THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENGO

[CORAM: TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC]

CRIMINAL APPEAL No.11 OF 2004

BETWEEN

TUMWINE ENOCK::::::::::::::::::::::::::::::::::::
APPELLANT

VERSUS

UGANDA ::::::::::::::::::::::::::::::::::::
RESPONDENT

[Appeal against the decision of the Court of Appeal at Kampala (Mpagi-Bahigaine, Engwau and Byamugisha, JJ.A) dated 1st September, 2004 in Criminal Appeal No.67 of 2000]

JUDGMENT OF THE COURT

The appellant, Tumwine Enock, alias, Mpumwire John, was indicted for robbery with aggravation, contrary to [the old section 272 and 273 (2)] of the Penal Code Act. The case for the prosecution was that the appellant and others still at large, on or about the 25th day of August, 1996, at mile 6 Mbarara/ Bushenyi Road, in Mbarara District, robbed Mpairwe Joseph of his motor vehicle, Reg. No.565 UBR and at, or immediately before, or after the said robbery, used a deadly weapon, to wit, a gun, upon Mpairwe Joseph. The appellant was duly tried in

the High Court, which convicted him and sentenced him to death.

The victim of the robbery, Mpairwe Joseph, PW1, owned a Toyota Corolla Motor vehicle Registration No.565 UBR. He operated it as a taxi in Mbarara town. On the 25th August, 1996 at around 8:00 p.m., he parked the vehicle at Shell Ankore Petrol Station. One Bahati David (DW3), a taxi broker, who was known to PW1 approached the latter with a customer who wanted a lift to Kamukuzi, a suburb of Mbarara Town, where the customer's car was. Bahati David, DW3 offered to go with them because it was at night.

DW3 sat on the front seat while the customer sat in the back. As PW1 was driving along Ntare Road, the customer requested PW1 to pick three more passengers who were standing along the road. PW1 who knew the appellant before, recognized him as one of those three passengers. PW1 drove them to a residence of the District Administrator, Mbarara, at Kamukuzi. He parked the car outside the gate. The three passengers went inside through the gate while the appellant, DW3 and PW1 remained in the car. After sometime, the three passengers returned and asked PW1 to drive them to mile 6, Bushenyi Road, where their car had been left because it had allegedly developed mechanical problems.

At mile 6, Bushenyi Road, the passengers asked PW1 to park

the car. He was immediately held at gun point as the appellant tied up his hands with a rope. PW1 and DW3 were thereafter put into the boot of the car. One of the passengers drove the car towards the Queen Elizabeth National Park. As the car drove uphill, it slowed down and so, both PW1 and DW3 heard the three passengers, who had taken over the vehicle, discuss a plot to kill PW1 and throw the body in the park. Both PW1 and DW3 untied their hands, opened the boot and jumped out of the car. As PW1 and DW3 started running in different directions, the thugs in the car ran after PW1 while firing bullets at him. One bullet hit him on the right side of the chest. He fell down. The assailants checked and left him for dead.

Eventually, PW1 managed to reach Mbarara University Teaching Hospital the following morning where he was hospitalized for one month. He was treated by Dr. Kitya, PW5, of a bullet wound which had passed between the 7th and 8th ribs and had damaged his liver. On 27th August, 1996, John Kamya, Superintendent of Police, PW2, who was the officer in-charge of Mpondwe Police Post, received information about the robbery and deployed police personnel at all possible entry and exit points at the border of Uganda with the Democratic Republic of the Congo. Consequently, a businessman called Mulekera Asuman and one Faruk Kifunda were arrested in possession of the vehicle which was detained by police.

Later, one Frank Musinguzi and Bahati, DW3, were also arrested in connection with the alleged robbery. The appellant's involvement in the crime was revealed by Frank Musinguzi to the investigating police officer, No.18973 D/CPL Bazigu Samuel, PW3. PW3 arrested the appellant from Mubuku Prison where he had been on remand on a charge of burglary. Frank Musinguzi informed PW3 that the appellant

was using a different name of Mpumwire John. The appellant was taken to Mbarara Police Station where D/IP Kwezi Jusua, PW4, conducted an identification parade in which PW1 identified the appellant and Frank Musinguzi as members of the gang which robbed him of his vehicle. Bahati, DW3, however identified different people during the same identification parade.

In his sworn statement, the appellant denied any involvement in the robbery. He raised a defence of alibi that on the day of the alleged robbery, he was at his work place at Mbarara Central Market until 6:00 p.m when he went back to his home at Kakoba Ward in Mbarara Municipality which he did not leave until the following morning. He denied being arrested by PW 3 at Mubuku Prison, claiming that he was arrested by PW3 from Mbarara Central Market on the 9th January, 1997. He denied any knowledge of PW1 and called two witnesses, namely: - Nuwamanya Abel, DW2 and Bahati David, DW3. The former witness, DW2, confirmed the arrest of the appellant by PW3 from Mbarara Central Market while the latter, DW3, confirmed his being put in the boot of the car together with PW1 on the 25th August, 1996. DW3, however, denied recognizing any of the robbers.

Both the learned trial judge and the assessors disbelieved the appellant and believed PW1 and PW3 and found the appellant guilty. The judge sentenced him to death.
The appellant appealed to the Court of Appeal on five grounds-

- ***The first complained about insuffient evidence of a single identifying witness.***

- ***The second complained about defective identification parade.***

- ***The third alleged inconsistencies, contradictions and fabrications in prosecution evidence.***

- ***The fourth complained of wrongful rejection of the alibi by trial judge.***

- ***And the last one complained of failure by the judge to evaluate evidence.***

In the Court of Appeal Mr. Anthony Ahimbisibwe argued all the grounds. The respondent opposed the appeal in that court.

In the Court of Appeal, counsel for the appellant attacked particularly the findings of the trial judge especially on the question of identification by a single identifying witness. In reality that was the main thrust of the appeal.

In counsel's view, conditions were difficult for PW1 to make any positive identification of the appellant. Further, counsel contended that because conditions were difficult, there was a possible danger of mistaken identification by a single identifying witness whose evidence should have been corroborated by some other evidence. Counsel relied on the authority of **Nabulere & others vs Uganda (1979) HCB 77.** He further argued that evidence at the identification parade would have provided some corroboration but since PW1 had seen the appellant before the incident, the identification parade was worthless. For that proposition, counsel relied on **Abdallah**

Bin Wendo & Anor vs R (1953) 20 EACA 166 and Emmanuel Nsubuga vs Uganda (1992 -1993)HCB 24.

The Court of Appeal upheld the findings of the learned trial judge that the appellant was properly identified by PW1 even though conditions for identification were difficult. So the Court dismissed the appeal. The appellant has appealed to this Court. Originally Mr. Sekabojja from the firm of Sekabojja & Company, Advocates, representing the appellant filed a memorandum of appeal containing only one general ground. Mr. Ojakol from the firm of Omoding, Ojakol and Okallany, Advocates, took over the appeal and filed a fresh memorandum of appeal containing the following two grounds -

1. ***The learned Justices of Appeal erred in law and fact when they failed to properly reevaluate all the evidence before it and thereby erroneously confirmed the conviction of the appellant.***

2. ***The learned Justices of Appeal erred in law and fact when they neglected to consider the appellant's alibi and as a result arrived at a wrong decision.***

Subsequently, following a decision of the Constitutional Court in Constitutional Petition No.6 of 2003 **(Suzan Kigula & 417 Others Vs Attorney General)** Messrs Katende Ssempebwa & Company, Advocates, filed a Notice of Additional Instruction of Advocates intimating that they intended to argue the appeal against the sentence of death in case this Court upheld the conviction of the appellant. This aspect of the appeal is pending.

Both counsel for the appellant and for the respondent filed written arguments under Rule 63 of the Rules of the Court.

In his written arguments, Mr.Ojokal submitted that the Court of Appeal failed in its duty as a first appellate court to reconsider or reevaluate the evidence on record and draw its own conclusions. He contended that if the Court had done so, it would have found -

- That the quality of identification was poor, and
- Corroborative evidence on identification was wanting.

He contended, correctly, that in criminal appeals, this court, as a second appellate court, is not required to reevaluate evidence like a first appellate court would do except in the clearest of cases. In his view this was **"such clearest of cases which make it incumbent upon this Court to reevaluate the evidence."** He relied on our decisions in **Henry Kifamunte Vs Uganda (S.Ct Crim. Appeal No.10 of 1997)** (See page. 280 of Supreme Court **Certified Criminal Judgments:** 1996/2000) and **Bogere Moses & Kamba .R Vs Uganda (S.Ct Crim. Appeal No.1 of 1997** (page 185 of same volume).

Learned Counsel criticized the Court of Appeal for its support of the findings of the learned trial judge concerning identification of the appellant by a single identifying witness. In the High Court, the trial judge had found that-

- *The appellant was known to PW1.*
- *PW1 was not separated from the appellant by any considerable distance being in the car most of the time and also that they were driving in an urban area most of the time.*

Counsel contended that by adopting the reasoning of the trial court, the Court of Appeal erred as the appellant was entitled to a rehearing by that Court. According to learned counsel-

- *The quality of identification was poor because:*
  - (i) *During the alleged 2½ hours when PW1 was with the appellant in the car, the appellant was in the back sit while PW1 was driving.*
  - (ii) *PW1 only knew the surname (Tumwine) of the appellant but came to know the name John later which creates doubt.*
  - (iii) *In addition, contended learned counsel, PW1 was placed in the boot of the car just 6 miles after driving from Mbarara municipality.*

- *Corroborative evidence was lacking because -*
  - (i) *Identification parade was useless and Court of Appeal failed to address itself on it.*
  - (ii) The Court of Appeal failed to subject evidence on alibi to rehearing.

Mr. Fred Waninda, SSA, for the respondent, replied to the above arguments. According to the learned Senior State Attorney, the Court of Appeal evaluated the evidence on the record before the Court found that the law on identification of the appellant by PW1 as a single identifying witness was adequately considered by the trial judge.

We would like to point out that there is no one corrects standard formula according to which the Court of Appeal, as a first appellate Court, would be judged as to whether or not the Court reevaluated the evidence on record. The mere fact that the Court of Appeal, or any other first appellate court, for that matter, adopted the reasoning of the trial Court is no proof that

the Court of Appeal did not rehear an appellant's case. On the contrary such adoption may in fact be indicative of the fact that indeed the Court of Appeal reheard the appellant's case.

We would observe that in the Court of Appeal, counsel for the appellant, just like in this appeal before us, mostly concentrated his criticism of the trial judge in the area of identification by a single identifying witness and later on the alibi raised by the appellant during trial. Mr. Wagona, SSA, then representing the respondent in that Court answered the arguments of appellant's counsel in similar fashion namely by pointing out that on the evidence available the trial judge dealt with the question of identification of the appellant at the scene of crime. The Court of Appeal summarized the salient arguments of both sides before it reproduced in extensio that portion of the judgment of the trial judge which reflects the manner in which the judge evaluated the evidence relevant to and authorities on the question of identification by a single identifying witness. While the manner of quoting portions of a judgment of a lower court is really a matter of style, that cannot be a sound basis for the argument that the first appellate court did not rehear the case. Certainly that is not the view which we take in the present appeal.

The learned trial judge, in a well reasoned judgment, found that there was common intention between the appellant and the rest of the gang. He fully addressed himself to the question of a single identifying witness and alluded to the necessary caution, considered the unfavourable conditions obtaining at the time of the robbery and found corroboration of PW1 in the evidence on identification parade. He found that the alibi was false and held, correctly in our view, that the disappearance of the appellant from his home for sometime, is evidence of guilt. We would point out that the evidence of DW3 generally supports the evidence of PW1 save that it did not incriminate the appellant in the commission of the offence. In that respect the note of the learned judge on the record is significant. He noted that: -

> "***The demeanour of the witness (DW3) is one of an ashamed witness. He realized he is not telling the***

truth".

This note was made after DW 3 had, in his evidence-in-chief, denied knowledge of the appellant claiming that he had only seen the appellant in court which must have been a lie.

We think that by adopting in their judgment the reasoning of the trial judge, the learned Justices of Appeal, in effect agreed with the evaluation of evidence by the trial judge.

We have not been persuaded that either or both courts erred in their respective findings. Accordingly we have not been persuaded that this is one of the cases where we must re evaluate the evidence and form our own conclusions. In the results the two grounds must fail.

Accordingly and as regard his conviction we do not find any merit in this appeal which is dismissed. Because of the decision of the Constitutional Court in Constitutional Court Petition No.6 of 2003 **(Susan Kigula & 417 Others Vs Attorney General)** from which an appeal is pending in this Court, we exercise our discretion and postpone confirmation of sentence in this case under Article 22 (1) of the constitution, until determination of the pending Constitutional Appeal to this Court.

Delivered at Mengo this 30th day of May, 2007.

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.

B.M.Katureebe
Justice of the Supreme Court.