THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, J.J.S.C.)

CRIMINAL APPEAL NO 28 OF 2001

BETWEEN

MUNDU TITO :: APPELLANT

AND

UGANDA :: RESPONDENT

[Appeal arising from the judgment and decisions of the Court of Appeal (Kato, Okello, Twinomujuni, J.J.A.) dated 9th August, 2001, in the Criminal Appeal No. 111 of 1999].

REASONS FOR THE DECISION OF THE COURT

We heard this appeal on 1st July, 2003, and dismissed it for lack of merit. We intimated that we would give our reasons later. We do so now.

The facts and background to this appeal may be summarised as follows:

On 1st March, 1997 at around 8.00 p.m. the farm of Kasajja Byakika at Kolonyi village in Mbale District was attacked by a gang of robbers. During the attack, one Okwalinga Kadir alias Dudu who was a watchman at the farm was murdered and several other employees of the farm were attacked, assaulted and robbed of various items of property including a bicycle, a radio and cash.

Two of the victims of the robbery, Twahiyu Were, PW2, and Mbaga Abdulla, PW3, recognised the appellant as one of the attackers. The appellant with six other suspects were subsequently arrested and charged with one count of murder and four counts of aggravated robbery. All the accused persons denied the charges. The appellant set up the defence of alibi. The six persons who were charged with the appellant were acquitted of all the charges. The appellant was acquitted on one count of robbery. He was convicted on the count of murder and on two counts of robbery and sentenced to death on each of those counts. The death sentence on the counts of robbery was suspended. On appeal, the Court of Appeal quashed the convictions and set aside the sentence on the count of murder and one count of robbery and upheld the conviction and sentence on the second count of robbery.

The Memorandum of Appeal to this Court contained five grounds but the fifth ground was abandoned. The remaining grounds were framed as follows:

1. *The learned Justices of Appeal erred in law and fact when in evaluating the evidence on record they found*

   and/or upheld the decision of the trial judge that the ingredients of the offence of aggravated robbery had been proved to the required standard.

2. *That the learned Justices of Appeal erred in law and fact when they found and upheld the decision of the trial court that the appellant had caused grievous bodily harm on Mbaga Abdalla and Twahiyu Were.*

3. *That the learned Justices of Appeal erred in law and fact when they improperly evaluated the evidence to find the appellant guilty of aggravated robbery.*

4. *The learned Justices of Appeal erred in law and fact when they found and upheld the decision of the trial court that there was sufficient evidence to prove theft of the One hundred and fifty thousand (Shs. 150,000/'=) and a radio by the appellant.*

Mr. Mohammed Mbabazi, learned counsel for the appellant argued grounds 1, 2 and 3 together and ground 4 separately. Counsel first submitted that there was insufficient evidence to prove that the appellant had caused any grievous bodily harm to Mbaga Abdalla. He contended that whereas in the indictment it was alleged that the appellant together with others had caused grievous bodily harm to Mbaga Abdalla on 1st March, 1997, the doctors' medical report showed that the alleged victim, Mbaga Abdalla, was medically examined sometime in August, 1997, some five months after the incident. Counsel contended that in no way could the doctor's findings be connected with an assault which had taken place so long before the examination by the doctor. The findings of the doctor could not possibly verify the fresh wounds or injuries described by witnesses at the appellant's trial. Learned counsel for the appellant submitted that the doctor's report was not a sufficient reason for the court to conclude that grievous harm had been committed during the robbery. He contended that therefore the doctor's report should have been excluded from the evidence, in which case, the offence of aggravated robbers' would not have been proved.

Mr. Mbabazi further submitted on the matter of common intent of the robbers. He contended that since all the other defendants had been acquitted, the prosecution had to show that the appellant personalty stole goods or property during the course of robbery and used or threatened to use a dangerous weapon. He contended that the evidence did not prove that theft had been committed in which case the appellant should have been acquitted. Counsel further contended that whereas Mbaga Abdalla, PW3, testified that the appellant was a workmate whom he had known and worked with for two years, on the night of the attack, Mbaga Abdalla did not initially recognise the appellant when he

allegedly ordered him to get out from under the bed. It is only at the moment when he emerged from under the bed, that he claims he recognised the appellant. Mr. Mbabazi contended that there was thus a contradiction in that witness's evidence which should have been resolved in favour of the appellant.

Mr. Elemu Ogwal, Assistant Director of Public Prosecutions for the respondent supported the findings and conclusions of the courts below. He contended that the attack on Mbaga Abdalla, PW3, was an attack by all the robbers who had a common intention to rob the farm while armed with offensive weapons. Mr. Ogwal submitted that the appellant was clearly seen and identified by credible witnesses. Whether one indicted person is acquitted and another is convicted is a matter of evidence and proof. Counsel for the respondent next made submissions on the medical evidence. He contended that the medical evidence was not challenged by the appellant. On the contrary, that evidence was admitted by consent? He further submitted that notwithstanding the period of time between the assault on the farm and the medical examination of victim of the robbery at a much later date, the doctor's opinion would still be valid and accurate in identifying the nature and cause of the injuries a victim sustained.

From the record of proceedings, it is apparent to us that both the trial court and the Court of Appeal properly evaluated and reevaluated the evidence. The fact that the majority of the persons with whom the appellant was indicted were acquitted and two of the convictions against the appellant were quashed by the Court of Appeal is clear indication that the courts below properly and rightly scrutinised the evidence implicating the appellant in the crime for which he was eventually convicted and sentenced.

The appellant was clearly seen and identified at the scene of the crime. Thus, Mbaga Abdalla testified,

> ***"He pierced me with a stick and I cried out. He told me to shut up. The base of the bed is made of various wooden straps. The straps are at intervals of six inches apart. The man pierced on my abdomen. I cried and he ordered me to shut up. He said. 'Nyamaza'. I kept quiet. He told me, "Toka', meaning get out. I got out. I was getting out I looked at his face. When I looked at it he hit me on the jaw with an axe and my jaw got dislocated. He hit me with a man's strength. It was a hard and deadly blow. Before the blow I managed to recognise him. He was Mundu Tito. There was electric light. I looked at him for about three minutes before he struck me. He was then fumbling to grab the radio. When he struck me, my jaw got locked in a dislocated position and I started bleeding. I continued looking at him and he also continued beating me."***

On the basis of the evidence adduced before him, the learned trial judge relied upon the leading authorities on the ingredients of the offence and come to the conclusion that the aggravated robbery had been committed and the appellant had been properly identified as the perpetrator of that crime. These authorities included **Abdalla Nabulele and Others v. Uganda** [1979] HCB 77 p.80, **Woolmington v. D.P.P.** [1939] A.C. 862, **Serugo v. Uganda** [1978] H.C.B. 1 and **Uganda v. Turwomwe** [1978] H.C.B. 15. The Court of Appeal reevaluated the evidence especially that of Mbaga Abdalla this way,

> ***"The identification of PW3 is that he heard the attack on PW2 from his house which was nearby. Shortly after, he heard a loud knock at his door and a voice demanding that the door be opened or else it would be broken. He hid himself under the bed but he was pulled out. Under the full glare of an electric light which was in the room, the appellant whom he had known previously assaulted him several times and dislocated his jaw. He was taken to hospital and for some days he was unable to talk or mention his attacker. When he was finally able to do so he mentioned the appellant as the only person he had identified during the attack on himself and***

> ***his wife. This evidence again was not shaken at the trial and the learned trial judge was entitled to believe it, which he did. It appears to us the evidence of these two witnesses clearly put the appellant at the scene of crime and the defence of alibi could not stand."***

At his trial, the appellant had also been convicted and sentenced on three counts of indictment. The learned Justices of Appeal reevaluated evidence relating to counts 1 and 2 and decided to quash the convictions and sentence

sfounded on them. Similarly, the learned Justices of Appeal reevaluated the evidence relating to count 3 of the indictment before upholding the conviction of the appellant on it. Having heard both counsel and perused the evidence on record, we were unable to fault the findings and

we confirmed the decision of the two courts below and dismissed the appeal in respect of count 3.

Dated at Mengo this 15th day of January 2004.

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