IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, J.S.C., ODER, J.S.C. TSEKOOKO, J.S.C.) CRIMINAL APPEAL NO.20 OF 1995

BETWEEN

STEPHEN MUGUME========== APPELLANT

AND

UGANDA========== RESPONDENT

(Appeal from the judgment of the High Court of Uganda (J.B.A. Katutsi, J.) dated 3rd July 1995)

IN

HIGH COURT CRIMINAL SSESSION CASE NO. 94/93)

JUDGMENT OF THE COURT:

In the High Court the appellant and another person were jointly charged with the offence of simple robbery contrary to Sections 272 and 273(l)(b) of the Penal Code Act. His co-accused was acquitted but the appellant was convicted and sentenced to imprisonment for 5 years and in addition he was ordered to receive five strokes of the case. He had appealed against conviction only.

The particulars of the offence laid against the appellant state that Stephen Mugume and Fred Mutumba on the 21st day of July, 1992 at Bunga Trading Center in the Kampala District robbed Semakula Charles of Motor Vehicle Reg. No. UPM 443 Toyota Carina valued at about 7,000,000/= and at or immediately after the time of the said robbery, threatened to use actual violence on the said Semakula Charles.

In facts adduced by prosecution witnesses were these.

On the material day at 8.10a.m. Charles Semakula (PW1) accompanied by his wife, gave a lift to a friend of his as he (PW1) drove his children to school in his car. He dropped the friend at Bunga Township (a suburb of Kampala). He then saw a crowd of people ahead. He

drove the car at a slow speed to get a view of the situation. Two people, who looked like members of a local Defence Unit (LDU), approached him. One of them was tall, slender and armed with a gun. The other was short. The short one asked PW1 for help. As PW1 wondered what help it was, the armed man pointed his gun at PW1 and ordered him and the family to surrender the car. PW1 obeyed and he, his wife and the children, as they wept, abandoned the car with children's school requirements inside. The shorter man drove the vehicle away with the tall- armed man sitting beside him. Some members of the public watched this drama. Edward Serwanga (PW8) was among the members of the public who witnessed this robbery. In his evidence PW8 supported PW1 about the occurrence of the robbery. According to PW8 's evidence the appellant wore a hat. It appears PW1 did not note the hat. PW1 reported the robbery to D/I.P. Obuk Julius (PW9) of Kabalagala Police Post. After the preliminaries PW9 handed the robbery case to M. Balimoyo (PW14), the C.I.D. Officer in charge of Kampala Region.

On the same day at 9.00a.m. Nalubwama Kasifa (PW3) saw the same car being driven past her near Nakandi's home (in Seguku village) along Kampala Entebbe road. The same vehicle returned 5 minutes later and stopped about 40 metres away. A light skinned tall slender man wearing a brown hat, a stripped brown shirt and carrying a small brown bag got out of the vehicle and walked away. At 7.00p.m. PW3 learnt that in fact that car had been robbed. She reported her morning experience to PW2 (Jane Mary Nalunkuma) the LC.1 chairman. PW3 was virtually supported by PW4, (Francis N. Muyomba) about the events, which occurred at 9.00a.m.

On 22/7/1992 Police Scene of Crime squad led by D/A.I.P Mugungu (PW12) unsuccessfully attempted to get fingerprints from the car at Seguku village. On 4th September 1992 on the instructions of PW 14, the appellant was arrested by
PW7 (A.I.P. Odongkara) while in Kampala.

No witnesses could identify the appellant during the identification parades held twice at Central Police Station, Kampala on 5/9/1992 and 24/9/92. But on 27/9/92, PW8 identified the appellant and his co-accused at a parade held at the same Central Police Station. The learned trial Judge discounted this evidence because of procedural irregularities in the conduct of the

identification parade. We shall revert to this letter.

Presumably on the strength of that identification parade the appellant was on 28/9/1993 charged in Court and remanded in Luzira prison from where he and his co-accused were identified by PW3 an PW4 on 30/10/1992 during the last identification parade.

PW1 did not participate at any identification parade because he could not identify the two people who robbed the car from him on 21/7/1992.

In his sworn testimony the appellant raised an alibi to the effect that he was not at the scene of the crime because on the material day (21/7/1992) he was away in Fort Portal, having gone there on 19/7/1992 to see his sick mother, Faith Mukindi (DW1).

The learned trial Judge believed the prosecution evidence in part as regards the appellant and rejected his alibi. Consequently, he convicted the appellant. Hence this appeal which contains three grounds of appeal.

At the start of the hearing this appeal Mr. Micheal Wamasebu, the learned Principal State Attorney, intimated to Court that he did not seek to support the conviction. His principal reason was that the identification parade had been irregularly conducted and this rendered the exercise of no evidential value arid that without the evidence of identification there was no evidence to support the conviction.

We, however, decided to hear arguments in support of the appeal.

The first ground of appeal complains that the learned trial Judge erred both in law and in fact in failing to properly evaluate the evidence as a whole and in particular PW8's evidence which occasioned a miscarriage of justice.
We understood this ground to be a general criticism of the evaluation by the Judge of all the evidence in the case. However, Mr. Nsubuga-Mubiru, learned Counsel for the appellant,

based his criticism on two findings by the Judge which findings in our view were proper in the context. The learned judge made these findings in the following words in the course of his scrutiny of evidence of PW8.

> ***"In my judgment, it is safe to hold that PW8 Serwanga was at the material time at the scene of the robbery'***

And that

> ***"I would hold that the quality of identification was good"***

The learned Judge first summarised the evidence of the prosecution and of the defence. He then subjected the evidence of PW8 to scrutiny including a reference to Exh. D2 a Police statement by PW8 which was introduced in evidence by defence before the learned Judge made the findings quoted above.

There is no dispute whatsoever that PW8 was at the scene. There is no evidence to support any suggestion that PW8 was unable U see participants in the robbery. Therefore, the findings by the Judge in this regard cannot be faulted. That is far from saying that the people PW8 saw robbing the car were the appellant and his co-accused. Ground one fails.

The second ground which is substantial complains that the learned judge erred in law and fact when he chose to disregard the law and practice and thereby failed to. consider the serious irregularities at the identification parades at all or in favour of the appellant.

Mr. Mubiru-Nsubuga criticised the conduct of the identification parades at which PW3, PW4 and PW8 purported to identify the appellant and his co-accused. Counsel contended that in as much as PW1, PW3, PW4 and PW8 did not give particular descriptions of the robbers whom the saw during the robbery at Bunga and in the case of PW3 later at Seguku from where a man seen by PW3 disappeared after abandoning the car, there could be no meaningful

identification parade. He submitted that since some other witnesses who were at Bunga during the robbery and at Seguku could not have identified the appellant during identification parades, PW3, PW4, and PW8 could not identify the appellant. The last argument is too simplistic. Different people have different capacities of perception of events. As regards the descriptions, we think that PW3 and PW8 gave some descriptions of the person or persons whom each witness claimed to have seen. Learned Counsel would have been on sounder ground if he had argued that the descriptions given by these witnesses were not so peculiar to the appellant or so detailed as to make him easily identifiable.

The criticism, which we think is valid is that these key witnesses, i.e. PW3, PW4 and PW8 were not invited at the earliest opportunity to participate in the identification exercise. Thus PW8 appeared only on Sunday 27/9/1992. But the learned Judge rejected his evidence of that identification parade because the Judge's view the exercise was done on a Sunday. Although we think PW8's evidence on identification is objectionable we cannot agree that no identification parade can be held on a Sunday as the learned trial Judge observed. The police are supposed to be on duty 24 hours, every day of the week. Moreover, the prosecution explained that the parade had to be held on 27/9/1992 because PW8, a driver, was due to go to Nairobi.

This aspect of the explanation looks plausible. But as we have said there was not sound explanation given by the prosecution as to why PW8 was not available much earlier than 27/9/1992. Overall therefore, the criticism of the act of holding the identification against protestations by the appellant was justified and the Judge acted wisely in rejecting that portion of the evidence though for reasons different from what we have stated.

The learned Judge rejected the evidence of PW4 and therefore we need no labour on the submission critical of his evidence.

In convicting the appellant the learned Judge relied on the evidence of PW3 and of that PW8. This is clear from the following passage:

"As I have said earlier in this judgment I accept that PW8 Serwanga was at the scene of robbery. There he saw two men robbing a vehicle the subject of the charge. Of the men he was one was tall and brownish. He was putting on a hat, and wearing a stripped shirt. A few hours later Kasifa PW3 saw a man getting out of the robbed vehicle. He was a slender tall and a bit brown man. He was dressed in a brown stripped shirt. lie had a hat on his head. Both these witnesses identified A1 in Court as the man they were referring to. There is no doubt left in my mind that the man PW8 saw at Bunga robbing a vehicle is the very man Kasifa PW3 saw at Seguku getting out of the robbed vehicle. Is it by coincidence that the height and facial color of the accused fit in the description given by the two witnesses"?

With respect we think that the learned Judge misdirected himself on evidence. In her examination in chief PW3 described the man who abandoned the vehicle in the following words:

"I then saw a man getting out of the vehicle. He was walking towards me. He walked about 10 meters from me and then crossed the road and continued facing Entebbe side. That is when I last saw him. He was a slender tall man. He was a bit brown. He was dressed in a brown- stripped shirt with a brown hat on his head He was carrying a brown bag".

Later in cross-examination she stated: -

"The man was putting on a hat. The whole face was exposed. I saw the man getting out of the vehicle. He had his hat on as he moved out of the vehicle. He had his hat on as he drove past me."

Clearly this evidence is just general and far from giving the height and facial colour of the person PW3 saw in a manner that precisely answers the height and facial colour of the appellant. Many other men could answer to such description. Moreover, the man who drove

the car from the scene of robbery was short and not tall. The tall man seen at the by PWI and PW8 had no brown bag. He only had a gun. Further PW 3 who was a stranger to the tall man never saw his face closer than 10 meters away with a hat on.
In evidence in chief PW8 testified as follows in the relevant parts:

> ***"After about 15 minutes or after five to 10 minutes lapse I saw two men coming while running. One was short and the other tall. The tall man was holding a gun."***

During cross-examination PW8 stated that:

> ***"When the two men first appeared they were running, but not very fact- almost trotting - running slowly. I first saw them clearly when they were about 40 metres away from me... I had not seen them before."***

The evidence is extremely general in description and does not give proper or approximate height and facial features of the appellant. Indeed, the description given by PW3 and PW8 is not on all fours.

The learned Judge correctly observed that identification parades are held as a means of corroborating the identification claim made by a witness. But we think with respect that the learned Judge fell into error in this case when he asserted that:

> ***"Where there is overwhelming evidence that the accused was properly identified at the scene, it would be an affront to justice to acquit him. The duty of the Court is to protect the community against wrong elements in society and not to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice"***

We do not think the evidence was overwhelming by any standards.

It is, we think, common sense that a witness would normally not be required to identify a suspect at a parade if the witness knows the suspect whom he/she saw commit an offence. Identification parades are, as a practice, held in cases where the suspect is a stranger to the witness or possibly where the witness does not know the name of the suspect. In such a case the identification parade is held, as correctly stated by the learned Judge, to enable the identifying witness confirm that the person he has identified at the parade is the same person he had seen commit an offence. Once the Judge disregarded the evidence of the parade of 27/9/1992 there could be no basis for his conclusion that the stranger whom PW8 saw at Bunga on 21/7/1992 for 4 minutes is the same person Al whom PW8 saw in Court during trial. On the facts and considering that the trial was held nearly 2 years later, that conclusion cannot be supported.

Further, in his controverted statement to police PW8 claimed that the tall man wore a cap. Although during the trial PW8 appears to have been made to draw a diagram of what he called cap, we think that in fact the person whom PW8 saw wore a cap as PW8 stated in his statement but not a hat as stated in evidence. PW8's statement (exhibit D2) was recorded by an Inspector of police who must know what a cap is. Alterations of dates on the same PW8's statement from 26/9/1992 to 26/7/1992 raised serious doubts about the motive behind the alteration of dates particularly so since the date below the signature of the police Inspector who recorded the statement is 26/9/1992 and not 26/7/1992. In short evidence of PW8 is unreliable.

As regards PW3 her evidence could only be accepted if the identification parade had conformed to established practice. It is clear from the evidence of PW4 and DW2 that the establishment practice as correctly set out *in* case of ***R. vs. Mwango s/o Manaa*** (1936) 3 E.A.C.A 29 and affirmed in ***Ssentale v. Uganda*** (1988) E.A. 365 was not followed. In the present case it is glaringly clear that in parade held on 30/10/1992 when PW3 purported to pick the appellant, the appellant was the only one prominently taller than other participants and it appears his skin appearance was equally conspicuous.

For these reasons, we cannot say that the identification parade was conducted with due scrupule and fairness, and we think that the learned Principal Attorney acted properly in not

supporting the conviction.

We accordingly uphold ground two of the appeal.

In view of our holding on ground two which disposes of this appeal we find no need to consider ground three. In the result we allow the appeal, quash the conviction and set aside the sentence and order. The appellant is set free.

Delivered at Mengo this 29th day of November 1995.

B.J. ODOKI
JUSTICE OF THE SUPREME COURT

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT