REPUBLIC OF UGANDA

IN TILE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODER, J.S.C. AND TSEKOOKO, J.S.C.)

CRIMINAL APPEAL NO. 6 OF 1995

BETWEEN

OWINO RENALD ==========APPELLANT

AND

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

(Appeal from the judgment of the Court of Uganda at

Tororo (E.S. LUGAYIZI) dated 3/3/95

IN CRIMINAL SESSION CASE NO. 381 OF 1994)

REASONS FOR THE JUDGMENT OF THE COURT:

The appellant Owino Renald, was convicted of the murder of Erasmus Okoth Owere C/S 183 of Penal Code. He was also found guilty of Robbery C/SS.272 and 273 (2) of the Penal Code. He was sentenced to death in respect of the conviction for murder but the learned trial judge reserved conviction in respect of the offence of capital robbery. Hence this appeal.

We dismissed the appeal and reserved our reasons, which we now give.

The appellant is a clan relative of the deceased (Erasmus Okoth Owere) and his father Vicent Ogewa Gawa (PW1). They all lived on the same village (Lwala) in Mulanda subcounty, Tororo District. For some time prior to the murder and robbery, there was general lawlessness in the sub-county due to rebel activities; Rebel activities appeared to have intensified after "Priestess Lakwena" had passed through the area in September 1987. The appellant and some other people joined the rebels and appear to have been roaming about in the area. Rebels suspected PWI to have reported them to an NRA detach. On 2/12/1987 the appellant dressed in army uniform and some other rebels went to the home of the deceased and PW1 and inquired of the whereabouts of the deceased and PWI. Both PW1 and the deceased where not at home but Mary Clare Awori (PW2) the wife of the deceased was present.

On the night of 4/12/1987 the appellant in the company of other rebels while armed with guns and panga invaded the home of the deceased, seized him, tied him up and forced him to lead them to the home of PW1. They made the deceased to cause PW1 to open his shop cum residence.

The group tied up PW I with a rope and joined him to the deceased. While (PW2) and the wife of PW1 were made to sit in the compound, the group robbed household and shop goods. The deceased and PWI were thereafter led to PW1 cattle kraal - 20 metres away (at gun point) where the group robbed 50 cattle though 8 of them eventually escaped and returned home. PW1 and the deceased were then led with the cattle to a swamp where the two were separated from each other before the deceased was cut to death with pangas by the appellant and one of the appellant's confederates. The appellant fired a gun twice in the air before releasing PW1. The appellant warned PWI never to divulge what had happened or else he would be killed. Inspite of the warning PW1 reported the murder and robbery to the army that night and to the police the following day. The appellant disappeared from the village after the commission of the offences.

In his sworn evidence, the appellant denied the offences and raised an alibi to the effect that at the material time he was on Sagiti Island, in Lake Victoria, Iganga District. The appellant claimed that he had been abducted by Lakwena forces from his Lwala village on 27/10/1987. He was then forced to join a 300 force of Lakwena fighters who fought battles against NRA up to Iganga District where NRA defeated Lakwena forces before the appellant found his way to Sagiti Island.

On the Island he earned some money by smoking fish for a Luo fisherman and eventually went to Kisumu in Kenya by boat across Lake Victoria. From Kisumu he proceeded to Nairobi and thence to Thika Refugee Camp where he stayed till his return to Uganda two and a half weeks before his arrest in connection with this case on 25/9/93.

The learned trial judge and the one remaining assessor disbelieved the appellant. In the result the appellant was found guilty of the two offences.

Ms. Harriet Musoke learned counsel for the appellant abandoned the second of the two grounds of appeal. The remaining ground states that -

> ***"His Lordship the judge erred in law and fact when he held that the appellant had been properly identified at the scene of crime whereas circumstances of identification were not favourable."***

Ms. Musoke submitted that as the robbers were many and were armed, PW1 and PW2 could not identify any of them. Mr. Ogwal-Olwa, the Principal State Attorney who appeared for the State, submitted that the circumstances were conducive to proper and unmistaken identification of the appellant.

The facts of this case are clear. PWI and PW2 lived on the same village as the appellant whom they had known for a long time. The robbers entered the deceased's house after PW2 lit a tadoba. The tadoba remained alight all the time the appellant and his group ransacked the house after tying up the deceased. They flashed their torches everywhere. The robbers took a whole one-hour at the home of PW2 before they led her and the deceased for a distance of 30 metres to the home of PW1. At the home of PW1, the appellant moved around freely. PW1 was very close to the appellant. Robbers flashed torches, which enabled PW1 to see the appellant easily.

Further the appellant spoke to PWI several times in Japadhola, their own language PW1 was familiar with appellant's voice. After the robbery at the homes of PW1 and PW2 the appellant and PW1 walked with the deceased and other robbers for about 2 kms before the deceased was killed. At the place where the murder took place, PW1 was barely 11/2 metres away from the appellant. All these matters are unchallenged. In normal circumstances it could be said that the appellant was too daring to risk identification. But this was rebel activities. The day

was theirs. We are satisfied that in all these circumstances there could not be any doubt about the identification of the appellant by either PW1 or PW2 or both. We are satisfied that there was overwhelming evidence against the appellant to warrant the conclusions, which the learned judge and the assessor reached. There is however one aspect of the judgment which we must say something about.

When concluding his judgment, the learned trial judge expressed himself in the following words -

> ***"I would therefore find the accused guilty of the offences in counts 1 and 2; and accordingly convict him*** *in* ***respect of count 1. ('I reserve conviction in respect of count 2)."***

The learned judge thus properly concluded the judgment in respect of count one but not so in respect of the second county. In terms of sections 81 and *85* of the Trial on Indictments Decree, 197 1(TIP) trial Judge must conclude the judgment by convicting an accused where that accused has been found guilty on any charge otherwise the judgment remains incomplete. In normal circumstances we would have had to return the case to the trial Judge for him to enter a formal conviction on the second count before determining the appeal. See ***Katelega v. Uganda*** (unreported Criminal Appeal 1/94). However, in the special circumstances of this case where the Judge had properly convicted the appellant on the first count, we would apply the provisions of section 40(2) of the **Judicature Act,** 1967 together with S.137 of TID, to enter a conviction on the second count as we are satisfied that this will not occasion any unjustice to the appellant.

For these reasons we dismissed the appeal.

Dated at Mengo t his 13th day of September 1995

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

A.H.O ODER
JUSTICE OF THE SUPREME COURT

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

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE
REGISTRAR, THE SUPREME COURT.