

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Kasule, Buteera & Egonda-Ntende, JJA]

Criminal Appeal No.228 of 2012

BETWEEN

Frank Kabanda=====Appellant

AND

Uganda=====Respondent

(An appeal from the Judgment of High Court of Uganda [Margaret C Oumo Oguli, J., sitting at Masaka and delivered on the 4 December 2012])

JUDGMENT OF THE COURT

Introduction

1. On the 23 October 2010 some persons attacked the home of Kagimba Ngabo Yowana at Kasisa Kibanda in Kalisizo District. They stole 11 heads of cattle from the kraal near the home of the said Kagimba. The wife of Kagimba, Grace Katengwa, testified that she recognised the appellant who she knew previously as he lived on their village and had only recently come back to Kasisa about 2 weeks prior to the robbery. The assailants were armed with a gun.
2. The only evidence against the appellant is the testimony of Grace Katengwa who claims to have identified the appellant at the time of the robbery. 6 cows were recovered from Tanzania and returned to the owner.

3. The appellant denied the offence and gave unsworn testimony in his defence. He called no witness. The learned trial judge convicted the appellant and the other co accused of the offence of aggravated robbery contrary to Sections 285 and 286 of the Penal Code Act. They were sentenced to a term of imprisonment of 40 years.
4. The appellant appealed against conviction and sentence setting forth 3 grounds of appeal that we reproduce below.

'1. The learned Trial Judge erred in law and fact when she held that the appellant had been correctly identified.

2. The learned Trial Judge erred in law and fact when he relied on insufficient and incredible evidence to convict the appellant.

3. And in the alternative and without prejudice to the foregoing the trial Judge erred in law when he sentenced the appellant to 40 years in custody when it was harsh and excessive in the circumstances.'

Duty of a First Appellate Court

5. It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account, of course, that the appellate court did not have the opportunity to hear and see the witnesses testify. See Rule 30(1) of the Court of Appeal Rules and Pandya vs R [1957] EA 336; Ruwala vs. Re [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC). We shall do so accordingly.

Submissions of Counsel

6. Ms Esther Nakamate, learned counsel for the appellant, argued grounds no.1 and no.2 together. She submitted that the learned trial Judge convicted the appellant basing on

the evidence of a single identifying witness in circumstances that were not favourable for correct identification. The time available for identification was rather limited. It was at night and dark. The only light available was a candle light. The witness had not identified the appellant in the statement she made to the police shortly after the incident. She referred this court to the decision of this court in Kagenyi Stephen v Uganda Court of Appeal Criminal Appeal No.228 of 2012 [unreported] in which the co accused with the appellant was acquitted by this court for similar reasons.

7. Ms Gladys Nyanzi, learned counsel for the respondent, opposed the appeal. She supported the conviction and sentence. She submitted that the evidence of PW1 indicated that the conditions for identification were quite favourable as the witness knew the appellant. The witness heard the voice of the appellant as he is the one who ordered the witnesses to lie down. There was a 'tadoba' light burning at the time of the incident. PW1 described the clothes that the assailants were wearing. The trial court rightly convicted him as charged.
8. With regard to sentence Ms Nyanzi submitted that in light of the fact that the maximum punishment is death the sentence in question which was a period of imprisonment was neither harsh nor excessive in the circumstances of this case. This court should not interfere with the same.

Re-Appraisal of the Evidence on Record

9. The key evidence linking the appellant with the offence in question is the testimony of PW1. It is fairly short and can be reproduced *in extenso*.

'On 23 October 2010, I was inside when they hit the door, they entered the house and the one with the blue jacket pointed a gun at me. There was candle light, as we were still sitting, I tried to get up but before I could, the thugs had already entered, so they told us to lie down. I was with my husband. There were 3 persons who attacked me in my house. Then only one person remained in the house and he had a gun. When inside the house we heard the cows being

removed from the kraal. The cows were near the house. The cows were mine together with my husband. The one that was armed waited till we didn't hear the movement of the cows, then he left. It took about half an hour. I took time to go out because the assailants had warned us not to get out. I identified the accused. The one with the gun had a blue jacket. A2 was wearing a shirt and a trouser, the shirt had stripes. After taking my cows I saw them after they had been arrested. There was an identification parade where I identified them among 12 persons. Kabanda was known to me before the robbery. A2 I saw at the time of the theft. Kabanda used to stay in Tanzania but he came to visit his father. Kabanda had stayed there like 2 weeks before the theft. After the identification I showed them to the police. I reported to the police, I called Musazi Benon he came and found his Uncle, they followed up the cows till they found them. Musazi is my son. Katambala is the one who reported the matter to the police, he is my elder son.'

10. In cross examination she stated in part,

'I remember the events of that day very well. I made a statement to the Police. I told the police I saw three people, and I told them Kabanda was among them. I told police how Kabanda was dressed. Kabanda had a gun. I didn't know how to read and write. I thumb printed after making my statement. The police read back to me then I thumb printed after making my statement. The police read back to me then I thumb printed the document. They stole

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COWS.
..... The assailants ordered us to lie down and not make an alarm. We did not make the alarm.

There was a tadoba. I saw the assailants and heard the cows going. I just heard. I didn't look there. I saw all the 12 at once and I picked 2 accused persons. I first saw the accused persons in my house, and then I saw them in Masaka, then I saw them for the second time in Kalisizo and then I saw them in Masaka- the identification was in Masaka.'

11. In re examination she stated,

'I made the second statement in Masaka. The identification parade was in Masaka. It was my first time to come to Masaka. I saw the two accused when they entered my house. I saw them 3 times, when they were stealing my cows, second at Kalisizo, third in Masaka.'

12. PW1 knew Kabanda prior to the incident in question. When the thugs burst into the room they ordered them to lie down which she did. Though PW1 of course must have got an opportunity to observe them as they came in, it was apparently for a short time before being told to lie down. Though there was a 'tadoba' light on in the room which provided some light it is not clear how bright this light was. The witness was ordered to lie down and it is not clear if she continued to observe the lone assailant remaining in the room at this time. It is not even clear if it is Kabanda or the second or third appellant who remained in the room.

13. The dressing of A2 and one other assailant is described but that of the third is not. It is not clear on the testimony before the court as which assailant remained in the room. From the record of the trial court A2 was Kabanda Frank, the appellant now before this court. The witness mentions Kabanda by name and then as for A2 it is stated that the witness saw him for the first time at the theft. This would suggest that the Kabanda, the appellant now, was possibly not A2. This is somewhat confusing.

14. The defence at the trial introduced into evidence the statement to the Police of PW1 that was made on 31 July 2010, only a week after the commission of the crime in question. This statement reads in part,

‘That it was on 23 July 2010 at around 1900 hours when I put eleven heads of cattle into the kraal. Then I went to house. At around 2200 hours after our supper when we were preparing to sleep about four people dressed in Jackets invaded us in the house. One was armed with a gun(SMG). He pointed it at me. He started cocking it. I was with my husband Kagimba Ngabo Yowana. We all kept quiet. Then we heard our cows being taken. The one who had a gun remain guarding us until those with our cows went away. He also followed them. I managed to see four people because they all entered our house and there was light in the house and I can identify one who pointed a gun at me. He was putting on a jacket blue in colour and white cape. Later that person followed them. After their departure I rang my son Busaza Benon who was in Kampala and informed him to how they stole our cows.’

15. It is clear that according to this statement PW1 could only identify one person out of the four assailants. Nevertheless she was not able to state his name. Since he knew Kabanda it is odd or rather strange that he did not mention Kabanda’s name who she knew prior to this incident. Secondly since she could only identify one assailant who had remained in the house it would have been important that in her testimony she explained who this person was. However, to the contrary, her testimony is clearly inconsistent with her initial statement to the police. PW1 in her testimony now talks of three assailants instead of four. She claims she is able to recognise the 2 before the court instead of only one she stated in her initial statement.

16. These inconsistencies are not explained by the prosecution. In our view these are not minor inconsistencies that can be ignored as they go to the root of identification of the

assailants. It is probable that it is not until the three persons were arrested in Mutukula that this witness came to believe that they were now three assailants and not four.

17. The evidence of PW1 on the identification of the appellant is not credible in light of inconsistencies between her initial statement to the police and her testimony before the trial court. At the same time her testimony falls short of demonstrating that the alleged identification of the appellant is free from error.

18. The Court of Appeal of Uganda [later renamed the Supreme Court] stated in George William Kalyesubula v Uganda Criminal Appeal No. 16 of 1977 [unreported] that:

'The law with regard to identification has been stated on numerous occasions. The courts have been guided by Abdalla Bin Wendo & Another Vs R (1953) 20 EACA 166 and Roria Vs Republic [1967] EA 583 to the effect that although a fact can be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification is free from error.'

19. This same point was further addressed in similar terms in Abdala Nabulerere & Another Vs Uganda Criminal Appeal No. 9 of 1978 [unreported] and Bogere Moses & Another Vs Uganda Supreme Court Criminal Appeal No. 1 of 1997 [unreported].

20. In light of our re evaluation of the testimony of PW1, and the paucity of any other evidence pointing to the appellant as the perpetrator of the crime in question, we find that there is merit in Grounds No.1 and No.2 of the appeal. The learned trial Judge acted in error to base her conviction on the testimony of a single identifying witness, PW1, that was neither credible nor safe to found a conviction. In light of this finding, it is unnecessary to consider ground no.3 which was in the alternative.

Decision

21. This appeal is allowed. The conviction and sentence of the trial court is set aside. The appellant is released forthwith unless held on some other lawful charge.

Signed, dated and delivered at Kampala this 7th day of September 2015

Remmy Kasule

Justice of Appeal

Richard Buteera

Justice of Appeal

Fredrick Egonda-Ntende

Justice of Appeal