THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO.

(CORAN: ODER, J. S.C., TSEKOOKO, J. S.C, KAROKORA, J. S.C. MULENGA, J.S.C., KIKONYOGO, J.S.C.)

CRIMINAL APPEAL NO. 2 OF 1998

BETWEEN

JOHN KATURAMU ……..……APPELLANT

AND

UGANDA……..RESPONDENT.

(Appeal from judgment of the Court of Appeal* (Kato, *J.A, Okello, J.A., Mpagi-Bahigeine J.A.), at Kampala in Criminal Appeal No. 23/97 dated 29th April, 1998)

JUDGMENT OF THE COURT.

This is a second appeal. It is from a judgment of the Court of Appeal confirming a conviction and sentence of death passed by the High Court sitting at Fort Portal. The Appellant, John Katuramu was tried on an indictment for aggravated robbery contrary to ss.272 and 273 of the Penal Code. On 28/1/94 he was convicted as charged and sentenced to death. Hi appeal to the Court of Appeal was dismissed on 29/4/98. He then appealed to this Court.

The facts of the case as proved at the trial are briefly as follows. In the night of 21/10/90, a group of people attacked the home of Yovan Kyalimpa of Nyantungo village, Mwenge County in Kabalore District. It would appear that in the course of that intrusion, Kyalimpa's goats which were kept in the kitchen were let out. They made noise outside. Kyalimpa decided to investigate the cause of the commotion. He lit a todoba and a lantern. He left the tadoba burning inside the bedroom, and went out carrying the lantern. His wife, Violet, followed him. Outside they were soon accosted by the intruders who told them that they were under arrest and ordered them to lie down. Before they did *as* they were ordered Kyalimpa was hit on the head from behind and he fell down. He sustained a cut wound on the head. His wife lay beside him. Two of the intruders dashed into the house where they stole diverse household goods while the others guarded their victims outside.

Meanwhile, inside the house, Kyalimpa's 15 year old son, Daniel Kyomya1 heard the sound of a person running into the house from outside. He thought it was his father and went to check on him in the parent's bedroom. There, he found a stranger instead who was squatting near a cupboard from which he was removing glasses and tea cups which he was putting in a gunny bag. The stranger whom he recognised to be the appellant ordered him to go back to bed. He went back to his bedroom but subsequently managed to sneak out of the house and raised alarm.

Upon hearing the alarm, Kyalimpa, recognising it to be from Daniel and fearing that the attackers would harm his son, grabbed a stick, got up and threatened to kill the attackers. One of them speared him in the arm. His wife and children continued to raise alarm. Eventually the attackers run away. Information was taken to the RC1 chairman and vice-chairman who came to them home and escorted Kyalimpa to the police to make a report, and to the dispensary for medical treatment.

Before this Court, the appellant presented the following two grounds of appeal:

"1. The learned Justices of the Court of Appeal erred in law and fact in holding that the evidence of identification of a single indentifying witness did not require corroboration, when that evidence was weak, thereby coming to a wrong conclusion, namely confirming the conviction of the appellant.

2. The learned Justices of the Court of Appeal did not subject the entire evidence to scrutiny as a result of which they came to a wrong conclusion namely confirming the conviction of the appellant."

Mr. Turyakira who appeared for the appellant in this Court argued the two grounds together. Basically, his argument was that the evidence implicating the appellant with the offence, being the evidence of a single identifying witness, was too weak to sustain a conviction; and that if the Court of Appeal had properly reevaluated that evidence it would have held that it required corroboration and would then have found that there was none. The basis for his contention that the identification evidence was so weak as to require corroboration was that the conditions under which the single witness identified the appellant were difficult such that the possibility of

mistaken identity were not ruled out. He relied on the decisions in ***RORIA VS REPUBLIC*** (1967) EA 583 and ***NDYAYAKWA & OTHERS VS UGANDA*** (1978) HCB 181.

For the respondent, Ms Damali Lwanga, Prinicpal State Attorney, submitted in reply, that although the identification was by a single witness, the conditions, under which he identified the appellant, were favourable to correct identification, and that, his evidence was free from mistake. She contended that therefore, there was no need for corroboration, but she added that, in any event, the evidence was corroborated.

In our view the Court of Appeal handled the issues carefully and exhaustively. In the first instance the Court correctly directed itself on its duty as a first appellate Court. Their Lordships said: -

"Before we respond to the issues raised in the submissions of both Counsel, we wish* to *echo what the East African Court of Appeal had stated in Okeno vs R (sic) (1972) EA 32 at page 36, that this Court being a first appellate Court is duty bound* to *re-examine exhaustively all the evidence on record in order to determine the question whether the evidence is enough to sustain the conviction."

The Court noted that the evidence of identification was given by a single witness and reviewed it. It also reviewed the judgment of the learned Judge both with regard to the law applicable to such evidence, and her elaborate evaluation of and conclusion on, it. With all that in mind, the Justices of Appeal proceeded to reevaluate the identification evidence and came to their own conclusion which was in agreement with that of the learned trial Judge. Their Lordships said:-

"We think that the trial Judge considered the sole identification evidence by PW2 accurately and came to the correct conclusion that the conditions favoured correct identification: there was sufficient light provided by a todoba,* the *witness had the appellant under observation for a reasonable length of time; besides, he had known the appellant before as a person who frequented their village and related to him by marriage. The appellant himself admitted the fact of prior knowledge. We therefore do not accept the argument by. Mr. Byarugaba that the witness only had glanced at the stranger he found in his father's room when PW2 turned after walking backward to the doorway of his room. To accept that view would be condoning a

misinterpretation of the clear evidence of PW2. The evidence shows that when PW2 was ordered by the stranger to go* to *his room and sleep, he walked backward without turning his back to the stranger. He kept facing the stranger until he reached his doorway when he turned. It is not correct to say that when he reached* the doorway of *his room that PW2 turned to glance at the stranger as Byarugaba would like us to believe. We are satisfied that the witness had ample time to look into the face of the man found squatting in his father's room."

It is evident from the above cited passage from their judgment, that the learned Justices of Appeal scrutinised and re-evaluated the identification evidence in light of the attack on it made by the appellant's Counsel. They did not leave any material aspect of that evidence unconsidered. In the circumstances we are unable to fault their judgment in this regard. We therefore find no merit in Mr. Turyakira's argument to the extent that it criticises the Court of Appeal for failure to re-evaluate the evidence.

The other aspect of Mr. Turyakira's argument is that it was erroneous for both courts below to conclude from that evidence that the conditions, under which Daniel (PW2) identified the appellant, were favourable to correct identification. According to him the conditions were difficult and the courts ought to have so found. He particularly attacked the Court of Appeal for accepting that the light from a tadoba was sufficient, and for holding that Daniel had ample or reasonable time to look at the face of the appellant when there *was* no direct evidence on the time the witness took observing the stranger in the parents' bedroom. Needless to say that the expressions "favourable" and "difficult" in relation to conditions under which identification is made, and "ample" and "reasonable" in relation to time for observation, are relative terms. There is no yardstick or other scientific measure with which to determine the favourableness or difficulty of the conditions under which identification is made, or the ampleness or reasonableness of time for accurate observation. In each case the court has to determine from the totality of conditions as described in the evidence, whether it was possible for the witness to make correct identification; and if it was, whether he did so with or without difficulty. Invariably the issue of correct identification arises where there was some degree of difficulty in the conditions surrounding the identification notI.4here there was no difficulty at all or _where identification was impossible. Therefore in our view in holding, as the Court of Appeal held, that:

"In the instant case, it has been found that conditions under which PW2 identified the appellant favoured correct **identification"**

The court was not saying that there were no difficulties at all, but that having regard to the evidence as a whole which it reviewed and re-evaluated exhaustively it was satisfied that the witness had been able to correctly identify the appellant. We have no reason to interfere with that holding particularly bearing in mind what we said recently in ***Kifamunte Henry Vs Uganda*** Cr. App. No. 10/97 that we, as a second appellate court are not required to reevaluate the evidence like a first appellate court except in the clearest of cases such as where the first appellate court failed to do so.

The last aspect in Mr. Turyakira's argument is the complaint against the holding of the Court of Appeal that the evidence of Daniel, the single identification witness did not require corroboration. The context of the holding complained of is in the following passage of that court's judgment:

"Available authorities have established that corroboration is required to confirm the evidence of a single identifying witness only where conditions favouring correct identification are difficult. See Erafis' Ndyayakwa and others vs Uganda (supra), Roria vs **Republic** ***(supra). In the instant case it has been found that conditions under which PW2 identified the appellant favoured correct identification. The evidence of PW2 therefore did not require corroboration... It could alone hold the conviction."***

We think that on the whole the passage contains a correct statement; but we also think that it is capable of creating a wrong impression of the law on the issue. It is not accurate to suggest, as in the concluding part of the passage that in every case where it is found that conditions favoured correct identification no corroboration is required. As we have said earlier in this judgment even where overall the conditions favour identification there may have been some difficulties. Secondly even where conditions are difficult it does not follow that in absence of corroboration for the evidence of identification the case would necessarily be dismissed. The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However the court should always warn itself of the danger of possibility of mistaken identity in such case.

This is particularly important in cases where there were factors which presented difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with the greatest care and where possible look for corroborating or other supportive evidence, so that it can be sure that there is no mistake in the identification. If, after so warning itself and scrutinising the evidence, the court finds no corroboration for the identification evidence it can still convict if it is sure that there is no mistaken the identity. corroboration therefore is only a form of aid to assist the court to be sure. (See ***George William Kalyesubula vs Uganda*** Cr. App No. 16/77; ***Abdala Nabulere & Another vs Uganda*** (1979) HCB 77; ***Moses Kasana vs Uganda*** (1992 - 93) HCB 47 and ***Bogere Moses & Another vs Uganda*** Cr. App. No.1/97 (unreported).

In the instant case we are satisfied that the Court of Appeal was present to the fact that the conviction of the appellant rested solely on the evidence of Daniel, the single identify witness and was conscious of the need to test that evidence with the great care, which it did. We think, bearing in mind that the court was aware of the very favourable impression PW2 made on the trial judge as an intelligent and truthful witness, the court of appeal was sure from that evidence that there was no mistake. We are therefore unable to fault its holding that the evidence of Daniel (PW2) did not require corroboration.

Mr. Turyakira tried to capitalise on the holding of the Court of Appeal that the learned trial court had erred in holding as corroboration evidence of PW5 to the effect that the appellant initially denied his identity when the police went to arrest him. He argued that since the trial court had deemed it necessary to look for corroboration and the Court of Appeal held that what was taken as corroboration was in fact not, because it was not reliable evidence, the Court of appeal ought to have allowed the appeal on the ground of lack of corroboration for the identification evidence. With due respect, however, the argument is not well founded. The learned trial judge did not hold that it was necessary to find corroboration for the identification evidence. She was convinced that the evidence was sufficient to sustain the conviction but added that in any case there was corroboration. After a thorough evaluation of the evidence this is what the learned trial judge said:

"After careful consideration of the evidence of PW2 I have found that PW2 told the truth when he said that he identified the accused. He was steady and was not shaken when he was testifying. The way he answered the questions he struck me as intelligent young man. I am fortified in my finding by the fact that if PW2 managed to recognise the person as not his father, which was correct,..... he was able to recognise whatever he saw; and since the accused was already known* to *him, the chances of mistaken identification were ruled* out. *In case other evidence is* neede4to *render credence of PW2 there is the evidence of ….."

She listed three pieces of evidence which in her view corroborated the evidence of the single identifying witness. She then concluded thus:

"After carefully warning myself about the danger of acting on the evidence of a single identifying witness I have found the evidence of PW2 to be truthful and* free *from error* for *the reasons already expounded in this judgment I am convinced and satisfied that PW2 saw the accused at the scene of crime …."

It is evident from the foregoing that the trial court accepted Daniel's evidence of identification irrespective of the corroborative evidence she found to exist. In our view therefore Mr. Turyakira's argument also fails on this aspect.

In the result we find that both grounds of appeal fail. We therefore dismiss this appeal and confirm the conviction and the sentence of death passed on the appellant.

Before taking leave of this case we are constrained to direct the Registrar and all others responsible for, and concerned with compiling the records of appeal, and the custody of the original court files, to pay more attention to accuracy of the record, and preservation of the original court file intact. A lot of time was wasted at the time of hearing this appeal in order to verify whether, after convicting the appellant, the trial court had passed sentence on him. That was because both in the original handwritten notes as recorded by the trial judge, and in the typed copy thereof, the record of sentencing was missing. Instead there was a formal typed order seemingly extracted from the original, which was not only unusual but was in addition, not signed. It was on after the commitment warrant signed by the trial judge was traced that we were satisfied that the appellant was duly sentenced by the trial court. We assumed that the sheet

containing the trial judge's notes on sentencing was misplaced even before the record was typed for the appeal to the Court of Appeal.

Dated at Mengo this 1st day of October 1998

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

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

A.N. KAROKORA,
JUSTICE OF THE SUPREME COURT.

J.N. MULENGA,
JUSTICE OF THE SUPREME COURT.

L. M. M. MUKASA-KIKONYOGO
JUSTICE OF THE SUPREME COURT.