

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

5 **CORAM: HON. JUSTICE C.N.B KITUMBA, JA.**  
**HON. JUSTICE S.B.K.KAVUMA, JA.**  
**HON. JUSTICE A.S.NSHIMYE, JA.**

**CRIMINAL APPEAL No.30 OF 2002.**

10

**KATUNDA JOHNSON .....APPELLANT**

**VERSUS**

15 **UGANDA .....RESPONDENT**

*[Appeal from the decision of the High Court, held at Bushenyi (Mugamba, J) dated 26/5/2002  
in Criminal Session Case No.169 of 2002].*

20

**JUGEMENT OF THE COURT**

Katunda Johnson, the appellant, was jointly indicted with another co-accused with aggravated robbery, contrary to section 285 and 286 (2) of the Penal Code Act. The co-accused was acquitted but the appellant was convicted as indicted and sentenced to suffer death.

25

The following are the facts of the appeal. On May 31<sup>st</sup> 1999 at Rushega village Bitereko subcountry Bushenyi District Julius Bagumisha PW1 and Night Bagumisha Pw2 who are husband and wife, were sleeping in their house at around 1.00 a.m.

The door to their house was banged and fell inside. Some two assailants entered their house. The  
30 witnesses were able to see and recognize the appellant by aid of the light from the torch that he was flashing. The appellant cut the two witnesses with a panga.

PW1 was cut on the wrist and PW2 was cut on the arm. The witnesses made an alarm which was answered by their neighbours who took them to hospital. The appellant and his co-accused were arrested on the following day and taken to the police. They were jointly indicted for robbery with aggravation. The co-accused was acquitted at the close of the prosecution case as he had no case  
5 to answer.

The appellant in his unsworn statement totally denied the offence. He set up a defence of alibi. The learned trial judge rejected the defence, believed the prosecution case, convicted the appellant and sentenced him to death.

10

He has appealed to this Court on the following grounds: -

- (a) ***That the learned trial judge failed to properly evaluate the evidence and hence came to a wrong decision.***
- (b) ***There was no proper identification of the assailant.***
- 15 (c) ***That there was lack of competent legal proof.***
- (d) ***That the sentence was harsh and excessive.***

He prayed court to allow the appeal quash the conviction and set aside the sentence. In the alternative to vary the sentence.

20 Mr. Stephen Mugoma, learned counsel for the appellant, argued all the grounds together and Mr. Michael Wamasebu, Learned Assistant Director of Public Prosecutions replied in a similar manner. We shall deal with the grounds of appeal as counsel submitted on with them.

Appellants' counsel complained about the evaluation of evidence. He contended that if the learned  
25 trial judge had evaluated the evidence properly, he would not have convicted the appellant. Counsel submitted that PW1's testimony was to the effect that when the door was kicked it fell on the bed. He covered himself with his blanket but was able to see and recognize the appellant. Appellant's counsel submitted that PW1's testimony that he saw and recognized the appellant in such circumstances was unbelievable.

30 Counsel argued further that PW2's testimony that she saw and recognized the appellant as he was flashing the torch into her eyes could not be believed either.

On sentence Mr. Mugoma prayed court that in case the conviction is upheld, maximum leniency should be exercised to the appellant. He submitted that the appellant is a young man in his early twenties. His mother is aged 60 years and his father is 65 years. The appellant had three brothers and one of them died and the other two disappeared. The appellant is the only one who used to cultivate food for his parents. Counsel submitted that the appellant had been in prison since his remand for about 10 years and to him that was enough punishment.

Mr. Wamasebu opposed the appeal against both conviction and sentence. He contended that the conditions were favourable for correct identification. He submitted that the appellant was familiar to the witness, as they were village mates. Both witnesses observed the appellant for sometime and he was not far because the room in which they were was very small. The appellant had a torch and the witnesses were able to see and recognize him. He, therefore, supported the learned trial judges' finding that PW1 and PW2 saw and recognized the appellant as their assailant.

Regarding sentence, the learned Assistant DPP while conceding that the sentence of death was too harsh in the circumstances, submitted that the appellant deserved a custodial sentence which is more than 10 years. He submitted that he subjected the victims to severe blows with a pang. He suggested that a sentence of life imprisonment would be appropriate.

The issue during the trial and in this appeal is whether the two prosecution witnesses properly identified the appellant as their assailant.

The learned trial judge in his judgement held that the appellant was properly identified because there was light from torch. Besides the witnesses knew the appellant before and there was a short distance between them and the appellant.

We are a first appellant court and we have the duty to re appraise the evidence on record. See Rule 30 (I) (a) of The Judicature (Court of Appeal) Rules and **Kifamunte Henry V Uganda**.Cr.App.10 of 1997 .S.C.

In the instant appeal there only two eye witnesses namely Julius Bemugisa, PW1, and his wife Sanyu Night (PW2).

PW1 testified as follows –

5           **On 30<sup>th</sup> May 1999, at around 1.00 a.m. I was at my home with my wife**  
              **sleeping. The door to my house fell in and woke me up. I knew I had**  
              **been attacked as the door was to my bedroom. I raised an alarm and**  
              **covered myself into a blanket, still on my bed. I was able to see A1 with a**  
10           **panga. I looked through the opening in the blanket and recognized AI as**  
              **he was carrying a torch. The torch was directed towards where I slept.**  
              **There was bright light from the torch. AI came directly facing where I**  
              **was. There was a distance of 2<sup>1/2</sup> metres from where I was lying to the**  
              **door. After he cut me, he carried the radio cassette and went out.**

15    In cross examination, he stated –

**When the door fell A1 flashed a torch. I was able to see AI and then**  
              **covered myself into the blanket. Between the flash or the torch and**  
              **covering of myself, it took a short time like a second. I knew AI before. It**  
              **is Katunda I knew.**

20

In her evidence in chief Pw2 stated as follows; -

**A1 on 30<sup>th</sup> May 1999 at 1 a.m came to our home. I saw AI in front of my**  
              **bed. I was with my husband at the time. He had a torch. He had a torch**  
              **which he flashed to where we lay. The torch was flushed at us for about 5**  
25           **minutes. AI was about one metre from where the bed was when he**  
              **flushed the torch. Next thing he did is to cut us. He cut me with a panga.**  
              **I saw him and he was holding the torch. He cut me. He cut me on the**  
              **upper arm. He also cut my husband. He cut my husband on the wrist on**  
              **the right hand. He took the radio cassette.**

30

The learned trial judge listened to the witnesses' testimonies observed their demeanors in court and came to the conclusion that they were honest witnesses.

We are unable to fault him on his conclusion in view of the evidence on record above quoted.

5 On sentence we have listen to the submissions of both counsel.

The appellat severely cut the victims in order to rob them of a mere radio cassette. According to the evidence of Dr. Victor Velenzuela PW.5, PW1 had a deep cut wound which almost cut off the right hand. The two bones of the right one were almost severely severed. Medically it was near amputation.

10

We appreciate that the appellat is a young man but should have used his youthful energy to engage in lawful activities.

15

In our view he deserves no mercy. A long custodial sentence as suggested by the learned Assistant DPP is appropriate.

In the result, we up hold the conviction. We set aside the sentence of death and substitute it with one of life imprisonment.

20

Dated at Kampala this 6<sup>th</sup> day of August 2009.

**C.N.B KITUMBA**

**JUSTICE COURT OF APPEAL**

25

**S.B.K.KAVUMA**

**JUSTICE COURT OF APPEAL**

30

**A.S.NSHIMYE**

**JUSTICE COURT OF APPEAL**

