THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.104 OF 1999

OKWANG PETER :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(An appeal from a conviction and sentence of

tile High Court of Uganda at Tororo (A. Kania, J.)

dated 17/9/99 in CS. C No.341 of 1996)

CORAM: HON. MR. JUSTICE C.M. KATO, JA.

HON. MR. JUSTICE S.G. ENGWAU, JA.

HON. MR. JUSTICE C.N.B. KITIMBA, JA.

JUDGMENT OF THE COURT:

The appellant, Peter Ogwang, was indicted for aggravated robbery in the High Court sitting at Tororo, tried, convicted and sentenced to death under sections 272 and 273(2) of the Penal Code Act.

The facts leading to his conviction are as follows. On the night of 18/10/94 the complainant, Miria Nakato Pata (PW2) was sleeping in her house. She was awakened by a bang on her door. On hearing the bang, she separated the curtain and saw the appellant outside. She saw a number of people enter the house and one of the gang cut her with a panga. The appellant joined the attackers and cut her with a panga saying that if she was not killed she would put them in trouble. The robbers collected a number of household property which they carried away. The complainant raised an alarm which was answered by the neighbours. She mentioned to them that the appellant was one of her assailants. On hearing his name being mentioned, the appellant ran away. Subsequently the matter was reported to the police and the appellant was arrested.

At the trial, the appellant denied having committed the offence. He put up a defence of alibi to the effect that when the complainant was being attacked he was sleeping at his home. He also

claimed that PW2 had a grudge against him. The learned trial judge rejected his defence and convicted him as charged, hence this appeal.

There are 3 grounds of appeal, namely:

“1. That the learned trial Judge erred in law and fact by finding that the appellant had been positively identified and that he was part of the gang that committed the offence.

2 That the learned trial Judge erred in law and fact in rejecting the appellant’s defence of an alibi.

3. That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence adduced at trial hence reached erroneous decisions.”

Learned counsel for the appellant, Mr. Henry Kunya, argued the first ground separately then grounds 2 and 3 together. On ground I he submitted that the learned trial judge was wrong to hold that the appellant was correctly identified by PW2 who was the only identifying witness. He contended that the circumstances, under which the complainant claimed to have identified the appellant, were not favourable for correct identification. The complainant was frightened and that affected her presence of mind. The learned counsel further submitted that the complainant had contradicted herself by saying that when she saw the appellant outside he was with a group of people, but she said that she had seen him alone. In his view this contradiction rendered the credibility of PW2 questionable.

On the other hand Mr. Elem, learned counsel for the respondent, submitted that the judge was right in his finding that the appellant had been positively identified by PW2. According to him, conditions favouring correct identification existed as the complainant knew the appellant before the incident, there was moonlight and the attackers were flashing torches everywhere.

The law relating to a conviction based on the evidence of a single identifying witness was summarised in the case of: and Sheh Bin Mwambere [1953] 22 EACA 166 at page 168 as follows:

> **"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of single witness respecting identification especially when it is known that the conditions favouring correct identification where difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."**

In the case now before us, the prosecution case was based almost entirely on the evidence of a single witness by the name of Miria Nakato Pata (PW2). Her evidence was to the effect that on the fateful night she was sleeping in her house with two children each of whom was aged 4 years and who were never called as witnesses. She heard a bang at the door. She then parted the curtain and saw people outside, including the appellant, by help of the moonlight. The attackers entered the house and she was cut with a panga. They had torches which were being flashed and that helped her to recognise the appellant. The complainant also testified that she mentioned to those who answered her alarm the name of the appellant as one of those people who had attacked her home.

This evidence was attacked by learned counsel for the appellant on a number of grounds. One of the grounds was that the prevailing conditions did not favour correct identification of the appellant by PW2. We agree with that contention. Although the learned trial judge in his judgment repeatedly referred to the existence of "bright moonlight", the complainant only spoke of there having been moonlight she did not describe the moon as having been bright. The brightness of the moon was an important element in this situation as it was the only source which could have enabled the complainant to recognise the appellant while outside.

Another point of complaint by appellant's counsel was the contradiction in the testimony of PW2 regarding the number of people she saw. When being examined in chief, she told court that she saw the appellant with other people outside, but when under cross-examination she said that the appellant was alone. In our view, this contradiction is quite major as it raises some doubt as to

whether the complainant was in her proper mental faculty so as to recognise any of the attackers. It may be true, as found by the trial judge, that there were torches being flashed in the house but it appears the complainant was not composed at that time as she admitted in her evidence that she was frightened and shaking.

There was the issue of the complainant having made her statement to the police about 8 months after the attack. Although there is no law as to how soon a statement should be made to the police, we consider such a long time to be material in this particular case. After such a long time the complaint might have lost memory of what happened, she might even have been tempted to fabricate some details. According to the complainant she made 3 different statements to the police on different dates, no explanation was given as to why all these statements had to be made. If the complainant's story was straightforward as to what she saw on the fateful night why was it necessary to record all those statements from her?

Considering the evidence as a whole, we are of the view that the prevailing circumstances did not favour correct identification by the complainant as to who really attacked her. PW2's evidence of identification cannot be said to be free from error or mistaken identity. The first ground of appeal succeeds.

Concerning the second ground of appeal, Mr. Kunya argued that the learned trial judge did not sufficiently consider the issue of existing grudges between the complainant and the appellant. We agree with that contention. The learned trial judge in his judgment dealt with the issue of grudges as follows:

> **"From her evidence PW2 Miria Nakato Pata knew the accused as the son of Deo, her neighbour and an LCI Defence Secretary of their village. Her house is about 200 metres from the house of the accused. The complainant litigated with the accused once before the LCI court and at the time of the offence the complainant had a complaint against the accused before the LCII court. In his sworn evidence the accused testified that the complainant's home is 200 metres from his and she is his most immediate neighbour. He confirmed the disputes he had with the complainant from the evidence of PW2 Miria Nakato Pata and that of the accused. There is no**

doubt whatsoever that at the time of the offence the accused was familiar to the complainant."

The above passage shows that the judge only addressed his mind to the defence of grudges in relation to familiarity of the appellant and PW2. He did not consider the possibility of the complainant having fabricated the evidence against the appellant because of the grudges which they had. We are of the view that had the trial judge approached the matter in that way, he would possibly have come to a different decision. Prosecution did not adduce evidence to establish that the complainant was not prompted by the existing grudges to implicate the appellant in this case.
Regarding the defence of alibi, Mr. Kunya submitted that the appellant was never put at the scene of crime by the prosecution evidence and that the appellant's defence raised a reasonable doubt which should have been resolved in his favour. He submitted further that the judge did not evaluate appellant's evidence properly and rejected it outright without consideration. Mr. Elem, however, contended that the evidence of Pw2 had put the appellant at the scene of crime and that the trial judge properly evaluated the evidence of the appellant before rejecting it.

After correctly stating the law relating to the defence of alibi the learned trial judge held thus:

"Having believed that PW2 Miria Nakato Pata correctly identified the accused under conditions favourable to correct identification the alibi set forth by the accused is rejected. I find it proved beyond reasonable doubt that the accused was at the scene and part of that gang which committed aggravated robbery on 18/10/94 to the prejudice of Miria Nakato Pata."

We have already held elsewhere in this judgment that PW2 could not have correctly identified the appellant. The finding of the trial judge that the appellant was placed at the scene of crime by the evidence of PW2 cannot therefore be sustained. In our view the appellant's defence which was supported by that of his wife, Agulansi Andrea (DW2), raised some doubt about the possibility of the appellant having been at the scene of crime. The learned trial judge should have resolved the benefit of that doubt in favour of the appellant. Grounds two and three must succeed.

In the result, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be set free from prison unless he is being held there for some other lawful reasons. So it is ordered.

Dated at Kampala this 23rd day of March 2001.

C.M. Kato

JUSTICE OF APPEAL

S.G. Enwuau

JUSTICE OF APPEAL

C.N.B. Kitumba

JUSTICE OFAPPEAL