THE REPUBILC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

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

HON. LADY JUSTICE C.N.B. KITUMBA, JA.

HON. LADY JUSTICE C.K.BYAMUGISHA, JA.

CRIMINAL APPEAL NO. 08/05

BETWEEN

NTANDA TONDO::::::::::::::::::::::::::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

[*Appeal from the judgment of the High Court of Uganda at Kampala (*C.A.OKELLO J) *dated 25th January 2005 in High Court Criminal Session Case No.152/02*]

REASONS FOR THE JUDGMENT

On 26th March 2007 we allowed the appellant's appeal, quashed the conviction and set aside the sentence of death. We promised to give our reasons later which we now proceed to do. The appellant herein was indicted on an amended indictment containing three counts. The first two counts charged the appellant with robbery contrary to sections ***285 and 286(2)*** of the Penal Code Act.

It was alleged in the particulars of the first count that on 12/o4/01 at Kazinga Zone in the Wakiso District, the appellant and others still at large, robbed Kavuma Joel of a T.V Philips 14 inches black and white in colour, a radio cassette Sony, a blanket, 4 pairs of shoes, a radio lamp, a flat iron. It was alleged that immediately after the said robbery they used a deadly weapon to wit a panga on the said Kavuma Joel.

In the second count, it was alleged that on the same day and place the appellant together with others still at large, they robbed Katende Ibrahim of a mobile phone(motor rola), a trouser, a charger for the mobile phone, a Panasonic radio cassette, a flask, a blanket and cash 30,000/=. It was alleged that at or immediately after the said robbery they used a deadly weapon to wit a panga on the said Katende Ibrahim.

The third count charged the appellant with unlawful wounding contrary to section 222 of the Penal Code Act. It was alleged in the particulars of the indictment that the appellant and others still at large on the 12th April 2001 at Kazinga Zone Wakiso District they unlawfully wounded Masaba Fenekasi.

The case for the prosecution was that during the night of 12th April 2001 a group of people armed with a gun and a panga went on a robbery spree. In the course of the robbery a number of household goods were stolen from different homes.
The appellant was arrested and he was later identified at Bweyogerere police post as one of the robbers who was wearing a green track suit.
The prosecution called a total of six witnesses. The defence called two. The appellant himself and the Assistant Superintendent of Police, Stephen Onenchan Jacan.
At the close of the prosecution's case the trial charge acquitted the appellant on the first count. She put him on his defence on the second and third counts.
In his sworn evidence the appellant denied having participated in the robbery on the day in question. He stated that he was arrested at around 6 a.m around Kazinga Zone on his way to Nakawa Pepsicola plant in search of a job. He was taken to Bweyogerere police post and later to Jinja Road police station. He maintained that he was a victim of mistaken identification because he was in the area where the robbery had taken place when law enforcement personnel were looking for suspected robbers.

The learned trial judge rejected his defence and convicted him of aggravated robbery and sentenced him to death- hence the appeal before this court.

The memorandum of appeal filed on his behalf had 5 grounds namely

1. **The learned trial judge erred in law and in fact when he relied on the uncorroborated evidence of P.W. 2 to convict the appellant in the absence of**

proper identification and hence came to a wrong conclusion that the appellant committed the robbery.

2. **The learned trial judge erred in law and in fact and occasioned a miscarriage of justice when she ignored the glaring contradictions and grave inconsistencies in the prosecution case and convicted the appellant of robbery on very unreliable evidence.**
3. **The learned trial judge erred in law and fact and occasioned a miscarriage of justice to convict the appellant of robbery in the absence of exhibits connecting him with the robbery.**
4. **The learned trial judge erred in law and in fact and occasioned a miscarriage of justice when she failed to properly evaluate the evidence and therefore ignored the defence of alibi raised by the appellant.**
5. **The learned trial judge erred in law and in fact when he unfairly and unreasonably sentenced the appellant to death.**

The appellant sought the following orders from court:-

1. To allow the appeal and set aside the judgment of the High Court.
2. To set aside the death sentence and set the appellant free.

When the appeal came before us, Mr Byamugisha- Kamugisha, learned counsel for the appellant, submitted on the grounds of appeal as they were listed in the memorandum of appeal.

In submitting on the first ground, learned counsel pointed out that the appellant was convicted on the evidence of a single identifying witness Katende, who was also the complainant. He contended that the conditions were not favorable to identify the appellant. The conditions are that it was at night and the appellant and the identifying witness were strangers. He pointed out that the identifying mark was a green track suit which was not tendered in evidence. The other occupants of the house were not called to testify.

He cited to us the case of ***Roria v R. [1967] EA 583*** where the court held that it is legally possible to convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence. The court went on to state that in the circumstances of the case it was unsafe to do so. The conviction was quashed.

Learned counsel further stated that the attackers had a torch and later electric light was switched on yet the complainant did not identify the attire of the other attacker. He submitted that the complainant visited Bweyogerere police post in the company of Fenekasi Mukasa

(P.W.3). They found the appellant under detention. This witness testified that he recognized the person who cut him. He was wearing a black suit and the appellant was wearing the same clothes.

On the arrest of the appellant, counsel submitted that the person who arrested the appellant (P.W.5) stated that he saw a young man wearing a track suit. The witness failed to identify the appellant as the person he arrested.

Learned counsel contended that the evidence of Katende cannot be relied upon because it does not meet the test in ***Roria's*** case. Therefore, counsel said, an identification parade was necessary and there should have been some other evidence connecting the appellant with the crime.

He further pointed out that the trial judge erred in convicting the appellant since the alleged stolen property was handed back to the owners and police records do not show that Katende was one of the people whose property was handed back.

On ground two, counsel submitted that the contradictions in the prosecution's case were grave and should not have been ignored by the trial judge. The complainant who was P.W.2 stated that he gave the robbers 35,000/= and his wife gave 15,000/= and yet the appellant was charged with theft of 30,000/=. The second contradiction according to counsel, was that Katende (p.w.2) identified the appellant as the one who was wearing a truck suit. Yet P.W.3 stated that the appellant was wearing a suit and P.W.5 said that the person he saw wearing a truck suit was not the appellant.

On ground three, learned counsel submitted that there were no exhibits connecting him with Katende's property. He asserted that the first ingredient of the offence was not proved beyond any reasonable doubt. He also claimed that there was no proof that a deadly weapon was used.

The green truck suit which was the identifying mark was not exhibited.

He pointed out that at page 60 of the proceedings, the learned State Attorney told court that the truck suit belonged to Kabugo who was the first accused and the case against him was dropped at the close of the prosecution's case.

In reply, Mr Waninda, learned State Attorney confessed that he has found it difficult to support the conviction. He pointed out that the truck suit was central to the prosecution case and it should have been exhibited. The station diary (exhibit D.2) from Bweyogerere police

post did not mention the offence with which the appellant was charged. He stated that P.W.2 might have been honest but mistaken.

We accept the decision taken by the learned State Attorney not to support the conviction of the appellant as the correct one. The evidence of a single witness who claimed that he identified the appellant wearing a green truck suit was not subjected to proper judicial scrutiny by the learned trial judge. The truck suit was never exhibited and there was no explanation for it. The attack on the complainant took place at night and there were other occupants of the house who were also not called to testify. Again no explanation was given. Although the prosecution has the final say as to what witnesses it can summon to prove its case, we feel that in a case like the instant one where the attack took place at night and the identity of the attackers depended on visual identification by the witnesses, the prosecution in our view, cannot omit to call witnesses who were present. Another flaw in the prosecution case was failure to hold an identification parade to ascertain whether the witness had made correct identification.

It was for these reasons that we allowed the appeal and made the order for the appellant's immediate release from custody unless he was being lawfully held on other lawful charges.

Dated at Kampala this 18th day of April 2007.

G.M.Okello

Justice of Appeal

C.N.B.Kitumba

Justice of Appeal

C. K. Byamugisha

Justice of Appeal