THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: ***MPAGI-BAHIGEINE, TWINOMUJUNI&BYAMUGISHA, JJA.***

CRIMINAL APPEAL NO. 107/03

BETWEEN

AZIMA SIMON:: APPELLANT

AND

UGANDA::RESPONDENT

[An appeal from the Conviction and sentence of the High Court of Uganda, Arua High Court Circuit (*Kania J) *dated 17th January2003 in HCCCS No. 32/01]

JUDGMENT OF THE COURT

This is a first appeal from the decision of the High Court sitting at Arua High Court Circuit. The appellant was indicted for aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. It was alleged in the particulars of the indictment that on 17th day of January 2000 at Amadu village, Offaka Division in Arua District the appellant and others still at large robbed Batista Afidra of Shs 498,000/= and or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun on the said Afidra.

The facts material to this appeal are that on the day in question at about 3 a.m the complainant was at home sleeping with his wife, Agidiru Joyce,(PW2). He heard people calling him and asking him to open. He refused to open and instead went to the window where he saw two men in military uniform whom he did not recognize. He called his wife who also saw the assailants and recognized the appellant. The assailants fired two bullets in the house and one of the bullets hit Agidiru on the shoulder. Upon that firing, the complainant went outside to confront the attackers. They ordered him to sit down and demanded Shs 7 million. The assailants then led him to the house where his brother's son was sleeping and ordered him to open the bag which was on the table. He opened it and the assailants took Shs 498,000/=.

The next day the matter was reported to the police and investigations commenced. The appellant was arrested in Arua Town. He made a charge and caution statement before D/ASP Anguma Simon (PW 3) and the statements were tendered in evidence as Exhibit P.1 (Lugbara) and the English translation as exhibit P.2 respectively.

The appellant denied the offence and raised the defence of alibi although he did not state where he was on the day in question. The learned trial judge disbelieved the defence story. He convicted him as charged and sentenced him to death-hence the instant appeal.

The memorandum of appeal filed on his behalf contains three grounds.

1. **The learned trial judge erred in fact and law when he held that the appellant participated in the robbery and thus came to the wrong decision.**
2. **The learned trial judge erred in law and in fact when he admitted the contents of the charge and caution statement before holding a trial within a trial thus prejudicing the innocence of the appellant and as a result came to a wrong conclusion.**
3. **The learned trial judge erred in law and fact when he failed to adequately evaluate the evidence as a whole and a result came to a wrong conclusion.**

Mr Muguluma represented the appellant on state brief while Mr Vicent Okwanga, Senor Principal State Attorney represented the respondent. Mr Muguluma in his combined grounds one and two together. The gist of these grounds is that the identification of the appellant at the scene of crime by PW2 was not correct because the time was too short. The second complaint is that the trial judge took into account the charge and caution statement which was never put to the appellant. He further submitted that the trial judge allowed the statement to be read out in court without ascertaining whether the appellant actually made the statement. He claimed that without the statement there is no sufficient evidence to convict. He prayed for the acquittal of the appellant.

Mr Okwanga did not agree. He supported the conviction and sentence. He stated that there was overwhelming evidence to support the conviction. On the admission of the charge and caution statement, the learned Senior Principal State Attorney pointed out that the appellant was ably represented at the trial and he did not repudiate the statement. The witness who tendered it was not cross-examined by counsel. He supported the trial judge for admitting the statement. The learned Senior State Attorney argued that even if the statement is excluded the prosecution’s case would still be strong. He pointed out that PW2 identified the appellant at

the scene of crime and there was bright moonlight. Therefore conditions for favourable identification were present. He invited court to dismiss the appeal.

The main thrust of the evidence adduced against the appellant was from PW2 who stated that on the day in question she stood at the window and saw the appellant who was known to her as a neighbor. The conditions that were prevailing at the time were a bright moonlight. The Supreme Court in the case of **Bogere Moses &another v Uganda Criminal Appeal No.1/97** gave guidelines on the approach to be taken when dealing with the evidence of visual identification by eye witnesses. The court said:

"The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and warn itself of the possibility of mistaken identity. The court then should proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing, the court must consider the evidence as a whole, namely the evidence of any factors favouring correct identification together with those rendering it difficult."

This being the first appeal, it is our duty to re-evaluate the evidence and determine for ourselves whether the conclusions reached by the trial court should be allowed to stand.

The attack took place at night when visibility is normally difficult even when there is bright moonlight and the identifying witness must have been frightened. These factors militate against correct identification. The appellant was known to the witness and this factor could have aided correct identification. In the case of **Yowasi Serunkuma v Uganda SCCA No.8/89** the Supreme Court stated that the evidence of a single identifying witness at night may be accepted, but only after the most careful scrutiny, and after looking for 'other' evidence to confirm that the identification is not mistaken. Although the identifying witness stated that she observed the appellant for a long time without stating the time she spent observing him, we do not think that she had a long time to observe the appellant as she claimed. PW 1 who was with the witness stated that he went to the window and observed two men in military uniform and his wife also came to the window and saw them. Then he continued.

"*At that time I could not identify the assailants as both of them were in uniform. But one of them was taller than the other. I reported to my wife and she also saw the assailants. The assailants continued calling us. The baby started crying. One of the assailants kicked the*

door but it did not open and two minutes later I heard gun fire directed where the child was crying".

105 The above sequence of events does not seem to provide a 'long time' as PW2 testified.

The learned judge in dealing with the evidence of PW2 said

"From the evidence of PW3 Ajidru (sic) Joyce the accused was known to her as a resident
110 ***of the same area where she resided. Her evidence was that she was able to identify the accused because there was bright moonlight. She identified the accused from the position she took at the window and the accused was near the said window and she took a long time in observing the accused who was wearing a striped scalp cap. Because the witness had known the accused before the commission of this offence, she identified the accused by***
115 ***bright moonlight, the accused was standing by the window from which the witness observed the accused for a long time I find the conditions under which the accused was identified were favourable to correct identification free of error or mistake and that the accused was correctly identified as having been one of the assailants who attacked the home of and robbed the complainant PW2 Afidra Batista Shs. 498,000/=".***

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The conditions under which the witness observed the appellant were not that conducive to rule out the possibility of mistaken identity as the learned judge found. What was needed was some 'other evidence' to confirm in some material particular that the witness was not mistaken. The judge looked for corroborative evidence and found it in the charge and caution
125 statement which was tendered in evidence without any objection from the defence.

The Evidence Act has specific provisions that govern the admissibility of confessions. The relevant provisions for matters now before us are sections 23 and 24. Section 23 (1) partly reads:

"No confession made by a person whilst he is in the custody of a police officer shall be
130 ***proved against such person unless it is made in the immediate presence of***

(a) a police officer of or above the rank of Assistant Inspector, or

(b) a magistrate.

Section 24 reads:

135 ***" A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused and all the***

circumstances, to have been caused by any violence, force threat inducement or promise calculated in the opinion of the court to cause an untrue confession to be made."

We have no doubt in our minds that what the appellant told Anguma Samson (PW3) in his statement was a confession. We shall now deal with the manner in which it was admitted in evidence. The Supreme Court has now settled the law in a wealth of its decisions. In the case of **Chandia v Uganda SCCA No.23/01** at page 9 of the judgment the court said:

" Firstly we would reiterate what we have stated in our recent decisions that because of the doctrine of the presumption of innocence enshrined in Article 28(3) of the Constitution, where, in a criminal trial, an accused person has pleaded not guilty, the trial court must be cautious before admitting in evidence a confession statement allegedly made by an accused person prior to his trial. We say this because we think that an unchallenged admission of such statement is bound to be prejudicial to the accused and to put the plea of not guilty in question. It is not safe or proper to admit a confession statement in evidence on the ground that counsel for the accused person has not challenged, or has conceded to its admissibility. Unless the trial court ascertains from the accused person that he or she admits having made the confession statement voluntarily, the court ought to hold a trial within a trial to determine its admissibility; see **Kawoya Joseph v Uganda Criminal Appeal No.50/1999(Supreme Court (unreported), Edward Mawanda v Uganda Criminal Appeal No.4 of 1999** ***and*** **Kwoba v Uganda Criminal Appeal No.2 of 2000(Supreme Court) (unreported)."**

The record of proceedings at page 13 where the statement was read aloud in court by PW3 indicate to us that the learned trial judge did not address his mind to the provisions of section 24(supra) and the decided cases on the subject. It was his duty to inquire from the appellant whether the statement which the prosecution claimed he made before PW3 was indeed his. Mr Oyarmoi who represented the appellant did not raise any objection when the prosecution applied to tender the statement in evidence and the implication the statement might have on the appellant's plea of not guilty. He put only one question to PW3 during cross-examination and it was not related to the recording of the statement.

We are of the considered opinion that failure by the trial judge to inquire from the appellant whether the statement attributed to him by the prosecution was voluntarily made or not occasioned a miscarriage of justice. The evidence adduced by the prosecution was

insufficient to prove the participation of the appellant in the commission of the offence beyond reasonable doubt.

In the result we allow the appeal. The conviction of the appellant would be quashed and the sentence set aside. We order for his immediate release from custody unless he has other lawful charges against him.

Dated at Kampala this 13th day of April 2010.

A.E.N.Mpagi-Bahigeine

Justice of Appeal

A.Twinomujuni

Justice of Appeal

C.K.Byamugisha

Justice of Appeal