THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE A.S. NSHIMYE, JA

CRIMINAL APPEAL NO.221 OF 2003

1. **MWESIGWA SEMU**
2. **KAAHWA MOSES…….APPELLANTS**

V E R S U S

UGANDA…….RESPONDENT

[Appeal against the judgment of
the High Court at Masindi (Bamwine, J)
dated 21st November, 2003 in Criminal Session Case No.49 of 2003].

JUDGMENT OF THE COURT:

This is an appeal against conviction and sentence whereby the High Court of Uganda sitting at Masindi tried the two appellants and convicted them of Simple Robbery and sentenced them to 12 years imprisonment on three counts of that offence. In addition, he ordered that the victims be paid compensation totalling to Ug.shs.280,000/=. The High Court also

convicted the first appellant of the offence of rape and sentenced him to 12 years imprisonment. The sentences of imprisonment were to run concurrently.

The background to the trial as outlined by the DPP in a summary of the case which accompanied the indictment was as follows:

> **"In the night of 20th at Kiryamwongo village in the Masindi District, a series of robberies were committed by a gang of thugs armed with an AK-47 assault rife. Many valuables were robbed which included mainly cash, some sodas, biscuits, a wrist watch, a radio belonging to different people that is ARIMPA ROBBERT, CHANDIA MARY, MADRA SAM, MAGARET AMVIKO, JADRI Y. YOSIA, IRUMBA FRED, MADIRA GIFT AND MUTONGANI FRED. Some of the victims were injured in the course of the robberies. One woman was raped namely ASABA CHRISTINE. The two accused persons were identified and the matter was reported to police hence their arrest. The others fled on a motorcycle."**

The appellants were originally indicted with eight counts of Robbery C/S 272 and 273(2) of the Penal Code Act (now S. 285 and 286 (2) of the Penal Code. The first appellant was also indicted of Rape C/S 117 and 118 of the Penal Code (now ss.123 and 124 of the Penal Code Act.).

At the trial, the prosecution failed to lead evidence on counts 3, 4, 5, 6 and 7 of the indictment. The appellants wee acquitted of those changes. The prosecution led evidence in respect of counts 1, 2, 8 and 9 of the Indictment. They were convicted and sentenced to 12 years imprisonment as aforesaid. Hence this appeal.

The Memorandum of Appeal contained the following two grounds of appeal:-

1. The learned trial judge erred in law and fact when he convicted the 1st appellant of rape without sufficient proof that the rape was committed.
2. The learned trial judge erred in law and fact when he held that the appellants had been properly identified.

At the hearing of the appeal Ms Matovu Rita represented the appellants on State brief and Mr. Mulindwa Badru, a State Attorney with the Directorate of Public Prosecutions, represented the respondent.

For convenience, we propose to deal with the 2nd ground of appeal first which raises the issue of identification of the appellants at the scene of crime. Ms Rita Matovu strongly argued that throughout the entire series of robberies, there was no sufficient light to enable the victims to identify the appellants. She submitted that torch light and moonlight which were mentioned as being present at the scene of the robbery were not sufficient in the circumstances. She complained that key witnesses gave hearsay evidence on identification and others claimed to have identified the appellants by voice none of which is adequate to put the appellants at the scene of crime. She asked us to re-evaluate the evidence and agree with her that the case against the appellants was not proved against them beyond reasonable doubt as required by law.

Mr. Mulindwa for the respondent supported the conviction of the appellants. He submitted that there was sufficient evidence to support the conviction. First, there was the evidence of a hurricane lamp which enabled PW1 and PW6 to see the two appellants at the scene of crime. They had previously known the appellants and one of them was a classmate of PW6. The appellants themselves had torches which they kept on flashing around. Secondly, the robbery took almost three hours. The witnesses had a lot of opportunity to observe the appellants.

Thirdly, throughout the robbery, the prosecution witnesses were in close proximity with the appellants and given the presence of the other factors already mentioned above, they could not have made a mistaken identification. The learned trial judge considered the evidence of identification along with that of alibi adduced by the appellants. He concluded as follows:-

> **"From the prosecution evidence, this was a group of robbers with a common intention which can be inferred from their joint conduct, their presence together at the scene of crime and their acts generally that night. They were properly identified. The conditions under which they operated favoured correct identification. The evidence of PW1, PW2, PW3 and PW6 considered together excludes any possibility of mistaken identity. Weighing this evidence and the**

accused persons alibis, I do not hesitate to come to the conclusion that the alibis are false. I reject them."

Earlier on, the learned trial judge had considered the evidence which the defence had attacked as contradictory. He observed:-

"I have considered what has been pointed out by the defence as instances of contradiction. Though not pointed out as such was PW5 Dratiru's failure to distinguish A1 and A2 at the trial. Considering the other evidence on record, I did not consider this a major contradiction in the prosecution case. I did not get the impression that PW5 told court any deliberate falsehood. I have also considered the fact that although PW6 Asaba's evidence is that she knew Semu's names from A2, this is not reflected in the first part of her statement to the Police. The addendum to the statement contains Semu's name. This not being a self recorded statement, it could as well be that the recording officer wrote what he considered to be material and not what Asaba herself considered to be material evidence. In fact, about Kaahwa's name not appearing in the statement, her explanation was that she could not have said what Police did not ask her. There is no indication that she was ever asked about the identities of her assailants and she exhibited ignorance of them. Considering the prosecution evidence as a whole, I would equally disregard this omission in the prosecution evidence."

It is the duty of this court, under Rule 30 of the Judicature (Court of Appeal Rules) Direction and under the authority of **Pandya vs R [1957] EA 336** and **Bogere Moses vs Uganda Cr App. No. 1/1997 (SC) (**unreported), being 1st appellate court, to re-appraise all the evidence which was adduced before the trial court and to come to its own conclusion as to whether the decision of the lower court should be supported or not. In doing so, the 1st appellate court must always bear in mind that it did not have the opportunity, which the trial court had, of seeing the witnesses give evidence in court and of assessing their demeanour.

With this in mind, we now examine the evidence of identification which was adduced along with the appellants alibi.

PW1 was Arimpa Sande Robert. He claimed that the robbers started at his shop where they found him with Irumba, Tabu, Richard and Asaba Christine (PW6). He testified that there was a hurricane lamp, small size which helped him to see the 1st appellant whom he had seen before. He said that the first appellant was joined by the 2nd appellant, Kaahwa, and Kiiza who had a gun but was never arrested. He described in detail how the robbers tied them together and went with them from house to house robbing and raping their victims. The operation took about three hours after which the victims, including PW1, were set free.

PW1 recorded a statement at the police station early the next morning. It was exhibited in court as D. Exh.1. In that statement he stated that the two robbers who first appeared were strangers to him and he had never seen them before. However, as time went on during the robbery, he recognised the voices of two robbers whom he knew very well as BYAMANI and KIZZA whose faces he did not have opportunity to see. Both of them were never arrested nor are they indicted in this trial. The question is: if PW1knew the appellants as he claimed in court, why did he fail to mention their names to the police on the first opportunity. Why did it take him two years – up to the time of trial, to state that he had seen and recognised the two appellants whom he had known before? We shall return to the evidence of this witness after examining the other identifying evidence. However, the evidence of this witness is highly tainted by this apparent lapse of memory for two years.

PW2 was Chandia Mary, alias Chandiru Mary. She stated that on the date in question, at about midnight, her home was attacked by many robbers included the two appellants. She claimed that she recognised them because she had seen them before but she did not know their names. She said she saw clearly with the help of torches which they carried and flashed about as they went about the robbery. Under cross-examination, she admitted that she had told police that she recognised a tiny man. She then said in court that she had recognised a short, stout man but she failed to point among the appellants which of them answered that description. She admitted that after the robbery, PW1 told her the names of the robbers but she could not retain or remember them at the trial. For whatever this evidence is worth, this witness cannot be said to have recognised the appellants on the night of the robbery.

PW3 was a lady named Nyanjura Asia Mutongani. This witness claimed that her house was attacked at 2.00 am on the night in question and robbed of a number of shop goods and money. He husband (PW4) was not at home having spent the night at the home of another

wife. She heard a motorcycle outside her shop. The robber stopped and called Fred, the name of her husband. They said they wanted a torch to check on their fuel. PW3 did not move out of her bedroom. The robbers kicked the door open and two of them entered. She recognised the voice of the first appellant, who never entered the house. She had seen him around many times near and at their shop but she never saw him that night. She said she recognised one Kaahwa (2nd appellant) who entered her bedroom and threatened to kill her whereby the 1st appellant pleaded for her from outside that she should not be killed. When the robbers left, she sent for her husband whom she told everything. Under cross-examination, she said she told the police that the robbers were the two appellants. PW4 who is PW3's husband gave hearsay evidence as to what she had experienced. Though his version is similar to that of his wife, it is not of much value. He also contradicted her in several particulars relating to what exactly was stolen from the house.

PW5, Hellen Drateru testified that thieves came to her house between midnight and 1.00 am. She had already gone to bed. The thieves called her by name and kicked her door open. Many of them entered. They demanded for money while beating her. She stated that the two appellants were among the robbers. She said she knew only one of them by the name Kaahwa (2nd appellant). When asked to point him out in court, she pointed at Mwesigwa, (the 1st appellant). She insisted that she knew Kaahwa and that even his father was called Aforo and that she had known him since childhood. When asked in cross-examination to point out in court that person she had known since childhood, she again, said it was the person in a yellow shirt and pointed at Semu Mwesigwa (the 1st appellant). Clearly if she failed to identify the person she said she had known since childhood, she could not possibly identify the 1st appellant whom she had never seen before.

Finally, we deal with the evidence of PW6 Asaba Christine. Contrary to what PW1 told court that she was with him at his shop when the thieves struck, she herself told court that she was already in bed in her room. Many people knocked and kicked the door open. They had torches of various sizes which they flashed around. They took her to PW1's, shop and tied her and started beating her together with other people. Four of them were tied on one rope. The thugs were four. She claimed that during the progress of the robbery, she recognised Kaahwa and Semu (appellants). She claimed that she was Kaahwa's schoolmate and they had grown up together. She recognised him when the robbers paraded their victims outside the shop of PW5. He came to her and told her that Semu (whom she did not know) wanted

her. He then untied and told her to remove her knickers and go to Semu. She refused and Kaahwa beat her up. She decided to go to Semu who was waiting on the other side of the shop. Semu who was armed with a panga demanded for sex and threatened to cut her up. She surrendered and he had sex with her forcefully. She recognised him as Semu because Kaahwa had told her that, that was his name and he was also flashing a torch. She pointed at the 1st appellant as the man who raped her and at the 2nd appellant as the person she knows and grew up with.

The next day after the robbery, PW6 recorded a statement at the police station. In her statement which was exhibited as Exhibit DEX 2, she did not mention any name of any person she had recognised during the robbery. She just described how her room was forced open, how she was pulled out and tied together with other victims and how she was moved around while the attackers carried the robberies. She did not say she had been raped. When she was released she just went home and slept. She signed the statement. Later on, on the time and date not indicated, an additional statement was recorded from her. She was made to just cancel her signature and to continue.

It is clear from the statement that what followed was recorded by a different handwriting by two different officers. PW6 then added to her original statement:-

> **"On addition to the above one of the robbers ordered someone whom I don't know by names to remove my knickers. He removed it and I was ordered to hold it. I stayed there with it and later another robber ordered me to go with him. I refused and he kicked me. He then forced me and I went with him aside. Reaching there, I found somebody there who pulled the knife and said to me that if you don't sleep with,(sic) I am going to cut you. He then touched in the pockets of the jacket and removed a condom. He put it on and later pushed me down. He then had an intercourse with me. After the above, he told me to join the rest. The person who raped me, I know him by face and on inquiry he was found to be Mwesigwa. That is all."**

Looking at this statement, it is clear that the recording officer or officers were forcing her to say what she did not want to volunteer. She was being forced to say she was raped which she did not want to say and she was being forced to say she had recognised the robber and the

rapist, which she refused to accept. The additional statement contains many cancellations, alterations and insertations which make it look like an outright forgery. This is totally unacceptable. Incidentally, PW1's statement was equally tampered with. At the end of his statement, he stated

> **"I know the voices of the two men but I did not see their faces. *[Left a small space]* that's what I can apparently state."**

A different policeman with different handwriting inserted in the small space indicated the following:-

> **"N.B. While at Bayo's place the thugs ordered Jadri with……to play sex on one Margaret which he did. When he finished they cut him for he finished early."**

Here again the police appear to have been forcing PW1 to say he witnessed a rape which he had formerly refused to reveal.

Finally, the learned trial judge, with respect seems to have read a lot from an allegation that the two appellants were found together at a trading centre the morning after the robbery and were arrested. The policeman and the L.C. Chairman who are said to have been present did not give evidence on the matter. The allegation was made in court by PW4 whose evidence mostly consisted of what his wife told him (Hearsay evidence). The evidence of arresting officials was very necessary in the circumstances of this case.

We have endeavoured to deal in detail with all the evidence on record on which the learned trial judge relied to hold that the appellant were sufficiently identified. We are not satisfied that he gave due weight to the inconsistencies and the contractions contained in the testimony of these witnesses. He did not evaluate properly the shocking number of witnesses who told court that they had clearly identified the appellants two years after the event when they failed or neglected to disclose the identity of the attackers on the morning of the robberies and alleged rapes. The arrest of the appellants seems to have been engineered by PW4 on the information of his wife who did not see the person she claimed to have identified. In our view, the learned trial judge did not subject the whole evidence to scrutiny to the extent that he should have. The prosecution evidence left so many gaps unexplained that we think it

would be dangerous for us to support the conviction of robbery. There was a failure to prove the identity of the assailants. We allow the second ground of appeal.

Regarding the ground of rape, we have already dealt with the evidence of PW6, the victim of the rape when considering the evidence of identification. This witness gave evidence that she had grown up with the 2nd appellant and had identified him at the scene. But in the statement she recorded the next morning. She made no mention of him at all. It is not enough for her to say that she was not asked about him. She was supposed to be assisting the police to solve the robbery and the rape she was supposed to be a victim of. It is also noteworthy that the next morning she did not report that she had been raped. She is only forced at an unknown time and date to record an additional statement to say that she was raped.

Even then she did not mention the person who did it. She was, as I indicated above forced to include in their statement that:

> **"The person who raped me, I know him by face and on inquiry he was found to be Mwesigwa."**

This statement could not have voluntarily come from the head of PW6. In evidence in court she contradicted herself to say that she knew she was raped by Mwesigwa because Kaahwa told her that, that was his name. Why then did she not tell the police the next morning that she was raped by a person she was told by Kaahwa to be Mwesigwa? Whose inquiries were these that found that it was a person named Mwesigwa who raped PW6. We think that the prosecution did not establish beyond reasonable doubt that the Mwesigwa Moses now in the dock participated in the events of that night. If he had, the victim PW6 would have reported it at the earliest opportunity.

We also note that there was no attempt to establish by medical evidence that PW1 was a victim of a sexual assault on the night of the robbery. Though she testified that she was medically examined after a few days, we have no explanation why the evidence was suppressed. We can only guess that if it had been produced, it would have been adverse to the prosecution case. The learned trial judge did not consider this aspect of the case at all. He may have believed the testimony of PW6, but as we have shown above, it was not worthy of such credit.

In our view, the evidence of penetration was not proved beyond reasonable doubt.

In the result, we allow this appeal, quash the conviction and set aside the sentences. The appellants should go free unless held on other lawful charges.

Dated at Kampala this 31st day of March 2008.

Hon. Justice L.E.M. Mukasa-Kikonyogo,

DEPUTY CHIEF JUSTICE

Hon. Justice A. Twinomujuni,

JUSTICE OF APPEAL

Hon. Justice A.S. Nshimye

JUSTICE OF APPEAL.