THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

{CORAM: ODOKI, CJ, TSEKOOKO, KATUREEBE, TUMWESIGYE & KISAAKYE, JJSC.}

Criminal Appeal No. 07 of 2009

1. HARUNA TURYAKIRA
2. SENOGA BIZIBU .... APPELLANTS
3. JAMES KAIRUTU

Versus

UGANDA ..... RESPONDENT

[Appeal from the judgment of the Court of Appeal, at Kampala (Engwau, Twinomujuni and Kitumba JJA) dated 26th February, 2009 in Criminal Appeal No. 146 of 2003]

JUDGMENT OF COURT

This is a second appeal arising from a decision of the Court of Appeal which upheld the conviction by High Court of the three appellants for the offence of simple robbery.

The three appellants, Haruna Turyakira [A1], Senoga Bizibu [A2] and James Kairutu [A3] were charged with robbery with Code Act. They were convicted by Akiiki Kiiza, J., of a lesser cognate offence of simple robbery, contrary to sections 272 and 273 (1) (b) of the Penal Code Act. They were each sentenced to fourteen years imprisonment and ordered to pay compensation of Shs. 800,000/= each to Ssebuzungu Christopher, PW1, the victim of the robbery and thereafter be under police surveillance for three years after release.

FACTS:

On the night of 27th May, 2000, Ssebuzungu Christopher [PW1], his wife Natukunda Allen [PW3] were sleeping in their house. Husband and wife slept in their bedroom while PW3 was sleeping in a different bedroom. At about 01:00am the door of the house was hit hard and it opened. PW1, PW2 and PW3 woke up. Four attackers first entered the bedroom of PW3. They flashed torches as they demanded for money from her. PW3 who had known the three appellants recognized them. They were with one Bashir whom she also recognized and was later killed by a mob because of this robbery. The three appellants then closed the door to PW3's room before forcing their way into the bedroom of PW1 and PW2. They flashed torches and demanded for money. PW1 who had known A1 and A3 for thirteen years, and A2 for two years, recognized each by sight as well as buy voice. Similarly, PW2 who had known A2 for five years, A2 for one year and A3 for ten years recognized the three appellants. A1 and A3 tied up PW1 before stabbing and assaulting him. A2 stabbed PW1 before stabbing and assaulting him. A2 stabbed PW1 on the right shoulder with a knife. A3 also stabbed him. The robbers then pulled PW1 from the bed onto the floor tied him with banana fibres as they demanded for more money. He indicated where money was whereupon A2 Shs. 1,000,000/= from under the mattress. The appellants demanded for more money. PW1 informed them that there was another Shs. 1,000,000/= in the cupboard. A2 removed it.

After robbing the money the appellants also tied PW2 and placed her on top of her husband [PW1]. They got out of the bedroom, closed the door of that bedroom and went away. Later PW1 called PW3 and his children untied PW1 and PW2. PW1 instructed PW3 to call neighbors which she did. The neighbors secured a vehicle which took PW1 and PW2 to Mubende Hospital where the two were hospitalized and treated for two weeks. Meantime, on 27/05/2000, 07:00 am PW3 reported to Ezekiel Mbyaliyehe [PW4] the LC1Vice Chairman that it was the appellants who attacked and robbed PW1 and PW2 the previous night. PW4 led a team of village mates of the robbery victims to A1's home at 10:00am. A1 was found still sleeping. The team woke him up. Although he denied participating in the robbery, he was arrested and taken before the village LC1 Committee where, after being questioned, he confessed that he together with A2, A3 and others had committed the robbery. The team went to A3's home where they found both A3 and A2. When the two saw PW4's team, they fled.

The team pursued these two but was able to arrest only A3. Sometime later, police arrested A2. The three were jointly charged and tried each by Akiiki Kiiza, J., for capital robbery. During their each of the three appellants made brief unsworn statements denying the offence. A1 and A3 admitted that they were arrested by PW4's team. A1 admitted he was found sleeping in his compound. He said nothing about the alleged confession. A2 admitted having been arrested by the police. The assessors advised the judge to convict the appellants of capital robbery.

The learned trial judge believed the evidence of the four prosecution witnesses. He disbelieved the appellants. However he acquitted them of the offence of capital robbery but convicted each of them of simple robbery. The basis for the acquittal of capital robbery was the learned judge erroneous view that the knife used in inflicting injuries on PW1 was neither properly described nor produced in court. Yet Dr. Busulwa had examined PW1 and PW2. He described on police medical forms 3 [Exh. PT 1 and PT 2] that PW1 and PW2 had cut wounds. The appellants' appeal to the Court of Appeal was dismissed. Hence the present appeal which is based on two grounds of appeal. The two grounds are framed this way

1. The learned Justices of the Court of Appeal erred in law and fact in upholding that the appellants had been properly identified.
2. The learned Justices of the Court Appeal erred in law and fact in failing to properly evaluate the entire evidence on record, thereby affirming the decision of the High Court.

ARGUMENTS

Mr. Enoth Mugabi, counsel for the appellants, lodged written statement of arguments on behalf of the appellants and, at the hearing of the appeal he relied on that statement. Similarly, Mrs. Alice Kobuhangi Khaukha, Principal State Attorney [PSA] who represented the respondent, filed written arguments in reply. Both counsel argued the grounds together.

Mr. Mugabi's arguments in summary are that there were inconsistencies in the prosecution case which go to the root of the case and that if the trial judge had evaluated the evidence properly, he would have acquitted the appellants. He appears to attend that the evidence is unclear as to which bedroom the attackers first knocked. Learned counsel contended that

because PW1 was made to lie down facing the floor, he could not identify the attackers. Learned counsel further contended that whereas PW1 testified that the whole incident lasted thirty minutes, he was contradicted by PW2 who testified that it lasted one and half hours. Counsel argued that because it was night time PW1, PW2 and PW3 could not identify the attackers even with the help of torch light. Without giving a basis for his theory, learned counsel opined that a person to whom torch light is directed as in this case, cannot identify the holder of the torch. He contended that both the trial judge and the Court of Appeal did not appreciate the principles of identification set out in the cases of *Nzaro Vs Republic (1990-1994) 1 EA 472 (of Kenya) and Abdallah Bin Wendo & Another Vs Re (1953) 20 EACA 166.*

In reply, Mrs. Alice Kobuhangi Khaukha opposed the appeal. She supported the decisions of both the trial judge and the Court of Appeal contending that the conditions obtaining during the robbery were favorable for accurate and proper identification of the appellants. She correctly argued in effect that there were no discrepancies that go to the root of the case. She pointed out, for instance, again correctly in our view, that PW1was made to lie on the ground after he had seen and observed the appellants and after A2 had stabbed PW2 and picked Shs. 1,000,000/= from under the mattress. The tying of and lying on the appellants who were village mates and whom he had known for very many years. The learned Principal State Attorney submitted that all the conditions set out in the Kenyan case of Nzaro (supra) as being favorable for proper identification were present in this case. She distinguished the case of Abdallah Wendo (supra) from the present case.

CONSIDERATION

We are persuaded by the arguments of the learned Principal State Attorney. We note that the first ground of appeal is a modification of the first ground in the Court of Appeal. Likewise, the present second ground is a combination of the 2nd and 3rd grounds in the Court of Appeal.

Although the appellants were represented by a different counsel in the Court of Appeal, Mr. Mugabi's arguments before us are the same as those which were raised in the Court of Appeal. As a first appellate Court, that Court subjected evidence on record to adequate reevaluation and proper scrutiny. We would therefore do no better than quote what the Court of Appeal stated at page 9 of its typed judgment.

'In the current appeal, PW1, PW2 and PW3 knew the appellants before the incident as village-mates and neighbours. PW1 and PW2 saw the appellants so clearly that they could even narrate the specific roles each of the appellants played in the commission of this crime. It was the 2nd appellant who got PW1 off the bed. It was the 2nd appellant who picked the money from the mattress. Both witnesses identified all the 3 appellants and one Bashir who was lynched in connection to the incident.

PW1, PW2 and PW3 saw the 2nd appellant flashing a torch light on and off. PW2 and PW3 also saw Bashir flashing a torch light at the scene. As PW1 and PW2 were rushed to hospital with critical injuries, they were hospitalized for two weeks. PW3 who had remained at home, reported to the LC1 Chairman (PW4) that it was the appellants and Bashir who attacked them.

The following day, PW4 and team went to arrest the assailants. The 1st appellant was arrested. When the 2nd and 3rd appellants saw the arresting team, they fled. The arresting team chased them until the 3rd appellant was arrested. The 2nd appellant, however, escaped. Running away by the 2nd and 3rd appellants amounts to corroboration of the participation in the commission of the crime, as fleeing was incompatible with innocence. ***See: Kiwanuka Remigious Vs Uganda, SCCA No. 41 of 1995.'***

Taking into account our findings, we are unable to fault the learned trial judge when held that there were no any possibility of mistaken identity of the appellants and that the conditions for a correct identification existed. In the premises, the 1st ground of this appeal; lacks merit.

We entirely agree with the reasons and conclusions of the Court of Appeal.

We would add that the case ***Abdallah Bin Wendo*** (supra) is wholly distinguished from the present case. The case of **Wendo** is a typical; case showing difficulties in identification by a single witness, in the dark, and who was assaulted by attackers whom he had not known before. This Court and its predecessors have set out guidelines to be followed regarding identifying witnesses in a number of decided cases. One of the leading decisions in Uganda is **Abdallah Nabulele & Others Vs Uganda (1979) HCB 77** upon which the trial judge relied and which sets

out guidelines on visual identification. The guidelines are similar to those set out in the Kenyan case of **Nzaro** (supra). These guidelines were correctly followed in this case by the learned trial judge. The Court of Appeal acted properly in upholding the decision of the trial judge. We find no sound reason to interfere.

OBSERVATIONS:

Although there was no cross-appeal by the respondent, both in this Court and the Court of Appeal, regarding the acquittal of the appellants of the charge of capital robbery, we consider it desirable to make observations about the learned trial judge's reasoning in support of the acquittal. At page 14 of his typed judgment, this is what the learned trial judge opined before he acquitted the appellants of the offence of capital robbery-

'The weapons used are described as a pang or knife. These were allegedly used to stab PW1 on the chest. Unfortunately, this knife /pang were not produced in Court. The injuries sustained by both PW1 and PW2 appear to be superficial. The medical report shows that PW1 had 3x2cm and PW2 had injuries which were described as 1.5x1cm. The Doctor classified both as "harm". A deadly weapon must be used in order (for) the case to fall under section 273 (2) of the Penal Code Act. I have a doubt in my mind whether the weapon used to inflict the injuries on the complainant was capable of causing death. The knife used was not tendered so as to determine its size nor ion mu view, sufficiently described during the trial.

In the circumstances therefore, I find that a deadly weapon has not been proved beyond reasonable doubt……..."

We must say with respect that the reasoning of the learned judge is rather strange. First of all the evidence of Dr. Busulwa who examined the victims was admitted under the old S. 64 of Trial Indictment Act. In respect of PW1, the judge had recorded the admitted facts as follows

"Cut wounds on the chest 3cm x 2cm

A second wound 2cm x 3cm

He classified these as harm".

The measurement of the wounds recorded here tally with what the doctor wrote on police FORM PF3. If the judge was in doubt about what caused the "cut wounds", by virtue of S.64 (3) of the Trial on Indictment Act he had powers to summon the doctor to express his opinion about what type of weapon caused the injuries. Or indeed during the trial, he should have asked either PW1 or PW2 or both to explain how the panga or knife looked like. We note that theses witnesses were apparently not challenged about the appearance of the panga or the knife when they were testifying. In fact during cross examination of PW2, `she stated (page 57) that "A3 had a spear. A2 had a knife, a panga, and a torch……..". If the learned judge was in doubt that was the time he should have asked for explanation. He could have recalled these witnesses for that purpose. The weapons could not be produced because none was seized as exhibit. The injuries must have been serious. That is why were kept for two weeks. Moreover the recorded evidence quoted above is the evidence which the judge read out to the assessors (according to the record on P.75) when he summed up the case to the assessors. On the basis of that, the assessors returned a verdict of guilty of capital robbery.

Further and interestingly, the learned judge believed the evidence of PW1 and PW2. In this evidence in chief, PW1 stated that he was stabbed with a knife. He was not challenged on this. It is not unreasonable to say that in Uganda, many Ugandans know that spear and a panga are weapons that can be used for death by cutting or spearing.

We would add that by 2000 when the robbery in this case was committed, S. 273 (2) defined a deadly weapon as follows-

> *"In this subsection, 'deadly weapon' includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death".*

This definition would certainly cover the spear, knife and panga which were seen by PW2. See also the case of Wasaja Vs Uganda (1975) EA. 181 with regard to the use or threat to use a deadly weapon in connection to the case, he doesn't seem to have appreciated its application.

In our opinion and with due respect to the learned trial judge, he misdirected himself on the law before he acquitted the appellants of the charge of capital robbery. However, since there was no cross appeal on this point, we say no more on this matter.

In conclusion, we find no merit in this appeal which is dismissed.

Delivered at Kampala this……5th …… day of …July……..2011

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B. J. Odoki

Chief Justice

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JWN Tsekooko

Justice of the Supreme Court

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B. M. Katureebe

Justice of the Supreme Court

J. Tumwesigye

Justice of the Supreme Court

E.M. Kisaakye

Justice of the Supreme Court