THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, JJSC.)

CRIMINAL APPEAL NO. 53 OF 2000

BETWEEN

KUTEGANA STEPHEN..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

(Appeal from the Court of Appeal decision by (Kato, Okello, Mpagi-Bahigeine, JJA) delivered on 25th October, 2000 in Criminal Appeal No. 60/ 99

JUDGMENT OF THE COURT.

The appellant Stephen Kutegana, was indicted in the High Court sitting at Jinja for aggravated robbery Contrary to Sections 272 and 273(2) of the Penal Code Act. He was convicted on 23/5/99 and sentenced to death. His appeal to the Court of Appeal was dismissed; hence this appeal.

The brief facts of the case which were accepted by the lower court was that the complainant Batulumayo Mukasa (PWl) had known the appellant from childhood. On the morning of 6/10/1995 the appellant went to Batulumayo's home and inquired if Batulumayo had palm leaves for making baskets used for fishing. On being told that he had the leaves, the appellant informed Batulumayo (hereinafter referred to as the complainant) that he would return with the money for them in the evening. At around 10:00 p.m. when the complainant went outside his house to collect his bed pan, he saw, with the aid of moonlight, the appellant, standing in one corner of his house, armed with a panga and a torch. The appellant was with another man whom the complainant never identified. The appellant quickly moved towards the complainant and got hold of complainant's hand and demanded money

from him. When complainant told him that he had no money, the appellant cut him on his forehead with the panga asking "how about the money you have been lending out!" The appellant dragged him inside the house, kicked and stepped on him. At that time, the complainant told the appellant that there was money inside the house.

The complainant led the appellant inside the house where the money was. Appellant's colleague had a torch, which he flashed to enable the appellant see and get money from where it had been kept. After being given Shs. 670,000/=, the appellant inflicted on the complainant more cut wounds on the head, shoulder and other parts of the body. He took the complainant to his bed, covered him up in the bed and left him for dead. The complainant was only unconscious. Later, the complainant regained his consciousness, managed to crawl out of his bed and out of his house to the house of PW2, Balodha, his neighbour whom he woke up. Balodha, (PW2) reported the matter to the LC's who in turn reported the matter to police. The complainant was taken for medical treatment. On the following day, the police arrested the appellant and charged him with the offence of capital robbery.

At his trial, appellant's defence was an alibi to the effect that at the time of the robbery he was at his house. The trial judge rejected the defence of the appellant and believed the prosecution evidence and consequently convicted the appellant. The decision of the trial judge was upheld by the Court of Appeal. From the decision of that court, the appellant has appealed to this court on two grounds, namely:

(1) That the learned Justices of Appeal erred in fact and law by finding that identification made by a single witness was sufficient to sustain the conviction in the circumstances.

(2) That the learned Justices of Appeal erred in fact and law in rejecting the appellant's alibi.

When this appeal came up for hearing Ms. Luswata, Counsel for appellant, submitted that although there was a robbery committed at the home of the complainant the evidence was not sufficient to prove that the appellant participated in the robbery. She submitted that although the lower courts appreciated the

principles applicable to evidence of a single identifying witness such as those spelt out in the case of ***Abdalla Nabulele vs. Uganda (1979)*** HCB 77, both the trial court and Court of Appeal had failed to properly apply them to the facts of this case. For instance, she contended that the lower courts never considered the fact that after the complainant was cut on the forehead, blood from the cut wound impaired his vision as a result of which he could not see and recognise his assailant. Accordingly, she contended that the lower court ought to have looked for corroboration, which she submitted was missing. She also pointed out that when the complainant reported to his immediate neighbour at night, he never disclosed the names of the robbers, which meant that he had not identified the appellant.

Mr. Wamasebu, Principal State-Attorney for the state, submitted that there was sufficient evidence of identification of the appellant at the scene of crime as found by the trial judge and upheld by the Court of Appeal. On the argument by Counsel for appellant that the complainant could not identify the appellant, because blood oozing from the cut wound on the forehead impaired his vision, Mr. Wamasebu, submitted that before he was cut, the complainant had already seen and identified the appellant with the aid of the moonlight. He also argued that the ability of the complainant to recognize the appellant was enhanced by the fact that on the morning before the robbery the complainant saw and conversed with the appellant who called on the complainant and asked if, he had palm leaves to sell.

In this appeal, the prosecution case depended exclusively on the identification by a single witness. This court, and its predecessors have considered in many cases the problem of cases depending on evidence of identification by a single witness. In the case of ***Roria v Republic (1967) EA 583*** the East African Court of Appeal stated at page 584 D-E:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in the course of debate***
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> ***There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if they are as many as ten - it is on question of identity. That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should***

never he upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

This position was restated by the predecessor to this court in ***George William Kalyesubula vs Uganda Criminal Appeal No. 16 of 1977***

(unreported) in the following passage:-

> ***"The law with regard to identification has been stated on numerous occasions. The courts have been guided by Abdulla Bin Wendo & Another vs R*** (supra) and ***Roria vs Republic*** (supra) ***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 can safely be accepted as free from the possibility of error."***

These points were re-emphasized by the same court in ***Nabulele's case*** (supra).

We have examined the evidence of the complainant regarding identification of the appellant at the scene of crime. We note that the evidence of the complainant was accepted by the trial judge and upheld by the Justices of Appeal. The latter court observed:-

> ***"The learned trial Judge examined the circumstances in which identification came to be made viz the length of time the encounter lasted, the distance between them i.e between the complainant and the appellant and the light. There was moonlight outside and in the house, there was a torch which appellant's colleague was flashing. He also considered the previous familiarity of the complainant and the appellant. It is the sum total of these factors which affected his decision. We therefore think that there cannot be any doubt that the learned judge properly applied the principles aforesaid and reached the correct conclusion."***

We were not persuaded by Ms. Luswata's argument. First there is no evidence on record that the complainant's vision was impaired or otherwise adversely affected by blood oozing from the cut wound on the forehead. The assertion was speculation on learned counsel's part. What is more, we agree with Mr. Wamasebu that the complainant saw and recognised the appellant even before he was cut. Secondly, the failure of complainant to disclose the name of his assailant to his neighbour to whom he first reported the incident does not necessarily mean that he had not recognised the assailant. It could be due to other reasons. It is significant, however, that as early as 8:30 am. on the following day, he disclosed to constable Samuel Muwanika (PW6) who found him at Kakoge Aid Post, weak and full of sleep that the name of his attacker was Kutegana Stephen son of Munaaba.

In the result, ground one must fail.

In the second ground the complaint is that the learned Justices of Appeal erred in fact and law in rejecting the appellant's alibi. Ms. Luswata submitted that the prosecution had failed to place the appellant at the scene of crime. She contended that the trial judge rejected the evidence of the appellant because he found him to behave strangely by not remembering certain names and so the judge held that the appellant was evasive and inconsistent. She submitted that the trial judge never evaluated the evidence to show whether the appellant was at the scene of crime. She contended that apparently many suspects were arrested and that this shows that the police were not sure of the perpetrators of the robbery.

The learned Principal State Attorney Mr. Wamasebu urged us to uphold the finding of the trial judge that the behaviour of the appellant was strange, that Batulumayo, an elderly man had a sharp memory which impressed the trial judge who found the appellant a liar. The learned trial judge's impression of the complainant is summed up as follows:-

> ***"In his statement which he made to police on 12/10/95, he gave a detailed account of all that happened to him. He was not shaken in cross-examination. Despite giving his age as 81 years, his memory was sharp. Indeed, he impressed me as a truthful and credible witness....."***

On the other hand the learned trial judge's findings and assessment of appellant's evidence is stated in these words:-

> ***"The accused tried to put a defence of alibi, saying he was at his home throughout. He even denied having gone to the home of the victim on the day in question. He even denies knowledge of the people known to be his mother, grandfather and other close relatives and friends. He even at first denied knowledge of Mukunya with whom he said he was arrested together for this offence only to admit he knows him later, saying the pronunciation the prosecution made was different from the one he knew. These are strange behaviour, which in our law could be interpreted to point to the guilt of the accused."***

Clearly, the trial Judge who had the benefit of seeing the complainant and the appellant testify was in a better position to make the conclusion he made.

The Court of Appeal reiterated the law on the burden of proof when an alibi is advanced by accused as a defence, and upheld the trial judge in these words:

> ***"It is settled law that the burden of proving an alibi does not lie on the prisoner beyond reasonable doubt. Sekitoleko vs Uganda (1967 EA 531. It is the duty of the court to direct its mind properly to any alibi set up by an accused, and it is only when the court comes to conclusion that the alibi is unsound that it would be entitled to reject it. See R V Thomas Finel (1916) 12 Cr. App. Rep. 77. We find that the appellant's defence consisted of unexplained inconsistencies, which amounted to blatant lies. The evidence of the complainant placed the appellant at the scene of crime. His evidence was sufficiently corroborated by the deliberate lies told by the appellant. The judge was therefore entitled to reject it and rightly held that they were a pointer towards his guilt."***

We have not been persuaded that either the trial judge or the Court of Appeal erred in law or in fact in the above quoted conclusions.

In the result ground 2 must also fail.

Therefore this appeal has no merit. It is accordingly dismissed.

Dated at Mengo this 11th day of January 2002.

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.

G.W. KANYEIHAMBA,
JUSTICE OF THE SUPREME COURT.