THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: TSEKOOKO; KATUREEBE; KITUMBA; TUMWESIGYE AND KISAAKYE; JJSC.)

CRIMINAL APPEAL NO. 20 OF 2011

BETWEEN

1. OMORIO DAVID
2. OKELLO JOHN BAPTIST } **::::::::::::::::::::::::APPELLANTS**

AND

UGANDA ::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Kavuma, Nshimye and Kasule, JJ.A) dated 18th July 2011 in Criminal Appeal No. 310 of 2009]

JUDGMENT OF THE COURT

The appellants, Omorio David and Okello John Baptist, both members of the Uganda Police Force, were indicted for aggravated robbery contrary to Sections 285 and 286(2) of the Penal Code Act. They were tried in the High Court at Mbale (Nahamya, J,) on 18th November 2009, convicted, sentenced to life imprisonment and ordered to pay compensation to the complainant. They appealed against their conviction, sentence and compensation order to the Court of Appeal which dismissed their appeal against conviction and order of compensation. However, the Court of Appeal reduced the sentence imposed by the trial court from life imprisonment to

20 years imprisonment for each appellant. On 22nd June 2012 the appellants filed an appeal to this court against conviction, compensation order and the sentence of 20 years imposed by the Court of Appeal.

Background facts.

In August 2007, Lawendi Collins (PW1) and Bernard Fungo (PW4) broke into the bedroom of one Kamota Maximus (PW2) and stole Kenya Shs. 460,000/= and US $ 7,130. PW1 was a nephew while PW4 was a worker to PW2. After the theft they fled to Mbale. PW2 lived at Endebesi in Kenya and he reported the theft to Endebesi Police Station. The Police at Endebesi gave him a letter requesting the Police in Uganda to trace and arrest the suspects. He asked Tetui Phillip (PW3), a businessman who resided in Mbale, to assist in following up the matter. PW3 together with Mrs. Chelengati Evelyn Tete (PW5), the woman MP for Bukwo District from Kapchorwa region, approached one Cheptai, an MTN Manager in Mbale, and asked him for MTN printouts which could be used to trace the two fugitives since they were known to be on MTN network. Cheptai gave PW3 the printouts. PW3, following the advice of Cheptai, privately contacted Detective Corporal Omorio David, the 1st Appellant, and requested him to help them trace the fugitives. After explaining the matter to him PW3 gave the 1st Appellant an envelope containing the printouts, photographs of PW1 and PW4 and the letter of request from the Kenya Police.

The 1st Appellant enlisted the help of the 2nd Appellant, a fellow police officer, in the task of tracing and arresting PW1 and PW4. Using the printouts the 1st Appellant found that PW1 had been communicating with a woman called Brenda on his cell phone. He got a woman who pretended to be Brenda to call PW1 and ask him to come immediately to Mbale Referral Hospital to see her, pretending that she was ill and in need of his help. On 13th September 2007 at around 11:00 a.m. PW1 and PW4 went to the Hospital to see Brenda and on arriving there the two witnesses were immediately arrested by the Appellants who put them in handcuffs.

The 1st Appellant made a phone call to PW5 and told her that he had arrested PW1 and PW4 and he was going to recover the money from them. The appellants then took them to a lodge near the hospital and there asked them to tell them where they had kept the money they stole from Kenya. PW1 and PW2 were not co-operative and the 1st Appellant who had a pistol threatened he would shoot PW1 if he did not co-operate. PW1 then confessed that the money was at Namakwekwe in a lodge where they were staying. The two appellants got a special hire vehicle and took PW1 and PW4 to Namakwekwe. PW1 led them to the lodge and showed them a bag which contained the money. The amount contained in the bag was Shs 350,000/= plus US dollars which PW1 had not counted but which was stated by PW2 in his evidence to be US $ 7,130. Out of that money the 1st appellant got 100,000 and gave it to PW1 and PW4 for them to leave Mbale and go to Lira and start business there with the money. The appellants also gave PW1 and PW4 a phone

contact for a taxi hire driver who would take them. The rest of the money was taken by the two appellants.

After losing the money they had stolen, PW1 called his father and confessed to him that he and PW4 had stolen money from his uncle (PW2) and that that money they had stolen had been taken from them by police officers. The father of PW1 then informed PW2 of the development and arranged for PW1 and PW4 to go and stay at PW3's home in Mbale. From PW3's home they were taken to Mbale Police Station to report the incident. Following the reporting of the matter the two appellants were arrested, searched and subjected to an identification parade where they were identified by PW1 and PW4.

PW1 and PW4 were taken back to Kenya where they were charged with burglary and theft, convicted and sentenced to 3 years' imprisonment each. They got a presidential pardon after serving 2 years imprisonment. After their release from Kenya prison they came back to Uganda to give evidence in the trial of the appellants in the High Court at Mbale. The prosecution in the trial called 7 witnesses. Both appellants gave unsworn statements denying the commission of the offence and set up the defence of alibi. The High Court disbelieved the defence evidence, and disagreed with the opinion of the assessors who had advised the trial judge to acquit the appellants, convicted the appellants and sentenced each one of them to life imprisonment. It further made an order of

compensation for the 1st appellant to compensate PW2 an amount of Kenya shs. 200,000 and US $ 2000 and for the 2nd appellant shs. 50,000 and US $ 5,130. Being dissatisfied with the decision of the trial judge the appellants appealed to the Court of Appeal. The Court of Appeal upheld the conviction and the order of compensation against the appellants. However on sentence, it substituted 20 years imprisonment for each appellant for the sentence of life imprisonment imposed by the trial judge. Being aggrieved with the decision of the Court of Appeal the appellants filed this appeal.

Grounds of Appeal.

The appellants based their appeal on the following grounds.

1. **The learned Justices of Appeal erred in law and fact when they failed to find that the complainants (PW1 and PW4) were accomplices in a crime thus their evidence unreliable thus arriving at a wrong decision occasioning miscarriage of justice.**
2. **The learned Justices of Appeal erred in law when they relied on the evidence of PW4 while he was not sworn thus arriving at a wrong decision occasioning miscarriage of justice.**
3. **The learned Justices of Appeal erred in law when they failed to properly re-evaluate the evidence thus arriving at a wrong decision occasioning miscarriage of justice.**

4. **The learned Justices of Appeal erred in law and fact when they failed to consider the major contradictions and inconsistencies in the prosecution case thereby occasioning miscarriage of justice.**

IN THE ALTERNATIVE WITHOUT PREJUDICE

1. **The learned Justices of Appeal erred in law and fact when they failed to make finding that the appellants were police officers on duty and no criminal sanction could arise thereby occasioning miscarriage of justice.**

The appellants then prayed court to allow the appeal, quash the conviction and set aside the sentence.

Consideration of the Appeal

In considering the appellants' grounds of appeal we will consider ground 1, 2, 4 and the appellants' alternative ground first for we think we can dispose of them pretty fast before considering ground 3.

At the hearing of the appeal, Mr. Duncan Ondimu appeared for the appellants on state brief while Mr. Charles Olem Ogwang, Assistant Director of Public Prosecutions, appeared for the respondent. They both made oral submissions.

Ground 1 is that the learned Justices of Appeal erred in law and fact when they failed to find that the complainants (PW1 and PW4) were accomplices in crime and so their evidence was unreliable and

that relying on it by the two courts below to convict the appellants occasioned a miscarriage of justice. Learned counsel for the appellants did not make any submissions on this ground, and rightly so in our view, because it does not deserve serious consideration. PW1 and PW4 may have been convicted of the offence of theft in a Kenyan court involving the same money the appellants were indicted in the Uganda High Court for robbing, but this cannot make them accomplices. PW1 and PW4 did not act together with the appellants in the commission of any offence to be called accomplices with the appellants.

Ground 2 of appeal is that the learned Justices of Appeal erred when they relied on the evidence of PW4 while he was not sworn thus arriving at a wrong decision. On this ground learned counsel for the appellants submitted that the evidence of PW4 should never have been relied upon by the court considering that there was no evidence on record to show that he was sworn as a witness. He relied on Section 40(1) of the Trial on Indictments Act which requires every witness in a criminal cause before the High Court to be examined upon oath and Section 10 of the Oaths Act that states that a person shall not be convicted upon the uncorroborated evidence of a person who has given evidence without oath.

Learned counsel for the respondent countered this argument by arguing that though the record does not indicate that the witness was sworn, it can be inferred from the proceedings surrounding his examination that he was indeed sworn. There was examination in

chief, followed by cross-examination, and finally re-examination. All these procedures are usually done when a witness has been sworn. He further argued that even if the witness was not sworn, the court cannot interfere with the findings of the lower court if no miscarriage of justice was occasioned. He cited Section 34 of the Criminal Procedure Act to support his view.

We agree with learned counsel for the respondent that failure to state in the record that PW4 was sworn seems to have been just an inadvertent omission by the learned trial judge seeing the procedure that followed of examining and cross-examining the witness. Moreover, even if PW4 was not sworn, his evidence was amply corroborated by the evidence of PW1. We find no merit in this ground.

Ground 4 is that the learned Justices of Appeal erred in law and fact when they failed to consider the major contradictions and inconsistencies in the prosecution case thereby occasioning a miscarriage of justice. Learned counsel for the appellants argued on this ground that PW1 and PW4 who were convicts should not have been believed as they were not trustworthy and could tell lies. He referred to the contradictions in the evidence of PW1 and PW4 at page 85 of the Record of Appeal where PW1 stated the amount said to have been given to them by the appellants to be Shs. 100,000 whereas PW4 stated that it was K shs. 10,000. He relied on the case of **R V. Baskerville** [1916] 2KB 658 P. 665 to the effect that the rule of practice as to corroborative evidence has arisen in consequence

of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. Counsel for the appellants also criticised the way the identification parade was conducted and argued further that there was no evidence connecting the appellants to the crime.

Learned counsel for the respondent, on his part, opposed this ground by arguing that the contradictions and inconsistencies were explained at page 72 of the Record of Appeal where PW4 stated that he did not know how much money it was and that he was illiterate and he could not count. On the issue of the identification parade, learned counsel for the respondent submitted that the appellants were properly identified and all the right procedures were followed.

It is true that there were contradictions in the evidence of PW1 and PW4, especially relating to the money which the appellants gave them and the amount that they kept in the lodge. However, PW4 stated that he was illiterate and could not count. So he was in effect saying that the amount of money stated by PW1 was the correct amount as PW1 was educated and his counting was more reliable. Moreover, we do not consider this contradiction to be major as to go to the root of the case. The learned trial judge took note of these contradictions but observed that they were of a minor nature. She also observed the demeanour of PW1 and PW4 and stated that they depicted people who were simple but truthful witnesses. We cannot fault her on this.

On the issue of the identification parade we agree that the laid down procedures of conducting an identification parade were not followed. However, we do not consider that the identification parade was at all necessary. We think the issue of mistaken identify does not arise in this case. According to the testimony of PW1 and PW4 the appellants arrested them at around 11:00 a.m. in broad day light. They travelled together with them to Namakwekwe in the same car, and when they reached Namakwekwe PW1 went to the lodge with the appellants where he showed them where the money was kept. The appellants left the witnesses at around 3:00p.m. So PW1 and PW4 spent about 4 hours in all with the appellants. There was, therefore, ample time and favourable conditions for the proper identification of the appellants by PW1 and PW4. We find no merit in ground 4.

The appellants alternative ground of appeal is that the learned Justices of Appeal erred in law when they failed to make a finding that the appellants were police officers on duty and no criminal sanction could arise relating to their conduct on that day. Learned counsel for the appellants submitted that the appellants were on duty and they were protected by sections 1(s) and 21 (1)(c) of the Police Act.

Learned counsel for the respondent opposed this ground arguing that the law protects only those police officers on assigned duty and that the first appellant signed for a pistol to be used on guard duty only to use the weapon to pursue duties not assigned to him.

It may be true that under Section 21(1)(c) of the Police Act a police officer may be taken to be on duty at all times, and that under Section 23(1) of the Act a police officer may arrest a person if he has reasonable cause to suspect that that person has committed or is about to commit an arrestable crime. Still there are procedures that a police officer must follow otherwise his actions will be unlawful. For example, if a police officer arrests a person without a warrant he has to produce the suspect before a magistrate's court within 48 hours unless earlier released on bond. The evidence on record shows that when the appellants arrested PW1 and PW4 without a warrant, they took them to Namakwekwe to be shown the money. They gave shs 100,000 to them and told them to leave Mbale and go to Lira. They took the rest of the money and did not hand it over to Police to be used as an exhibit. Clearly this was not proper conduct on the appellants' part and so they cannot seek protection for this improper conduct from Section 21 (1) (c) of the Police Act. This ground fails as well.

Ground 3 of Appeal is that the learned Justices of Appeal failed to properly re-evaluate the evidence thus arriving at a wrong decision that occasioned a miscarriage of justice. Learned counsel for the appellants argued in his submissions that on a first appeal, the appellant is entitled to have the appellate court's own consideration and views on the evidence as a whole and this, in his view, was not done by the learned Justices of Appeal. He relied on **Kifamunte Henry vs. Uganda** SCCA Appeal No. 10 of 1997 to support his argument. He further argued that since PW1 and PW4 were not the

owners of the money in issue but were thieves who had stolen that money from PW2, the ingredients of the offence of Aggravated Robbery as to ownership could not be borne out.

Learned counsel for the respondent, on his part, argued that the issue of ownership was properly addressed as the indictment at p. 1(a) cited the proper owner of the money which was robbed. In his view the evidence on record supported the indictment of Aggravated Robbery.

Section 285 of the Penal Code Act creates the offence of robbery. It provides:

> **"Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery."**

Aggravated Robbery is defined, according to Section 286 (2) of the Penal Code Act, as use or threatened use by the offender of a deadly weapon in the course of the robbery perpetrated by him.

From the definition of robbery it is clear that stealing is an essential ingredient to the offence. In **Oryem Richard and Another vs. Uganda**, Criminal Appeal No. 2 of 2002 (SC) the ingredients of the offence of aggravated robbery which must be proved by the prosecution beyond reasonable doubt were laid down to be –

(a) That there was theft of some property.

(b) That there was violence in the course of the theft.

(c) That there was actual use of a deadly weapon or threat to use it.

(d) That the accused took part in the commission of the offence.

Section 254 (1) of the Penal Code Act gives the following definition of the offence of theft.

"A person who fraudulently and without a claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."

And Section 254 (2) (a) provides:

"A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intent –

(a) An intent permanently to deprive the general or special owner of the thing of it."

Section 254 (2) of the Act defines "special owner" to include any person who has any charge or lien upon the thing in question or any right arising from or dependent upon holding possession of the thing in question.

We think that "possession" as contained in the definition of "special owner" does not mean lawful possession. A person can steal property from a person who is not in lawful possession of it. This

interpretation is in line with the interpretation of "possession in cases of theft from other jurisdictions like, for example India and England and Wales whose law on theft is not very different from Uganda's. See for example **R v Turner (No 2)** [1971] 2 All ER 441. We are, therefore, unable to agree with learned counsel for the appellants that the appellants cannot be indicted for Robbery with Aggravation because PW1 was not the owner of the money.

The appellants also complained in Ground 3 that the learned Justices of Appeal did not properly re-evaluate the evidence on record to come to their own decision and that as a result they made a wrong decision which resulted in a miscarriage of justice. On the re-evaluation of evidence, the learned Justices of Appeal in their judgment reminded themselves of their duty as a first appellate court to give the evidence as a whole a fresh and exhaustive scrutiny and draw their own conclusions of fact. For this position they cited **Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10, Pandya v. R [1957] E.A. 336, Uganda vs. G.W. Simbwa** SCCR Appeal No. 37 of 1995 (unreported) **Okeno v. Republic** [1972] 32 and **Kifamunte Henry vs. Uganda** SCCA No. 10 of 1997 (unreported). The learned Justices of Appeal then quoted at length 3 pages of the learned trial judge's judgment in her evaluation of evidence dealing with the appellants' use of a pistol in demanding to be shown the money, participation of the appellants in the commission of the offence and the credibility of the evidence of PW1 and PW4, and PW3 and PW5. The learned Justices of Appeal then concluded by stating that they found that the learned trial

judge correctly evaluated the evidence before her that led her to the conclusion that the pistol used was a deadly weapon, and that the two appellants used it to rob PW1 and PW4. Accordingly, they upheld the conviction of the appellants for Aggravated Robbery.

Going by the Record of Appeal, the only evidence the learned Justices of Appeal subjected to scrutiny was the evidence relating to the acquisition of the pistol from the armoury by the 1st Appellant, and its use in the taking of the money from PW1 and PW4. We respectfully think that the learned Justices of Appeal should have subjected all the evidence to the same scrutiny. Perhaps if they had done so, they would have come to a different decision.

We think that there is sufficient evidence on record to show that the appellants participated in arresting PW1 and PW4. There is also credible evidence that the 1st Appellant obtained a pistol from the armoury and he used this pistol to threaten to shoot PW1 if PW1 refused to show the appellants where they (PW1 and PW4) kept the money. There is also credible evidence that when the appellants were shown the money which amounted to Kshs 350,000 and US $ 7,130, they gave PW1 and PW4 Kshs 100,000 of it and took the rest for themselves.

In the evaluation of the evidence by the learned trial judge, there is evidence which she disregarded but which we consider to be important to the case. This is the evidence that shows that the 1st Appellant was asked by PW3 who was acting as an agent or representative of the actual owner of the money (PW2) to trace PW1

and PW4, and recover the money from them. PW3 gave the 1st Appellant a letter from Endebesi Police Station, the photographs of PW1 and PW4 and the MTN printouts which PW3 and PW5 had obtained from one Cheptai to facilitate the 1st Appellant in tracing PW1 and PW4 and recovering the money from them. The 1st Appellant accepted PW3's request and got the 2nd Appellant, a fellow police officer, to assist him in accomplishing the task. Using the MTN printouts and the photographs of the two fugitives, the appellants managed, on 13th September 2007, to arrest PW1 and PW4 at Mbale Referral Hospital. The 1st Appellant had PW5's phone number and, according to PW5's evidence, the 1st Appellant called her on that number to tell her that he had arrested PW1 and PW4 and that he was going to recover the money from them. He promised to keep her informed of his progress.

According to the evidence which the trial judge considered, after their arrest PW1 and PW4 were taken to a lodge near the hospital. The 1st Appellant asked them where they kept the stolen money, but they refused to co-operate. The 1st Appellant then threatened to use the pistol to shoot PW1 if he did not tell them where they kept the money. From that point PW1 and PW4 became co-operative. They took the appellants to Namakwekwe and showed them where they kept the money. The appellants then recovered the money. However, instead of giving the money back to the owner, the appellants kept it for themselves. The 1st Appellant did not appraise PW5 of his progress as he had earlier promised.

The evidence seems to indicate that from the beginning the appellants had the intention of recovering the money from PW1 and PW4 and handing it back to the representatives of the owner (PW3 and PW5) otherwise the 1st Appellant would not have found it necessary to call PW5 to tell her that he had arrested PW1 and PW4 and he was going to recover the money from them. It is not clear at what stage the appellants changed their minds and decided to take the money for themselves instead of giving it to the owner. It may have been at the time when they recovered the money from PW1 and PW4 or it may have been earlier.

If the appellants had given the money to its owner after recovering it from PW1 and PW4 by the threatened use of a pistol, they would not have been accused of theft, let alone robbery with aggravation. The use of a pistol by the 1st Appellant could perhaps have been a subject of a separate charge against the 1st Appellant such as threatening violence or assault or, as learned counsel for the appellants submitted, abuse of office, but not Robbery with Aggravation, for there would have been no theft at all. We must emphasize here at this point that the tendency by police investigators to assault, injure and inflict grievous harm on persons being investigated cannot be condoned and must be discouraged by bringing to justice perpetrators of this unlawful, notorious police practice.

Nevertheless we are unable to find that when the 1st Appellant used the pistol to threaten PW1, he had already formed an intention to

steal. There is a doubt about when the appellants formed the intention to steal and, as in all criminal cases, this doubt must be resolved in favour of the appellants. In the result, the conviction of the two appellants for Aggravated Robbery contrary to Sections 285 and 286 (2) of the Penal Code Act cannot stand and is, therefore, quashed, and their sentences of 20 years imprisonment each set aside.

However, we find that there is sufficient evidence that the appellants stole Kshs 250,000 and US $ 7,130 belonging to PW1 (Kamota Maximus). Therefore, in accordance with Section 87 of the Trial on Indictments Act, we convict the two appellants of the offence of theft contrary to Sections 254 and 261 of the Penal Code Act.

Taking into account the period the appellants spent in prison before the completion of their trial, we sentence each appellant to a term of imprisonment of 6 years, their sentences to begin running from 18th November 2009 when their trial in the High Court was concluded.

The order of compensation against each appellant is set aside.

Dated at Kampala this 1st day of March 2013.

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J.W.N TSEKOOKO

JUSTICE OF THE SUPREME COURT