THE SUPREME COURT OF UGANDA

AT MENGO

CRIMINAL APPEAL NO. 1/86

(CORAM WAMBUZI, C.J, MANYINDO, D.C.J, & PLANT J.S.C)

BETWEEN

HILTER OJASI :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

AND

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

(Appeal from the judgement of the High Court of Uganda Holden at Jinja (Oder J) dated 13 January 1986).

JUDGEMENT OF THE COURT:

The appellant Hilter Ojasi was sentenced to death having been found guilty, of aggravated robbery (contrary to section 272 and *273* (2) of the Penal Code Act). There were two counts of aggravated robbery, and as we read the judgement it seems that the death sentence was imposed on each count. The two counts formed one series events in different house in one compound.

On the night of 14th February, 1932, the homes of one James Onyinyi (p.w.5) was attacked by a large number of robbers armed with various weapons. The homestead consisted of grass thatch house of his sons Gabriel Macho (pw 2) and John Opio (p.w.3). There were also some granaries and a goats hut in the compound. Gabriel Macho and John Opio had visited the house of one Nyongesa to pat their condolences, but returned at about 11p.m. The whole family settled down to sleep. They were awakened by gunshots, and the voice of people attacking them. People were dragged outside their houses various items of clothing and household goods were stolen, and the women raped. The matter was reported the next day. By the time the case was heard Janet Auma had died, and the Prosecution relied on the evidence of Joyce Natocho and the two sons Gabriel and John Opio.

The first ground of appeal challenged the conviction of robbery on each count, because it was said that the learned Judge had not made findings of fact which would constitute the offences charged. There was no finding of theft, or the appellant had taken part in the theft. In his judgement, the learned Judge had said,

"It is common ground and there is no doubt that on the night of 14th February 1986, the homestead and the members of the family of James Onyinyi (p.w.5) were attacked by a large number of robbers armed with various weapons, and robbed of a number of personal household goods."

That passage illustrates that the learned Judge accepted that, there had been a theft which was part of a robbery. Force had been used to effect this crime. The aggravated nature of the robbery was illustrated by the use of a gun, which was a deadly weapon, for the purposes of this case. There were therefore findings which give rise to a conviction or convictions for aggravated robbery.

We were somewhat surprised by this attack by learned defence Counsel, because later on, the learned Judge commenced his reasoning with the comment: -

"The only issue in this case is the identity of the robbers. Was the accused one of them? Three of the robbery victims have given accounts of their respective experience of the incident an each said he/she recognised the accused as one of the robbers."

Defence counsel gave us the impression that the identity of the appellant was not the only issue, and indeed there was the other issue whether the appellant was one of the robbers in the sense of acting with common intent with the others. The learned Judge had however acted on the submission of Mr. Kintu, Counsel for the defence, at the trial. He is a deferent person from Counsel who appeared before this Court. Mr. Kintu submitted:—

I concede there's evidence that there was a robbery on night 13/14 February 1986 whoever was involved made off with property from Onyinyi's home. Also seems there was a gun used. It's my humble submission that the prosecution has failed to prove who was involved in that robbery— particularly whether accused was one of them.'

It is plain that the learned Judge correctly set out the issues for trial. It may be observed that in Uganda concessions may be made by the defence, (under section 64 of the Trial on Indictual Decree No 26 8197.) a procedure which is not permitted in other jurisdictions. In the latter cases where the prosecution must prove every element of the charge, a submission which amounts to a concession can be challenged later on appeal. But where a concession may be made, and the prosecution is thereby relieved of proving that fact or facts, that cannot easily be reviewed on appeal unless there are exceptional circumstances of mistake or fraud (inter alia) when perhaps a re-trial may have to be ordered. In the present case the defence is bound by the concession unless there are exceptional circumstances. It is not sufficient to indicate that Mr. Kintu chose the wrong course. There were no exceptional circumstances and therefore the concessions stand.

In any event, there was ample evidence to support the concessions. However the issue on the appeal may properly cover the question whether the appellant was accurately identified and whether he had taken part in the robbery. That is what the learned judge noted. It is important to set out at the beginning that the first Assessor thought that the appellant ought to be acquitted, and the second Assessor thought that he should be convicted of a lesser offence and not aggravated robbery. What lesser offence was in his mind is not clear, since he opined that there was not enough evidence to convict the appellant of robbery. The appellant pointed out this situation in his Memorandum of Appeal.

The learned Judge was criticised or not examining the evidence as a whole, and in not seeing that the inconsistencies destroyed the evidence of the main eye—witnesses. He was thus wrong to find that the appellant had been identified at the scene of the crime. He was wrong not to have weight to the appellant's alibi.

It must be conceded that the learned Judge approached the issue of identification impeccably. He decided to follow the principles set out in RORIA VS. REP. (1967) E.A. 583, although in the case before him there were two distinctions. This was a case where three witnesses accused the appellant of being present at the scene of the crime (and not one witness as in RORIA), and these three witnesses were very familiar with the appellant and so recognised him. However the learned Judge still decided to test the evidence with the greatest care warning himself that honest witnesses may yet be mistaken.

The learned Judge set about his task by setting out some three factors which favoured identification. There were that the three witnesses knew the appellant very well for most of their lives; they had good reason to observe the appellant as he assaulted Gabriel Macho with the butt of his gun; (and indeed Gabriel had a scar in that area;) and Joyce Natocho had been raped by the appellant; and lastly, there was full moonlight outside their houses, which would have afforded these witnesses the opportunity of recognising the appellant, during the incidents which occurred outside. Joyce was taken to another house, and Gabriel and John Opio were ordered to lie down near the granary.

On this part of the case there are two points against the witnesses. They had claimed that there had been a tadoba lamp burning in the house of Joyce and one in the house of Gabriel.

There were then said to the unfavourble factors. The attack occurred at night; the witnesses were taken by surprise they were frightened and feared for their lives and there occurred a flurry of activities. The witnesses were being taken out of their house and two

were assaulted i.e. Joyce raped and Gabriel hit with a butt. They would not therefore be in a calm frame of mind to recognise the appellant.

There was another reason why their evidence was suspect and that was because there was a grudge due to past coffee smuggling as alleged by the appellant.

The recognition could only have been by moonlight near the granary by the two young men Gabriel and John Opio and by Joyce Natocho between her house and that of her co—wife. Yet at each place there was time and the incentive to find out who the assailant was. The appellant was not a distant overlord but a participant in aggression against these witnesses. There was evidence, therefore, which in principle the learned Judge could accept, that the appellant was recognised. The appeal also came with the astonishing news that he had been sent to assassinate the husband and the father of these witnesses but that the witnesses could buy him off it they paid him money. They did not have the sum. Demanded, property was stolen. Perhaps that property was taken in lieu of payment? It seems reasonable inference.

Against this analysis, the learned Judge had to discount the recognition by tadoba lamps and the late explanation of the granary. The first seems to have been an exaggeration. The second seems to have been an addition. There is no very easy explanation of either. The learned Judge did not hesitate to criticise these faults. Nevertheless he preferred the prosecution case to that of the defence. It is suggested that because the appellant was well—know to the witnesses they may have guessed at his identity or decided to accuse him because of the trouble over the coffee smuggling. In fact he was elsewhere.

Reviewing all these aspects of the case for ourselves, find that the learned Judge sometimes overstated the situation in favour of the defence this especially to with regard to the addition of the granary incident. It is a common experience that on occasion Police statements do not contain all that happened to a witness. It is of course a matter for careful consideration if an important episode is left out, which then covers a lapse in another episode. Here the moonlight outside the place of the lamps inside. Nevertheless, the learned Judge summed up the situation correctly that the police statements were brief and did not cover every aspect of the events that occurred, if he believed the story of what happened at the granary, he was entitled to do so. Much depended on how the witnesses impressed the learned Judge. He thought that they were substantially truthful, apart from the tadoba lamps. Having, in mind the nature of the attack that appears to us have been a reliable conclusion. Here was an attempt at assassination, which turned into a robbery as the main victim was absent. The whole compound was being disturbed. Money was being sought in compensation. It would be

in keeping with the situation if the two young sons of the victim, Gabriel and John Opio would be questioned and threatened. That is what they say happened. The learned Judge believed them in preference to the defence of alibi and there is no reason why he should not have done so.

Once the granary episode is accepted, then the recognition of the appellant is assured. It is supported by the evidence of Joyce.

The learned Judge was anxious at the lack of exhibits produced which had been stolen; and indeed this: worried the assessors. But there are of course many examples of theft where no goods have been recovered. His advice on the straightforward production of evidence was salutary; but the lack of such evidence did net unsettle the verdict this case.

Though the appeal was well—argued, it has not convinced us that the conviction was unsound. We affirm the conviction and uphold the sentence. Consequently the appeal is dismissed.

DILIVERED at Mengo this 31st day of January 1990.

S.W.W. WAMBUZI
CHIEF JUSTICE

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

H.G PLATT
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS A TRUE
COPY OF THE ORIGINAL

B.F.B. BABIGUMIRA
REGISTRA SUPREME COURT.