

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

(CORAM: TSEKOOKO, OKELLO, KITUMBA, , TUMWESIGYE AND
5 KISA AKYE, JJSC.)

CRIMINAL APPEAL NO. 21 OF 2007

B E T W E E N

ONGOM JOHN BOSCO: :::::::::: :::::::::: **APPELLANT**

A N D

10 **UGANDA:** :::::::::: :::::::::: **RESPONDENT**

(An Appeal from the Judgment of the Court of Appeal (Mukasa-Kikonyogo, DCJ, Bahigeine and Kavuma, JJA), at Kampala dated 13th June 2007, in Criminal Appeal No.205 of 2002]

15 *Criminal procedure – role of the second appellate court – when second appellate court can interfere with the findings of the first appellate court.*

Held: appeal dismissed, conviction and orders for compensation upheld

JUDGMENT OF THE COURT

This is a second appeal from a decision of the Court of Appeal upholding the conviction and sentence of the appellant, Ongom John Bosco, of simple robbery, by the High Court sitting at
20 Masaka which sentence the appellant to 13 years imprisonment.

The facts giving rise to this appeal, as have concurrently been found by the two lower courts, were briefly that the said robbery was committed on 25th October 1999, at about 3.00 p.m at the Uganda Women’s Finance Trust Bank Ltd., (UWFT) Masaka Branch. The appellant, who was employed by Uganda Securico, was on that day deployed to guard the UWFT, Masaka Branch.
25 He had a gun to enable him provide the necessary security to the Bank.

At about 3.00 p.m., the Bank had closed to customers. The Cashier/Accountant, Mr. Tibita Richard, (PW2) was counting the money received in the course of the day and balancing his till sheet when the appellant entered the banking hall.

He had been at the entrance of the Bank. In the banking hall was also the office
5 assistant/mobiliser, Harriet Nakanwagi (PW3). The branch Manager, Sarah Nsimbe (PW4) was
in her office, nearby the banking hall. Then two late customers knocked at the door and were
allowed into the banking hall. They requested to deposit their money. They were allowed and
PW2 received their money which totaled to UG Shs. 285,000= . He entered that receipt into the
late receipt book, put the money in that book which he placed behind the counter. The two
10 customers then went out and the door was closed behind them. PW2 then returned to continue
balancing his till sheet when the unexpected happened. Suddenly the appellant was heard
shouting in English language at the top of his voice to the Cashier that “**gentleman get up, I said
get up I want money.**” PW2 got up raised his hands up while walking slowly towards the
appellant as if he was passing him when he turned and grabbed the appellant from behind.
15 Struggle ensued between them. They struggled moving towards the door. The scared Harriet
Nakanwagi (PW3) cried out and ran towards the store. Meanwhile the struggle continued and
when they reached the door and pushed the appellant inside the banking hall towards PW3. As
the appellant stumbled, PW2 rushed out closing the door behind him.

The Manager (PW4) who heard the sound of straggle and the cry of PW3 came out of her office
20 into the banking hall to find out what was happening. However, seeing the appellant holding his
gun in a shooting position, PW4 sensed danger and rushed back into her office closing the door
behind her and took cover under her desk. Appellant who was left alone in the banking hall
eventually walked out and escaped.

It was later discovered that the Ug. Shs. 285,000= which was left in the book behind the counter
25 was missing. The matter was reported to Police and the appellant was eventually arrested and
indicted for aggravated robbery contrary to sections 272 and 273(2) of the Penal Code Act.

He later made a charge and caution statement in which he admitted staging a robbery and
stealing some money from the bank. The confession was admitted in evidence by consent. In his

defence, the appellant raised an alibi and belatedly challenged the confession as having been interpreted to him in Alur, a language which he did not understand well.

The trial judge rejected the appellant's defence and convicted him of simple robbery as stated earlier in his judgement. He was sentenced as stated earlier in his judgment. He was also ordered
5 to compensate the victim of his crime in the sum of UG. Shillings 184,000=.

His appeal to the Court of Appeal was dismissed, hence this appeal to this court on the sole ground that *"the learned Justices of Appeal erred in law when they failed to properly re-evaluate the prosecution evidence on record and arrived at a wrong conclusion."*

At the hearing of the appeal, Mr. Tiishekwa A. Rukundo represented the appellant while Mr.
10 Vincent Okwanga, Senior Principal State Attorney represented the respondent.

Though he had promised at the pre-hearing conference to file his written submissions by the 8th of July 2010, Mr. Rukundo filed the same late on 13-07-2010, the eve of the hearing date. On the hearing date, he opted to summarise his written submissions orally. He was allowed to do so.

He submitted that the learned Justices of Appeal failed to properly re-evaluate the evidence on
15 record as was required of them by law and that as a result; they wrongly confirmed the decision of the trial court when there was no evidence to support that decision. He pointed out that the circumstantial evidence on record did not irresistibly point to the guilt of the appellant to the exclusion of others. In his view, PW2 did not testify that the appellant knew where the money was placed nor was there evidence which excluded other people from the banking hall to
20 irresistibly point to the appellant as the person who stole the money. He pointed out that PW3 testified that the loss of the money was discovered after some strangers like Edward Mpagi had entered the banking hall.

He added that in his view, the appellant was convicted on the basis of his retracted confession which lacked corroboration. He further submitted that there was no evidence to link the money
25 recovered to the money stolen.

He prayed that the appeal be allowed, conviction quashed, the sentence and the order imposed on the appellant be set aside. That the appellant be set free.

On the other hand, Mr. Okwanga supported the conviction and the sentence with the order
5 imposed on the appellant. He submitted that the record shows that the learned Justices of Appeal properly re-evaluated the evidence on record and correctly found the appellant guilty of the offence. In his view, there is overwhelming circumstantial evidence which irresistibly point to the appellant's guilt.

He pointed out that when PW2 had a brief scuffle with the appellant, there was loose money
10 behind the counter. When PW2 ran out for his dear life, the appellant was left alone in the banking hall where the money was. When it was later checked, the money was found missing and the appellant had disappeared without handing over the station to another guard.

Learned Senior Principle State Attorney submitted that the circumstantial evidence, including the appellant's conduct, corroborated his charge and caution statement in which he admitted the
15 theft. The confession was admitted in evidence by consent and that its late challenge by the appellant was an afterthought. That the appellant's disappearance from his guard duty without handing over to his colleague was a conduct inconsistent with innocence.

He prayed that the appeal be dismissed.

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The above arguments of counsel raise the issue of the role of a second appellate court. This is not a new point. It is an issue which has had judicial consideration before. In ***Rex – vs – Hassan Bin Said alias Kimani Somali (1942) 9 EACA 62***, the former Eastern Africa Court of Appeal considered the role of a second appellate court and held that an appeal to a second appeal is
25 purely on question of law. See also s.5 (a) of the Judicature Act and the case of ***Kifamunte*** (intra)

A second appellate court is precluded from questioning the concurrent findings of facts by the trial and first appellate courts, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have come to the same conclusion.

5 A second appellate court can only interfere with such finding where there was no evidence to support the finding because this is a question of law.

Inference legitimately drawn from proved facts by the trial and first appellate courts must establish the guilt beyond all reasonable doubt.

The above principles were echoed by the former Court of Appeal for East Africa in *Okeno – vs – Republic (1972) EA 32*, where it said:

10 **“It is appropriate on a second appeal only to decide whether a judgment can be supported on the facts as found by the trial and first appellate court as this is purely a question of law.”**

15

This court has had occasion to re-state the principles in *Kifamunte Henry – vs – Uganda*, an appeal No. 10 of 1997, when it said:

20 **“On second appeal, the Court of Appeal is precluded from questioning the findings of facts 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 the finding of fact this being a question of law.”**

25 Having stated the legal position regarding the role of a second appellate court, like this one, the imposing question to consider now is whether there was evidence in the instant case to support the concurrent findings of facts of the trial and first appellate courts.

In finding that robbery was committed at the UWFT, Masaka Branch on 25th October 1999, the learned trial judge said:

5 ***“Sarah Nsimbe, the Branch Manager of UWFT testified as PW4. She testified that on the fateful day she was seated in her office. The Cashier/Accountant (PW2) and the temporary Cashier, Nakanwagi Harriet (PW3) were balancing their books. All of a sudden she heard noise and PW4 (sic) rushed to the store after shouting that she was dying. Then she heard the noise of shoes indicating a scuffle. As she went to the banking hall, PW2 was running out and PW3 was running to the store. The assailant was holding the gun as if to shoot. She ran back to her office and took cover. She heard his footsteps when he left and got the courage to come out. She went to the store and talked to PW# who briefed her about what happened. When she heard the voice of Mpagi who had been in the field in the banking hall, they came out. They were joined by PW2 who told them what happened. They checked what was missing and then went to police. 10 Shillings 285,000= was missing. The matter was reported to Masaka Police Station. The witnesses gave their evidence in straight forward manner which was not shaken by cross-examination. I accepted it as true. The first ingredient has therefore been proved beyond reasonable doubt.”***

20 It is quite clear from the above passage from the judgment of the learned trial judge that she relied on the evidence of PW2, PW3 and PW4 to find as a fact that robbery was committed at the UWFT, Masaka Branch on 25th October, 1999.

On whether it was the appellant who committed that robbery, the learned trial judge considered the appellant’s alibi against his charge and caution statement which he later challenged that it was interpreted to him in Alur, a language he did not understand well, and the evidence of PW2, 25 PW3 and PW4 who were the identifying witnesses as they were at the scene of crime and concluded that:

30 ***“I have considered the above evidence in its totality. I am satisfied that the prosecution witnesses identified the accused person at the scene of crime and that his alibi is false.”***

There can be no doubt from the above passage that the learned trial judge relied on the totality of evidence on record including the evidence of PW2, PW3 and PW4 who were the identifying

witnesses to find as a fact that the appellant participated in the robbery. This in our view dispels the argument of Mr. Rukundo that there was no evidence other than the appellant's uncorroborated retracted confession, to support the conviction.

- 5 The learned trial judge indeed considered the confession which she treated rightly in our view, as retracted and warned herself of the dangers of acting on such evidence without corroboration unless she was satisfied that it was true.

In the instant case, the learned trial judge was satisfied that the confession was true and gave reasons for that view.

- 10 According to her, the confession tallied with the evidence of PW2, Pw3 and Pw4 which put him at the scene of crime where he staged a robbery and also showed that he disappeared from his duty station after the robbery incident. It also tallied with the evidence of DW1 which showed that the appellant went to the witness's home in the evening of the day of the robbery, got drunk there and left his gun with the witness. It further tallied with the evidence of PW5 which showed
15 that the appellant disappeared from his home after the robbery incident causing PW5 to accompany the appellant's sister to report his disappearance to the police.

The retracted confession was therefore used as corroboration of the evidence of the identifying witnesses and other circumstantial evidence.

- We have perused the record and are satisfied that the learned Justices of Appeal re-evaluated the
20 evidence on record and found that the charge and caution statement tallied with the prosecution evidence. It must be noted that there is no standard procedure of re-evaluation of evidence by a first appellate court.

While it may be desirable to show that the evidence on record has been re-weighed by the first appellate court, that is not the standard procedure. In the instant case, we have no doubt that the learned Justices of Appeal re-evaluated the evidence and agreed with the trial judge's findings of facts.

- 5 We have pointed out earlier in this judgment, that the role of a second appellate court is to find out whether the concurrent findings of the two lower courts can be supported by evidence on record. We have also shown above that there was overwhelming evidence to support the findings. Apart from the retracted confession, the appellant's conviction could still be sustained on the other pieces of evidence on record.
- 10 In the result, we find no merit in the appeal which we accordingly dismiss, and uphold the conviction, sentence and the order for compensation.

Dated at Kampala this **20th** day of **August**, 2010.

J.W.N TSEKOOKO
JUSTICE OF THE SUPREME COURT

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G.M OKELLO
JUSTICE OF THE SUPREME COURT

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C.N.B KITUMBA
JUSTICE OF THE SUPREME COURT

J. TUMWESIGYE
JUSTICE OF THE SUPREME COURT

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E. M. KISAAKYE
JUSTICE OF THE SUPREME COURT