accused that they should kill me and then go away. I got off the ground immediately and took hold of accused. His companion came and started beating me up again while

I held the accused on the ground. I then left the accused and took hold of his companion. Accused went and was hurt by the thorns of the fence. I too got hurt by the thorns and remained on the ground. The attackers ran away and left me there".

The witness was severely beaten by the appellant and his confederate. However, there was light, he knew the appellant before and talked to the two before they began assaulting him.

The argument by appellant's counsel that in such circumstances the victim could not have identified the appellant is not, therefore tenable.

The submission by appellant's counsel that there was a gap between the time PW3 was attacked and when he identified the appellant at the police station on the following day is, to say the least, ridiculous. PW3 knew the appellant before and he saw and recognized him at the time before he was attacked and during the attack itself.

The learned Justices of the Court of Appeal properly re-evaluated the evidence of identification at the time of the robbery and came to the right conclusion that witness properly saw and recognized the appellant as his attacker.

Counsel for the appellant criticized the Court of Appeal for not finding PW3 a liar because he testified that he heard from five hundred metres away people shouting that they had arrested a thief. With due respect, we think that counsel's contention is not based on any scientific evidence that one cannot hear people shouting five hundred metres away. Besides, Habib Kapere, PW5 testified that when he heard the alarm he went to PW3's house from where he heard people saying that they had arrested a thief. He went to the scene and found someone being assaulted. He went and called the police who came to the scene and took the appellant away. We note that the evidence of PW5 and PW3 on this point was not at all challenged by the appellant in cross-examination.

The Court of Appeal re-evaluated the appellant's defence that he had been attacked by PW3 and three other people. The Court of Appeal found that the injuries found on PW3 by Dr Tumuhimbise PW7 could not have been sustained by him when he was assaulting the appellant. They were caused by flogging.

The learned Justices of the Court of Appeal like the trial Court could not believe the appellant's alibi. The prosecution and the defence evidence was evaluated together and put the appellant at the scene of crime. There was no error about the identification of the appellant and we agree. In their judgment, the learned Justices of Court of Appeal stated:

> **"We think the appellant lied to court when he stated that he was assaulted by PW3 and three other people. The injuries which were found on PW3 when he was examined by PW7 could not have been sustained when the witness was assaulting the appellant. On the other hand, the testimony of PW4 and PW5 are to the effect that the appellant was assaulted by a mob soon after being arrested with a pistol. The sequence of events is such that the appellant's version of events cannot possibly be true. There was no evidence that PW3 was one of those people who arrested and assaulted him. It is more likely that when the appellant and his companion ran away from the scene of crime, he was arrested and assaulted by the people who answered the alarm. The facts and circumstances of the case are such that the evidence of identification was free from any possibility of error. A conviction could be based on it"**

We are of the considered view that the evidence of identification of the appellant by PW3 was overwhelming. Prosecutions' failure to call the people who made an alarm at PW3's house or the person who obtained the gun from the appellant does not affect the prosecution case.

The appellant's counsel briefly referred to the confession statement (Exhibit P1) that was admitted in evidence at the trial without objection from counsel for the appellant. In his own evidence the appellant retracted the statement when he testified that he did not voluntarily make that statement. It was counsel's contention that both courts were wrong to use that confession to corroborate PW3's evidence.

With due respect to counsel, it is only the learned trial judge who held that the confession corroborated the evidence of PW3. The Court of Appeal did not refer to that confession in its judgment.

This Court has held in number of cases that according to Article 28 (3) (a) of the Constitution, there is a presumption of innocence of an accused person in a criminal trial until proved guilty or

has pleaded guilty. The trial court has always to be cautious before admitting in evidence a confession made by the accused before trial, where the accused pleads not guilty. When the appellant's counsel does not object to the admission of such a confession, it is proper for the judge to ascertain from the accused person whether the confession was made voluntarily. When the accused person objects, the court must hold a trial within to determine the admissibility of the confession **See Kawoya Joseph Vs Uganda S.C Criminal Appeal No 50 of 1999. Omaria Chandia Vs Uganda S.C Criminal No 23 of 2001.**

In the instant appeal before admitting the statement in evidence, the learned trial judge did not ascertain from the appellant whether he had made the confession voluntarily. With due respect to the learned trial judge, that was an error on his part. That notwithstanding the evidence on record is sufficient to warrant the appellant's conviction.

The appeal is devoid of merit. It is accordingly dismissed.

Dated at Kampala this……28th…….day of ……April……..2011

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J.W.N.TSEKOOKO

JUSTICE OF THE SUPREME COURT

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B.M. KATUREEBE,

JUSTICE OF THE SUPREME COURT

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C.N.B. KITUMBA

JUSTICE OF THE SUPREME COURT

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J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

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E.M. KISAAKYE

JUSTICE OF THE SUPREME COURT