THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. JUSTICE C.N.B KITUMBA, JA.
HON. JUSTICE A.S NSHIMYE, JA.

CRIMINAL APPEAL No.46 OF 2005

1. YODA ATIKU]

:::::::::::::::::: APPELLANTS

2. BANURA DAVID]

VERSUS

UGANDA :::::::::::::::::: RESPONDENT

[Appeal from the conviction and sentence by the High Court of Uganda sitting at Masindi (L.N. Mukasa J) in Criminal Session Case No. 22 of 2004 dated 21/4/2005)

JUDGEMENT OF THE COURT

This is an appeal against conviction of aggravated robbery contrary to section 285 and 286 (2) of the Penal Code Act and sentence of death.

The following is the prosecution case as was accepted by the learned trial judge. Yoda Atiku, hereinafter to be referred to as the first appellant and Banura David, hereinafter to be referred to as the second appellant and jointly as the appellants were workers of one Kanuramwire Kensi, Pw2. On the 7th November 2001, Pw2 sent the appellants together with his other workers to Kijunjubwa market with five heads of cattle. Pw2 sold the cattle for Shs. 1,500,000/-. He paid off some debts, bought some items and returned home with Shs. 300,000/-.

During the night of that day at around 2.00 am, Pw2's house was attacked by thugs. Pw2 was inside his house with other members of the family sleeping. Among the members of his

family were his wife, a visitor and his children who included his adult daughter, Faiby Kimoori, Pw3, who had come for a visit. Pw2's house was a round hut with three rooms and had no shutters at the entrances. Members of the family were awakened by the barking of the dogs. When they got up they saw thugs who were carrying torches and pangas. They demanded for money and cut Pw2 with a panga. Pw2's wife gave them a coat in which there was money. The thugs left carrying two suitcases which contained household properties and the money.

Pw2 and Pw3 were able to see and did recognize the appellants by the light from the torhes. Pw2 who had been cut on the knee was taken for medical treatment. He spent one week in hospital. According to the medical evidence of Dr. Olwedo Laker Yorac, Pw1, Pw2 had a deep cut wound on the knee and the blood vessels were cut which resulted into massive bleeding. In his opinion the wound had been inflicted by cutting with a sharp object like a panga or a knife. He classified the injury to Pw2 as grievous harm.

In the evening of 8th November, the two appellants and their two co-accused were arrested and taken to Hoima Police Station. They were charged with robbery with aggravation contrary to section 285 and 286 (2) of the Penal Code Act. One of the co-accused died before commencement of the trial.

In their defences, the two appellants and their co-accused totally denied participation in the offence. All of them set up the defence of alibi.

The learned trial judge found that the prosecution had not proved the offence against the appellant's co-accused and acquitted him. However, he believed the prosecution case in respect of the two appellants, convicted them as indicted and sentenced them to death.

Dissatisfied with the decision of the learned trial judge, both appellants filed their joint memorandum of appeal to this court on the following grounds.

1. **That the learned trial judge erred in law and fact in failing to properly evaluate the evidence on record thereby leading to the conviction of the appellants.**
2. **That the learned trial judge erred in law and in fact disregarding the appellant's alibi yet accepted that of the co-accused.**

3. **That the learned trial judge erred in law and fact to hold that the appellants were properly identified at the scene of the crime in conditions unfavorable to correct identification.**

4. **That the trial judge erred in iaw and fact disregarding the major inconsistencies in the prosecution case hence reaching a wrong conclusion.**

5. **That without prejudice to the above the death sentence was harsh and manifestly excessive in the circumstances.**

They prayed court to allow the appeal, quash the conviction and set aside the sentence or in the alternative reduce the sentence.

During the hearing of the appeal both appellants were represented by learned counsel, Mrs. Eva Luswata Kawuma and learned Principal State Attorney, Rose Tumuhaise, appeared for the respondent. Counsel for both parties argued grounds 1,3 and 4 together and grounds 2 and 5 separately, in that order. In this judgment we shall handle the grounds of appeal in the similar manner.

The complaint in grounds 1,3 and 4 is that the learned trial judge did not properly evaluate the evidence. Counsel for the appellant contended that the appellants' participation in the commission of the crime was not proved. She argued that the light in the house was not sufficient for proper identification. She submitted that according to her testimony Pw3 was made by one of the attackers to lie on the floor while facing down. She urged that she was facing the opposite direction and could not have seen what was happening in Pw2's bedroom. Counsel argued further that Pw2 testified that the attackers were about a meter from him. Counsel pointed out that there were grave contradictions in the evidence of Pw2 and Pw3. Pw2 stated that the attack took about 30 minutes whereas Pw3 stated that she observed the attack for one and half hours. According to counsel, the evidence of Pw3 could not corroborate that of Pw2. Additionally, Pw2 was a very forgetful witness and could not remember the period he spent in hospital. Besides he had bad eye sight and could not have, therefore, seen and recognized the appellants. Counsel complained that Pw3 kept on referring to the appellants as John though she claimed that she knew him as a family worker, but the trial judge gave very little attention to it. Counsel criticized the learned judge for relying on the evidence of Pw3 who she found to be an exaggerating witness.

The learned principal state attorney did not agree. She supported the learned trial judge's finding that the appellants were properly identified by Pw2 and Pw3. She argued that the appellants were known to the witnesses before. During the attack they flashed torches and the witnesses were able to see and to recognize the appellants who were well known to them before the incident. The appellants who resided in one of the houses at the home of Pw2 disappeared from there soon after the incident. She submitted that Pw2 soon after the attack revealed to No. 29009 D/c Deo Amanya, Pw4, the investigating officer, who found him at the clinic at around 5.00 am, that it was his workmen who had attacked him and robbed him of his property.

On our part we observe that in his judgment the learned trial judge was alive to the principles by which the court must be guided to ascertain that the evidence of the identifying witnesses is free from error. The judge relied on the **Abdalla Nabulere and Another vs Uganda [1977] HCB 79.**

He found that the appellants were well known to eye witnesses because they were Pw2's workers and lived in the same homestead but in different houses.

According to the judge there was sufficient light from the torches which the assailants were flashing and there was moonlight. The distance between Pw2 and Pw3 and their attackers was not far.

We are of the considered view that there is enough evidence on record to justify the learned try judge's finding. Pw2 testified that when he was in his house together with members of his family asleep, he was awakened by the barking of dogs. Before he could get out of the house three attackers entered. They were carrying torches, pangas and knives. Then he sat on his bed. The attackers cut him while demanding for money and he gave them money. Throughout his testimony Pw2 testified that he saw and recognized both appellants by the aid of the light from their torches which they were flashing.

The evidence of Pw3 is very much similar to that of Pw2. She, too, was awakened from sleep by the barking of the dogs. Pw2 was carrying a torch so as to get out of the house and find out what was happening. Before he could do so three attackers entered the house. They demanded for money and cut Pw2. Pw2 surrendered his coat to his wife in which there was money. In the meantime one of the attackers had pushed Pw3 down. She testified that while lying down she was able to see and recognize the attackers by the aid of their torches and also the light from Pw2's torch, which had fallen down when it was still switched on. The

attackers left with two suitcases and the money. From an opening in the house she was able to see the robbers as they went into the bush.

In our view, the argument that the two witnesses could not have seen and recognized the appellants by the light from torches is not tenable. Pw3 saw the appellants by the aid of the light from the attacker's torch and that of Pw2 which had fallen down, she was lying down. Pw2 was able to see the appellants from the light from the attackers' torches.

According to the evidence on record the appellants were very well known to the eye witnesses because they were workers of Pw2 and lived in the same homestead. Pw2's house was a small one had no doors. It was possible to see what was going on.

Counsel for the appellants criticized the learned trial judge for introducing other source of light in his judgment which had not been testified to by the witnesses in this passage.

> **"The evidence of Pw2 and Pw3 shows that there was sufficient light from the attackers torches, Pw2's torch and the moonlight through the opening in the house. In his submission the defence counsel stated that the two whiteness's testimonies were contradictory as to the source of light. Since Pw2 did not talk of moonlight and light from his torch. In cross examination Pw2 stated;-**
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> > *"They were flushing the torches upwards and on the floor. It was a bit dark. Apart from the torches there was no other source of light as we had already gone to bed".*
>
> **Pw2's statement above shows that his mind, as he answered the question as to the source of light in the house, was focused on the items which had been lit in the house to provide light. He did not address his mind to the natural sources of light like the moon or stars outside. When he says…..……"there was no other sources of light as we had already gone to bed".**

With due respect to counsel, his criticism has no basis. The learned trial judge correctly stated that there were openings in the house which would allow light to go through. We agree with the judge that Pw2 was only concentrating on light from torches that had been lit in the house and did not address his mind on the moon light. The evidence of Pw2 and Pw3 regarding the source of light is not, therefore, contradictory.

We appreciate that both eye witnesses gave different time of the duration of the attack. However, this in our view does not make their evidence unreliable. Firstly, this is not a serious contradiction, which was made by the witnesses with the intention of deceiving the court. Secondary the witnesses are villagers and probably did not have a clear notion of time duration. We agree with the learned judge that Pw2 estimated the time of the attack to be only the time when the robbers were inside the house. On the other hand Pw3 gave the duration of the robbery to include the time when she was watching the attackers as they were going away into the bush.

Appellants counsel complained that Pw2 had bad eyesight and could not properly see the appellants. According to his evidence and that of Pw3, his eyesight became bad after the robbery had already taken place at his house. In the circumstances he was, therefore, able to see and recognize the appellants.

Besides the testimony of the eye witness the judge considered other evidence, which linked the appellant to the commission of the offence. Firstly Pw2 sent the appellants with five heads of cattle which he sold and they, therefore, had knowledge that he had money. Secondary the appellants disappeared from their usual place of residence which was an unfinished house next to the house of Pw2.

We find no merits in grounds 1,3 and 4 which must, therefore, fail.

We now consider ground 2 which is; -

> **'That the learned trial judge erred in law and in fact in disregarding the appellants' alibi yet accepted that of the co-accused'.**

On this ground appellants' counsel contended that the learned trial judge ought, to have acquitted the appellants because their defences of alibi was similar to that of their co-accused whom he acquitted. With due respect, we disagree. In his judgment the learned judge properly considered the law and evidence on the defence of alibi and applied it to the facts of the instant appeal.

He stated that an accused person who puts forward the defence of alibi does not have the burden of proving the alibi. The burden is on the prosecution to prove that the accused was at the scene of crime and not at the place where he claims he was. He relied on the following quotation from the authority of **Bogere Moses & Another vs Uganda SCCA No. 1 of 1997**. Their Lordships stated; -

"To hold that such proof has been achieved, the Court must not base itself on the isolated evaluation of the prosecution evidence alone, but base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denied it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of the acceptance perse the other version is unsustainable".

The learned trial judge considered both the prosecution and defence cases. He did not believe the two appellant's alibi that they had been at the burial of Anyati Atononsio from 4th November to 8th November. He found that both appellants had been identified by the two eye witnesses at the scene of crime whereas their co-accused had not been identified. In the circumstances the judge was right to disbelieve the appellant's alibi and to convict them.

Ground 2 also fails.

On sentence counsel for the appellants submitted that the sentence of death that had been passed against the appellants should be set aside. The appellants have been in prison for over 8 years. Both of them had minor children. The Principal State Attorney left the issue of sentencing to this court.

We have carefully listened to counsel's submission on sentence. We appreciated that the appellants are young men. However, they committed a very serious crime against their employer. One Olwendo Laker Yorok, Pw1 testified that the cut wound through the blood vessel that had been inflicted on Pw1 could have lead to death if there had not been urgent medical intervention. The appellants were trusted by their employer, Pw2, but abused that trust. We find no good reason to reduce the sentence of death which was passed by the trial court.

In the result the appeal against both conviction and sentence is dismissed.

Dated this 18th day of August 2009.

A.E.N. MPAGI BAHIGEINE

JUSTICE OF APPEAL.

C.N.B. KITUMBA

JUSTICE OF APPEAL

A.S. NSHIMYE

JUSTICE OF APPEAL.