THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT MBARARA

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

HON. JUSTICE A. S. NSHIMYE, JA

HON. JUSTICE M. S. ARACH AMOKO, JA

CRIMINAL APPEAL NO. 19 OF 2005

[Appeal from the Judgment of the High Court at Fort Portal (L. N. Mukasa, J.) dated 11/02/2005) in Criminal Session case No. 50 of 2002]

ALIGANYIRA RICHARD:::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA:: RESPONDENT

Criminal law and procedure – aggravated robbery – defence of alibi -evidence- circumstances favouring correct identification- evidence- contradictions in evidence- effects thereof- standard of proof in criminal matters-whether use of the expression 'probably' lowers the standard of proof - duty of the first appellate court- sentence -whether death sentence too harsh

The appellant was convicted of aggravated robbery and sentenced to death. He appealed against both conviction and sentence.

Held : (1)As a Court of Appeal of first instance, we are enjoined by Rule 30 of the Rules of this Court to re-appraise and evaluate all the evidence that was adduced before the trial court and subject it to a fresh scrutiny, make our own findings and draw our own conclusions in order to determine whether the findings of the trial court can be supported.

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Uganda sitting at Fort Portal in which the appellant was convicted of aggravated robbery and sentenced to death on the 11/02/2005.

The case for the prosecution was that on the 10th of August, 2001, at Katoosa Trading Centre, Kirongo Parish, Kyenjojo District, the victim, one Angella Nsungwa (PW1) was sleeping in her shop. She was attacked by armed assailants who entered the shop after breaking the window and the door. They found her in her bedroom making an alarm, ordered her to stop making the alarm or else she would be killed. They tied and assaulted her while demanding for money. She gave them Shs. 80,000, but they insisted on more. They dragged her out of the bedroom to the front of the shop while assaulting her. She gave them Shs. 130,000 more which was in the drawer in the shop. They also took many shop items which were later valued at Shs. 100,000. The victim's alarm attracted neighbours who came to her rescue, but the assailants ran away upon hearing the neighbours coming.

The victim was able to identify the two accused persons as being among the persons who had attacked and robbed her. The neighbours immediately followed and chased the appellants and managed to recover some of the shop items wrapped in a jacket which they identified to be that of Aliganyira (A1) now the appellant; a knife and a crate of soda were also recovered.

The matter was reported to Police and the two suspects were arrested and charged with the offence of aggravated robbery. They denied the offence. The appellant, in his sworn statement, raised the defence of alibi that he was at home with his grandmother on the night of the attack.

The learned trial Judge acquitted A2 but accepted the prosecution case, convicted the appellant and sentenced him to death as stated, hence this appeal.

The memorandum of appeal contained the following two grounds:

1. **The Honourable trial Judge erred at law in returning a finding that the Appellant was properly identified at the scene of crime based on the confused and conflicting testimonies of two principal witnesses (PW1 and PW2) in a clear case of erroneous and mistaken identity and occasioned a miscarriage of justice.**
2. **The Honourable trial Judge decided the case on a Balance of Probabilities as in civil cases and often times fell back on mere speculation and conjectures to buttress a failed prosecution case and occasioned a total failure of justice.**

Mr Sam Dhabangi represented the appellant on State brief while Mr. Fred Kakooza, a Principal State Attorney appeared for the respondent.

Regarding the first ground of appeal, the complaint is that the learned trial Judge relied on the confusing and conflicting testimonies of two principal witnesses PW1 and PW2 to make a finding that the appellant was properly identified at the scene of crime, yet this was a clear case of erroneous and mistaken identity. This occasioned a miscarriage of justice.

Mr. Dhabangi submitted that the only contested ingredient was the participation of the appellant. The appellant raised the defence of alibi, therefore the State had a duty to place the appellant at the scene of the crime. In his view, the state failed in this duty. The state adduced the evidence of the two principal witnesses, PW1 and PW2 who not only testified that the robbery took place at 2:00 a.m. in the dark of the night but that the robbery was allegedly committed by many people.

They also testified that the only source of light was from a torch. However, the testimonies of PW1 and PW2 were too contradictory to be accepted as true. PW1 told court that A2 (Magezi), was the attacker who entered the house through the window and she recognised him from the light from big torch which he was flashing.

PW1 further stated that Magezi opened the front door for his colleagues and this is when she recognised the appellant as he entered through the door because by then, Magezi was flashing the torch light. She reiterated this in her cross-examination. PW2 on the other hand came with a totally contradictory testimony.

During cross-examination, PW2 stated that of the two accused persons, it was A1 (the Appellant), whom she saw entering through the window, not Magezi. PW2 further stated that anybody who would say it was Magezi (A2) who had entered through the window would not be correct, yet PW1 and PW2 said they knew the appellant very well and that the appellant was in fact their immediate neighbour. They also claimed to identify the appellant by the attacker’s source of light. Mr. Dhabangi questioned how both witnesses could be so wrong and confuse the appellant with Magezi. According to him the only explanation is that the attacker who entered through the window and not through the door could not have been the appellant. In his view this kind of confusion can only lead to two compelling conclusions:

i. That the conditions favouring a correct identification were extremely difficult leading to the two witnesses to make erroneous assumptions about the identity of the appellant.

ii. That both PW1 and PW2 could have been honest witnesses, but immensely mistaken about the appellant.

That the trial Judge therefore made an erroneous finding in his judgment to the effect that the contradictions were not about identification of the appellant, but about the mode of his entry into the house (the scene of crime).

Mr. Dhabangi concluded his submissions on this ground by inviting the Court to evaluate the evidence and to find that the appellant was not properly identified at the scene of the crime.

On the second ground, Mr. Dhabangi submitted that it was clear from the judgment that the learned Judge, having made erroneous findings based on the glaring contradictions, found himself in a dilemma and reduced the standard of proof to that of the balance of probabilities and thereby occasioned a miscarriage of justice. He proceeded to illustrate his point that heavy doubts lingered in the trial Judge's mind by quoting parts of the judgment where the trial judge used expressions such as

"probably", "I have doubts", "...must have been....".

He invited this court to evaluate the evidence, restore the standard of proof beyond reasonable doubt, resolve the issue of identification in favour of the appellant, quash the conviction and set aside the sentence.

Mr. Kakooza opposed the appeal and supported the conviction. On the first ground, he agreed that the case was decided on the basis of the testimony of the two identifying witnesses, and referred to the judgment where the trial judge dealt with the question of identification. The learned trial Judge not only stated the law relating to the evidence of identifying witnesses, but also cited the relevant cases before evaluating the evidence of PW1 and PW2 with painstaking care. He contended that though the learned trial Judge noted the contradiction between the testimonies of the two witnesses, he however rightly believed that the contradiction was caused by the lapse of time between the time the offence was committed and when the witness testified in court.

Regarding the second ground, Mr. Kakooza was of the view that the use of the expressions referred to by trial Judge could have been a slip of the pen. Even then, he submitted, the sentences in issue should be read in the context of the whole judgment, not in isolation.

He prayed that the appeal be dismissed and the conviction and sentence be upheld.

> **As a Court of Appeal of first instance, we are enjoined by Rule 30 of the Rules of this Court to re-appraise and evaluate all the evidence that was adduced before the trial court and subject it to a fresh scrutiny, make our own findings and draw our own conclusions in order to determine whether the findings of the trial court can be supported.**

In so doing, we should bear in mind the fact that we did not have the opportunity that the trial court had of hearing and seeing the demeanour of the witnesses. See also **Selle Vs Associated Motors Boart Company, [1968] E.A 123.**

In the instant case, we have anxiously considered all the evidence that was adduced before the trial judge, his judgment as well as the submissions of both learned counsel. We agree with Mr Dhabangi that the record shows that the defence did not contest the first three ingredients of the offence of aggravated robbery, but only contested the participation of the accused. The record also shows that both accused persons raised the defence of alibi. Nevertheless, the trial judge was under a duty and he went ahead to evaluate all the evidence and made a finding on each of the essential ingredients of the offence.

Regarding participation by the accused persons, it is true that the case for the prosecution depended largely on the visual identification of the appellant by the principal witnesses, namely; PW1 and PW2.The record shows that the learned trial judge correctly appreciated that this was a case of identification by recognition and directed himself and the assessors accordingly. As stated by Mr Kakooza, we find that the trial judge evaluated their evidence painstakingly, correctly stated the law on the subject of identification and relied on the relevant cases before coming to the conclusion that the prosecution had proved that the appellant was the attacker who had entered Pw1's house through the window on the night of the attack.

In his judgment the trial judge applied the guidelines to be considered while dealing with the evidence of identification which were set out by the Supreme Court in the case of **Bogere Moses and another Vs Uganda, Criminal Appeal No. 1 of 1997.** The Court said:

"This Court has in very many decided cases given guidelines on the approach to be taken in dealing with the evidence of identification of eye witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The court should then 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."

In that case, their Lordships went on to discuss at length, various leading authorities on identification including, **Roria vs Republic [1967] E.A 584** and **Abdalla Nabulere and another Vs Uganda, [1979] HCB 77** where the following factors to be considered were set down:

i. Whether there was light.
ii. Whether the witness knew the accused before or he was a complete stranger.
iii. Whether the witness had sufficient time to look at the accused or only had a fleeting glance.
iv. The distance between the witness and the accused at the time of recognition.
v. Any other distinctive features which might have helped in the recognition of the accused by the witness.

We have also evaluated the evidence in respect of the conditions which were prevailing at the time of the attack using the above guidelines in order to determine whether the two witnesses were able to identify the appellant properly, and we make the following findings and conclusions:

First, both witnesses testified that the attack took place at around 2:00 a.m. at night. That both of them were able to see the attackers by the light from a torch flashed by one of the attackers who had entered through the window. That although they were many, only two of the attackers managed to enter the house. One of them was the appellant.

Secondly, the witnesses were emphatic that they knew the appellant before the attack. He was their village mate and neighbour. He was therefore not a stranger to them.

Thirdly, the evidence of both witnesses shows that the attack on PW1's house took some time. PW1 testified that the attackers struck at 2:00 a.m. Others started breaking the front door padlock, while the others were banging the backside window. One of them eventually entered through that window and opened the front door from inside and let in another one whom she recognised as the appellant. After searching for money in vain from the bedroom, they dragged her to the sitting room and forced her to lie down. They continued to demand for money and pulled the drawer in the shop counter and got some money. PW2 estimated that the attack lasted from 2:00 a.m. to 4:00 a.m. that night. It is thus safe to conclude from this evidence that the witnesses had sufficient time to recognise the attackers.

Fourthly, the two witnesses testified that the attack took place in the house of PW1. She was lying on her bed before the attackers dragged her from bed and executed their mission. PW2 was among the children who were lying on the floor next to the bed of their mother, PW1. There was no distance between them to make identification difficult. During the attack, the attackers were demanding for money, so it became quite easy for the victims to recognise them by voice as well for as pointed out above they knew them as village mates.

In the circumstances, we agree with the learned **PSA** that the learned trial Judge cannot be faulted for finding that the conditions for proper identification were met by the prosecution.

It is also clear from the summing up to the assessors and the judgment that the learned trial Judge was alive to the contradictions in the testimony of PW1 and PW2 regarding the attacker who entered through the window and the one who entered through the door.

According to PW1, it was Magezi (A2) who entered through the window and eventually opened the door to allow in Aliganyira (A1) the appellant. The testimony of PW2 is the opposite.

Rightly, the learned Judge, after evaluating the evidence in its entirety took into account the above contradiction and came to the conclusion that it was the appellant who had entered through the window. He attributed the confusion to lapse of time.

We agree with the findings by the learned trial Judge and add that in our view, it is immaterial how the appellant entered the house of PW1 that night. What is important is that the

appellant was properly identified by both witnesses as one of the attackers who participated in the attack on the house of PW1 that night. That was done, since the conditions favoured proper identification and the possibility of a mistaken identity was in our view minimum. We therefore find that the trial judge carefully evaluated the evidence and came to the correct conclusion that the appellant was clearly identified at the scene of crime at the time when the crime was committed.

Ground 1 therefore fails for the above given reasons.

Regarding the second ground, we find that counsel for the appellant selected the expressions referred to deliberately in order to fault the learned trial Judge for reducing the standard of proof. With due respect, the criticism is not borne out by the context of the said judgment which must, in our view, be read as a whole, and not in parts. It follows therefore that while we find the use of expressions such as **'probably',** inappropriate in a criminal matter, we do not agree with counsel for the appellant that the trial Judge lowered the standard of proof as alleged.

This ground also fails for lack of merit.

Lastly, it is the duty of this Court to ensure that the sentence meted to the appellant was appropriate. After carefully scrutinising all the evidence on record and considering the circumstances of this case, we think that the death penalty imposed on the appellant though legal, was harsh. The death sentence is therefore set aside. In its place, we substitute a prison sentence of 15 years from the date he was sentenced. In so doing, we have borne in mind the period he spent on remand.

Dated at Mbarara this ...**15th** ....day of .**December**...2010

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HON. JUSTICE A.E.N. MPAGI-BAHIGEINE

JUSTICE OF APPEAL

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HON. JUSTICE A. S. NSHIMYE

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