

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
**[CORAM: TUMWESIGYE, KISA AKYE, MWANGUSYA, OPIO-AWERI, & TIBATEMWA-
EKIRIKUBINZA, JJ.S.C.]**

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CRIMINAL APPEAL NO 21 OF 2014

BETWEEN

1. SGT BALUKU SAMUEL

2. PC WALUSA JOSHUA ::::::::::::::::::::] APPELLANTS

10

AND

UGANDA ::::::::::::::::::::] RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Kavuma, Ag. DCJ, Mwendha, & Kakuru, JJA) dated 8th October 2014 in Criminal Appeal No. 172 of 2011]

JUDGMENT OF THE COURT

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Sgt. Baluku Samuel and Police Constable Walusa Joshua, (hereinafter referred to as the appellants) filed this second appeal against the Judgment of the Court of Appeal which upheld their conviction of abuse of office and a sentence of 4 years imprisonment.

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The basis of their indictment for abuse of office at the High Court was that the appellants, as police officers employed by the Uganda Police Force took advantage of their privileged position and abused the authority of their office when they recovered stolen money amounting to Uganda Shs.

210,000,000/= and declined to declare it to the prejudice of their employer, the Uganda Police Force.

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The background to this appeal as can be ascertained from the Record of Appeal is that on 6th July 2010, along Kampala Road, a bag containing UGX 210,000,000 was snatched from an employee of Comdel Forex Bureau by a one Mugume Samuel (PW6). The suspect was riding a *boda boda*. Immediately after the theft, an alarm was made by another employee, Sarah Njuki. Upon hearing the alarm, *boda boda* riders nearby pursued the suspect under the mistaken belief that he had stolen a motorcycle. The pursuit of the suspect continued all the way to Komamboga Zone, Kanyanya, Kawempe Division. In the course of the pursuit, the number of *boda boda* riders kept increasing. At Komamboga Zone, the suspect found refuge in the house of one Sarah Nantege (PW2). An irate mob had in the meantime also

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grown.

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The commotion attracted the attention of the area local council chairman, Mulumba Samuel Semakula (PW1). Upon inquiry, PW1 was told that a suspected *boda boda* thief had sought refuge in one of his neighbor's compound. The chairman, fearing that there was going to be mob justice immediately rang Sgt. Baluku Samuel, the then Officer in Charge of the local Police Post, Universal Police Post, Komamboga Central Zone, Kawempe Division.

It was the prosecution case that upon arrival at the scene: (a) the police commanded by the first appellant together with two civilians entered the room where the suspect was hiding and apprehended him; (b) that upon being apprehended, the suspect (PW6) denied having stolen a *boda boda*; (c) that a search of the room was carried out whereupon a bag containing the money was found tucked under a baby cot; (d) the appellants and others, instead of securing the money immediately shared it among themselves; and (e) having shared the recovered money, the appellants together with other policemen loaded the suspect on a Police patrol vehicle and took him to Kawempe Police Station where a false report of a motorcycle theft was reported.

Subsequently, a complaint was made by Comdel Forex Bureau regarding the stolen money. An internal investigation carried out by the Police found that the appellants along with other Police Officers recovered the money from the suspected thief and failed to declare it.

The appellants were subsequently indicted for the offence of abuse of office contrary to section 11(1) of the Anti Corruption Act, 2009. In the alternative, they were indicted with one count of theft, contrary to sections 254(1) and 261 of the Penal Code Act. The appellants were initially indicted with 3 other policemen who were acquitted on a ruling of no case to answer.

On 18th August 2011, Bamugemereire, J. (as she then was) convicted the appellants for abuse of office and sentenced each of them to 4 years imprisonment. In addition, she ordered each appellant to compensate Comdel Forex Bureau with Ug. Shs. 100,000,000/=. The trial Judge further ordered that upon serving their custodial sentence and compensating Comdel Forex Bureau, both appellants were to be barred from serving in the Uganda Public Service for a period of 10 years. The learned trial Judge having convicted the appellants on the main count of abuse of office made no finding on the alternative count of theft.

Dissatisfied with the findings and orders of the trial Judge, the appellants appealed to the Court of Appeal against both conviction and sentence. The Court of Appeal set aside the order of compensation to Comdel Forex Bureau but upheld their conviction and sentence of 4 years imposed on each of them. The Court of Appeal also upheld the Order disqualifying them from holding public office for 10 years which was to run from the date of their conviction.

Still dissatisfied with the decision of the Court of Appeal, the appellants lodged a second appeal to this Court on the following three grounds:

- 1. The learned Justices of the Court of Appeal erred in law and fact by making up their minds regarding the Judgment appealed from and not carefully weighing it when they found that the case did not require an identification parade thereby reaching a wrong conclusion.***

2. *The learned Justices of the Court of Appeal erred in law and fact when they found that three witnesses PW2, PW3, and PW6 were not accomplices and their testimony was uncontroverted thereby failing to quash a conviction based on accomplice evidence.*

3. *The learned Honourable Justices of the Court of Appeal erred in law and fact when they found that the discrepancy in the color of uniform worn by the 1st appellant was minor and intended to deliberately mislead Court thereby reaching an unfair decision.*

The appellants prayed that this Court allows the appeal, sets aside their conviction and quashes their sentences.

Counsel for the appellants Alex Candia filed written submissions on behalf of the appellants but did not appear at the hearing of this appeal. Jacquelyn Okui, Senior State Attorney represented the respondent.

Counsel for the appellants argued grounds 1 and 2 jointly and ground 3 separately. Counsel for the respondent followed the same format in her submissions.

Parties' Submissions on Grounds 1 and 2 of Appeal

Submitting on Grounds 1 and 2, counsel for the appellants relied on *Kifamunte Henry v. Uganda, Criminal Appeal No. 10 of 1997 (SC)* and contended that the Court of Appeal failed as the 1st appellate Court in its duty. He contended that if the Court of Appeal had re-evaluated the evidence on record, it would have found that the conviction of the appellants was based on accomplice evidence of PW2, PW3 and PW6.

To support his contention, counsel relied on the testimonies of PW2 **Sarah Nantege**, PW3 **Umaru Senyonga** and PW6 **Mugume Samuel**. He analyzed the testimonies of PW2, PW3, and PW6 and submitted that the trial Judge was aware that all these witnesses were accomplices when she observed at page 364 of the Record of Appeal that *'what stands out clearly in this case is that both the prosecution and the defense relied heavily on accomplice evidence.'*

Furthermore, that the trial Judge stated that *'learned counsel for the accused submitted that the evidence of PW2, PW3 and PW6 should not be found credible since they were accomplices.'*

Relying on **Davies v. DPP (1954) 1 All E.R. 507 (H.L.)**, counsel for the appellants submitted that a person called as a witness for the prosecution is to be treated as an accomplice if he was *particeps criminis* in respect of the actual crime charged in the case of a felony.

Relying on the *Law on Evidence, 14th Edn Vol. 2, A commentary on the Indian Evidence Act, 1872* by **Chief Justice M. Monir** at page 2172, counsel for the appellants further submitted that an accomplice means a guilty associate or partner in crime, a person who is believed to have participated in the

offence, or who, in some way or other is connected with the offence, in question, or who makes admissions of facts showing that he had a conscious hand in the offence.

Further relying on **R. v. Baskerville (1916) 2 K. B. 658**, counsel submitted that with regard to accomplice evidence, adequate corroboration was essential and that corroboration must be by some
5 evidence other than that of a fellow accomplice.

Turning to the present case, counsel submitted that the trial Judge, having recognized that the case heavily relied on accomplice evidence, needed independent evidence to corroborate the accomplice evidence, other than the testimony of another accomplice. Counsel further argued that it was not enough that the trial Judge cautioned herself that the evidence must be corroborated but that it must be
10 corroborated as a matter of fact. In support of his contention, counsel for the appellants relied on the case of **Obeli v. Uganda, [1965] E.A. 622**.

Counsel further faulted the trial Judge for relying on the identification parade report as the only independent piece of evidence to corroborate the accomplice evidence, despite her finding that there were some discrepancies which she described as minor. Counsel further faulted the Court of Appeal for
15 holding that proving the appellants as perpetrators did not require an identification parade after their holding that the finding by the trial Judge that the identification parade was conducted fairly, professionally and in a transparent manner could not be sustained.

Counsel for the appellants further submitted that where the conduct of the identification parade was found lacking, there remained no other independent corroborating evidence on which to base the
20 appellants' conviction. He accordingly faulted the Court of Appeal for failing to find that the accomplice evidence was not corroborated. According to counsel, the Court of Appeal erred when it failed to quash the conviction of the appellants based solely on uncorroborated accomplice evidence.

Respondent's submissions on Grounds 1 & 2

Counsel for the respondent supported the Court of Appeal's upholding of the conviction and sentence
25 imposed on the appellants.

Counsel refuted the appellants' submissions and submitted that PW2, PW3 and PW6 were not accomplices of the appellants because they did not participate in the commission of the offence of abuse of office, which the appellants were indicted for and convicted of.

Relying on the case of **Mushikoma Watete alias Peter Wakhoka & 3 ors, Criminal Appeal No. 10 of 2000(SC)**, counsel for the respondent submitted that in a criminal trial, a witness is said to be an
30 accomplice if he or she participated as a principal or as an accessory in the commission of the offence which is subject of the trial.

Relying on section 11(1) of the Anti Corruption Act, 2009, which provides for the offence of abuse of office, counsel for the respondent submitted that the learned Justices of the Court of Appeal, at page 39 of the Record of Appeal, found that the evidence on record rightly showed that PW2, PW3 and PW6 did not fall within the definition stated in *Mushikoma Watete* (supra).

5 Counsel for the respondent further submitted that the appellants were tried and convicted of the offence of abuse of office in their capacities as Police Officers employed by the Uganda Police Force for their failure to declare as an exhibit, the Ug. Shs. 210,000,000/= they recovered from a suspected criminal.

Regarding the issue of identification, counsel for the respondent contended that the circumstances in which the appellants were identified by PW2, PW3 and PW6 were favorable and that there was
10 therefore no need for an identification parade. Referring this Court to the Record of Appeal, counsel for the respondent submitted that the learned Justices of the Court of Appeal observed that the appellants' case was one in which all the incidents took place during broad day light when there was ample time for the witnesses (PW2, and PW3) to recognize those involved in sharing the recovered stolen money.

Counsel for the respondent further submitted that PW2, PW3 and PW6 testified on oath that they saw
15 the appellants sharing money which they found with a suspect who was PW6 and that the sharing of the money took place at about 9:00 am during day time.

Counsel for the respondent further contended that according to their evidence, the three witnesses were in close proximity to the appellants because they were all in the room where the money was shared and that according to their testimony, considerable time was taken to share the money which made them
20 recognize the people that participated in the sharing.

While conceding that PW2 and PW3 did not know the appellants before, counsel for the respondent submitted that PW6 knew the appellants before as the officers that used to patrol the village where PW6 resided.

Counsel for the respondent also argued that the quality of the identification evidence was good and as
25 such, the identification parades were not vital. Furthermore, that considering the fact that PW2, PW3 and PW6 were not accomplices, their identification evidence corroborated each other's evidence. In her view, the fact that PW2, PW3 and PW6 placed each other at the crime scene gave more credence to their identification evidence.

In conclusion, counsel for the respondent prayed that this Court finds that the learned Justices of the
30 Court of Appeal did not err in law in finding that there was no need for the identification parades to be conducted. In the circumstances, counsel for the respondent prayed that grounds 1 and 2 should fail.

Without prejudice to the above submissions, while relying on the case of *Bogere Moses & anor v. Uganda, Criminal Appeal No. 1 of 1997 (SC)*, counsel for the respondent prayed that this Court finds that the appellants were properly identified.

Court’s Consideration of Grounds 1 of this Appeal

5 Both counsel argued grounds 1 and 2 jointly. However, we shall consider them separately because they raise different points of law.

Ground 1 was framed as follows:

10 ***“The learned Justices of the Court of Appeal erred in law and fact by making up their minds regarding the Judgment appealed from and not carefully weighing it when they found that the case did not require an identification parade thereby reaching a wrong conclusion.”***

Under this ground, the appellants faulted the Court of Appeal for holding that the identification parade was not necessary. In our view, the issue of identification under this ground arises on two different fronts. The first one regards the conduct of the identification parade itself while the second concerns the identification of the appellants at the scene of crime.

15 Having considered the parties’ submissions and the authorities on identification, the Court of Appeal dealt with the issue of the identification parade as follows:

20 ***“From the evidence on record, it is very clear that the manner the identification parade was carried out was contrary to the approved rules as approved by the case of R. Mwangi s/o of Manaa (supra). There were three identification parades one at Kawempe, one at Kibuli and another one at Wandegaya Police Stations but none of them complied with the rules. From page 132 line 11-23 the 1st appellant complained that they were being exposed to the witnesses but the officers concerned were just rude. The testimony continues up to page 133 of the Record of Appeal. They were threatened and were forced to sign the identification parade forms. So the finding of the trial Judge that the parade was conducted fairly and professionally and in a transparent***
25 ***manner cannot be sustained. It did not at all meet the criteria set up in the rules.”***

Whereas the Court of Appeal refers to three identification parades at Kawempe, Wandegaya, and Kibuli, the appellants’ testimony on record only refers to the conduct of the identification parades at Wandegaya and Kibuli. The record does not show where the other one was conducted. We however note that PW7 ASP Arinaitwe Bwana Gilbert under cross examination at page 155 of the Record of
30 Appeal stated that 3 parades were conducted. PW2 in her testimony also referred to different parades. At page 77, while being asked how she was made to identify the appellants, she responded as follows:

“Many officers were brought to us. They were paraded. I did not count them. Around 5 for the first parade because there were different parades.”

Clearly more than one identification parade was conducted. Regardless of which number one takes, a review of the evidence on record regarding the conduct of the identification parades casts doubt on the transparency of the whole exercise and the outcome of such process.

5 PW7 ASP Arinaitwe Bwana, the Police Officer tasked with the duty of conducting the identification parade at Kibuli, in his very brief testimony before the trial Court stated as follows:

“I have been with police for 7 ½ years. Edith Namatovu (ASP) asked me to do an identification. I did identification parade according to the book.”

In regard to how the identification parades at Wandegeya and Kibuli were conducted, the first appellant testified as follows at pages 172,173-174:

10 ***“Chemisto told me to go to CID Headquarters Kibuli on Monday. On Monday when I was moving, I was informed that the people (my police men) were also to come along. SP Kalimbaho, Mutungi and ASP Namatovu and Odong Pinny advised us to go to Wandegeya.***

15 ***The officers called us. They first called Mugume Samuel, Nantege Sarah and PC Walusa. We were paraded they were asked if they knew us. Kalimbaho insisted that Nantege should say she knew us. Mutungi said I should just bring the money.***

...

20 ***We were taken to Kibuli. They conducted an identification parade. I asked why they left out the Kanyanya General duty policemen. They conducted the parade. They took us to the office where Mutungi, ASP Namatovu were present. The witnesses were also in the same office. Owere, Baluku and Ekobo went first. Walusa and I were taken next. I straight away complained that the witnesses could see us. I resisted the way we were exposed to the witnesses. They were rude. All the while they said I had to bring back the money. I found SPCs and constables as part of the parade. I told Kalimbaho that the parade would have had only sergeants like myself. Arinaitwe told lies. He only brought us forms to sign. Kalimbaho conducted the parade. ...I never signed willingly. I disagreed with the way Arinaitwe conducted the parade. Kalimbaho insisted that I***
25 ***sign. They threatened to take us to Kireka for ‘panel beating’...I accepted to sign against my will.”***

On the other hand, the second appellant testified as follows:

30 ***“We were not allowed to make additional statements objecting to the identification. I was detained in Kalimbaho’s office. Kalimbaho conducted the identification parade. It was conducted in such a way that the witnesses could see us. The parade did not allow us to alter positions. I asked to change position. I was told I was comfortable where I was. Gilbert Arinaitwe brought me forms to sign. I told him I needed to make an additional statement. There was intimidation of taking us to Kireka, RRU. I signed the papers.”***

35 Under cross examination, he testified as follows:

“I signed because of the condition of being tortured...I spoke and protested to Kalimbaho. Sgt. Baluku asked first. He never listened to us. He turned a deaf ear.

...

I never knew the witnesses. I have never conducted an identification parade. I know that when carrying out an identification parade accused must not be exposed to witnesses. People with same size and probably same rank. If the witnesses request to see accused in other positions it may be sought.

5 ***Position of the suspect should be shifted...We were not informed of our right to counsel. I complained for not being given a lawyer. The investigating officers were the ones organizing the parade.”***

None of the respondent’s witnesses disputed the above assertions of the appellants with regard to the way the identification parades were conducted. The appellants remained consistent in their assertions
10 even under cross examination.

In our view, it was irregular for the police officers conducting the identification parades: (a) to let the witnesses see the appellants on the way to the identification parade; (b) to deny the appellants the right to consult their counsel when they requested to do so; (c) to prevail upon an identifying witness to say that she knew the appellants; (d) to intimidate the appellants to sign the identification parade report with
15 threats of being taken for ‘panel beating’ at Kireka, RRU, and (e) to deny the appellants permission to change positions in the course of the identification.

We are satisfied that the learned Justices of the Court of Appeal rightly found that the conduct of the identification parades did not comply with the law. We reiterate the rules governing how an identification parade should be conducted, which were first enunciated in ***R v. Mwangi s/o Manaa***
20 ***[1936] 3 EACA 29*** and emphasized in ***Ssentale v. Uganda [1968] EA 365*** and ***Stephen Mugume v. Uganda, Criminal Appeal No. 20 of 1995(SC)***. For clarity we shall proceed to restate these rules.

1. *That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.*
2. *That the officer in charge of the case, although he may be present, does not carry out the*
25 *identification.*
3. *That the witnesses do not see the accused before the parade.*
4. *That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.*
5. *That the accused is allowed to take any position he chooses, and that he is allowed to change his*
30 *position after each identifying witness has left, if he so desires.*
6. *Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.*
7. *Exclude every person who has no business there.*

8. *Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.*
9. *If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.*
- 5 10. *See that the witness touches the person he identifies.*
11. *At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.*
12. *In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "Pick out somebody", or influence him in any way whatsoever.*
- 10 13. *Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.*

Every Police Officer conducting an identification parade should abide by the above Rules and should inculcate in himself or herself the practice of always abiding by them to the letter. This will ensure that both the accused person and the Court are satisfied with the conduct of the identification parade even if
15 the accused may agree or not agree with the outcome of the conduct of the identification parade.

We shall now revert to the second front of the issue of identification which revolves around the identification of the appellants at the scene of crime.

It is not disputed that the incidents leading to the indictment of the appellants occurred during day time. It is also not in dispute that both appellants were at the scene. Further, what is also not in dispute is that
20 PW2, PW3 and PW6 were at the scene as well. What is contested by both appellants is what they were doing at the scene. The appellants further contested the finding of both lower Courts that they entered the rented room belonging to PW2 in which PW6 was found with the bag containing Ug. Shs. 210,000,000/=.

The respondent alleged that at the scene, the appellants not only took charge of the scene and
25 apprehended the suspect but that they also entered PW2's room and stole some of the money that they found on the suspect, PW6. The appellants disputed the part of stealing the money. Both the respondent and the appellants brought witnesses to support their positions. The prosecution relied on the evidence of PW2-Sarah Nantege, PW3-Umaru Senyonga and PW6-Mugume Samuel. On the other hand, the appellants relied on their own testimony as well as the testimony of DW3-**Musoke**
30 **Emmanuel**, a crime preventer, DW4-**PC Ekobo Augustine**, the car commandant of the Police vehicle and Accused No. 2 in the case from which this appeal arose, before his acquittal on a no case to answer basis, and DW5-**PC Owere Peter**, also a former accused acquitted on a no case to answer.

The learned trial Judge had the benefit of observing the demeanor of witnesses testifying. She found that PW2 and PW5 were positive in their identification of A1 and A2 at the scene of crime. On the

other hand, she found it hard to believe the defence witnesses. For instance in regard to DW3-Musoke Emmanuel, the trial Judge observed as follows:

5 ***“DW3 Musoke Emmanuel a crime preventer succeeded in convincing himself that he was away from the madding crowd and that DW1 (A1) was safely with him, holed up and safe, hidden in the valley since the crowd was raving mad and baying for blood. In stark contrast to all the other evidence on record, this witness claims to have witnessed, with his own eyes, while hidden in the valley, PW6 being brought out of the ceiling. Who ever coached this witness obviously did a very bad job. If his evidence was based on rumors he had gathered, he needs to check his sources next time. His evidence had obvious inaccuracies and was wholly unbelievable.”***

10 DW4’s and DW5’s testimony was treated with utmost care by the trial Judge for obvious reasons that the two had been co-accused of the appellants.

In addition, with regard to DW5, the learned trial Judge found him to be a witness who appeared hesitant to tell the whole truth, appeared unwilling and cautious, sparing and fearful of divulging anything which might incriminate the first appellant. This was one of the reasons that led the trial
15 Judge to believe the prosecution evidence and disbelieve the defence case.

In *Baguma Fred v. Uganda, Criminal Appeal No. 07 of 2004*, this Court reiterated the legal position upheld by the then East African Court of Appeal in *Pandya vs. R [1957] EA 336* that -

20 ***“When the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the appellate court has not seen.”***

25 As a second appellate Court, we did not have the benefit of observing the witnesses as they testified. The trial Judge however did. In the circumstances we have to rely on the observations of the trial Judge. In our view, the trial Judge’s observations with regard to the defence witnesses were spot on. We have not found any evidence on the record for us to conclude otherwise.

30 The Court of Appeal after reevaluating the evidence before the lower Court also came to the conclusion that the appellants were positively identified at the scene of crime by PW2 and PW3.

The Court of Appeal in dealing with the identification of the appellants at the scene held thus.

35 ***“It appears to us that this is a case which did not require an identification parade since all the incidents took place during broad light and there was ample time for the witnesses (PW2, PW3) to recognize those involved in sharing the recovered stolen money. There was other independent evidence which implicated the appellants beyond reasonable doubt.”***

Thus, it is clear that the two lower Courts made concurrent findings regarding the identification of the appellants. This Court as a second appellate Court is restricted in circumstances when it can interfere with concurrent findings of fact of the two lower Courts. In ***Kakooza Godfrey v. Uganda, Criminal Appeal No. 03 of 2008 (SC)***, this Court held that where two lower Courts have reached concurrent
5 findings of fact:

“...a second appellate Court, ...can only interfere in those concurrent findings if we are satisfied that the two Courts were grossly wrong and/or applied wrong principles of the law. We are mindful of the fact that we did not see the witnesses at the trial.”

We are satisfied that there was enough evidence to support the finding of fact by the trial Judge and the
10 Court of Appeal that the appellants were at the scene of crime; and that they participated in sharing the money recovered from PW6, the suspected thief. The incident took place during broad day light. There was also ample time for the prosecution witnesses to recognize those involved in the sharing of the recovered money. Furthermore, these witnesses were in close proximity to the appellants. In the circumstances we have found no basis for interfering with the concurrent findings of fact of the two
15 lower Courts.

We have also considered alibi raised by both appellants. Both appellants claim that they did not enter the room where PW6 was found with the bag of money but rather stayed outside the house where PW6 was holed up. The first appellant takes it a step further and claims that he was not even around when the suspect was arrested.

20 We are satisfied that the learned Justices of Appeal reviewed all the evidence for the prosecution and for the appellants and that they rightly concurred with the learned trial Judge’s holding that the appellant’s were properly identified at the scene. We agree with the conclusion of the two courts and are not persuaded that either court erred. We are therefore satisfied that the appellants were properly identified and squarely put at the scene of crime by the prosecution witnesses. In the circumstances,
25 their defence of alibi cannot stand.

In light of our analysis and findings above, we find that the failure to carry out an identification parade properly did not cause any injustice to the appellants. This is because there was other evidence relied on by the two lower Courts to convict and uphold the conviction of the appellants. We find the authority of this Court of ***Mulindwa Samuel v. Uganda, Criminal Appeal No. 41 of 2000 (SC)*** apt in
30 the circumstances. In ***Mulindwa*** (supra) the appellant’s contention was that the failure to conduct an identification parade was fatal to the prosecution case. In dismissing the appellant’s argument, this Court held as follows:

***“Regarding identification parade we, with respect, are unable to agree that the failure to hold one was fatal to the appellant’s conviction. The objective of an identification parade is to
35 test the ability of a witness to pick out from a group the person, if present, who the witness***

5 ***has said that he has seen previously on a specific occasion. Where identification of an accused person is an issue at his trial, an identification parade should usually be held to confirm that the witness saw the accused at the scene of crime. However, where other evidence sufficiently connects the accused with the crime, as was the case in the present appeal, failure to hold an identification parade is not fatal to the conviction of the accused.”***

In the present case, we have found that the appellants were properly identified and squarely put at the scene regardless of the poor conduct of the identification parades.

10 It is also our finding that the identification of the appellants as the perpetrators did not require an identification parade since the appellants were properly identified at the scene of crime as the ones who misappropriated the recovered money. Ground 1 therefore fails.

Before we take leave of this ground, we find it crucial to briefly state when it is proper to conduct an identification parade, the rationale for conducting such a parade and when the failure to conduct such an identification parade may not be detrimental to the prosecution case.

15 Regarding the first two issues, we find the decision of this Court in ***Stephen Mugume v. Uganda, Criminal Appeal No. 20 of 1995 (SC)*** quite insightful on this. In ***Stephen Mugume*** (supra) this Court held as follows:

20 ***“It is, we think, common sense that a witness would normally not be required to identify a suspect at a parade if the witness knows the suspect whom he/she saw commit an offence. Identification parades are, as a practice, held in cases where the suspect is a stranger to the witness or possibly where the witness does not know the name of the suspect. In such a case the identification parade is held ... to enable the identifying witness confirm that the person he has identified at the parade is the same person he had seen commit an offence.”***

25 On when an identification parade may not be detrimental to the prosecution case, our earlier cited authority of ***Mulindwa*** (supra) is categorical that where other evidence sufficiently connects the accused with the crime, as was the case in the present appeal, failure to hold an identification parade is not fatal to the conviction of the accused.

Court’s Consideration of Ground 2 of Appeal

Ground 2 of appeal was framed thus:

30 ***“The learned Justices of the Court of Appeal erred in law and fact when they found that three witnesses PW2, PW3, and PW6 were not accomplices and their testimony was uncontroverted thereby failing to quash a conviction based on accomplice evidence.”***

This ground challenges the findings of the learned Justices of Appeal that PW2, PW3 and PW6 were not appellants' accomplices.

The learned Justices of the Court of Appeal dealt with this issue as follows:

5 ***“On the issue of the trial judge relying on the testimonies of PW2, PW3 and PW6, counsel for the appellant submitted that they were accomplices who had participated in the sharing of the money, therefore their evidence without corroboration was unreliable. The matter of who is an accomplice was discussed in the case of Mushikoma Watete alias Peter Wakhoka & 3 Ors, Criminal Appeal No. 10 of 2000(SC). It is important to determine first whether PW2, PW3 and PW6 were accomplices. In the above case, it was made clear as follows:***

10 ...

The question to be asked here is whether the three witnesses participated in the stealing of the money from Comdel Forex Bureau and its recovery and sharing among the group...

15 ***The evidence on record clearly shows that the 3 witnesses did not fall in the definition as stated in the Mushikoma Watete case (supra). PW2 was a teacher, PW3 was a boda boda rider and PW6 was a police officer and his testimony was not controverted showed that he never entered the premises where the appellants shared the money after recovery.***

...

20 ***In the instant case it was not necessary for the trial Judge to warn herself or get corroboration. The evidence clearly showed that PW2 was a teacher and PW3 was a boda boda rider and PW6 did not even enter the room where the money was shared. The evidence puts them far from the subject of the offence committed. The ingredients of the offence took them away from being accomplices.”***

We note that the learned Justices of the Court of Appeal made a minor error when they referred to PW6 as a Police Officer. Our perusal of the Record of Appeal shows that PW6, Mugume Samuel was a motor vehicle mechanic and that he was the one who initially stole the money from an employee of Comdel Forex Bureau.

The appellants faulted the Court of Appeal for failing to re-evaluate the evidence properly which led them to come to the wrong conclusion that PW2, PW3, and PW6 were not accomplices to the appellants. The appellants further contended that PW2, PW3, and PW6 were accomplices and that their evidence identifying the appellants as the Police Officers who shared the recovered money, could not stand in the absence of corroboration evidence.

The respondent, on the other hand, contended that PW2, PW3, and PW6 were not accomplices to the appellants in respect to the offence of abuse of office.

There is no statutory definition of who an accomplice is. However, this Court has in various decisions, given guidance on who an accomplice is. For instance, in ***Mushikoma Watete alias Peter Wakhoka & 3 Ors, Criminal Appeal No. 10 of 2000 (SC)*** this Court held as follows:

5 ***“In a criminal trial a witness is said to be an accomplice if he or she participated as a principal or an accessory in the commission of the offence which is the subject of the trial. The clearest case of an accomplice is where a witness has confessed to the participation in the offence or has been convicted of the offence either on his own plea of guilty or on the Court finding him guilty after trial.”***

Furthermore in *Nasolo v. Uganda, Criminal Appeal No. 14 of 2000 (SC) [2003] 1 EA 181, 189*, this Court took a more liberal approach in defining who an accomplice is in the following terms:

10 ***“In a criminal trial, a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after the trial.***

15 ***However, even in absence of such confession or conviction, a court may find, on strength of the evidence before it at the trial, that a witness participated in the offence in one degree or another. Clearly were a witness conspired to commit, or incited the commission of the offence under trial, he would be regarded as an accomplice. See Khetem v. R [1956] EA 563; and Watete & others v. Uganda (supra).***

20 ***On the authorities, there appears to be no one accepted formal definition of ‘accomplice’. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case.”***

This Court then cited with authority the case of *Davies v. Director of Public Prosecutions [1954] 1 All ER 504* where the House of Lords observed as follows:

25 ***“On the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category: (i) on any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in case of misdemeanors).***

30 ***This is surely the natural and primary meaning of the term ‘accomplice’ but in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule, viz (ii) receivers have been held to be accomplice of thieves from whom they receive goods on a trial of the latter for Larceny, (R v Jennings [1912] criminal application Rep 2428; R v Dixon [1925] 19 criminal appeal Rep 36); and (iii) when X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted of his having committed crimes of this identical type on other occasions,***
35 ***as proving system and intent and negating accidents, in such cases, the court has held, that, in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration R v Farid [1930] criminal appeal Rep 168”.***

40 We also wish to note that section 19 (1) of the Penal Code defines a principal offender to include persons who aid or abet in the commission of crime. This section provides as follows:

“When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it-

- 5
- (a) ***every person who actually does the act or makes the omission which constitutes the offence;***
 - (b) ***every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***
 - (c) ***every person who aids or abets another person in committing the offence.”***

10 However, as we noted earlier, the appellants were initially indicted under two counts. The first count, which was the main one, was abuse of office contrary to section 11(1) of the Anti Corruption Act, 2009. The second count, which was in the alternative, was theft contrary to sections 254(1) and 261 of the Penal Code Act. The trial Judge convicted them on the main count of abuse of office. Having convicted them on the main count, she made no finding on the alternative count of theft.

15 At the Court of Appeal, the appellants’ appeal was challenging the trial Judge’s finding convicting them on the offence of abuse of office. It is the same finding that they are challenging in this appeal. We are not dealing with the offence of theft.

In our view, the starting point in determining whether PW2, PW3 and PW6 were accomplices is by making reference to the ingredients of the offence of abuse of office which the appellants were convicted of. These ingredients are provided for under section 11(1) of the Anti Corruption Act, 2009
20 which provides as follows:

25 ***“A person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.”*** Emphasis supplied.

Section 11 requires that for someone to be charged with abuse of office, he or she should be employed in a public body and must have done an arbitrary act which is prejudicial to the interests of their employer (the public body in question).

30 A perusal of the Record shows that PW2, PW3 and PW6 were not employees of the Uganda Police Force or any public body or public company. In partaking some of the recovered money, PW2, PW3 and PW6 engaged in depraved act. Nevertheless, their actions did not bring them within the ambit of those capable of being indicted for the offence of abuse of office. PW2, PW3 and PW6 would have been properly regarded as accomplices if the trial judge had convicted them on the alternative count of theft.

Our analysis above leads us to the conclusion that PW2, PW3 and PW6 could not be referred to as accomplices in respect of the offence of abuse of office. Furthermore, taking into consideration the provisions of section 19 vis-à-vis the offence of abuse of office, it is our view that the circumstances in this case cannot amount to and could not reasonably lead to an inference that PW2, PW3 and PW6
5 could be labeled as principal offenders (whether as aiders or abettors) for the offence of abuse of office. It is our view that section 19 of the Penal Code Act is not applicable in the circumstances as well.

We therefore agree with the holding of the learned Justices of the Court of Appeal that PW2, PW3 and PW6 were not accomplices to the appellants for purposes of committing the offence of abuse of office.

With respect to the appellants' argument that there was need for corroboration of accomplice evidence
10 (which we have found to be the contrary), we note that section 132 of the Evidence Act Cap 6, Laws of Uganda does not require corroboration of accomplice evidence. This section provides as follows:

“An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

We however wish to note that two important judicial practices have developed over time regarding
15 accomplice evidence. The first one is that whereas corroboration of accomplice evidence is not mandatory under our Evidence Act, it is always required as a matter of judicial practice.

Secondly, a Court wishing to rely on uncorroborated accomplice evidence should caution itself on the dangers of relying on such evidence before convicting the accused. However, this rule of caution only applies where the testimony of the accomplice has been found to be trustworthy.

20 These two judicial practices have recently been reiterated by this Court in ***Salongo Senoga Sentumbwe v. Uganda, Criminal Appeal No. 03 of 2014 (SC)***.

In conclusion on ground 2 of appeal, we agree with the learned Justices of the Court of Appeal that PW2, PW3 and PW6 were not accomplices to the appellants, in respect of the offence of abuse of office. This ground fails.

25 **Ground 3 of Appeal**

This ground was framed as follows:

“The learned Honourable Justices of the Court of Appeal erred in law and fact when they found the discrepancy in the color of uniform worn by the 1st appellant was minor and intended to deliberately mislead Court, thereby reaching an unfair decision.”

30 Counsel for the appellants contended that the prosecution witnesses were not consistent in their testimonies regarding the colour of uniform that was worn by the first appellant. In support of his submission, counsel submitted that PW4 stated that the first appellant was dressed in a blue police

uniform. On the other hand, PW2 testified that the police officer who called her into the house put on khaki uniform, while PW6 testified that the police men who were involved in the stealing of money were wearing khaki uniform.

5 Counsel for the appellants further submitted that the fact that this offence was committed during daytime when it was bright and clear, it was not possible that the witnesses were mistaken about the colors especially PW4, an Assistant Superintendent of Police who worked closely with both appellants. In counsel's view, the intentional framing of the appellants came as a result of being exposed during the identification.

10 In conclusion, counsel for the appellants submitted that choosing to treat the discrepancy in the color of uniform worn by the first appellant as a minor discrepancy exposed the first appellant to an unfair conviction and sentence.

15 Relying on the case of *Emmanuel Nsubuga v. Uganda, Criminal Appeal No. 16 of 1998 (SC)* on the issue of minor and trivial inconsistencies, counsel for the appellants submitted that the evidence of PW2, PW4 and PW6 cannot be wished away or disregarded as minor when they were major participants at the scene of the crime.

Respondent's submissions

20 Counsel for the respondent refuted the appellants' submissions. She contended that the discrepancy in the color of the uniform worn by the first appellant was minor and as the Court of Appeal found it was rightly interpreted as not intended to mislead Court. She argued that the Justices of the Court of Appeal's finding was in accordance with the trial Judge's finding.

25 Respondent's counsel further submitted that from the evidence of PW2, PW3 and PW6 especially, it was apparent that the witnesses focused more on the faces of the appellants than their uniforms. Furthermore, that for PW6 to have observed that he recognized the appellants as the ones who used to patrol the village goes to show that he concentrated more on their faces rather than what they were wearing, which was the gist of the prosecution case. Counsel for the respondent argued that this was another factor that justified the consideration of the discrepancy regarding the color of the first appellant's uniform as minor and not intended to mislead Court.

30 In conclusion, counsel for the respondent submitted that the Justices of the Court of Appeal did not err in law when they found that the discrepancy in the color of the uniform worn by the first appellant was minor and was not intended to deliberately mislead Court. She prayed that ground 3 fails.

Court's consideration of Ground 3 of this Appeal.

This ground only concerns the first appellant and what he was wearing at the scene.

Our perusal of the record shows that PW2 did not testify on what the police officers at the scene were wearing during her examination in chief. The only time the issue of what the police officers at the scene were wearing came during cross examination. Under cross examination, PW2 was asked how she knew whether the person who called her to enter the house was a policeman. In response, PW2 stated that she knew the person was a policeman because he was putting on a uniform. She was further asked what kind (not colour) of uniform it was and her response was that it was a khaki uniform.

With regard to PW6, we also note that he did not testify on the issue of what the police officers at the scene were wearing during his examination in chief. However, we note that under cross examination, he testified that he believed that the policemen were wearing khaki uniforms.

PW4 on the other hand, testified that the first appellant was dressed in a blue police uniform at the scene. The first appellant (then DW1) in his testimony also stated that at the scene, he was wearing a blue anti riot police uniform.

The learned Justices of the Court of Appeal dealt with this issue of inconsistency as follows:

“On the issue of ignoring the contradictions and inconsistencies surrounding the color of the police uniform the first appellant was wearing on the basis that it was corroborated by the identification parade, we find the discrepancy or inconsistency in the color of uniform worn by the 1st appellant was minor and not intended to deliberately mislead Court.”

We are aware that in assessing the evidence of a witness and the reliance to be placed upon it, his or her consistency or inconsistency is a relevant consideration. This Court in *Sarapio Tinkamalirwe v. Uganda, Criminal Appeal No. 27 of 1989 (SC)* held as follows:

“It is not every inconsistency that will result in a witness testimony being rejected. It is only a grave inconsistency, unless satisfactorily explained, which will usually, but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies will not usually have the effect unless the Court thinks they point to deliberate untruthfulness.”

We note that whereas PW2 and PW6 stated in their testimonies that the policemen at the scene were wearing khaki uniforms, another prosecution witness (PW4) testified (in agreement with the first appellant) that the first appellant was wearing a blue police uniform. It can therefore be stated that there was some inconsistency regarding the colour of the appellant’s uniform from the prosecution witnesses.

Be that as it may, it is our view that the issue of inconsistency is irrelevant because the critical evidence in this case was not what the 1st appellant was wearing at the scene, but rather the fact that he was at the scene and was involved in the sharing of the recovered money.

In this appeal, we are dealing with the offence of abuse of office. We have already analyzed its ingredients in our consideration of ground 2 of Appeal.

In *Criminal Appeal No. 01 of 1997: Bogere Moses & Anor v. Uganda*, this Court laid down the approach to be taken while dealing with evidence of identification by a witness as follows:

5 ***“This Court has in many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eyewitnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of mistaken identity. The Court should proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction unless it is satisfied that mistaken identity is ruled out. In so doing the Court must consider the evidence as a whole, namely, the evidence if any of the factors***
10 ***favouring correct identification, together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to all the rest of the evidence ...”***

The trial Judge, in our view properly evaluated the evidence of both the prosecution and the defence regarding the identification of the appellants (barring the conduct of the identification parade) and found that the prosecution evidence not only put the appellants at the scene, but also proved that the
15 appellants shared the recovered money. The Court of Appeal re-evaluated this evidence and upheld the finding of the trial Judge that the appellants shared the recovered money.

Likewise, we have perused the evidence and found that: (a) the events leading to the eventual indictment and conviction of the appellants for the offence of abuse of office occurred in broad day
20 light; and (b) there was ample time for the witnesses (PW2, PW3 and PW6) to recognize those involved in the sharing of the recovered money.

We wish to also note that PW6 was also familiar with the first appellant since PW6 always saw him patrolling the village along with other Police Officers. We also wish to note that PW4 (who testified that the first appellant was wearing a blue uniform) came at the scene after the suspect (PW6) was already arrested and put on the Police Patrol car. Indeed PW4 in his testimony further testified that he
25 found the 1st appellant inside the gate of the house from which PW6 had sought refuge and was subsequently arrested from.

In conclusion, we have noted the inconsistency. However, we have found it not material because the first appellant’s presence at the scene and his participation in the sharing of the money was proved beyond reasonable doubt. We also note that the appellant admitted being at the scene although he tried
30 to deny that he participated in sharing the money recovered from PW6.

We have therefore found no merit in ground 3 of appeal. We find that the issue of inconsistency was irrelevant in this case, since there was sufficient evidence that: (a) put the 1st appellant at the scene; and (b) proved that he participated in sharing the recovered money. Ground 3 of this appeal therefore fails.

In conclusion, the appellants’ appeal against conviction is dismissed. We confirm their conviction and
35 sentences by the Court of Appeal.

We also hereby confirm the order barring the appellants from holding any public office for a period of 10 years from their date of conviction by the trial Judge which was 18th August 2011.

Dated at Kampala this .24th... day of.....May..... 2018

5
JUSTICE JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT.

10
JUSTICE DR. ESTHER KISAAYE
JUSTICE OF THE SUPREME COURT.

15
JUSTICE ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT.

.....
JUSTICE RUBY OPIO-AWERI,
JUSTICE OF THE SUPREME COURT.

20
JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.