THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE, KISAKYE, JJ.S.C.)

CRIMINAL APPEAL NO.21 OF 2005

BETWEEN

1. MUHWEZI ALEX :::::::::: :::::::::::::::: APPELLANTS
2. BEINOMUGISHA HASSAN

AND

UGANDA:: RESPONDENT

Criminal procedure – second appeal – duty of second appellate court – number of witnesses required in law to prove a conviction –

Evidence – Identification – circumstances favouring correct identification – whether appellants were correctly identified using light from torches and where the incident lasted four hours – corroboration – what constitutes corroboration.

Held : appeal dismissed, conviction and sentence confirmed

[Appeal from the judgment of the Court of Appeal (Mukasa-Kikonyogo DCJ, Okello and Kavuma, JJ. A), dated 2nd August, 2005 in Criminal Appeal No.53 of 2002.

JUDGMENT OF THE COURT

This is a second appeal. It is against the decision of the Court of Appeal which upheld the convictions of the appellants for simple robbery and defilement contrary to sections 272, 273 (2) and 123(1) respectively of the Penal Code Act and sentences of imprisonment for 12 years.

For convenience we must correct at this stage the error introduced in this appeal by counsel for the appellants. Behayo Moses who was the first appellant in the Court of Appeal died before his appeal was heard by the Court of Appeal. Consequently during the hearing of the appeal, the court noted on the record that his appeal abated. As far as we are concerned the appearance of his name on our record of appeal is erroneous and therefore the same is struck out. We shall in this judgment refer to Muhwezi Alex as the 1st appellant (A1) and to Beinomugisha Hassan as the 2nd Appellant. (A2).

In the High Court the appellants, were indicted jointly with the deceased Behayo Moses (who was the first accused at the trial) in count 1 for aggravated robbery, contrary to sections 272 and 273 (2) Penal Code Act. Muhwezi Alex, the first appellant was alone indicted in count 11 for defilement, contrary to section 123(1) of the Penal Code Act. All the three were convicted of simple robbery on count 1 and each

one was sentenced to twelve years imprisonment. The first appellant was convicted on count 11 as charged, sentenced to 12 years imprisonment and the sentence was to run concurrently with the one on count 1. The three were dissatisfied with the decision of the High Court and appealed to the Court of Appeal.

The prosecution evidence as accepted by the trial court and the Court of Appeal is as follows:

During the night of 10/6/1999 at Muzira village, Kakunyu Sub- County, Bushenyi District robbers broke into the house of John Ruhurira (PW2). They robbed him of cash 350,000/= together with his graduated tax tickets, and tied him up together with his son Natumanya Andrew, (PW5), ordered them to go under the bed. When the two were under the bed the robbers threatened to kill John Ruhurira (PW2) unless they were given 800,000/=. Florence Sanyu (PW4), PW2's wife gave the robbers Shs 350,000/=.

When the robbery was going on, the first appellant took the complainant's daughter, Atuheire Catherine, (PW3) from her bedroom to the sitting room where he defiled her. John Ruhurira (PW2) managed with the help of his son, Natumanya Andrew (PW5), to untie himself and escaped from the house through the window. He made an alarm which was answered by villagers. The robbers ran away. The prosecution witnesses had identified the appellants as their attackers with the aid of the light from torches which the robbers were flashing in the course of the robbery.

The second appellant was arrested that night and on the following day he led the police to Ishaka town where the first appellant and the deceased were arrested. John Ruhurira's graduated tax tickets for 1998 and 1999 were recovered from the deceased at the time of his arrest.

In their defences, the appellants totally denied the offences. All of them put up the defence of alibi. The learned trial judge rejected their defences, convicted them of simple robbery on count 1 and sentenced them to 12 years imprisonment each. The first appellant was convicted on count 11 of defilement and sentenced 12 years imprisonment. The sentences against the first appellant were to run concurrently.

On the first appeal, the Court of Appeal upheld the convictions on the ground that the Justices of Appeal were satisfied on the evidence on record that the appellants were correctly identified by the prosecution witnesses. Hence this appeal to this court.

In this court each appellant filed a separate memorandum. The two memoranda of appeal are virtually identical.

During the hearing of this appeal in this Court, Mr. Ambrose Tiishekwa, appeared for the first appellant, Muhwezi Alex, who was present in court.

The second appellant, Beinomugisha Hassan, was absent because the prison authorities failed to bring him to court. He was represented by his counsel, Mr. Robert Tumwine. This court invoked its powers under Rule 69 of the Rules of this Court and proceeded to hear the appeal in the absence of the second appellant. Counsel for both appellants filed written submissions. Mr. Simon Peter Semalemba, Principal State Attorney, represented the respondent.

Notwithstanding the fact that the grounds of appeal of both appellants are similar, we think that it is appropriate to discuss and dispose of each appellant's case separately.

The first appellant's memorandum of appeal contains one ground namely:-

"The Learned Justices of Appeal erred in law when they failed to correctly re-evaluate the prosecution evidence about participation of the appellant in robbery and defilement"

In his written submissions, counsel for the first appellant complained that the learned Justices of Appeal erred in law when they failed to correctly re-evaluate the prosecution evidence regarding the participation of the appellant in the commission of the two offences of robbery and defilement.

He contended that the prosecution evidence did not prove the offences against the appellant beyond reasonable doubt. He submitted that the attack took place at night around 1.00.a.m. Ruhurira John (PW2) and his family were already asleep. He was woken up in fear as a result of a bang on his door. According to counsel, though the attackers had torches which they were flashing in the room, the prosecution witnesses did not have control of those torches. In such circumstances, Ruhurira John (PW2) could not have seen and recognized the first appellant whom he did not know before. Counsel argued further that Florence Sanyu (PW4) had testified that she knew the first appellant. However, she too saw him under the same conditions like her husband. Additionally, she was also under fear as the attackers threatened to rape her.

Counsel argued further that the victim of defilement (PW3) admitted upon cross examination that she had not known the first appellant before the incident. She could not, therefore, recognize the first appellant. Counsel criticized the learned Justices of Appeal that they erred for holding that the eye witness's evidence corroborate the evidence of identification which was given by each other. He argued that none of these pieces of evidence could corroborate each other because all of them needed independent corroboration. Counsel contended that Pw4 was a single identifying witness who could have been honest but mistaken.

Mr. Simon Peter Semalemba, Principal State Attorney, for the respondent supported the decisions of the two courts contending that the learned Justices of Appeal properly re-evaluated the evidence. The Learned Principal State Attorney argued that the circumstances under which the offences were committed were favourable for correct identification. There was light from the torches and the incident lasted for about four hours. The witnesses and their attackers were close to each other. According to the evidence of No 25998 D.C. Mujuni Stephen (PW7), the second appellant informed the first appellant that his uncle Ruhurira John (PW2) had sold coffee. He contended that it is the second appellant who informed those who arrested him that he would take them and show them the people who had attacked the witnesses.

On contradictions, he submitted that the witnesses were not challenged on these contradictions and they were not challenged that they made different statements to the police. The investigating officer was not challenged too on that matter.

As the second appellate court our duty is to determine whether the first appellate court re-evaluated the evidence on record and properly considered the judgment of the trial judge see. ***Kifamunte Henry V Uganda S.C. Criminal Appeal No 10 of 1997 [1999] KALR 50 at P.57,*** where this court emphasized the role of a second appellate court thus:-

> "***Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a court of first instance has wrongly directed itself on a point and the Court of first appellate Court has wrongly held that the trial Court correctly directed itself, yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view R.Mohamed Ali Hashan vs. R [1941] 8 E.A.C.A 93.***

On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support finding of fact, this being a question of law. R. vs. Hassan Bin Said [1942] 9 E.A.C.A.62)

We are satisfied that the Court of Appeal was alive to its duty to re-appraise the evidence that was before the trial Court and came to its own conclusion. The Court of Appeal referred to rule 29(1) (a) of the Court of Appeal Rules and the authority of ***Peters V Sunday Post*** [1958] E.A. 424 which lay down the principles of re-evaluation of evidence by a first appellate court.

The learned Justices of Appeal dealt with grounds 1 and 2 that were filed in that court. In both grounds the complaint by appellants' counsel was on contradictions between the evidence of the eye witnesses namely PW2 and PW4, regarding whether they actually saw the first appellant and recognized him as their attacker. The Justices of Appeal extensively quoted from the record of proceedings thus:

"In the instant case, the complaint is that the trial judge erred when he failed to appreciate the grave contradictions between the evidence of PW2 and PW4 casting doubt to their identification, particularly of A2 at the scene. Our re-appraisal of the evidence on record reveals no such a contradiction.

The evidence of PW2 as is relevant to this point went as follows:

"The two people I saw that night are here. They are A1 and A2. After they entered the bedroom, they told me to sit down and demanded for shillings 800,000/= A1 held a knife, torch and a stick. A2 held a knife and a torch. The two tied my hands with my neck tie. I had only shillings 350,000/= remaining after using 450,000/=. My wife handed the 350,000/= to them. A2 picked my pair of trousers which had my graduated tax tickets and took the tickets."

Under cross - examination he said:

"***When I was getting out of bed, I saw two men in my bedroom. They flashed a torch at me. There was no light in my bedroom. I lit a tadoba after they had left…..Before the incident, I had not seen A1 and A2. I saw them after the Kibaate visit."***

The Evidence of PW4 as is relevant to this point went as follows:-

"After the bang, we saw people enter our bedroom and ordered us to sit down. I recognized the people who entered the bedroom. There were torches on and I recognized the people I used to see in Ishaka town. Those who entered our bedroom were A1 and A2.

After they ordered us to sit, they tied my husband. They tied his hands and mouth. They told him they wanted money and that the person who had taken them had told them to kill him. They said they wanted shillings 800,000/=. A1 held a knife and a torch. A2 had a knife and a stick."

Under cross-examination, she said:-

"On the night in issue, I did not see A3. However, I saw A1 and A2. They were not unfamiliar when I saw them that night, because I had seen them in Ishaka town."

It is important to note what PW5, the 14 year old son of the complainant, said in his evidence as follows:-

"***A3 came and got me from my bed. He had a torch and I knew him before so I recognized him. Time was about 2.00am. He told me to move to my father's bedroom. In my father's bedroom, I found the other two:- A1 and A2. I had not seen them before. They tied me together with my father and ordered us to go under the bed. Later, I untied my father. He then untied me also. A1 told those in the sitting room that Mzee had escaped. My father got from under the bed and escaped through the window."***

Under cross-examination he said:-

"Since the incident, I had not met the accused 1 and 2. I saw A3 after his arrest. I saw him in the morning, following the robbery at about 2.00 am. A3 wore a Khaki pair of trousers and a checked shirt. That is what I saw. He had nothing on his head. I did not see him holding anything. A2 held a knife, a torch and a stick. A1 also held a knife, a torch and a stick."

PW5's description of what A2 held while in the complainant's bedroom tallied with PW4 description. We still do not find any contradiction between his evidence and that of PW2."

The Court of Appeal resolved that there were no contradictions between the evidence of PW2 and PW4 as far as recognizing the first appellant was concerned. That was proper re-evaluation of evidence by the Court of Appeal and we agree with it.

We are unable to appreciate counsel's submission that Florence Sanyu (PW4) had no reason to have taken interest in the first appellant whom she used to see at Ishaka town and therefore was able to recognize him as someone she had seen before.

With due respect to counsel for the first appellant, his criticism of the Justices of Appeal on corroboration is not sound. In the first place there was no need in law for the evidence of all the prosecutions witnesses who identified the first appellant during the robbery to be corroborated. They were all adult witnesses and gave their evidence on oath. There is no number of witnesses required in law to secure a conviction.

Counsel for the first appellant appears to us, with due respect, to advance strange notions on corroboration. He appears to state that the evidence of one eye witness cannot corroborate that of another eye witness. Corroboration as we know it is independent evidence that implicates the accused with the commission of the offence. In No. ***RA 78064 CPL Waswa Ninsiima Vs Uganda Criminal Appeal No 48 and 49 of 1999 S.C,*** this Court stated:

"Corroboration is constituted by some independent evidence which implicates or tends to implicate the accused with the offence he is charged of. That, in essence, was the decision of the English Court Criminal Appeal, with which we agree, in the often cited case of ***R.vs*** **BASKERVILLE [**1916-17] ALL ER. Rep. 38, in which Viscount Reading C.J. said at p.43.

> ***"We hold that evidence in corroboration, must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him that is which confirms in some material particular not only the evidence that crime has been committed, but also that the prisoner committed it.***
>
> ***The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law, or within that class of offence for which corroboration is required by statute."***

Regarding the offence of defilement the victim Atuhaire Catherine, (PW3) evidence was amply corroborated by the testimony of her mother Sanyu Florence (PW4) who saw the appellant taking her to the sitting room where she was defiled.

In our opinion the Justices of Appeal properly re-evaluated the evidence and upheld the convictions of the first appellant.

We find that the appeal by the first appellant is devoid of merit and is accordingly dismissed.

The second appellant's memorandum of appeal contains two grounds which read:

1. ***That the learned Justices of Appeal erred in law and fact when they failed to re-evaluate the whole evidence on court record that had a lot of contradictions and wrongly decided to rely on it to convict the 2nd appellant.***
2. ***The Learned Justices of Appeal failed to re-evaluate the defence evidence that had been incorrectly evaluated by the Trial Judge leading to the conviction of the 2nd appellant.***

Learned Counsel for the second appellant complained in the two grounds of appeal that the learned Justices of Appeal erred in law and in fact when they failed to re-evaluate the whole evidence that had a lot of contradictions and to re-evaluate the second appellants' defence of alibi.

Counsel argued that the Justices of Appeal, like the trial judge, held that Atuhaire Catherine (PW3) recognized the second appellant by voice. He argued that the parents of that witness who are adults did not recognize the second appellant by voice. He contended that, it was not feasible for the witness who was a young girl to recognize him by voice. We must dismiss this straightaway because by 1999 when the offence was committed, PW3 was aged 15years and therefore not too young to appreciate what happened.

Counsel criticized the Justices of Appeal for upholding the conviction of the second appellant inspite of the fact that they noted that the trial judge did not evaluate the witness police statements.

In reply, the learned Principal State Attorney supported the decision of the Court of Appeal. He contended that the Justices of Appeal properly re-evaluated the evidence on record. He argued that whatever contradictions there were between the witness's evidence in court and the police statements were minor. They were probably due to lapse of time as the offences were committed in June 1999 and the trial was held in 2002. He submitted that in any case the prosecution witnesses were not challenged on those contradictions.

We have already stated in our consideration of the case against the first appellant that Ruhurira John (PW2) and his wife Sanyu Florence (PW4) saw their attackers by the aid of light from the torches which

they were flashing. The alleged contradictions that were complained about by counsel in the first appellate court were correctly resolved by that Court. Counsel for the second appellant has not raised those alleged contradictions in this appeal. Natumanya Andrew, (PW5) too saw the second appellant and recognized him. Atuhaire Catherine PW3 and her brother (PW5) identified the second appellant because he was their relative and they recognized him by voice. Counsel's argument that it is not possible that Atuhaire Catherine (PW3) recognized the second appellant by voice whereas her parents had not done so is not tenable. All witnesses need not identify the accused in a similar manner. One witness may recognize a witness by physical features and another may recognize him by voice. Additionally, a witness does not have to be a voice expert in order to recognize the voice of an accused person as counsel has argued.

In the case of ***Moses Kayondo V Uganda (Criminal Appeal No 11 of 1992 SC),*** this Court upheld a conviction which was based, inter alia, on evidence of a young boy who had identified the accused during the night, by voice. The appellant was his uncle. The above case is not very different from the instant appeal.

The Learned Justices of Appeal were, in our view, rightly concerned about the learned judge's failure to consider the witnesses' police statements. This was first information which would have been used to test the prosecution witnesses truthfulness or otherwise. However, though the police statements were on record they were not proved. Sanyu Florence (PW4) when cross-examined on her first statement to the police stated that she did not tell the police that she used to see the first accused and the fist appellant in Ishaka town her answer was as follows:

"I told the police that I know A1 and A2. Some details are missing from my statements".

When Atuhaire Catherine (PW3) was challenged in cross examination about the discrepancy between her last statements to the police that she had said that the second appellant was arrested because he had not answered the alarm, her reply was:-

"I told the police I had seen A3"

According to the record the prosecution witnesses in effect stated that their police statements were not correctly recorded. That being the case the court could not have used such statements to discredit their evidence given in court on oath unless the police officer who recorded them was called and adduced evidence that the statements were correctly recorded. The duty was upon counsel for the appellants during trial to call the recording police officer. This court held so in the case of ***Okwanga Antony V Uganda (Criminal Appeal No 20 of 2000.S.C.)***

In that case the police statements were admitted in evidence without objection from the prosecution. There were discrepancies between the witness's statements and their evidence in court but the witnesses denied making those statements.

This court held.

> ***" Since the makers of the statements denied that the statements reflected what they had told the police, it was necessary to call the Police Officers to prove the statements notwithstanding the admission in evidence of the statements without objection by the prosecution. <u>The only way to disprove the witnesses' allegation of incorrect recording of their statements was to adduce evidence of rebuttal by the statements. If it was proved that the statements were correctly recorded, then they could be used to discredit the evidence in court of persons who made the statements. Only the Police Officers who had recorded the statements could do so.</u>" (Underlining ours)***

In the present appeal since the statements were not properly proved, they were valueless. We are of the considered view that the Court of Appeal properly re-evaluated the evidence and rightly concluded that the second appellant was at the scene of the crime and participated in the commission of the offence. His alibi is false and was properly rejected. We entirely agree with that decision

The second appellant's appeal too lacks merit. It is accordingly dismissed.

Before we leave this appeal, there is an observation to make. At the trial, during submission, prosecuting State Attorney abandoned the third count. The trial judge did not make a decision on the abandoned count. The proper course of action which the trial judge should have taken was to acquit the appellant for lack of evidence to prove that count. We accordingly acquit the appellants on the 3rd count.

Dated at Mengo this **13th** day of **April** 2010

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

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B.M. KATUREEBE,
JUSTICE OF THE SUPREME COURT

…….

C.N.B. KITUMBA,

JUSTICE OF THE SUPREME COURT

……

J. TUMWESIGYE

JUSTICE OF THE SUPREME COURT

……..

E.M. KISAAKYE

JUSTICE OF THE SUPREME COURT