THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA
HON. A. TWINOMUJUNI, JA
HON. C.N.B. KITUMBA, JA

CRIMINAL APPEAL NO.52/2002

KAMUKAMA MOSES……..APPELLANT

V E R S U S

UGANDA……...……..RESPONDENT

[Appeal against the decision of
the High Court of Uganda at Mbarara (P.K. Mugamba,J)
dated 19 April 2002 in H.C.C.S Case No.166 of 2000]

JUDGMENT OF THE COURT:

This is an appeal against conviction and sentence whereby the appellant was convicted of the offence of Aggravated Robbery c/s 272 and 273(2) of the Penal Code Act and was sentenced to death.

The brief facts of the case are that on 28th March 1999, thugs broke into the house of James Bitwababo at Rwemirabyo village, Bumbaire Sub County in Bushenyi District. James Bitwababo (PW3) and Anne Bitwababo his wife (PW2) were at home. The thugs tied them up and beat them while demanding for money. PW3 surrendered Ug. Shs.75,000/=. After a sustained attack on the house lasting about 2 hours and because of continued alarm from the complainants, the thugs left. PW4, PW5, PW6 who were running to the house met some of the thugs leaving the house of PW3. They recognised the 1st appellant who had also been recognised by the wife (PW2) of the complainant. Two of the suspects were subsequently arrested and charged as already stated. They denied the offence. They were convicted and sentenced accordingly. Hence this appeal.

Their Memorandum of Appeal filed on 8th June 2009 has the following grounds of appeal-

" 1) That the learned trial judge erred in law in convicting the appellant for aggravated robbery in the absence of evidence to connect him with the offence.

2) That the learned judge erred in law in convicting the appellant on the basis of unreliable evidence of identification.

3) That the learned judge erred in law in rejecting the appellants alibi which ought to have raised a reasonable doubt.

The gist of this appeal is that the trial judge erred to convict the appellant when there was no evidence to connect him with the offence. It is averred for the appellant that the evidence produced by the prosecution was not reliable and did not put the appellant at the scene of crime. The trial judge is criticised for refusing to believe the appellant's alibi which was not contradicted.

In his argument in support of the grounds of appeal, Mr. Edward Mugogo, learned counsel, submitted that the learned trial judge relied on unreliable evidence of PW2 (wife of the complainant). He contended that PW2 did not tell the witnesses who answered the alarm (PW4, PW5) that she had recognised the appellant among the robbers. He argued further that there was no direct evidence linking the appellant with the robbery. He cited the cases of **Abdulla Bin Wendo (1952) 20 EACA 166** and **Roria vs Republic [1967] E.A. 583** to support his submissions. He submitted that in absence of credible evidence putting the appellant at the scene of crime, his alibi should have been accepted.

In reply, Ms Josephine Namatovu, a Senior State Attorney did not agree. She submitted that the appellant who was well known in the village was identified by PW2. In view of the fact that the robbery took over two hours and in view of the availability of torch and moonlight, she could not have been mistaken. Her evidence was corroborated by the evidence of PW5 and PW7 who met the appellant moving away from the scene of crime where an alarm was being raised.

Their evidence was also corroborated by the evidence of PW4 and PW7. The learned trial judge warned himself of the danger of convicting on uncorroborated evidence and found that there was sufficient corroboration in this case. In her view there was sufficient evidence to support a conviction. Her prayer was that we uphold the conviction and the sentence.

We have carefully evaluated all the evidence on record as we are duty bound to do under section 30 of the Court of Appeal Rules. We have borne in mind that we did not have the advantage available to the trial judge to observe the witnesses as they gave evidence. The only issue in this appeal is identification.

The learned trial judge relied on the evidence of PW2, the wife of the complainant and PW4, PW5 and P7, all of whom are neighbours of the victims of this robbery. He saw their demeanour in court and believed them as truthful witnesses. PW2 saw and recognised the appellant whom she had long known as a villagemate. She recognised him with the help of torch light from the torches which the thieves were flashing around during the robbery. She told the neighbours, PW4, PW5 and PW7 who answered the alarm that she had recognised the appellant. This evidence was corroborated by the evidence of PW4, PW5 and PW7 who met the appellant as he moved from the scene of crime while they were going to the scene to answer the alarm.

The trial judge considered all this evidence together with the evidence of the appellant. The appellant testified that on the night of robbery he was sleeping at his home. He never heard of the robbery at the home of the victim. He admitted that he and all prosecution witnesses lived in same village and he was well known to them. After considering this evidence, the trial judge rejected it because he had accepted the evidence of prosecution witnesses whose evidence he believed and found that it put the appellant at the scene of crime. After our re-evaluation of all the evidence, we are satisfied that there was overwhelming evidence on

record to justify the conviction of the appellant for the offence of robbery with aggravation. We agree with the trial judge and uphold the conviction of the appellant for the offence. This appeal is therefore dismissed.

We asked counsel to address us on the appropriateness of the sentence of death against the appellant. Counsel for the appellant asked us to pass a lenient sentence because the appellant is a youngman of 32 years with two children. He suggested that we impose a sentence of 5 years imprisonment instead. Ms Namatovu, learned counsel for the respondent maintained that the offence was committed in aggravating circumstances. She prayed that the sentence of death be upheld.

We have stated that the appellant was rightly convicted of Aggravated Robbery as charged. However, a death sentence on such an offender is no longer mandatory if circumstances exist to justify a lesser sentence. We have taken into account that the commission of the offence took over two hours. The robbers were heavily armed with pangas but looking at the injuries inflicted on their victims, they appear to have acted with restraint. They could have done much more physical harm than they did. This should count in favour of the appellant. We also note that the appellant was aged 25 years at the time he committed the offence. However, the offence he committed is very serious carrying a death sentence. He has already served 7 years while waiting for the court process to end. We consider that in the circumstances, the death sentence against the appellant be set aside and as sentence of life imprisonment be substituted instead. It is so ordered.

Dated at Kampala this 27th day of August 2009.

Hon. Justice S.G. Engwau

JUSTICE OF APPEAL.

Hon. Justice A. Twinomujuni

JUSTICE OF APPEAL.

Hon. Justice C.N.B. Kitumba

JUSTICE OF APPEAL.