THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 20 OF 2009

(CORAM: ODOKI, CJ; TSEKOOKO; KATUREEBE; TUMWESIGYE; KISAAKYE; JJSC.)

YODA ATIKU & BANURA DAVID ::::::::::::::::::::::::::::::;;;;APPELLANTS

VERSUS

UGANDA:::RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Mpagi-Baheigeine, Kitumba, and Nshimye, JJA) in Criminal Appeal No. 46 of 2005 dated the 19th August 2009].

JUDGMENT OF THE COURT

This is a second appeal by Yoda Atiku and Banura David (1st and 2nd Appellant respectively). They were indicted in the High Court for Aggravated Robbery contrary to Sections 285 and 286 of the Penal Code Act. The High court convicted them of that offence and sentenced them to death. They appealed to the Court of Appeal which affirmed their conviction and sentence, hence their appeal to this court.

The prosecution's case as accepted by both the High Court and the Court of Appeal was that the two appellants were workers of one Kamuramwire Kensi (PW2), a man aged 72 years, who lived at

Kijunjubwa, in Masindi District. The appellants resided in a separate house but within PW2's homestead. On 7th November 2001 PW2 asked the appellants to drive his five heads of cattle to Kijunjubwa market for sale. He followed them to the market and sold the five heads of cattle for shs. 1,500,000/=. In the market he used this money to pay off his debts and the two appellants' wages. He also bought some household items from the market. He returned home with shs. 300,000/=

In the night following the market day, at around 2:00 a.m., while PW2 was in his house with members of his family and a visitor asleep, they were awakened by the barking of his dog. They all got up. PW2 saw three people enter the house carrying pangas and torches. The house he lived in was a small house made of mud and wattle, with no shutters for the main door or bedroom entrances.

The attackers were flashing the torches around. They entered his bedroom where he was seated and demanded money from him. With the help of the torch light he was able to identify Yoda Atiku and Banura David (1st and 2nd appellant). The 3rd attacker whom he was not able to identify cut him on the knee with a panga. They took with them the shs. 300,000/= which was in his coat, two suit cases of clothes and some other household items. That same night the witnesses checked in the house where the two appellants resided but they were not there.

The medical examination which was done by Dr. Olwendo L.Y. (PWl) on PW2 the following day found he had a deep cut wound on the left knee. The big blood vessel of his knee had been cut and this resulted in excessive bleeding. PW2 spent several days in hospital undergoing medical treatment of his wound following the attack.

In the evening of 8th November 2001 the two appellants were arrested by police. They were charged in the High Court with Aggravated Robbery contrary to Sections 285 and 286(2) of the Penal Code Act. They denied participation in the offence pleading the defence of alibi. However, the trial judge accepted the case for the prosecution and disbelieved their defence of alibi. He convicted them as charged and sentenced them to death which was a mandatory sentence for the offence at that time.

The appellants appealed to the Court of Appeal which affrrmed their conviction and sentence. Being dissatisfied with the decision of the Court of Appeal they appealed to this court. They filed a joint memorandum of appeal containing two grounds which were drafted as follows:

1. **The learned Justices of Appeal erred in law and in fact when they held that the appellants were properly identified at the** scene of **the crime under conditions which were unfavourable for correct identification.**

2. That in the alternative but without prejudice to the above, the file should be remitted to the trial court for mitigation of the sentence.

The appellants were represented by Mr. John Bosco Mudde of *M/s* Katende, Ssempebwa & Co. Advocates who filled what he called a summary of appellants' submissions. At the hearing of the appeal he supplemented his written submissions with oral submissions. Ms. Rose Tumuheise, Principal State Attorney, represented the respondent and she made oral submissions.

Learned counsel for the appellants submitted that the learned Justices of Appeal erred to uphold the conviction. He submitted that the witnesses (PW2 and Faib Kimoori PW3) could not have properly identified the appellants as they claimed since the attack took place at 2:00 a.m. at night and the light from the torches could not have enabled the witnesses to see the attackers. Fear also affected their identification. He contended that PW2 was old with a sight problem and his memory was not good as he could not recollect many things that happened during and after the incident.

He further submitted that there were contradictions in the testimony of PW2 and PW3. For example, PW3 mentioned that there was moonlight whereas PW2 did not, and PW2 stated that the attack lasted 30 minutes whereas PW3 said it took one and a half hours.

He cited the cases of **Kiarie v Republic** [1976-1985] I EA 213, **R v. Eria Sebwato** [1960], EA 174, **Roria v Republic** [1967]. I EA 583, **Abdala Bin Wendo and Another v. R** (20EACA) **168,Wasswa and Another v. Uganda** [2002J 2 EA 667 and **R v. Turnbull and others** [1976] 3 All ER 54 for the view that where the evidence relied upon to implicate a person is only of identification that evidence should be absolutely watertight and the court should be cautious to base a conviction on it.

Ms Tumuheise Rose, learned counsel for the respondent, opposed the appeal saying that the learned Justices of Appeal properly reevaluated the evidence and came to a right decision. She submitted that PW2 knew the appellants as they were his employees and he disclosed to the police the following morning that he had been attacked by his workers. She argued that the appellants' defence of alibi was destroyed by the evidence of the prosecution witnesses who placed them at the scene of crime. She submitted further that the appellant's evidence during their trial of total denial of ever working for PW2 or knowing him was not credible and that they had run away from the scene of crime.

Consideration of ground one:

The appellants' complaints in ground one are similar to those which were made in grounds one, three and four in the Court of Appeal. The learned Justices of Appeal were convinced that PW2 and PW3

recognised the appellants with the help of the light from the attackers' torches as PW2's house was small with no doors and so it was possible to see at close range what was going on. They did not agree with learned counsel for the appellants' submissions that there was discrepancy in PW3's and PW2's testimony about moonlight. They agreed with the trial judge that PW2 concentrated on the light from the torches which had been lit in the house and did not focus his mind on the moonlight.

The learned Justices of Appeal agreed with the learned trial judge's finding that both appellants were workers of PW2 and lived in the same homestead and they were, therefore, very well known to PW2 and PW3 and so the witnesses could easily identify them.

On the issue raised by counsel for the appellants that there was contradiction between the testimony of PW2 who stated that the attack lasted 30 minutes and that of PW3 who stated that it took one and a half hours the learned Justices of Appeal agreed with the learned trial judge that PW3's observations of attack included what took place outside the house after the attack and so her estimation of time was longer. PW3 was subjected to extensive cross-examination but she remained firm. Moreover they did not see this as a serious contradiction and we respectfully agree with them in this respect.

The point raised by counsel for the appellants that PW2 had poor eye sight and so he could not properly see the robbers was equally considered by the learned Justices of Appeal. The evidence of both PW2 and PW3 was that PW2's eye sight became poor after the robbery had taken place and both the Justices of Appeal and the trial judge believed this evidence. We also agree with them in this respect.

Apart from the evidence of identification the learned Justices of Appeal took into account other evidence linking the appellants to the commission of the offence. The appellants knew that PW2 had sold his five heads of cattle and obtained money because they were the ones who took the cows for him to the market and they were in the market when the cows were sold. Secondly the learned Justices of Appeal considered the evidence that the appellants had disappeared from their usual place of residence on the night of the robbery.

We think that the learned Justices of Appeal re-evaluated the evidence properly to come to the conclusion that the two appellants indeed participated in the robbery at Kijunjubwa on 8th November 2001. We find no justifiable reason to disturb their conclusion. The learned Justices of Appeal were right to uphold the conviction. In the circumstances the appellants' ground one of appeal fails.

Consideration of ground two:

The appellants' second ground of appeal is "That in the alternative but without prejudice to the above, the file should be remitted to the trial Court for mitigation of the sentence". To support this ground counsel for the appellants argued that in the Constitutional Petition No.6 of 2003 **Susan Kigula and 416 others vs. The Attorney General** which decided that the various laws of Uganda that prescribe mandatory death sentences are inconsistent with Articles 21, 22(1), 24(a) and 44(c) of the Constitution included among these laws Section 286(2) of the Penal Code Act which imposes a mandatory death sentence for aggravated robbery, the offence of which both appellants were convicted.

Learned counsel submitted further that in the Kigula Constitutional Appeal decision, this court held that for those **"respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law."**

On the other hand, Ms Rose Tumuheise, Principal State Attorney, for the respondent, opposed this ground arguing that submissions in mitigation were made during the hearing of the appeal in the Court of Appeal and so there was no need to send the case file to the High

Court for mitigation because the Court of Appeal was competent to make the order it made. For this argument she relied on Section **11** of the Judicature Act which states:

> **For purposes of hearing and determining the appeal, the Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the Court from exercise of the original jurisdiction of which the appeal originally emanated.**

She also sought to rely on Section 94 of the Trial on Indictments Act which provides that though submission on mitigation is provided for by the law, failure by the court to ask the accused to say something on mitigation does not render the proceedings invalid.

The issue for the determination of the court is whether in view of the decision of this court in **Attorney General vs. Susan Kigula & 416 others** SCCA No.3 of 2006 the Court of Appeal ought to have remitted the case to the High Court to enable the appellants to make submissions on mitigation of sentence there.

Like in the instant case, this issue was considered by this court in the case of **Ambaa Jacob & Asiku Jamil vs. Uganda** Criminal Appeal No. 10 of 2009. In that case we held that the Court of Appeal erred when it heard the appeal against the death sentence by entertaining submissions on mitigation of sentence by the

appellants' counsel and should not have ignored the direction of this court in **Attorney General vs. Suzan Kigula and 416 others** (supra). In that case this court, as counsel for the appellants correctly submitted, ordered that for those "respondents whose sentences arose from the mandatory death sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law."

The same reasons which the court gave for its decision in **Ambaa Jacob & Asiku Jamil vs. Uganda** (supra) equally apply to the instant case. It was the view of this court that Section 11 of the Judicature Act could only apply where the Court of Appeal considered on appeal a decision of the High Court and reversed it. In such circumstance the Court of Appeal could then pass a sentence or make any order which the court of first instance could have made.

The circumstances of this case, as in **Ambaa** case (supra), are, however, different. When the High Court passed the death sentence against the appellants it had no discretion in the matter for the death sentence was at that time mandatory. However later the Constitutional Court in **Suzan Kigula vs. Attorney General** (supra) decided and this court in **Attorney General vs. Suzan Kigula**

(supra) confirmed on appeal, that mandatory death sentences in the law were unconstitutional. Having been declared unconstitutional these mandatory death sentences became null and void and therefore no longer existed in law. It was for this reason that this court ordered that all cases where appeals against death sentences were pending before an appellate should be remitted to the High Court for purposes of hearing appellants on mitigation of sentence. If the appellants were not satisfied with the decision of the High Court on sentence they would then exercise their right to appeal to the Court of Appeal against the decision of the High Court.

The order of this court in Suzan Kigula case applies to the instant case as well because the mandatory death sentence was passed against the appellants before the Suzan Kigula Constitutional case was decided making mandatory death sentences in the law unconstitutional..

As we stated in **Ambaa** case (supra) we think the Court of Appeal came to disregard the order of this court in **Attorney General vs. Suzan Kigula** (supra) that all pending appeals against the death sentence in appellate courts should be remitted to the High Court for purposes of hearing appellants on mitigation of sentence because it believed erroneously that there was a competent appeal against the death sentences before it. That is why it wrongly stated that "we have not found any reason to justify us to interfere with

the sentence" in its judgment. But there was no appeal against sentence since the mandatory death sentence had been declared by both the Constitutional Court and the Supreme Court to be unconstitutional. That is why the sentence has to be considered by the court of first instance. There must be a sentence passed by the High Court before it is appealed to the Court of Appeal.

To conclude, in accordance with our decisions in **Attorney General vs. Suzan Kigula** (supra) and **Ambaa Jacob & Asiku Jamil vs. Uganda** (supra) we set aside the order of the Court of Appeal confirming the death sentence and order that the file be remitted to the High Court for the appellants to make submissions in mitigation of sentence.

Delivered at Kampala this ... 3rd.... day of. July.. 2012.

B.J. ODOKI
CHIEF JUSTICE

J. W.N.**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