THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE S.G. ENGWAU, J.A
HON. JUSTICE A. TWINOMUJUNI, J.A

CRIMINAL APPEAL NO.132 OF 1999

MUTACHI STEPHEN ……..……APPELLANT

VERSUS

UGANDA ……..RESPONDENT

(Appeal from conviction and sentence of
the High Court of Uganda at Tororo (Kania, .J)
dated day of November 1999
in Criminal Session Case No.384/1994).

JUDGMENT OF THE COURT

This is an appeal against conviction and sentence on two counts of robbery c/s 272 and 273(2) of the Penal Code Act.

The brief facts of the case are that on 1st October 1995 at Akapu Zone, Mob Sub-county in Tororo District at 2 a.m., one Olowo Silvest (PW1) was awakened by a loud bang at his door whereupon the door was thrown open and three thugs entered his house. Two of them were armed with guns. They threatened to shoot him and menacingly demanded money and other properties while torturing him. They tore a mattress and took shs.44,000/= plus other household properties. Two of the thugs were recognised by the complainant as Stephen Mutachi and Donato whom he had known before that day. The wife of the complainant also recognised Stephen Mutachi whom she had also previously known. This recognition was facilitated by the fact that the thugs were flashing a torch around while searching for property and counting the money they

had stolen. There was also bright moonlight outside. The robbers took away the complainant who spent some time with them roaming the villages and torturing him. They later stripped him and left him tied on a tree.

During the same night, three thugs, two of them armed with guns, attacked a neighbouring village of Mpureta Zone at around 3 a.m. They robbed one Opoya Adriano of a Phillips bicycle after firing gunshots at the complainant. He was able to recognise only the appellant Stephen Mutachi who was firing a gun from outside where there was full bright moonlight. The complainant had previously known the appellant.

The appellant and Donato Nabiga were subsequently arrested and charged with two counts of robbery and the appellant was convicted of simple robbery on 1st count and sentenced to:

i) years imprisonment,
ii) 6 strokes of the cane, and
iii) to pay shs.400,000/= as compensation.

He was sentenced to death on the second count. Hence this appeal.

The Memorandum of Appeal filed on behalf of the appellant contains six grounds of appeal as follows: -

1. The learned judge erred in law in passing a sentence of 10 years, which was manifestly harsh in the circumstance.

2. The learned judge erred in law in sentencing the appellant to Corporal punishment of six strokes of cane.

3. The learned judge erred in law in ordering the appellant to pay a sum of *Ushs.400,0001* in compensation to the victim, which was manifestly illegal and/or excessive, in the circumstance of the case.

4. The learned judge erred in Law and fact in ordering the appellant's conviction based on the evidence of a single identifying witness when the circumstances were not favourable.

5. The learned judge erred in law and fact in giving unnecessarily serious weight to voice identification in reaching a guilty verdict against the appellant.

6. The learned judge erred in law and fact in failure to evaluate the appellant's alibi against the prosecution evidence on Count II, and as a result a miscarriage of justice was occasioned or suffered.

On the first three grounds of appeal which were against sentence only and concerned the first count of the Indictment, Mr. Peter John Nagemi, learned counsel for the appellant contended that: -

(a) a sentence of 10 years imprisonment was excessive given that the properties allegedly stolen were never found in the home of the appellant.

Corporal punishment was declared to be unconstitutional by the Constitutional Court on 14th December 2001.

Compensation of shs.400,000/= was excessive give1 that the complainant only lost one bicycle worth about shs.50,000/=.

In reply, Mr. Vincent Wagona, the learned Principle State Attorney, who presented the respondent, submitted that a sentence of only 10 years imprisonment on a person who was liable to be sentenced up to 20 years imprisonment was neither illegal nor excessive. He conceded that since the decision of the Constitutional Court in **Kyamanywa Simon vs. Uganda Constitutional Reference No.10 of 2000,** corporal punishment was constitutional. He supported the High Court order for compensation of .400,000/ on the grounds that:

i) The complainant lost a bicycle.

ii) The door of his house was damaged when it was hit and broken by a 20 kg stone used to gain entry to his house.

iii) The complainant was tortured and assaulted.

We do not find any merit in the first complaint that a sentence of 10 years imprisonment was illegal or excessive for a person convicted of robbery which has a maximum sentence of life imprisonment. Mr. Nagemi was totally unable to convince us that the sentence was illegal or excessive. He only tried to support his argument with an assertion that since stolen property was not recovered in the home of the appellant, he deserved a lesser sentence. We are not aware that recovery of stolen property in a robbery case has any bearing on sentence and Mr. Nagemi did not give us any authority to support such a proposition.

Mr. Nagemi was on a firmer ground on the question of corporal punishment. The learned State Attorney conceded the issue. This court has held in **Kyamanywa case** (supra) that corporal punishment is degrading punishment prohibited by Article 24 of the Constitution. Corporal punishment which was passed on the appellant falls in this category and is unconstitutional.

As regards to order for payment of compensation of shs.400,000/ against each appellant, we are unable to ascertain exactly how the learned trial judge arrived at this figure. In effect he ordered total compensation of shs.800,000/ on the first count. The trial judge never explained how that figure was arrived at and what factors he took into consideration. We know the complainant on that count lost a bicycle and his door was damaged but the learned trial judge did not attach any actual or estimated value to the damage or loss. There is no evidence as to what extent he was assaulted or what damage he suffered in monetary terms. In those circumstances we order that appellant pays compensation of shs. 150,000/= being the estimated cost of a new bicycle.

The complaint of the appellant in grounds 4, 5 and 6 of the Memorandum of Appeal raises three issues: -

(a) that the trial judge based a conviction on the evidence of a single identifying witness whereas circumstances for proper identification were not favourable.

(b) that the trial judge placed undue weight on voice identification in reaching a guilty verdict against the appellant

(c) that the trial judge failed to evaluate appellant’s alibi against the prosecution evidence on count II.

Mr. Nagemi submitted that there was only one identifying witness in respect of count II. In his view, since conditions for proper identification were not favourable, the court should have looked for some other evidence to corroborate the evidence of the sole identifying witness. He cited the case of **Waswa and Another vs. Uganda, Cr. Appeal No.48 & 49 of 1999 a** Supreme Court decision in support of his contention. He also complained that the trial court considered the prosecution case separately and the alibi of the appellant separately instead of considering them side by side. He concluded that the trial judge's undue reliance on voice identification misled him and led him to wrong conclusion.

Mr. Vincent Wagona on the other hand submitted that the evidence of a single identifying witness was enough because conditions for proper identification existed. In his view voice identification, though good evidence was not necessary as the evidence of visual identification by the complainant in count II was more than adequate. Mr. Wagona also submitted that though it is always necessary to consider the prosecution evidence alongside the defence, failure to follow that format to the letter in the instant case did not occasion any miscarriage of justice.

We propose to deal with these three grounds of appeal together as learned Counsel did.

We feel it is necessary here to show in some detail how the learned trial judge dealt with these issues in his judgment, then w can consider whether he misdirected himself or failed to evaluate the evidence as he should have. The learned trial judge stated: -

"It is trite law that when the case against an accused person is based solely on the identification evidence of a single witness a conviction on such evidence causes discomfort because such a witness may be mistaken and a conviction may lead to a miscarriage of justice. In such a case the Judge is duty bound to warn the assessors and himself of the special need for caution. There is therefore need to take such evidence with care and ascertain if the conditions under which the identification was made are favourable and if the judge is satisfied that conditions were favourable for correct identification he may proceed to act on the evidence of identification. If the conditions are difficult the court should look for other evidence in corroboration See Abdalla Nabulere vs. Uganda (supra).

Conditions considered favourable for correct identification are laid down in Abdalla Bin Wando vs. R (supra) Rena vs. R (supra, Wassajja vs. Uganda (supra) and Abdalla Nabulere vs. Uganda (supra). They are the following: -

(1) Familiarity of the accused to the witness at the time of the offence.
(2) Conditions of lighting.
(3)Proximity of the accused to the witness at the scene of the crime.
(4)The length of time the accused came under the observation of the witness.

In this present case PW3 Opoya Adriano testified that he had known Al since 1990. He knew him as LDU who guarded Walusaga Trading Centre. It was his evidence that he used to meet Al daily as he took his drinks to sell in Bunyole. That Al was known to PW3 Opoya Adriano has not been disputed. I find that Al was very familiar to PW3 Opoya Adriano.

Regarding the conditions of lighting that fateful night PW3 Opoya Adriano testified that there was bright moonlight and with the aid of the moonlight he was able to observe his assailants through holes in his window shutters and through the door which the assailants had kicked open.

As for the proximity of the assailants to the witness, the witness testified that the first time he observed his assailants through the window shutters Al was only two meters away. When he next observed the two assailants through the door they were four meters from him but when Al cocked his gun and took aim to shoot he was only three meters away from him.

PW3 Opoya Adriano testified on the length of time Al was under his observation was a total of five minutes. Taking the general effect of all this evidence that the accused was familiar to the witness at the time of the offence, there was bright moonlight and that the witness observed Al at close range for a total period of five minutes I consider and find that the conditions under which Al was identified as one of the assailants were favorable to correct identification free of error of mistake. I have also considered the evidence of PW3 Opoya Adriano that he knew the voice of Al and that when he spoke the witness confirmed Al was one of the assailants because his voice was known to the witness. I believe that with the frequent interaction between Al and the witness, the witness also identified Al by voice as one of his assailants thus confirming his visual identification of him. I therefore find that the prosecution has proved beyond reasonable doubt

that Al participated in the aggravated robbery c/s 272 and 272(2) of the Penal Code Act to the prejudice of Opoya Adriano. The prosecution has however not proved the participation of A2 in the robbery.

In his sworn statement in his defence Al pleaded that the night of the said robbery he was sleeping with his wife Kitui Juliana having retired at 8.00 p.m. By this testimony Al was setting up the defence of alibi. It is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence the alibi is false and to place the accused squarely at the scene of crime See Leonard Aniseth vs. Republic (supra), Sekitoleko vs. Uganda (supra) and Uganda vs. Fremijioi Kakooza (supra).

In this case having found that PW3 Opoya Adriano positively identified Al as one of his assailants in night of 1.10.93 in conditions favorable for correct identification the alibi of Al collapses. He has been squarely put at the scene of crime."

It will be noted that the learned trial judge deals with, identification by a single witness, voice identification and the appellant's alibi in the above extract. He considered the law applicable and applied it to the facts of this case. He was satisfied that the cumulative effect of visual identification and voice identification was to put the appellant at the scene of crime thus displacing the defence of alibi.

We have also considered and re-evaluated all the evidence that was adduced before the learned trial judge to prove or disapprove the indictment on count II against the appellant. We are unable to fault the manner in which he handled the evidence and the, law applicable. After a careful scrutiny of all the evidence, we come to a similar conclusion, as he did, that the appellant was correctly identified and convicted.

We are fortified in this belief by the fact that in fact the appellant was seen armed with a gun and in an area where two robberies were committed on the same night between 2 a.m. and 4 a.m. We must remember that the two offences were committed one after the other in two neighbouring villages. The complainant and his wife on count one identified the appellant. It was on the basis of their identification that he was convicted. That conviction has not been challenged on this appeal. In fact only the sentence was challenged. In effect, there are three eyewitnesses

who separately saw the appellant and two others, armed with guns, committing robberies in the two villages occupied by the complainants. We are satisfied that the possibility of mistaken identification in this case is non-existent and we hold that the appellant was correctly identified at the scene of crime and correctly convicted of the offences charged.

In the result, this appeal against conviction and sentence on count II of the Indictment must fail.

In conclusion this appeal is allowed only in respect of corporal punishment and payment of compensation of shs.400,000/= which is reduced to shs.150,000/=. The sentence and suspension of 10 years imprisonment in respect of count I, and the conviction and death sentence in respect of count II are upheld.

Dated at Kampala this 6th day of February 2003.

Hon. Justice L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE

Hon. Justice S.G Engwau
JUSTICE OF APPEAL.

Hon. Justice S.G. A. Twinomujuni
JUSTICE OF APPEAL.