THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 76/9

CORAM: HON. G.M. OKELLO, J.A.
HON. J.P. BERKO, J.A.
HON. C.N.B. KITUMBA, J.A.

1. KIZZA JOHN)
2.KATARIBABU DAVID) ……..APPELLANTS

VERSUS

UGANDA…….. RESPONDENT

(An Appeal from the Judgment of the High Court of Uganda sitting at Fort Portal, given by His Lordship Ag. Judge Mr. Yorakamu Bamwine on 21.6.1999 in Criminal Session Case No. 63 of 1996)

JUDGMENT OF THE COURT:

Kizza John and Kataribabu David, the appellants, were tried and convicted of robbery with aggravation contrary to S. 272 and 273 (2) of the Penal Code Act and sentenced to death. They now appeal to this court against the said conviction and sentence.

The facts that have given rise to this appeal lie within a very small compass. These are that at about 9p.m. on the 5th October whilst George Kamuhanda was resting in bed, he heard his wife, Mary Tibagasa, raised an alarm from the kitchen. When he tried to go out and find out what was happening to his wife, he realised that his house had been broken into and that thieves were already in the bedroom. The assailant, who had attacked his wife in the kitchen, brought her to the bedroom. The assailant tied George Kamuhanda and his wife together and started to demand money. The assailants took him to sitting room where he was alleged to have been pierced with a

spear picked from the bedroom by one of the assailants. Whilst two of the assailants were guarding them, the rest were busy from the house. George Kamuhanda and his wife were able to recognise the appellants among the assailants with the aid of the torch light they were flashing about.

After the assailants had left George Kamuhanda and Mary Tibagasa used their teeth to untie themselves. George Kamuhanda was treated at a clinic. A doctor who examined him some days later found a scar wound on the right hand measuring 2 cm long and l cm in thickness, a cut wound on the scapula measuring 10cm and another wound on the right shoulder. In the opinion of the doctor any sharp object could have caused the injuries. The doctor admitted, in cross examination, that he could not tell with certainty what instrument was used to inflict the wounds. He could also not tell how fresh the injuries were.

The appellants were arrested and charged with the offence. The first appellant, at the trial, set up a defence of alibi. He said that he left home for Kigando Trading Centre. He was arrested between 4-5 p.m. by people who started to beat him. When he asked what he had done, they told him that he would be informed at the police station. At the police station he was asked if he knew George Kamuhanda. He replied that he did not know him. He was also asked if he knew the second appellant and he replied that he did not know him.

The second appellant also set up a defence of alibi. He said he left his village on the 4/10/94 for Kiko for burial. He left Kiko on the 6/10/94 for home. He went to dig on the 7/10/94. He was arrested at about 9p.m. on the 7/10/94 from his home and brought to Mukunya Police Post. He denied having robbed George Kamuhanda or any body.

The learned trial Judge rejected their defences. He accepted the prosecution case and convicted them. There are two grounds of appeal, namely:

(1) That the learned trial Judge erred in law and in fact when he convicted the appellants on basis of unsatisfactory and unreliable evidence of identification and

(2) That the learned trial Judge's finding that a deadly weapon had been used in the course of the robbery is not supported by the evidence on record.

The argument of Mr. Mubiru, learned counsel for the appellants, under ground one is that since from the evidence the two identifying witnesses (George Kamuhanda and Mary Tibagasa) were made to lie face down, they did not have time to identify who the attackers were. Besides, George Kamuhanda said the attackers blinded him with a torch light and therefore he could not have seen his assailants. Mary Tibagasa said that she at first thought she had been attacked in the kitchen by a mad man. She did not recognise her attacker in the kitchen. She recognised him in the sitting room. As the only source of light at that place was the torch light, it was the contention of Mr. Mubiru that it was insufficient for proper identification.

M/s. Damali Lwanga, learned Principal State Attorney, has submitted to the contrary. She did not agree that the time the witnesses had to recognise the attackers was too short to prevent proper identification. According to her, the witnesses were not made to lie down immediately the attackers entered the room. George Kamuhanda said he recognised the first appellant inside the house and even held him during the struggle. George. Kamuhanda said he was blinded for a short period. He had seen the second appellant earlier on, in the day of the incident and knew him.

Mary Tibagasa also had seen the second appellant earlier on in the day. She even walked side by side with the second appellant from the kitchen to the sitting room. She submitted that the conditions under which the witnesses identified the appellants were favourable to correct identification and that their evidence was free from mistake. She cited and relied on ***John Katuramu v Uganda Cr. Appeal No. 2 of 1998 (unreported) Supreme Court.***

Before we responded to the issues raised in the submissions of both counsel, we wish to echo what the former East African Court of Appeal stated in ***Okeno v Republic (1977) E A 32*** **at 36** that. This courts, being a first appellate court, ***"must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld".***

The evidence of identification was given by two witnesses. The first was George Kamuhanda. He said he was resting in the bedroom whilst his wife (Mary Tibagasa) and the children were in

the kitchen preparing the evening meal. He heard an alarm raised by his wife. Before he could attend to his wife, he realised that his house had already been broken into and that thieves were already in the bedroom. He was tied with ropes. He recognised the first appellant when the latter was pinning him down. According to George Kamuhanda, the first appellant had a torch which was relatively bright. He even got hold of the first appellant during the struggle. He also recognised the second appellant when he brought George Kamuhanda's wife from the kitchen to the sitting room.

Mary Tibagasa also recognised the first appellant in the sitting room with her husband George Kamuhanda. There was flash light in the sitting room. She also recognised the second appellant later on in the sitting room as they walked side by side from the kitchen to the sitting room.

True, the incident happened in the night and that the attack was sudden. The witnesses were also scared and frightened. On the other hand, it was not a fleeting attack. From the evidence the incident lasted some two hours. The appellants were not strangers. George Kamuhanda had known the first appellant for some two months. The second appellant had come to the home of the complainant in the afternoon of the day of the incident under the pretence of buying jack fruit and had been seen by the two witnesses. The witnesses were not made to lie down immediately, as Mr. Mubiru wants us to believe. At least Mary Tibagasa and the second appellant walked from the kitchen to the sitting room before she, was tied with George Kamuhanda and made to lie down. Whilst down, Mary Tibagasa said she managed to steal glances at her assailants. The blinding of the eyes by torch light also lasted a second or two.

The learned trial judge after directing himself and the assessors correctly on the principle of law that visual identification evidence must be approached with caution, considered the factors for and against conditions favourable for correct identification. The factors that were not favourable for correct identification, according to him were that, the offence took place at night, the witnesses were taken by surprise by the attackers and that they were assaulted and scared. Against these were the fact that the appellants were known to the witnesses; there was a flash light, which according the judge acted as ***"a double edge sword",*** and also the fact that the episode lasted close to two hours. From the above analysis the learned trial judge concluded that,

the conditions which existed at the time of the attack, especially before they were tied and made to face down, favoured correct identification. We agree with that conclusion.

In our opinion the evidence of these witnesses, which the learned trial judge accepted, clearly indicated they had the interest to see the faces of their attackers and had sufficient time and opportunity to do so.

The first ground of appeal must therefore fail.

The complaint in ground two is that there is no evidence that a deadly weapon was used or threatened to be used in the robbery.

We think there is merit in this ground of appeal. The particulars in the indictment alleged that a knife and a panga were used in the robbery. Having alleged in the particulars of the offence that a knife and a panga were used in the robbery, the evidence led by the prosecution clearly ought to have focused on the kind of weapons as stated in the particulars of the offence and naturally the appellants ought to have applied their defences to those weapons. What we find in the evidence, however, is that none of the eye witnesses mentioned a panga or a knife as having being used. George Kamuhanda said he was pierced with a spear picked from his room. This was dismissed by the learned trial judge as ***"presumptions than factual."*** It therefore came as a matter of surprise when the learned trial Judge turned round and held that a ***"knife, panga and spear"*** were used during the robbery. With due respect to the learned trial judge there is no evidence to support that finding.

In the circumstance we find that no deadly weapon was used or threatened to be used in the robbery. We agree, however, that an offence of Simple robbery did take place and that there was sufficient evidence that proved it. The appeal against conviction for aggravated robbery therefore succeeds. The convictions for aggravated robbery are quashed and sentence of death set aside. We substitute therefore convictions for Simple robbery contrary to S. 272 and 273(1) (b) of the Penal Code Act.

The appropriate sentence will be considered after address by counsel.

Dated at Kampala this 26th day of November 1999.

G.M. Oke1lo

Justice of Appeal.

J.P. Berko

Justice of Appeal.

C.N.B. Kiturnba

Justice of Appeal.