THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[CORAM: ODOKI, J.C., TSEKOOKO, KATUREEBE, TUMWESIGYE, KISAAKYE, JJ.SC]

CRIMINAL APPEAL NO. 13 OF 2009

BETWEEN

KASOZI LAWRENCE:: APPELLANT

AND

UGANDA::: RESPONDENT

(An appeal from the judgment of the Court of Appeal at Kampala (Before A. Mpagi-Bahigeine, A. Twinomujuni and S. B. K. Kavuma, JJ.A) dated 1st April, 2009 in Criminal Appeal No. 35 of 2003).

JUDGMENT OF THE COURT

This is a second appeal against the decision of the Court of Appeal which had confirmed the Appellant's conviction by the High Court for simple robbery and imposition of a sentence of life imprisonment.

The facts of the case were well captured in the judgment of the Court of Appeal. Briefly, these were that on 16th July 2000 at 10.0 a.m one KYEYUNE RASHID (PW1) while driving a Toyota Corona Motor Vehicle Registration No. UAA 065 along Sir Apollo Kaggwa Road in Kampala was suddenly blocked by two vehicles in front and one at the back. Several men, some armed with guns, both big and small, joined him in the vehicle. He was forced to lie down while one of the attackers drove the vehicle along Entebbe Road to a place called Kawuku. PW1 testified that he was then beaten and abandoned in the bush at Kawuku. He testified further that during the journey from Sir Apollo Kaggwa Road to Kawuku and even at Kawuku, in the bush, he was able to recognize the appellant

as his attacker, he reported the matter to the police who commenced investigations that eventually led to the arrest of the appellant.

On 10th August 2000, the appellant was sighted in Masaka Municipality, driving the robbed vehicle ending up in a gun shootout between the occupants of the car and the police. The occupants of the vehicle, including the appellant, abandoned their guns and the vehicle and escaped. The appellant was subsequently arrested in Kampala and indicated for robbery with aggravation. At the trial, he pleaded an alibi, but the trial judge rejected his alibi. The appellant then appealed to court of appeal against both conviction and sentence, his appeal was unsuccessful and both conviction and sentence were confirmed by that court hence this appeal against conviction.

The appellant filed three grounds of appeal, namely:

1. "THAT the learned Justices of Appeal erred in law in confirming the appellant's conviction and upholding his sentence on the basis of unsatisfactory identification evidence."
2. "THAT the learned Justices of appeal erred in law regarding the interpretation and application of the doctrine of recent possession and the defence of alibi.
3. THAT the learned Justices of Appeal erred in law when they failed to adequately re-evaluate the evidence adduced at trial and hence reached an erroneous decision."

At the hearing of this appeal, the appellant was represented by Mr. Henry Kunya on State brief, while Ms. Damalie Lwanga, Assistant DPP represented the state.

Mr. Kunya intimated that ground 3 of appeal was actually incorporated in the first two grounds, and that in effect he would only argue grounds one and two in that order. The learned Assistant DPP also responded in like manner. We shall also consider the grounds in the same order.

Counsel for the appellant argued that the gist of the first ground of appeal was that two lower courts did not adequately evaluate the evidence of identification at the scene of the crime. He contended that hade the courts done so they would have found that the

appellant was not positively identified. To counsel, the conditions at the scene of the crime were not conducive to proper identification. The witness, PW1 according to counsel, was under a lot of fear and had been pushed down in the vehicle and therefore could not have positively identified the appellant. In the bush at Kawuku, it was at night and dark. The witness could not have positively identified the parade organized, the only time that the witness got to see the appellant was in the dock in court, nearly two years later. The dock identification could not be relied upon so as to safely convict the appellant.

Counsel criticized the court of Appeal for failing to re-evaluate the evidence on its own. To him, the Court of Appeal had merely reproduced the findings of the trial Judge. Learned Counsel also attacked the evidence of PW3, the police officer who identified the appellant at the Petrol Station in Masaka. He contended that PW3 had not had prior knowledge of who the occupants of the car were, it was at night and therefore he could not have positively identified the appellant. Counsel argued that the court of Appeal considered and weighed both the positive and negative factors with regard to identification, the court would have come to the conclusion that the evidence of identification was not credible. There was a possibility of a mistake.

On ground 2, on recent possession, counsel argued that the appellant was never found in possession of the vehicle. The occupants of the vehicle had escaped, and according to counsel, they had not been properly identified. In any case, he argued, there was always the possibility that the vehicle had changed hands so that the person found with the vehicle need not be the person who had stolen it in Kampala. Two months had elapsed. Counsel submitted that this unreliable evidence together with the appellants' alibi that at the time of the robbery he had been re-evaluated by the Court of Appeal and the court would have come to a different conclusion. He invited us to allow the appeal, quash the conviction and set aside the sentence.

For the respondent, Ms Lwanga fully supported the judgment and decision of the Court of Appeal. She contended that both the trial court and the Court of Appeal had adequately and properly evaluated the identification evidence. She submitted that it was not a case of one identifying witness at one location.

There were several instances at different places where identification was made.

The first point of identification was at Sir Apollo Kaggwa Road, the first scene of the crime, where the vehicle was robbed. The witness, PW1 clearly stated that he had identified the appellant as the person who confronted him with a pistol and ordered him to leave the driving seat and sit on the other side. The witness sat in the middle of the two robbers and was able to identify the appellant because of that close proximity. In those circumstances, the Assistant DPP submitted, the identification of the appellant by the witness was sound.

The Assistant DPP further agreed that the second point of identification was at Kawuku. There was moonlight and the appellant kept asking the witness whether he knew him, while at the same time beating him. The witness had testified that he had thus been able to identify the appellant a second time. The learned Assistant DPP contended that this evidence had been fully and properly re-evaluated by the Court of Appeal before that court supported the findings of the trial court as to identification of the appellant.

The Assistant DPP then argued that there was more identification evidence relating to the finding of the robbed vehicle in Masaka. There was the evidence of PW3, the police Officer, who testified that he had positively identified the appellant as one of the occupants of the vehicle at the Petrol Station at Masaka. There was also the evidence of PW7, Henry Kabuye and PW8, Tereza Kabuye, relatives of the appellant, which evidence placed the appellant in Masaka and connected him to the vehicle in question. Counsel submitted that the court had considered the evidence as a whole and had properly convicted the appellant. On appeal the Court of Appeal had properly re-evaluated the evidence as a whole and properly confirmed the conviction. Accordingly, she prayed that we dismiss the appeal.

The gist of this appeal is whether the Court of Appeal performed its duty as expected of a first appellant Court in re-evaluating the evidence on record and coming to its own decision. In considering this matter, we deem it necessary to restate the principles upon which this court as a second appellant court may interfere with the decision of the Court of Appeal. We note that there was concurrence of findings of fact as to identification by

both the trial court and the court of Appeal. This court has laid down the principles in a number of decisions, notable among which is **HENRY KIFAMUNTE – VS – UGANDA (1999) 2 EA 127** where this court stated as follows:

> "We agree that on first appeal from a conviction by a judge the appellant is entitled to the appellant court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to re-hear the case and to reconsider the materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment from but carefully weighing and considering the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impressions made on the judge who saw the witnesses, but there may be other circumstances quite apart which may show whether a statement is credible or not and which may warrant a court to differ from the judge even on a question of fact turning on the credibility of a witness which the appellate court has not seen……
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> ……......" Furthermore, even where a trial court has erred, the appellate court will interfere where the error has occasioned a miscarriage of justice. See Section 331(1) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like a first appellate court save in constitutional cases. On second appeal it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principles. **See PANDY – Vs – R [1957] EA 336; KAIRU – Vs – UGANDA [1978] HCB 123**"

In this appeal, it is clear that the trial judge believed the evidence of the Prosecution witnesses and totally disbelieved the defence of alibi by the appellant. The crucial evidence was that of PW1 and PW3 with regard to the identification of the appellate. The

trial judge after analysing the evidence given by the witness and warning himself as to the dangers of dock identification, stated as follows, at page 10:

> "There is no doubt that dock identification especially of a lone accused is of the weakest type. I had the witness under close examination while in the witness box. I was very impressed by his demeanour. He gave evidence in a straight forward manner without prevaricating. Yes, a witness might be honest and yet mistaken. I have given careful consideration of the circumstances under which the witness claims to have identified the accused. I am left no doubt that the circumstances were favourable for a proper and correct identification."

In the Court of Appeal, the first ground of appeal was that the trial Judge had "erred in law and fact when he convicted the appellant on the basis of unsatisfactory identification evidence."

The court dealt with this ground by first considering the evidence itself, considering the submissions of both counsel thereon, and the consideration of the evidence by the trial judge. The court cited with approval a long statement from the judgment of the trial judge then drew its own conclusion as follows:-

"We have re-appraised all the evidence that was before the learned trial judge including the defence of alibi of the appellant. We take into account the fact that he believed as credible the identification evidence of PW1 and PW3, we think in the circumstances, including the evidence that the stolen vehicle was found in possession of the appellant within a month of its robbery, he was entitled to hold that the appellant was correctly identified both at the scene of robbery and in Masaka where the appellant was found with the vehicle. This ground of appeal fails." (Emphasis added).

There is no formula for the re-evaluation of evidence. Perhaps the Court of Appeal could also have gone at some length into analysing the evidence of each witness in its judgment. That, to us would only be a matter of style, not an error leading to miscarriage of justice. We have ourselves critically considered the evidence as a whole from the time of the robbery up to the time of eventual arrest of the appellant. We are of the view that

there was sufficient and credible evidence to put the appellant at the scene of the crime and to come to the conclusion the two lower courts did. We see no reason to differ from the concurrent findings of the lower courts. Ground one of appeal must fail.

With regard to the second ground of appeal, we note that although the appellant was not physically found in possession of the vehicle at the time it was recovered, there was evidence linking him to the car up to the time when it was abandoned by the occupants. This in particular is the evidence of PW3 who testified that he clearly saw the appellant in the car. The chase resulted into a shootout with the police as a result of which the occupants fled. Clearly this evidence was linked with the evidence of identification of the appellant both at the scene of the crime when the vehicle was first robbed, and when the vehicle was seen in Masaka. This evidence was believed by the trial court which listened to, and observed, the witnesses as they testified in court. The observation of the trial judge with regard to the demeanour of the witnesses is particularly significant. The Court of Appeal considered this evidence and agreed with the trial court. In the KIFAMUNTE case (supra) this court further stated:

“This court will no doubt consider the facts of appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale we will assume the duty of the first appellant court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in its consideration of the appeal as a first appellate court, the Court of Appeal as first appellate court, the court of Appeal misapplied or failed to apply in such decisions as Pandya (supra); Ruwala (supra); Kairu (supra). It might also be helpful to compare Rule 29 of the Court of Appeal Rules and Rule 29 of the Supreme Court Rules.

These two rules support our view that as a second court of Appeal we do not have to re-evaluate the evidence.”

The Court of Appeal considered the evidence of PW1 and PW3 which was also considered by the trial judge. After quoting the observations of the trial judge on the issue of recent possession, the Court stated (at page 7):-

> "We are unable to fault this finding of the trial court. In coming to this conclusion, the trial judge had believed the evidence of PW1 and PW3. He in our view correctly held that the stolen vehicle was found in possession of the appellant. We agree with him that a period of three weeks was not too long to disqualify the application of the doctrine of recent possession. We agree that all the evidence considered together put the appellant at the scene of the crime and therefore his alibi could not stand." (Emphasis added).

In our view, the Court of Appeal clearly re-evaluated the evidence before it agreed with the trial judge.

Likewise, the Court of Appeal did consider the appellant's defence of alibi. The court considered, as had the trial judge, that the appellant had stated that on 16th July 2000 he had been at home and had gone to church. But the court found that evidence not credible in view of credible evidence by the two witnesses that put the appellant at the scene of the crime. The court stated:

> "We agree that once credible evidence considered with the evidence in favour of appellant put him at the scene of crime, then the defence of alibi is displaced."

We have looked at the evidence as a whole, including the evidence of PW7 and PW8, and are of the view, that the Court of Appeal did not err in its re-evaluation of the evidence. The Court did re-evaluate the evidence and decide to agree with the trial Judge. We agree with the two Courts.

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

Delivered at Kampala this……10th ……..day of……May……2011.

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B. ODOKI

CHIEF JUSTICE

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J.W. N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

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B.M. KATUREBE

JUSTICE OF THE SUPREME COURT

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J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

……..

E. M. KISAAKYE

JUSTICE OF THE SUPREME COURT