

IN THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE G.M. OKELLO, JA

HON. LADY JUSTICE A.E. MPAGI-BAHIGEINE, JA

HON. MR. JUSTICE A. TWINOMUJUNI, JA

CRIMINAL APPEAL NO.77 OF 1999

ALI RWAKILEMBE::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from a (decision) of the High Court of Uganda at Fort-
Portal (Hon. Mr. Justice Bamwine) dated 25/6/99 in C.S.C.
No.637/96)

JUDGMENT OF THE COURT

This is an appeal against conviction. The appellant, Ali Rwakilembe was on 25-6-1999 convicted by the High Court (Y. Bamwine Ag.J) at Fort Portal, of aggravated robbery c/s 272 and 273 (2) of the Penal Code and was sentenced to death.

On or about 31-7-95, at around 6 a.m. the complainant Lawrence Monday, PW2, was driving his Dyna Pick-up Reg. No. UAB 138 from Nkoma towards Fort Portal when he was suddenly stopped by three robbers who had placed a log in the middle of the road. One of the robbers manned the log barrier, the other who had a gun shot in the air, while the third one demanded the ignition keys from the complainant while searching his pockets for money. The complainant's cash amounting to Shs.380,000/= was stolen from him. In the meantime, a bus Reg. No.UXO 709 arrived and it was shot at, a bullet hitting one of the passengers in the neck. In the ensuing confusion, the robbers escaped into the bush. However, one of them had been identified as being brown with missing lower teeth. The complainant rushed to Nkoma Police Post to report the matter. A search was mounted following the foot-marks of one of the robbers who was putting on gumboots. The appellant, Ali Rwakilembe was immediately arrested by No.24839 D/C Ojambo Charles, PW1; Sabiiti Stephen, PW4; and Charles Kabagambe, PW5; all

members of the Special Police constabulary amongst others. The appellant was putting on a pair of boots; his clothes were wet and muddy. He was found with cash Shs.250,000/= and opium hidden in his undergarments. He failed to show the police neither where he was coming from nor where he had spent the night. He however told the police that he had been in the company of two others, Nyakoojo and Moses Friday. He was arrested and taken to Nkoma Police Post and thereafter transferred to Kabarole Police Station. He was indicted for this offence. At the trial he set up an alibi that he had gone to visit a witchdoctor but lost his way. This was rejected by the learned judge.

Out of the three grounds of appeal originally framed, two (2) were abandoned. Only ground No.1 was argued:

“(1) The learned trial judge erred in law and fact in that the correct identification in accordance with facts and law was not proved especially with regard to a single identifying witness in this case.”

Mr. Joseph Zagyenda learned Counsel for the appellant took a number of points.

First, he expressed doubt regarding identification of the appellant by Lawrence Monday (PW2) when Peter Birungi (PW3) who also knew him as a fellow driver in town could not or did not identify him. He further pointed out that the appellant’s name was never mentioned to the police officer who received the report, PW1 D/C Ojambo Charles.

The second point concerned the lighting at the material time. Mr. Zagyenda submitted that the incident took place at around 6 a.m. when it was still dark and foggy which is characteristic of Fort Portal morning weather. It lasted only five minutes. He contended that generally the conditions favouring correct identification were non-existent. In his view the principles of law governing identification by a single witness were not properly applied. The conviction should not be allowed to stand.

The Principal State Attorney, Ms Lwanga, opposed the appeal, maintaining that the conditions for identification were favourable and the law was properly applied. She stated that Lawrence

Monday (PW2) had opportunity to identify the appellant whereas Peter Birungi (PW3) did not even though both knew the appellant as a fellow driver in town. Peter Birungi (PW3) was in hiding in the bush about 30 metres away. For Lawrence Monday, who remained at the scene, there was sufficient lighting from both the complainant's vehicle as well as from the bus which had been stopped by the robbers at the scene. She submitted that though it was dark the incident lasted about forty-five minutes, which was sufficient time for one to recognise a familiar face. In her view, though some witnesses put different timing to the incident they should not be pinned down to exact timing in such a situation. She finally submitted that the identification of the appellant by a single witness, Lawrence Monday was corroborated by the circumstances under which he was arrested.

Regarding the law of identification in criminal cases, Courts have laid down stringent rules for the purpose of minimising mistaken identification leading to wrong convictions. In this connection they have been guided by the cases of Abdalla bin Wendo and Anor v. R. (1953) 20 EA. CA. 166 and Roria v Rep. 1967 EA 583. It is well settled that though a fact may be proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of such a witness in respect of identification especially when the conditions favouring a correct identification are difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can be concluded that the evidence of such a witness is reliable. A witness may be truthful and his evidence apparently reliable and yet there is still the risk of an honest but mistaken identification. The true test is whether the evidence can be accepted as free from the possibility of error.

The above principles were reiterated by the Court of Appeal in Abdala Nabulere & Ors v. Uganda Cr. App No.9/78 UCA:

“Where the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can be all mistaken. The judge should examine closely the circumstances in which the

identification came to be made particularly the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality the greater the danger.”

According to the evidence on record, Lawrence Monday testified that he was able to identify the appellant whom he knew as a fellow driver. He spent time with him demanding keys and money. There was the glaring light from both vehicles.

“.....When I stopped, another man emerged from the bush. I identified the latter man. He is now in the dock putting on a Muslim cap. I know the name of this man who emerged from the bush. He is Rwakilembe. He used to drive a vehicle to our home in Rwamwanja, Nkoma. And he even used to come to Rwamwanja cattle market.
A1 came to where I was seated and demanded for the vehicle keys. I had already stopped. I gave him the keys and he ordered me to lie down. He then removed cash from me and went back to my vehicle.....”

Under cross-examination, Lawrence Monday stated:

“.....All in all I saw 3 robbers. I didn't see A2. I was able to identify the person who took the keys from me. The vehicle head lights were very bright. When you open the driver's door, the light which comes on is enough to assist you to identify a person. Drivers know each other. I didn't know his home. We only used to interact in town.”

However, the evidence of Peter Birungi clearly disclaims any possibility of having identified anybody:

“.....When I saw strangers, I ran away. One of them had a gun. Two didn't. I therefore disappeared to the bush. I had hidden myself nearby - about 30 metres. I could see the robbers from my hiding place.”

Under cross-examination Peter Birungi stated:

“When the vehicle stopped, I got a chance to run away. At that time, I did not recognise anybody.”

In our opinion this straightway disposes of Mr. Zagyenda’s concern as to why Peter Birungi did not recognise the appellant. Seeing is not the same thing as recognising. It is possible to see a silhouette or a profile of a human being without recognising them. We think this was the case with Peter Birungi who was hiding in a bush about 30 metres away.

The learned judge directing himself along the principles of law set out above considered that the appellant and Lawrence Monday were not strangers, both being drivers in town; there was sufficient light from both vehicles; the appellant went straight to Lawrence Monday to demand the car keys, there was therefore zero distance between the two.

He observed:

“..... there were also inferences to draw in the opposite direction, that is, that circumstances favouring correct identification existed. They include the fact that both Lawrence Monday and Ali Rwakilembe being drivers in a town like Fort Portal knew one another. None was a stranger to the other. The whole thing did not last a twinkle of a second. There was time for the thief to do a thorough check. The robbery is said to have lasted up to around 6.45 a.m. when the darkness had cleared away. There were also vehicle lights -both of the vehicle which was first robbed (Lawrence Monday’s) and the bus which pulled up later.”

We think the judge was perfectly correct in accepting the identification of the appellant by Lawrence Monday, a single witness. There was opportunity for correct identification.

As pointed out by the Principal State Attorney, there was also corroborative evidence to support Lawrence Monday’s identification evidence. This was to be found in the circumstances under which the appellant was arrested.

Sabiiti Stephen (PW4), Special Police Constabulary had this to say:

“We followed the route of robbers..... After covering some distance, we came across a footpath. We got puzzled but decided to continue. We then met one man coming from where we

were going. We asked him who he was. He showed us a small chit to the effect that he had lost his graduated taxi tickets. It was purportedly issued by one Rwakilembe of Tax Park Police Post. The man told us he had come to the village on a Saturday.

He took us to a Trading Centre called Ease Muwane. Instead of taking us to where he had spent the night, he said he had been arrested.

On close scrutiny, we saw leaves of some thorny trees on him. He looked like a person who had been to a thick bush. We told him to remove boots. There was dew on them. We searched him and found him with money in a kavera Shs.230,000/=”

Charles Kabagambe (PW5), Special Police Constabulary who was on the search party complemented Steven Sabiiti’s (PW4) story.

“...We followed the path and reached a garden. We saw boot marks. We followed the route and landed on a foot path. After a short distance we met one Rwakilembe. We asked the man who he was. He had no graduated tax ticket. He had a chit indicating it had been issued by Tax Park Police. He took us to a Trading Centre called Mufashe. He said he knew someone there. The residents said they did not know him. He too said he didn’t know anybody there. We removed his boots. They were wet. He had bugando flowers in his hair. We searched him further and found money hidden in the pants. It was Shs.230,000/= . . .”

It is clear it is the appellant’s boot marks which led to his arrest.

In his defence the appellant stated:

“Before my arrest I was a driver. On 31-7-95 I was proceeding to a place called Rwebigogo to see a native doctor. I went on a motor cycle which dropped me somewhere and returned. I proceeded on foot to one ‘doctor’ Bizimungu but before reaching there, I met army men. I greeted them and by-passed them. After a short distance they called me back. They asked me where I was going. I told them I was going to the home of one John Bizimungu. They asked for graduated tax tickets. I produced them. At a certain Trading Centre, we found there some people. They said they had met me and I was not from that area. I was ordered to sit down.

I told them I had money. I removed it. It was Shs.250,000/=. They beat me further and said I was thief they had been looking for. They tied me with ropes. I was taken to Kijagara as they looked for more people.”

It is clear from this explanation that the appellant unwittingly put himself in the vicinity of the robbery.

The learned judge considered the evidence of the search party and concluded:

“I consider the evidence of those who carried out the search to be truthful and I accept it as such. The defence of alibi put up by the accused person cannot be sustained since through the evidence of five prosecution witnesses, the accused has been placed at the scene of crime, in the company of two other robbers one of whom was armed with a gun.”

The judge considered the appellant’s defence of alibi and rejected it. The appellant’s furtiveness in the bush coupled with the big amount of money in his underclothes can indeed be utilised as furnishing further proof his guilt. His disheveled condition in the wet bush so early in the morning has no other explanation than that he was one of the robbers who had attacked and robbed Lawrence Monday (PW2) nearby and was on the run when he was netted.

In view of the foregoing we are satisfied that the learned judge analysed all the evidence for the prosecution and the defence in detail. The evidence he accepted fully supports his decision which we endorse and we can see no substance in this appeal. It is accordingly dismissed.

Dated at Kampala this 3rd day of January, 2000

G.M. Okello

Justice of Appeal

A.E. M Mpagi-Bahigeine

Justice of Appeal

A.Twinomujuni

Justice of Appeal