IN THE COURT OF APPEAL FOR UGANDA

AT KAMPALA

(Coram: Saied, C.J., Lubogo, P.J., Nyamuchoncho, J.A.,)

CRIMINAL APPEAL NO. 10 OF 1977

BETWEEN

JOSEPHATI KAIRU ……………………………...………………………..…APPELLANT

AND

UGANDA ………………...………………………………………………………RESPONDENT

(Appeal from a conviction and sentence

of the High Court of Uganda at Kampala

(Kantinti, J.) dated 27th June, 1977

in

Criminal Session Case No. 26 of 1977).

JUDGMENT OF THE COURT

LUBOGO, P.J.

This is second appeal by the appellant against the conviction and sentence whereby he was sentenced to 4 years imprisonment on each of the four counts to run concurrently, two being for theft contrary to section 252, personating a Public officer contrary to section 87(b) and the fourth demanding money with menaces with intent to steal contrary to section 279, all of the Penal Code Act.

The first appellate court dismissed the appeal as the grounds of appeal had no merit. We agree that the appeal had no merit for consideration of the lower court, but we were much concerned by the way the first appellate court dealt with the appeal in that no judgment was written. We have, therefore, been constrained to write a comprehensive judgment to substantiate the

conviction and sentence of the trial Magistrate. Before we narrate, briefly, the facts upon which the prosecution case depended it is incumbent upon us to comment on proceedings in the first appellate court.

The record seems to show that the memorandum of appeal was read to the appellant and he had nothing to add to it. A State Attorney supported to conviction on the grounds that the evidence was water tight as there were no discrepancies and that the identification was in no doubt. We have no quarrel with that submission. Our concern is,

It reads:—

> "Upon hearing Mr. Tumwesigye learned State Attorney and the appellant who did not wish to say anything and upon reading the record, I see no merit in the appeal. There was ample evidence to support conviction on the three counts. The identification of the accused was in no doubt, as he was seen by the complainant and his family on several occasions. This was a bad case and I feel the sentence is not excessive in the circumstances. I dismiss the appeal"

This purported to be a judgment. The learned judge refers to three counts, when in fact, the appellant was charged on 4 counts.

With due respect the so called order or judgment fell far below the required standard of the first appellate court. There is no dearth of authority am regards the duty of such an appellate court. We shall only refer to the pronouncements of the former Court of Appeal for East Africa in Dinikerrai Ramkrishan Pandya v. R (1957) E.A 336. The duty of the first appellate court is to rehear and re-adjudicate as it is its obligation in law, and then come to a decision after re-evaluation of evidence on record. We feel that this was not done in the present case. The order or judgment was a recital of what the State Attorney had submitted. The learned judge did not treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect, according to Pandya case (supra). In spite of that failure of the first appellate Court we support the courts, decision. Now we give our reasons in support of that decision; but before we do, it is necessary to give a brief resume of the facts upon which the prosecution relied in the trial court.

Jero Kyebambe (PW1) said he met the accused at about 1 p.m. on 10/7/76 at Wandegeya car park. The appellant introduced himself to him as Sergeant Joseph Mukasa of the State Research, Nakasero. Kyebambe refused to disclose his name to the appellant whereupon the appellant showed him a document on which his (Kyebambe) name and that of one Serunjogi were written. The appellant then told Kyebambe that he had sold Serunjogi a printing machine, the property of the State Research, and for that reason he was wanted at Nakasero.

As they walked away from the car park they were joined by Kayongo Yaledi, the brother of Kyebambe. The appellant then suggested to Kyebambe that he would be spared for the weekend if gave him some money. The amount was not specified. However, Kyebambe and his brother produced Shs. 500/— each, and this amount was handed to the appellant. The appellant went away with a promise to come back on Monday. Kyebambe, in the meantime, contacted Sgt. Magara of Wandegeya Police Station who advised him to withdraw some money from the bank and deposit it at Wandegeya Police Station. On Monday the appellant went back to Kyebambe's house at about 9 a.m. with a person who appeared to be a police officer but with no numbers on the uniform. They met with his family. The appellant asked Kyebambe whether he had the money; ho replied in the negative; then the appellant ordered the police man to arrest him. He was slapped also at the same time. At this juncture Kyebambe suggested giving the appellant a cheque. He looked for the cheque book but could not find it. Then he told his wife (PW2) to collect some money from the shop. This she did and handed it to the appellant. The amount was Shs. 5000/=. The appellant was not satisfied as he wanted Shs. 15,000/—. He promised to come back on Wednesday. After they had left Kyebambe went again to Wandegeya Police Station to report the matter. He was again advised to deposit some money with them in order to lay a trap. Kyebambe then deposited Shs. 3000/— in notes whose numbers were recorded and the notes were handed back to him. On Wednesday two police officers were placed in the houses and others in plain clothes stayed in the compound, but the appellant did not turn up on that day. On Friday in the same week the appellant went to the shop and told PW2 that their case had been finalised. PW2 sent a boy to the police station to alert them, but by the time they came the appellant had left by taxi. After a week the appellant came back again with an army officer who had a sword. They demanded Shs. 15,000/-. Kyebambe did not have it. They decided to take him

away, hut in the meantime a boy had gone to the police station to inform them of the goings on. As they walked towards Nakasero near Y.M.C.A. they were intercepted by the police.

They were t ken to police station to make a statement.

In cross-examination Kyebambe said then he knew the appellant as Sgt. Mukasa because the appellant wrote his name on the envelope which he gave him.

PW1, Kyebambe Nalongo, corroborated the events of 19/7/76 as narrated by Kyebambe. So did Kayongo as to the events of 10/7/76 and the Monday following. The only discrepancy in their evidence wan that PW2 said the appellant demanded Shs. 21,000/- while PW3 said he demanded Shs. 20,000/-. Again D/Sgt. Esira Magara (PW4) of Wandegeya Police Station did confirm what Kyebambe told him and the events that followed immediately before the appellant's arrest. Here again there was some discrepancy as to the amount the appellant demanded. George Serunjogi (PW5) also said that he knew the appellant because he had gone to their shop in connection with a printing machine together with an Army man. He again saw the appellant at Wandegeya Police Station. So much for the prosecution evidence.

The appellant in his defence merely denied the allegation and stated that he was at home in the village at the material time. The appellant in his memorandum of appeal seems to stress that this is a case of mistaken identity; that the prosecution witnesses differ as to the date of his arrest, and that the army officer should have been called to give evidence for the prosecution, and that no money was found on hm. Those seem to us as the only grounds of appeal.

With regard to mistaken identity, there was ample evidence adduced by the prosecution and believed by the trial magistrate. In the first place although the appellant's name is not Mukasa posed as Sgt, Joseph link Mukasa. He showed PW1 and PW3 a bullet scar on the arm. After his arrest he was again identified at Wandegeya Police station by the scars he had on the arm. Apart from the scars the appellant was seen on several occasions by PW1, PW 2 and PW3 in broad daylight and from close quarters. He was also seen by Serunjogi (PW5) at their shop and again at the police station. All this testimony was believed by the trial magistrate and we have no reason to differ from him. So much for identification. With regard to the discrepancy whether he was arrested on 16/6/76 or 29/7/76 we are of the view that the discrepancy does not go to the root of

the matter as long as there was no mistake in identifying the appellant. The evidence on identification was overwhelming.

As regards the question of not calling the Army officer to give evidence for the prosecution it has also no merit. The prosecution is entitled to adduce so much of evidence that will enable them to prove the case beyond reasonable doubt. The fact that no money was found on the appellant on search is immaterial so long as he was properly identified. We are of the view that he was so identified. The defence of alibi, therefore, does not arise. It was completely negatived by the prosecution evidence.

We are of the opinion that the appellant was properly convicted on all counts. He demanded money from PWI on two occasions and PWI parted with it against his will. This was due to the fact that he personated an army officer. He demanded further suns on pain of imprisonment of Kyebambe at Nakasero. The ingredients of the offence under section 279 of Penal Code as explained in Patel And Another v. R., (1946) 13 E.A.C.A. 179 were proved beyond any doubt. The appeal against conviction on all four counts is dismissed.

Lastly learned State Attorney brought to our notice that the sentence of four years imprisonment on the third count was illegal. We agree. The maximum sentence under section 87 of Penal Code is three years. For this reason the sentence of four years imprisonment on the third count is set side and is replaced by a sentence of two years imprisonment to run concurrently with the other three sentences. The trial magistrate gave sound reasons for sentencing the appellant to four years imprisonment on counts 1, 2, and 4. We have no reason to differ. To this limited extent, therefore, the appeal against sentence succeeds but as the sentence of two years on the third count is concurrent to the sentence of £cur ears on the other counts, the appellant will nevertheless serve the four years imposed by the trial Court. In all other respects this appeal is dismissed.

Dated at Kampala this 29th day of June, 1978.

(MOHAMMED SAIED)

CHIEF JUSTICE.

D.L.K. LUBOGO

PRINCIPAL JUDGE

(P. NYAMUCHONCHO)

JUSTICE OF APPEAL.

I certify that this is a
true copy of the original.

(M. Ssendegeya)

CHIEF REGISTRAR