THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORUM: HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

CRIMINAL APPEAL NO.203 OF 2004

1. **ASIKU JAMIL**
2. **OMBA JACOB……APPELLANTS**

V E R S U S

UGANDA…….RESPONDENT

[Appeal from the judgment of
the High Court at Arua (Kania, J)
dated 14/5/2004 in C.S.C. No.10 of 2001]

JUDGMENT OF THE COURT:

This is an appeal against conviction and sentence whereby the High Court at Arua convicted the appellants for Robbery c/s 285 and 286(2) of the Penal Code Act and sentenced them to death. The brief facts of the case are that on the night of 28th April 1999, a number of thugs attacked the homes of Buleni Ronald, PW1, Amoni Medina, PW2 and Asumpta Amina, PW3. They were robbed of money and some other items. During the course of the robbery, PW1 was shot at in the thigh. The matter was reported at the nearby Okollo Police Post in Arua District. The next morning a number of policemen and an L.C. Official followed the footmarks of the attackers which led them to the home of the 2nd appellant. They were told that he had just left home for Arua. The policemen found wet clothes which the wife of the 2nd appellant told them that he had worn the previous night which he had not spent at his home. They also learnt that the appellant had come with visitors who were sleeping in another house but in the same compound. When the policemen tried to check on the so called visitors, they were shot at by the thugs instantly killing one policeman. The thugs run away.

However, one of the policemen (PW6 DC Angunyo Omari Juria) saw the first appellant pick the gun of the dead policeman before he ran from the scene with another thug. Later on, the appellants were arrested and indicted with the offence of robbery with aggravation. At the trial, the appellants denied the charges and pleaded alibi. They were convicted and sentenced to death, hence this appeal.

One memorandum of appeal was filed on behalf of the appellants containing three grounds of appeal as follows:-

1. **The trial judge erred in law and in fact when he held that the appellants were properly identified.**
2. **The trial judge erred in law and fact when he admitted the evidence of an identification parade which was irregularly organised.**
3. **The trial judge erred in law and in fact when he failed to properly evaluate the evidence on record causing a miscarriage of justice.**

At the hearing of the appeal, the appellants were represented by Mr. David Matovu of M/s Semakula, Kiyemba and Matovu Advocates, while Mr. Kulu Idhambi, a Senior State Attorney with the Directorate of Public Prosecutions, represented the respondent. Mr. Matovu argued the three grounds of appeal separately. There is no dispute that on the night of 28th April 1999 at Okollo Trading Centre, a robbery took place to the prejudice of PW1, PW2 and PW3. The robbers used and fired a gun during the robbery and used a panga. What is in dispute here is the identity of the robbers. The three ground of appeal listed above are all about the issue of identification. We propose, therefore, to deal with the three grounds of appeal together.

Mr. Matovu argued a three pronged attack on the evidence of identification. First, he argued, the robbery took place in the middle of the night. All the conditions for correct identification did not exist. The witnesses, PW1, PW2 and PW3 were in panic and could not have identified anyone. In fact PW2 and PW3 did not recognise anyone at the scene of crime. PW1 who claimed to have recognised the first appellant did not name anyone in the statement he made to the police within one week of the robbery. He invited us to hold that the evidence of identification fell below the required standard.

Secondly, he attacked the evidence of the identification parade which was carried out at Arua Police Station on 7th May 1999. He submitted that the parade was irregularly organised and carried out. He contended that it was conducted in contravention of the rules laid down in the case of **Sentale vs Uganda [1968] E.A. 365.** He complained that Rules 1, 3, 5 and 6 in the **Sentale case** were not followed at all. His plea was that the evidence of the identification parade should not have been relied upon, at all, to convict the appellant.

Thirdly, Mr. Matovu submitted, the trial judge failed to evaluate the evidence properly as a result of which a miscarriage of justice occurred. He especially attacked the evidence of tracing the attackers by following footmarks which in his view were not reliable because of three reasons:-

(a) It is impossible, according to him, to follow accurately the footmarks of three people for a distance of four miles.

(b) It had rained quite a lot in the night in question and therefore the rain must have washed away any footprints, if any were made.

(c) The alleged footprints were never examined scientifically to prove that they belonged to the appellants and nobody else.

In a brief reply, Mr. Kulu Idhambi submitted that at the scene of crime, there was sufficient light from the moonlight, candles and torches held by the robbers to enable the witnesses to recognise and identify the appellants. He contended that in respect of the second appellant, he was very well known to the witness PW1, as they were even relatives.

Regarding evaluation of the evidence of footprints, he submitted that the evidence was very cogent and led the investigators to the home of the appellant which was not disputed. In his view, the learned trial judge took trouble to evaluate all evidence of identification and correctly came to the finding that the appellants took part in the robbery.

Regarding the conduct of the identification parade, he submitted that it was carried out in accordance with the rules stipulated in the **Sentale case.**

The appellants did not object to the manner it was conducted and the fact that the volunteers were of quite varying ages and sizes did not materially affect the witnesses ability to identify the appellants.

It is the duty of this court, as a first appellate court, to re-evaluate all the evidence that was adduced before the trial court and to determine for itself whether the findings of the trial court should be supported or not. In doing so, the court must bear in mind that it did not have the opportunity, which the trial court had, to see witnesses give evidence in court and to assess their credibility. We have done this. We must observe that it is not fair to attack the judgment on the grounds that the trial judge did not adequately evaluate the evidence before him. In fact, we find that the trial judge carefully considered and evaluated at length the evidence of identification. Taking all the evidence, including the defence evidence, he came to the conclusion that the two appellants took part in the robbery. First, he accepted the prosecution evidence as truthful and credible. Second, he found that all the evidence against them was circumstantial. Third, he accepted that the condition for correct identification laid down in the famous case of **Nabudere vs Uganda [1997] HCB 77** were present.

Fourth, he accepted the evidence that given that it rained on the night of robbery, it was possible to follow the foot prints of the robbers, as the police did in this case.

The learned trial judge directed, correctly in our view, himself and the assessors as follows:-

> **"It is trite that when visual identification of an accused person is made by a witness in difficult conditions like at night such evidence should not ordinarily be acted on to convict the accused in the absence of corroboration. Corroboration should be looked for. The rational for this is that a witness may be honest and prepared to tell the truth but he might as well be mistaken. This need for corroboration however does not mean, that no conviction can be based on visual identification evidence by sole identifying witness in the absence of corroboration. This court has the power to act on such evidence in the absence of corroboration. But visual identification evidence made under difficult condition can only be acted on and form the basis of a conviction in the absence of corroboration if the judge presiding warns the assessors and advises himself/herself as to the dangers of acting on such evidence as indeed I did during my summing up to the Assessor. If after administering the above warning the presiding judge finds that the identification was positively made without the**

possibility of an error or mistake, he then can convict an accused person on it in the absence of corroboration.

The conditions which are considered favourable for correct and positive identification without the possibility or error have been developed over the years by our courts in the cases of <u>Abdalla Bin Wendo vs R[1953] 20 EACA 166, Roria vs R[1967] EA 583 and Abdalla Nabulerre vs Uganda & others [1979] HCB 77.</u> These conditions are:-

(i) **Whether the accused was known to the witness at the time of the offence.**

(ii) **The conditions of lighting.**

(iii) **The length of time the witness took to identify the accused.**

(iv) **The distance from which the witness identified the accused."**

The learned trial judge then went on to evaluate the evidence adduced against each of the three accused who were before him and found that only two were correctly put at the scene of crime. We agree that when it rains, it is possible to follow the footprints of a suspect to his home or wherever he goes after committing a crime. It is common knowledge that this is a very commonly used method to trace suspects or lost animals. We are not persuaded by Mr. Matovu's argument that, this cannot be done without compromising accuracy where long distances are involved. We agree with the trial judge's conclusion that the evidence on record implicated both appellants in the commission of the robbery. The evidence is fortified by the other evidence on record. We agree with the trial judge that though the witnesses were not known to PW2 and PW3 there was sufficient light and the incident took so long that they could identify the 1st appellant at the identification parade, which they did.

The learned trial judge did not comment on the conduct of the identification parade and how it affected the accuracy of the identification. However, Mr. Matovu did not point out anything that could have fatally affected the validity of the parade. It may not have been perfect but all in all, we find that it was a valid exercise and the identification of the first appellant at the parade was accurate. We are satisfied that the trial judge subjected all the evidence to scrutiny. We agree with his findings that the two appellants took part in the robbery.

Regarding the sentence of death which was imposed on the appellants, we have not found any good reason to justify us to interfere with that sentence.

In the result, we find no merits in the appeal and we dismiss the appeal and uphold the conviction and the sentence.

Dated at Kampala this 2nd day of April 2009.

Hon. Justice A. Twinomujuni
JUSTICE OF APPEAL.

Hon. Justice C.N.B. Kitumba
JUSTICE OF APPEAL.

Hon. Justice C.K. Byamugisha
JUSTICE OF APPEAL.