IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CORAM: Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba *J J*.S.C.

CRIMINAL APPEAL NO.42 OF 2001

Between

1. **BAGUMA STEPHEN**
2. **TUMUSIME JOHN::APPELLANTS**

And

UGANDA:::RESPONDENT

(Appeal from decision of the Court of Appeal (Mukasa-Kikonygo, DCJ., Kato & Kitumba JJ.A.) at Kampala, in Criminal Appeal No.8/2000, dated 2nd August 2001).

JUDGMENT OF THE COURT

Baguma Stephen and Tumusime John, were convicted and sentenced to death by the High Court sitting at Fort-Portal on 11.1.00, for aggravated robbery committed in the night of 17.3.98, at the house of Bagonza Jackson, within Fort-Portal Municipality. The Court of Appeal upheld the convictions and sentences. The two appellants have appealed to this Court against the decision of the Court of Appeal.

According to the evidence accepted by the trial court, the two appellants broke into the house at around mid-night. They were armed with pangas, knives and iron bars and had torches. They ordered the occupants to remain quiet otherwise they would be cut. One of them wielding a panga, threatened to cut Jackson. He pushed him under the bed and forced him to lie there facing down. Jackson remained in that position throughout the incident. The appellants demanded for money. Jackson's wife, Suzan, surrendered to them all the money in the house piece meal, up to a total of shs.800, 000/-. They then ransacked the house, grabbing and taking away an assortment of clothing and other household goods.

There were six occupants in the house when the robbers broke in. Four of them gave evidence, namely: Jackson as PW1, Suzan as PW2, their son, Murungi Dan, as PW4, and the house girl, Mary Kajumba, as PW3. Jackson and Suzan were sleeping in their own bedroom, Dan was sleeping in the sitting room, and Mary was sleeping in another room with the two who did not testify. Jackson did not recognise any of the assailants. Mary recognised both Baguma and Tusiime as the assailants. Suzan recognised Baguma only, and Dan recognised Tusiime only. None of the witnesses knew either appellant by name. They only knew them by appearance, because they used to see them at their respective places of work. The day after the robbery, in the late afternoon, the three witnesses who had variously recognised the assailants went to town with two police officers, to look for the appellants. They first came across Tusiime who was identified by Mary and Dan. He was arrested and taken to the police station by one of the police officers. Later, Baguma was also seen at a restaurant. Mary and Suzan identified him to John Gagwa, PW5, the police officer that had stayed behind. When PW5 informed him that he was under arrest, Baguma attempted to escape. He was chased, captured, and taken to the police station. In the evening of that day, the police searched the homes of the appellants, but they did not recover any of the stolen property.

Each appellant gave evidence on oath denying the charge, and setting up an alibi in defence. Tusiime further contended that his arrest was not because of identification by any of the witnesses. He said that one Saulo, pointed him out to a policeman, alleging that he had also been involved in the robbery, whereupon he was arrested and beaten without being told what he had done. Baguma also testified that Saulo was with a group of people who tried to grab him and force him to enter a car. He explained that he tried to run away fearing for his life. The trial court rejected the appellants' defences, and believed the prosecution evidence; hence the convictions.

In this appeal, the appellants are represented by different counsel. Consequently, they filed separate memoranda of appeal. However, some of the grounds of appeal are almost identical. In each memorandum, the appellant complains that the learned Justices of Appeal erred in upholding the finding of the trial court that he was properly identified, and in its decision to reject his defence of alibi. In addition, Baguma complains that the learned Justices of Appeal erred when they -

- *held that the contradictions in the prosecution case **were** minor;*
- *failed to properly and adequately evaluate the evidence as a whole.* Tusiime's third

complaint was that the learned Justices of Appeal erred

- *in confirming the conviction and sentence...in absence of satisfactory proof of the ingredients of the offence.*

Mr. Ddamulira Muguluma, the learned counsel for Baguma, submitted that during the robbery, the light was not sufficient to enable the witnesses to identify the assailants. He argued that the contradictions and inconsistencies in the prosecution evidence were indication that the evidence of identification was not sufficiently reliable to support the convictions. He enumerated the alleged contradictions and inconsistencies, and maintained that each witness had his/her own version of what transpired during the robbery. He particularly criticised the evidence of Suzan, because she had not known Baguma before the robbery, and because, according to counsel, she did not identify him to the police independently. Counsel also criticised Mary's evidence of identification of Baguma, because she claimed that she recognised him outside the house, where there was no light. He complained that the trial court had wrongly failed to allow Baguma to call a witness that he had all along indicated he wanted to call. He also criticised both courts below for failure to take into consideration Baguma's explanation that his attempt to escape from arrest was due to genuine fear for his life. He contended that the Court of Appeal had erred in failing to re-evaluate all that evidence.

Mr. Kunya, learned counsel for Tusiime, also criticised the Court of Appeal for failure to re-evaluate the identification evidence, and in particular for not taking into consideration, conditions that were unfavourable to correct identification during the robbery. He submitted that the witnesses were awakened from sleep, and that they must have been in fear during the ensuing commotion. He argued that the fact -

- that neither of the two witnesses who claimed to have recognised Tusiime during the robbery, had given his description before his arrest; and
- that in the search of Tusiime's house in the afternoon following the robbery, none of the stolen goods were found,

raised substantial doubt on the identification evidence. He also maintained that the Court of Appeal had, without re-evaluation, accepted the prosecution evidence wholesale, and failed to consider Tusiime's defence of alibi that was tenable. Finally, Mr. Kunya submitted that the prosecution had failed to prove beyond reasonable doubt, an essential ingredient of the offence, namely: that the assailants had used or threatened to use a deadly weapon. The assailants' weapons were neither produced in evidence nor described sufficiently to rule out the possibility that what the witnesses saw, were imitation weapons. Counsel cited Wasaja vs. Uganda (1975) EA 181, in support of his contention that the prosecution had to prove that the weapon in issue was deadly. According to him, the evidence adduced in this regard was too weak to support a conviction for robbery with aggravation.

Mr. Elem Ogwal, the learned Assistant Director of Public Prosecutions, submitted that the Court of Appeal had properly re-evaluated the evidence, and had correctly addressed issues pertaining to identification and the defence of alibi. On the question of proof of use or threatened use of a deadly weapon, the learned Assistant DPP argued that a panga, like a knife, is a basic tool for offensive purposes, and is therefore a deadly weapon. Evidence that the assailants threatened to use a panga was sufficient proof that they threatened to use a deadly weapon.

The learned trial judge properly directed the assessors and himself on the care that must be taken when the prosecution case rests solely on visual identification. He considered and evaluated the evidence adduced against each appellant, the night conditions under which the witnesses were able to see their assailants, and the discrepancies in the prosecution evidence. He also considered each appellant's defence of alibi, as well as Baguma's explanation of his attempt to escape from arrest. He was satisfied -

- that the conditions were favourable to correct identification;
- that the discrepancies were minor; and
- that the defences of alibi, and Baguma's explanation, were false.

He concluded, as did both assessors, that each of the appellants had been correctly identified as a participant in the robbery.

In their judgment, the learned Justices of Appeal carefully reviewed the trial court judgment. In particular, they considered in detail, the way the trial court handled the issues of identification, discrepancies and the defences of alibi, which were subject of the grounds of appeal. They found no fault in the judgment, and upheld its findings. The fact that they expressed their conclusions in that manner is not an indication that they did not re-evaluate the evidence. We are satisfied that in the process of the said careful review of the trial court judgment, they re-evaluated the evidence and came to the same conclusions of facts as the learned trial judge did. The contention that they did not is without substance. In Henry Kifamunte vs. Uganda, Criminal Appeal No. 10/97, we held that as a second appellate court, we do not have to re-evaluate the evidence, except in the clearest of cases, as where the first appellate court has failed in its duty to do so. This is not a case requiring re-evaluation of the evidence by this Court, as that was appropriately done by the first appellate court. Accordingly, we find no merit in the grounds of appeal in which the appellants raise the issues of identification, discrepancies, alibi and re-evaluation of evidence.

Whether the prosecution did not prove an essential ingredient of the offence of aggravated robbery, is a question of mixed law and fact. For that reason, we accepted to consider Tusiime's third complaint,

although it was not canvassed in the Court of Appeal. In the indictment, the particulars of offence recited that the appellants *"threatened to use deadly weapons, to wit knives, on the said BAGONZA JACKSON".* All the four eyewitnesses testified variously, that the assailants were armed with knives, pangas and iron bars. However, only Jackson testified about the threat to use any of them. He said -*"I saw people entering the house. They were two. They had a powerful flashlight, pangas, knives and an iron bar. I was told to keep quiet and that in case I made any noise I would be cut. We pushed to our bedroom. One of the assailants raised a panga to cut me. I was ordered to lie down. The one armed with a panga and knife stepped on my leg and ordered me to lie facing down. I was pushed under the bed and one of the assailants told me that if I looked at him he would cut me. I was ordered to give them money."* (emphasis is added) The learned trial judge directed the assessors and himself, that one of the ingredients of the offence, which the prosecution had to prove, was the *"use or threatened use of a deadly weapon"* in the robbery. In holding that the ingredient was proved beyond reasonable doubt, he expressly relied on that portion of Jackson's evidence. The issue that Mr. Kunya raises is whether that evidence goes far enough to prove that the weapons in question were *real* and not *imitation* weapons.

The Court of Appeal for East Africa, in Wasaja vs. Uganda (supra), considered a similar issue in relation to threatened use of a gun. At p. 182, the court observed -
"Of course it is for the prosecution to prove all the ingredients of the offence, including that the weapon used to threaten was a deadly weapon. It may be that the judge was not satisfied on this point. In our view, once it is proved that a weapon is a deadly weapon, then using it to intimidate the victim of a robbery by pointing it at him is a sufficient threat within the meaning of s.273(2) aforesaid. The vital consideration is that the weapon must be shown to be deadly in the sense of 'capable of causing death'. As we have indicated, toy pistols, broken guns incapable of discharging bullets or guns without ammunition, or imitation guns are not, and cannot be deadly weapons. There was no evidence in this case that the gun held by the appellant was a deadly weapon. For all we know it may have been a harmless imitation." (emphasis is added). In that case the trial judge had declined to convict for aggravated robbery under s.273 (2) of the Peal Code apparently because he was not satisfied that the appellant had threatened to use the pistol he wielded. The Court of Appeal said that that was a wrong reason, because the wielding of the pistol was sufficient threat. Nevertheless, it was of the view that the trial judge rightly convicted for simple robbery, rather than aggravated robbery, because there was no proof, beyond reasonable doubt, that the pistol was a deadly weapon. The trial court in the instant case, considered the issue in the context of a submission by defence counsel to the effect that proof of the ingredient required proof of grievous harm to the complainant. After recalling Jackson's evidence, the learned trial judge said -

"..defence counsel submitted that for this ingredient to be proved the perpetrator must have caused grievous harm to the complainant in execution of the robbery and proof of grievous harm would be by medical evidence which was not adduced in this case. My understanding of s.273 (2) of the Penal Code is that this ingredient is proved if the offender does any of the following:-

1. *uses a deadly weapon*
2. *threatens to use a deadly weapon*
3. *causes death*
4. *causes grievous harm*

A deadly weapon is defined by the same section to include "any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death."

The instruments used in this robbery fit into this definition and it is immaterial that the complainant or any of the occupants in the house was (not) injured. I therefore hold that the second ingredient has also been proved.... beyond reasonable doubt." (emphasis is added).

Evidently, in holding that the instruments used in this robbery fit into the statutory definition of a deadly weapon, the learned trial judge not only took into account the common knowledge that knives and pangas are used for stabbing and cutting, but also inferred that what the witnesses saw, and subsequently described to the court, were real knives and pangas, and not imitations. We agree that in a case where the decision to convict for capital or simple robbery depends on the nature of the weapon used or threatened to be used, it is legitimate and indeed desirable for the trial court to probe for detailed description of the weapon in issue. However, it cannot be correct to suggest that in any case, where such probe is not done, the possibility of the weapons being imitations is necessarily not ruled out. Much depends on the weapon in issue. A witness testifying merely that, he saw a robber armed with a gun, may well raise a reasonable doubt, whether the gun was loaded or capable of functioning. On the other hand, short of mere speculation, no such doubt arises from testimony that the robber was armed with such simple and plain weapon as a knife or a panga. In our view, this case is distinguishable from Wasaja vs. Uganda (supra). In the circumstances of the instant case, the trial judge had no cause to doubt that the weapons were what the witnesses described them to be. Accordingly, it was not an error to hold that the weapons were deadly, and that all the ingredients of the offence were proved beyond reasonable doubt. Tusiime's third ground of appeal must also fail.

In the result, we find no merit in this appeal, and we dismiss it.

Dated at Mengo this 12th day of November 2003.

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.