THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT

KAMPALA

(CORAM: ODOKI, CJ; TSEKOOKO;

KATUREEBE; TUMWESIGYE; KISAAKYE;

JJSC.)

CRIMINAL APPEAL NO: 1 7 OF 2009

BETWEEN

MUTESASIRA MUSOKE :::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Engwau, Kitumba and Nshimye JJA) in Criminal Appeal No.1 01 *of2003 dated* 10th *July 2009]*

JUDGEMENT OF THE COURT

This is a second appeal from the judgment of the Court of Appeal, which confirmed the High Court's conviction of the appellant for the offence of Aggravated Robbery contrary to Sections **285 and 286(2)** of the Penal Code Act but reduced the sentence of death imposed by the same court to life imprisonment.

The facts as accepted by the High Court and the Court of Appeal are that the appellant, Mutesasira Musoke, on 15th December 2000 at around 8:30 p.m. hired Mugume Benon (PW2) to take him on his

boda boda (motorcycle for hire) from Buswabugabo where he was stationed to Beera Wabigalo in Mityana. While being transported to Beera Wabigalo, the appellant grabbed PW2 and pierced him on the neck. Both of them fell down and started struggling for the motorcycle. Immediately a man emerged from the bush and seized and rode it off carrying the appellant with him.

PW2 then went to Mityana Police Station where he reported the robbery of his motorcycle. PWl, *D/CP* Wamala, was detailed to investigate the case. On 30th January 2001, he got information that there was a number plate and a side mirror of a motorcycle in an abandoned house previously occupied by the appellant. He went to that house and recovered the number plate Reg. No. UAC OOIR and side mirror both of which PW2 identified as parts of his stolen motorcycle. PWI then went and arrested the appellant and took him to Mityana Police Station together with the recovered number plate and side mirror.

In the course of the investigation the appellant gave information that he had sold the motorcycle to one Muyanja Vincent in Makindye, Kampala. The appellant led PWI and PW2 to Muyanja's workshop where a fuel tank and an engine cover were recovered. Both parts recovered were identified by PW2 as having been part of his stolen motorcycle.

The appellant and Muyanja Vincent were both charged with aggravated robbery. The High Court convicted the appellant of the offence with which he was charged and sentenced him to death. His

co-accused was convicted of receiving stolen property and sentenced to 6 months' imprisonment.

The appellant appealed to the Court of Appeal against both conviction and sentence. The Court of Appeal confirmed the conviction but substituted the sentence of death with that of life imprisonment. Dissatisfied with the decision of the Court of Appeal the appellant appealed to this court on three grounds, namely:

1. **That the Justices of Appeal erred in law and fact when they upheld the appellant's conviction in absence of satisfactory prosecution evidence to sustain the charge.**
2. **The Justices of Appeal erred in law and fact when they failed to properly re-evaluate the evidence adduced at trial to come to their own conclusion hence occasioning a miscarriage of justice.**
3. **That the sentence of life imprisonment handed by the Justices of Appeal is harsh and excessive in the circumstances at hand.**

At the hearing of this appeal, the appellant was represented by Mr. Kabega Musa while the respondent was represented by Mr. Odiit Andrew, Principal State Attorney. Both counsel filed written submissions. Counsel for the appellant argued grounds 1 and 2 together and ground 3 separately. Counsel for the respondent did the same. We shall follow the same course in considering the grounds of appeal.

In his submissions on grounds 1 and 2 learned counsel for the appellant contended that the learned Justices of Appeal did not re-evaluate the evidence properly before affirming the conviction of the appellant. He argued that the prosecution did not adduce any evidence of ownership of the motorcycle by PW2.

On the second ingredient of the offence of robbery with aggravation, that is use or threat to use a deadly weapon at or immediately before or immediately after the robbery, counsel argued that no evidence was led as to the nature of weapon used nor was the weapon exhibited in court. He argued that there was a contradiction by PW2 as to which medical officer examined him and that there was a lot of question marks relating to the medical report.

On the third ingredient of the offence, that is the participation of the appellant in the robbery, learned counsel argued that the Court of Appeal generally concurred with the finding of the trial judge without subjecting the evidence on identification of the appellant to thorough scrutiny as is required by law. He argued that the incident took place at night and the light of passing vehicles could not have been sufficient for proper identification of the appellant.

On exhibits of the motorcycle's parts which were found in an abandoned house, counsel for the appellant argued that the appellant had last lived in that house in 1996, about four years from the time the parts were found in the house. On the fuel tank and engine cover which were alleged to have been found in a workshop belonging to DW2, learned counsel argued that these

parts were never exhibited in court and he wondered why they were not.

Learned counsel for the respondent on his part argued that the learned Justices of Appeal ably re-evaluated all the evidence on record as is required by the law. On the ownership of the motorcycle, counsel for the respondent argued that the learned Justices of Appeal evaluated the evidence properly to come to the conclusion that the motorcycle belonged to PW2.

On the issue of a deadly weapon counsel argued that while it was rue that PW2 and PW4 did not mention the type of weapon used, from the description of injury by PW4 as a deep cut wound, the Court of Appeal came to the right conclusion that the wound was inflicted with a weapon made or adapted for cutting to satisfy the requirements of the provisions of section 273 (2) (now section 286(3)) of the Penal Code Act. He argued further that failure by the prosecution to exhibit the weapon in court was not fatal to the prosecution's case since its description was ably done by the prosecution witnesses.

Regarding the participation of the appellant in the robbery, learned counsel for the respondent argued that the Court of Appeal agreed that both PW2 and PW3 correctly identified the appellant before the robbery and that this evidence was corroborated by the finding of the number plate and side mirror of the stolen motorcycle which were recovered from the house previously occupied by the appellant. Furthermore, that the recovery of the fuel tank and

engine cover which were found in the workshop of DW2 after the appellant led PW1 and PW2 to it further corroborates the evidence of identification of the appellant by PW2 and PW3.

Counsel for the appellant raises three issues in ground 1 and 2 which he contends were not properly dealt with by the Court of Appeal. We shall deal with the three issues in this order: (1) that PW2 did not establish ownership of the stolen motorcycle (2) that the appellant was not properly identified as having participated in the robbery and (3) that no adequate evidence was adduced to prove
hat a deadly weapon was used.

On the issue of ownership of the motorcycle by PW2 the Court of Appeal stated in its judgment that the evidence of the complainant was clear that the motorcycle was his and it was robbed from him while it was in his possession. And further that PW3, a mechanic, knew that the motorcycle belonged to PW2 as he used to repair it for PW2. Mr. Kunya, counsel for the appellant, cited sections 253(1) and 254(1) and (2) of the Penal Code Act to show that the prosecution must prove actual ownership of the thing stolen for the offence of theft or robbery to stand. We think with respect that he is not right in his submissions on this point.

Section 254(2) of the Penal Code Act provides: "A **person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents-**

(a)An intent to deprive the general or special owner of the thing of it;

(b) …….

(c) ……..

(d) …….

(e) ……..

And "special owner" includes any person who .... has any right arising from or dependent upon holding possession of the thing in question."

There is sufficient evidence on record to show that the motorcycle was in PW2's possession when it was stolen from him. We find no merit in this argument and we agree with the finding of the learned trial judge and the Court of Appeal that PW2 owned the stolen motorcycle for purposes of Sections 285 and 286(2) of the Penal Code Act.

On the issue of identification of the appellant as a participant in the robbery of the motorcycle from PW2 this is what the Court of Appeal stated:

> **"On the issue of participation, both PW2 and PW3 had correctly identified the appellant before the robbery at Buswabulongo stage in Mityana town. According to PW2 and PW3, the appellant was wearing a black jacket on the night of robbery. Both witnesses identified the appellant**

with the help of moonlight and lights from passing vehicles ……..

After the robbery, PWI recovered a number plate Reg. No. UAC OOIR and side mirror of the stolen motorcycle from the house previously occupied by the appellant at Kitebere village. According to PWl, the appellant sold the stolen motorcycle to Muyanja Vincent Kirangwa, DW2. It was the appellant who led PWI and PW2 to the workshop of DW2 at Makindye in Kampala, resulting into the recovery of a fuel tank and an engine cover which PW2 confirmed to be parts of his motorcycle."

Learned counsel for the appellant complained that the Court of Appeal did not properly re-evaluate the evidence regarding the appellant's participation in the robbery. We think counsel's complaint is not justified. The Court of Appeal as can be seen from its above-quoted statement clearly re-evaluated the evidence on identification of the appellant to come to the conclusion that the appellant participated in the robbery. Even if there was to be doubt that light from the moonlight and passing vehicles was sufficient to identify the appellant in the night, still there was sufficient corroborative evidence to pin the appellant in the robbery. See **Wasajja V. Uganda** [1975] E.A. 181.

Regarding the third issue that there was not enough evidence to prove that a deadly weapon was used in the robbery, the Court of

Appeal quoted at length what the learned trial judge stated in his judgment on the matter and then concluded:

> **"We find from the evidence on record that neither the complainant nor the doctor who examined him mentioned the type of a deadly weapon used during the robbery. However, we agree with the findings of the learned trial judge in his judgment reproduced in this judgment elsewhere above that the weapon used during the robbery was a deadly weapon within the definition of Section 273(2) of the Penal Code Act."**

At the time when the robbery occurred in December 2000 a deadly weapon was defined by Section 273(2) of the Penal Code Act (before it. was amended in 2007) as including **"any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, it likely to cause death."**

The particulars of offence in the indictment of the appellant went as follows: "MUSOKE MUTESASIRA and VINCENT MAYANJA alias Kirangwa on the 15th day of December, 2000 at Wabigalo village in Mubende District, robbed MUGUME BENON of a motorcycle Reg. No. UAC 001R and at or immediately before or immediately after the said robbery used a deadly weapon to wit a knife to the said MUGUME BENON".

In an indictment of robbery with aggravation a deadly weapon is a key ingredient of the offence and it must be proved by the prosecution, like any other essential ingredient of any offence, beyond reasonable doubt.

In the instant case it is conceded by the trial judge and the Court of Appeal that neither PW2 nor any other prosecution witness saw what weapon was used. In the particulars of the offence in the charge sheet it is stated that a deadly weapon "to wit a knife" was used in the attack against PW2. However, during the trial, the prosecution did not produce as an exhibit the knife which was allegedly used nor lead any evidence of any witness having seen a knife being used.

The prosecution merely relied on the evidence of the medical doctor who examined PW2, 24 days after he was attacked. He testified in court that on examination of PW2 on 8th January 2001 he found that he had a deep cut wound on the right side of the neck and lacerations on the right hand and he graded the injuries as harm. This evidence tallies with the findings in the medical report which he signed and which was exhibited in court.

In cases where an accused person is indicted for aggravated robbery, failure by the prosecution to exhibit in court the deadly weapon used in the robbery will not be fatal to the prosecution's case as long as there is other reliable evidence adduced to prove

that a deadly weapon was used. See, for example, **Haruna Turyakira & others vs Uganda,** Criminal Appeal No. 07 of2009.

In the instant case PW2 stated in court that on the 15th December 2000 the appellant hired him to take him to Beera Wabigalo but that on the way the appellant grabbed him by the neck and pierced him in the neck and both of them fell down and as he struggled with the appellant another person appeared from the bush, got hold of the stolen motorcycle and rode off carrying the appellant with him. The following day of the incident PW3 saw PW2 with a plaster on his neck and PW2 told him that a person he had carried the previous night had pierced him.

PW 4, a medical doctor who examined PW2 testified that PW2 had a deep cut wound on the right side of his neck and lacerations on his right hand. The indictment against the appellant was that the appellant used a deadly weapon "to wit a knife" to rob PW2 of his motorcycle. The Court of Appeal in confirming the conviction of the appellant for aggravated robbery accepted the finding of the trial judge that a deadly weapon was used. In its judgment the Court of Appeal quoted with approval the statement from the trial judge's judgment which goes as follows:

> **"PW2, Mugume Benon, did not say what weapon was used for inflicting the injury. The evidence of PW4, Dr Ocan Banda, who examined the complainant, says that the complainant sustained a cut wound on the right side of the neck. Though the complainant was of the impression**

that he had been pierced, in fact he had been cut as the evidence was that of an expert. It follows, therefore, that the injury of the complainant was inflicted with a weapon made or adapted for cutting.

An instrument or weapon made or adapted for cutting by operation of the definition of S. 273(2) of the Penal Code Act is a deadly weapon. In the instant case therefore the assailant of the complainant used upon him a deadly weapon immediately before robbing him of his motorcycle. I find therefore that the prosecution has proved the ingredient of the offence of aggravated robbery beyond reasonable doubt."

The only evidence the learned trial judge and the Court of Appeal relied upon for proof that a deadly weapon was used by the appellant against PW2 is the medical evidence of Dr. Ocan Banda, PW4. However, the medical evidence itself raIses a number of questions which cast doubt on its reliability.

First, it was performed 24 days after the attack. Considering that PW2 reported the robbery of his motorcycle immediately after the attack no reason is given why the police took so long before referring him for medical examination. Furthermore the medical report does not give a fair description of the wound that was examined. It merely says that PW2 had a deep cut wound on the right side of his neck and lacerations on the right hand. How deep or long the wound was is left to the court to guess.

Additionally considering the period that had passed the medical report should have indicated whether the wound was healing, and if not, whether it was infected, for in the period that had passed before the medical examination was done the wound could not have remained fresh.

In his evidence PW2 stated that after the attack he hired a boda boda to report the attack to police. No evidence was adduced by the prosecution to show that when he came to the police station to report the robbery, his clothes were soaked in blood as would be expected of a person who had just sustained, according to the medical evidence, a deep cut wound on his neck.

According to PW3 PW2 told him the day following the attack that the person he had carried the previous night had pierced him. He had a plaster on his neck. It would, therefore, appear that the plaster on PW2's neck was only a first aid treatment suggestive of a minor injury. Unless the weapon stated to have been used is produced in court or sufficient evidence is adduced in court to describe that weapon, reliance on such injury alone would in our view not be sufficient evidence to prove the ingredient of a deadly weapon in an indictment of aggravated robbery.

Expert evidence should be carefully scrutinised and not be taken as unquestionable truth by courts of law as the trial judge seems to have done in this case. We agree with the statement of counsel for the appellant that the evidence of PW4 as the medical doctor who examined PW2 is not reliable enough to prove that the

appellant inflicted a deep cut wound with a deadly weapon on PW2 and to result in the conviction of the appellant for aggravated robbery. We think that if the High Court and the Court of Appeal had subjected the evidence of PW4 to thorough scrutiny as they ought to have done, they would have arrived at a different conclusion.

In the circumstances, the appellant's conviction of aggravated robbery contrary to Sections 285 and 286(2) of the Penal Code Act must be quashed. Instead the appellant is convicted of robbery contrary to Sections 285 and 286(1) (b) of the Penal Code Act.

Ground 3 of the appellant's memorandum of appeal is that the sentence of life imprisonment handed by the Justices of Appeal is harsh and excessive in the circumstances. This court would have dismissed this ground as incompetent by virtue of Section 5(3) of the Judicature Act.

However, in view of the fact that this court has quashed the appellant's conviction for aggravated robbery and substituted it with the offence of robbery contrary to Sections 285 and 286(1) (b) of the Penal Code Act the maximum sentence of which is life imprisonment, the sentence of life imprisonment for aggravated robbery passed on the appellant by the Court of Appeal has to be reviewed.

In his submissions on ground 3 counsel for the appellant only argued on the legality of the sentence of life imprisonment passed by the Court of Appeal on the basis of **Attorney General Vs Susan Kigula & 417 others,** Constitutional Appeal No. 3 of 2006, and did not say anything in mitigation of the sentence apart from merely stating that it was excessive. In view of what we have decided **Kigula** case is no longer relevant here.

In conclusion the appeal succeeds partially.

This court will, therefore, have to hear the submission of the appellant in mitigation first before deciding on the sentence relating to his conviction for robbery contrary to sections 285 and 286(1) (b) of the Penal Code Act.

Delivered at Kampala this 26th day of September 2011

B.ODOKI
CHIEF JUSTICE

J.W.NTSEKOOKO
JUSTICE OF THE SUPREME COURT

3.

B.M. KATUREEBE JUSTICE
OF T E SUPREME COURT

J. TUMWESIGYE
JUSTICE OF THE SUPREME COURT

E.M. KISAAKYE
JUSTICE OF THE SUPREME COURT