THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 08 OF 2014

(***Coram**: Katureebe C.J.; Arach Amoko; Mwangusya; Opio Aweri; Mwondha JJSC)*

BETWEEN

TITO BUHINGIRO …….……..... APPELLANT

AND

UGANDA ..... RESPONDENT

[Appeal against the judgment of the Court of Appeal, at Kampala Criminal Appeal No. 15 of 2011 delivered on the 9th April 2014 by Kasule, Buteera and Prof. Lilian Tibatemwa-Ekirikubinza; JJA]

JUDGMENT OF THE COURT

This is an appeal from the decision of the Court of Appeal which upheld the conviction of the appellant by the High Court for the offence of Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act and a sentence of 19 years imprisonment.

The brief background of the case as presented by the prosecution is that **BAHATI YASIN** (PW2) is a clean coffee dealer based at Ishaka, Bushenyi District. The appellant used to be a Transporter who owned a lorry (Mercedes Benz) 1820) white in colour with a green band in the middle. On 1st July 2007 the appellant was introduced to Bahati who loaded 20 tonnes of clean coffee to be transported to Ibelo Industrial Area Kampala at a fee of Shs800,000/= out of which shs. 200,000 was paid to the appellant. The loading was done at Ishaka and Kabale. PW2 instructed one of his workers, Umar Nsubuga (PW1) to travel with the appellant and ensure that the coffee was delivered. On boarding the lorry Nsubuga found two people seated in front of the lorry and they were joined by two others at the Mbarara Weighbridge. The appellant told PW1 that the two men at the Weighbridge were his friends who were travelling to Kampala to collect spare parts for their motor vehicle. However, shortly afterwards the two attacked PW1 whom they assaulted. He was tied with a rope and

blindfolded. The appellant and one of the assailants pulled out a pistol and demanded for money from him. In the meantime the appellant drove the lorry from the main road branching off to a murram road. Eventually the group reached a place where they off loaded all the coffee from the lorry. Later the appellant drove the lorry back to the main Road. PW1 who was still blindfolded was abandoned at a place which he recognised as Naalya in Kampala.

Immediately, Nsubuga contacted PW2 whom he informed of his ordeal and the fate of the coffee. The matter was reported to the Police who traced the lorry to Ndeeba, Kampala where mechanics under the supervision of the appellant were trying to change the looks of the lorry by removing the green band in the middle so that it would all look white. The appellant was arrested at the garage at Ndeeba. He led the Police to Kyagulanyi Coffee Factory where some of the coffee had been offloaded.

The appellant denied having been in Ishaka where he allegedly picked the coffee on 1st July 2007. He stated that on 28th June 2007 he had travelled from Juba, South Sudan and arrived in Kampala on 30th June, 2007. On 1st July 2007 he took his vehicle for repairs in a garage in Kampala from where he was arrested on 2nd July 2007 when the mechanic was spraying part of the vehicle which had gotten damaged when another vehicle knocked him.

The trial Judge believed the prosecution case after evaluating the entire case including the appellant's alibi which he rejected. The Court of Appeal agreed with the trial judge that the appellant had been properly identified by all the prosecution witnesses who saw him in various places during the loading of the coffee on his lorry and the factory where it was offloaded.

The Court of appeal also rejected his alibi opining that he had been placed at the scene of crime. He appeals to this Court against the findings of the two Courts and raises two grounds as follows:-

1. That the learned Justices of Appeal erred in law when they failed to adequately re-evaluate the evidence on record as regards identification thereby coming to an erroneous decision.

2. That the learned Justices of Appeal erred in law when they held that the Appellants alibi had been discredited.

The appellant thus prayed this Honourable Court to quash the conviction and set aside the sentence.

Mr. Henry Kunya represented the appellant at the hearing of the appeal while the respondent was represented by Ms Ann Kabajungu Amooti, a Senior State Attorney in the Directorate of Public Prosecutions. Both Counsel filed written submissions which they adopted at the trial.

On the first ground Mr. Kunya submitted that the Court of Appeal as the first appellate Court had failed in its duty to subject the evidence as regards identification to a thorough re-evaluation before coming to the conclusion that it was sufficient to support the conviction against the appellant. He submitted that instead of weighing the factors favouring correct identification against those against, the Court had concentrated on the factors favouring correct identification while ignoring those that weighed against it before coming to the conclusion that the identification of the appellant was free from error. He contended that the fact that none of the witnesses had ever had any interaction with the appellant before and the fact that the attack occurred at night in the cabin of the lorry whereupon PW1 was blindfolded and his attackers sat on him throughout the journey should have been put into consideration before reaching the conclusion that the appellant was positively identified. Counsel also raised the issue of the variance of the Registration number of the lorry which none of the two Courts below considered and yet it was a crucial factor in determining the identification of the appellant.

On ground 2 Counsel contended that while the Court of Appeal rightly stated the law regarding the defence of alibi, the Court misapplied the law in the instant case. In his submission, the reason the Court of Appeal rejected the appellant's alibi was because they had accepted the identification evidence against the appellant before considering his alibi and yet the evidence of identification itself was not credible.

Ms Ann Kabajungu Amooti for the respondent submitted that the Court of Appeal had re-evaluated all the evidence regarding the identification of the appellant right from Ishaka and Kabale where the coffee was loaded onto his lorry to Masaka where it was offloaded. This evidence included that of PW2 who negotiated the cost of the transport with the appellant, PW1 who travelled with the appellant in the lorry up to the weigh bridge in Mbarara where he was attacked, PW3 and PW4 both of whom saw the appellant when the coffee was offloaded at Kyabakuza in Masaka and PW6, a Police Officer who found the appellant in a

garage in Ndeeba trying to change the look of the motor vehicle. According to State Counsel there were no conditions that rendered the identification of the appellant difficult.

On ground two, the learned Senior State Attorney submitted that the prosecution had discharged its burden of disproving the appellant's alibi which was evaluated together with the prosecution evidence regarding the circumstances under which the appellant was identified. According to her, both Courts had properly evaluated the evidence before coming to the conclusion that the appellant had been placed at the scene.

The first ground of appeal brings out the issue relating to the duty of the Court of Appeal as a first appellate Court and the consequences of the alleged failure by the Court to fulfil its function.

The duty of the Court of Appeal as first appellate Court is provided under Rule 30 (1) of the Court of Appeal Rules. The Court is duty bound to re-appraise the evidence and draw its own conclusion of fact.

The Supreme Court in the case of **Kifamunte Henry Vs Uganda (SCCA No. 10 of 1997)** held that it is the duty of the first appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial Court and make its own mind and failure to do so amounts to an error of law.

This is a second appeal. This Court does not have the duty to re-evaluate evidence unless it has been shown that the first appellate Court did not re-evaluate the evidence on record. In **Areet Sam Vs Uganda (Criminal Appeal No. 20 of 2005)** the Supreme reiterated the above duty in the following terms:-

> **"We also agree with Counsel for the respondent that it is trite law that as a second appellate Court we are not expected to re-evaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong on findings of fact, the Court is obliged to do so and to ensure that justice is properly and truly served.."**

In the instant case the High Court relied on the testimony of Bahati (PW2) who negotiated with the appellant for transportation of his coffee to Kampala. The two engaged in a

conversation as the coffee was being loaded at Ishaka and Kabale. The conversation took a considerably long time during which PW2 noticed that the appellant's left hand fingers were bent. PW2 asked the appellant what happened and he explained that he had been shot during the war. PW2 returned to Ishaka from Kabale while Umar Nsubuga (PW1) continued on the journey with the appellant. He was assaulted and blind folded after the weighbridge in Mbarara but before that he had had a ample opportunity to observe him and could readily recognise him. Nakayiwa (PW3) and Nsimbe (PW4) had identified him when the coffee was offloaded at PW3's factory. The High Court also relied on the fact that on the day of his arrest the appellant was found in a garage where he was supervising the change of the looks of his lorry.

We have set out the above evidence because it is the same evidence the Court of Appeal re-evaluated before coming to the same conclusion that all the witnesses who testified to have seen the appellant in Ishaka, Kabale Mbarara and Kampala had dealt with him in broad day light and spent with him a considerably long time and thus had ample opportunity to recognise him. We would like to single out Bahati (PW2), who, during the conversation with the appellant observed a deformity on his fingers for which he offered an explanation. In our view, Mr. Kunya's complaint that the Court of Appeal failed to adequately re-evaluate the evidence on record as regards identification has no basis and we find no basis for questioning the concurrent findings of facts by the High Court and Court of Appeal that the factors favoured a correct identification being made.

Mr. Kunya also submitted that none of the Courts below considered the fact that the appellant was not known to any of the witnesses before, a factor which was unfavourable for correct identification being made. We are aware of the case of **Abdulah Nabulele & others Vs Uganda, Court of Appeal, Criminal Appeal No. 9 of 1978** where it was observed that the length of time, the distance, the light and familiarity of the witness with the accused are factors which go to the quality of the identification evidence. In this case, although the appellant was a stranger to the witnesses, the length of time and the interaction with him in diverse places in broad day light make the factor irrelevant.

On the issue of variance of the registration numbers of the lorry, we are of the view that the fact that none of the witnesses was certain about the registration does not affect the quality of the identification evidence. There was a suggestion that the Registration Number of the lorry

was changed. It is also possible that none of the witnesses bothered to observe and note the registration number of the vehicle. Further, the evidence of identification relied on by the trial Court and the Court of Appeal was such that even without the details of the registration number to which not much attention was paid by the witnesses, there was no question that the witnesses had been mistaken about a person with whom they interacted in broad day light and for such long periods as already observed. Ground one of the appeal fails.

Lastly, regarding the appellants defence of alibi which is the subject of the second ground of appeal, we have already stated what the appellant pleaded in form of his alibi. Both Courts considered not only the evidence adduced by the prosecution but also that adduced by the appellant before making a finding that he had been placed at the scene of crime. The Court of Appeal cited with approval the case of **Bogere Moses and Another Vs Uganda (SCCA 1 of 1997)** where the Supreme Court of Uganda held as follows:-

> **"What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time.**
>
> **To hold that such proof has been achieved the court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence that the accused was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and the hold that because of that acceptance per se the other version is unsustainable."**

In the Court's analysis of the appellant's defence of alibi the Court of Appeal re-evaluated the appellant's assertion that he was in Juba and only returned to Kampala on 30th June 2007 and the prosecution evidence that on 1st July 2007 when he claims that he had returned to Kampala from Juba he was seen in Ishaka and Kabale where the coffee was loaded on his lorry which he transported to a place where it was offloaded. He was also seen at this point. The concurrent finding of the two Courts below was that considering the overwhelming evidence of the identifying witnesses the defence of alibi was not sustainable. Again we see

no basis for interfering with the finding which was arrived at after the evaluation of both versions of the case. Ground two also fails.

In the result we find no reason whatsoever to depart from the findings and decision of the Court of Appeal. This appeal is accordingly dismissed.

Dated this ……..day of ……..2018.

…….
Katureebe
Chief Justice

…….
Arach-Amoko
Justice of the Supreme Court

…….
Mwangusya
Justice of the Supreme Court

…….
Opio Aweri
Justice of the Supreme Court

……..…….
Mwondha
Justice of the Supreme Court