THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. MR. JUSTICE C.M. KATO, JA.
HON. LADY JUSTICE A.EN. MPAGI-BAHIGEINE, JA.
HON. MR. JUSTICE J.P. BERKO, JA.

CRIMINAL APPEAL NO.15 OF 1999

1. BUKENYA PATRICK
2. MANSURU RAJABU …….APPELLANTS

VERSUS

UGANDA …….RESPONDENT

(Appeal from the High Court at Fort Portal
in Criminal Session Case No. 170196)

JUDGMENT OF THE COURT:

The two appellants, Bukenya Patrick and Mansuru Rajabu, were convicted of aggravated robbery (contrary to sections 272 and 273(2) of the Penal Code Act) and sentenced to death. They now appeal largely on the ground that the evidence against them was concocted, improbable, contradictory and insufficient to connect them with the offence.

The brief facts of the case are that on 8/5/96 while the complainant, Hussein Sebbi (PW6), was sleeping together with members of his family at his home in Njara in Fort Portal Municipality, a group of thugs forced the rear door open and entered the house at about 3a.m. The thugs had a panga and torches. They demanded money. One of the thugs placed a panga on the neck of PW6 and threatened to cut him if he did not produce money. The thugs collected a number of household properties which included a brief case, a suit case, clothes, one brown suit, a white and black Kaunda suit, one black pair of trousers and cash Shs. 300,000/= from his room. From another room the thugs took a small brief case labeled ‘President” and a handbag containing

ladies clothes. One of the young girls in the house called Fatuma Ismail (PW8) recognised the second appellant by voice. The rest of the thugs were not recognised.

On 17/6/96 when the complainant was driving in Fort Portal town he sighted the first appellant putting on the top of his Kaunda suit which had been stolen on 8/5/96. He stopped by the first appellant and greeted him. The first appellant appeared scared and started to run. The complainant raised an alarm and the first appellant was arrested. He was handed over to the police. He was tied and brought to Fort Portal Police Station. Other properties of the complainant were recovered from the first appellant's home at Rugombe Fort Portal-Kampala road. The second appellant disappeared from the village after the incident. He was arrested in April 1997 when he re-appeared and was picked by PW8 at an identification parade.

At the trial the first appellant, in his unsworn statement, said that he was sent to Fort Portal by his mother on 915/96 to buy drugs for her. He met one Nyakojo Rogers who borrowed from him Shs. 4000/= and gave him some properties as security. About a week later the said Nyakojo Rogers was arrested on a charge of theft and remanded in Katojo Prison. One day he took one shirt out of the, properties Nyakojo had given him and put it on. That was the shirt PW6 identified as his and caused his arrest. He denied having participated in the robbery.

The second appellant also made an unsworn statement. He said that he was arrested together with his father in April 1997 by some defence personnel who were looking for a gun alleged to have been used in a robbery. They were taken to the police station and detained. Two weeks later D/Copl Okello (PW7) interrogated him about a golden watch belonging to PW6 which PW7 alleged he, the appellant, had stolen. The second appellant said that he told PW7 that he had not stolen any watch. He was picked at an identification parade by a young girl. He also denied his involvement in the offence. The learned trial judge believed the prosecution evidence and convicted the appellants.

The two grounds were argued together on a broad proposition that the prosecution evidence was contradictory and insufficient to connect the appellants with the offence. Accordingly, the learned trial judge should not have relied on it to convict them.

Learned counsel for the appellants first dealt with the case against the second appellant. According to learned counsel, the evidence of PWIO, Zainabu Issa, sets the sequence of events that happened in the home of PW6 on 8/5/96. According to PW1O the attack started from his room. He first heard a bang on his door. He woke up and sat on his bed. He then heard someone saying "**leo mutazileta pesa komanyoko zenyu**" meaning "**to day you must bring the money**". The person kicked his door open and flashed torchlight direct to his eyes and told him to lie down or else he would be killed. He obeyed and lay down. The person collected his bag and a torchlight from his room and went out. Later his mother was brought to his room and told to lie down and she did. Three of the thugs went to his father's room, whilst one remained guarding him and his mother and PW8. According to PW8 the person who was guarding them was the second appellant. PW8 also said that after the robbery the members of the family talked and it became clear that apart from herself, none of the rest of the family said they identified any of the thugs. Learned counsel has therefore submitted that PW6 lied when he said he identified the second appellant and has invited us to reject the evidence of PW6 regarding the identification of the second appellant. That would leave only the evidence of PW8 whose evidence, according to counsel, required corroboration since she was only 11 years at the time of the incident. According to counsel her evidence was not corroborated.

We think that there is merit in the argument of learned counsel regarding the evidence of PW6 on the identification of the second appellant. The evidence on record clearly showed that the second appellant remained outside the door of PW6 when his colleagues were in PW6's room. PW6 came out after the robbers had gone. PW6 Therefore could not have identified the second appellant.

We are, however, satisfied that the second appellant was properly identified by PW8. The evidence shows that she knew the voice of the second appellant very well. The second appellant had slept in their home before. The second appellant used to come to their shop at Njara Trading Centre at least three times in a month and she would hear him talk. She said that she has known the second appellant for three years. We think that the instances narrated by PW8 were sufficient to enable her to identify the voice of the second appellant. She even told the police that she did

recognise the voice of the second appellant during the robbery. That led the police to look for him.

We do not, however, agree with learned counsel that the evidence of PW8 required corroboration as a matter of law. At the time of the incident she was 11 years, but she was 14 years at the time of trial. She was therefore not a child of tender years since the issue as to whether a child is of tender years arises only at the time of trial and not when the offence was committed. **John Muchami alias Kalule v Uganda Criminal Appl. No. 3 of 1993 (unreported) Supreme Court.**

We therefore think that the evidence of PW8 alone was enough to connect the second appellant with the offence. But it so happened that her evidence is in actual fact, corroborated by the sudden disappearance of the second appellant from the village soon after the robbery. We find no merit in the appeal of the second appellant. His appeal as a result fails and is dismissed.

The case against the first appellant rested entirely on circumstantial evidence as none of the witnesses identified him during the robbery. The incident happened on the night of 8/5/96. The first appellant was seen by PV on 17/6/96 wearing the top of his Kaunda suit that was stolen during the robbery. When 4-ie was arrested he told the police that he had bought the shirt from one Kyomuhendo who was then on remand in Katojo prison on a different charge. The police contacted the said Kyomuhendo who denied selling any shirt to the first appellant. In court, however, the first appellant changed the story regarding how he got the shirt. He said the shirt was among the properties one Nyakojo Rogers gave him as security for a loan of Shs. 4000/= he gave him on 9/5/96. Apart from the shirt, the police, acting on a tip-off, raided the home of the mother of the first appellant (PW9) and recovered other properties which PW6 identified as some of his properties that were stolen. PW9 said the first appellant brought a bag containing the properties to his wife on the 9/5/96 when she sent him to buy drugs for her. The shirt he was found wearing on 17/6/96 was among the properties.

The first appellant was therefore found in possession of some of the stolen properties within 24 hours after they were stolen. He gave contradict, explanation as to how they came into his

possession. That raises a very strong presumption of participation in the stealing. The learned trial judge was therefore right to rely on the doctrine of recent possession of stolen property to convict the first appellant.

Though the learned trial judge considered a defence of alibi, the defence of the first appellant did not raise an alibi. He did not say that he was somewhere else on the night of 8/5/96. His evidence was that he was sent by his mother lo go and buy drugs for her on 9/5/96. That was a day after the incident. That cannot raise an issue of alibi.

For the above reasons the appeal of first appellant also fails. We accordingly dismiss the appeal of the appellants.

Dated at Kampala this 26th day of April 2001.

C.M. Kato
Justice of Appeal

A.EN. Mpagi-Bahigeine
Justice of Appeal

J.P. Berko
Justice of Appeal