

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT MBARARA

CRIMINAL APPEAL NO. 290 OF 2010

*Appeal from the decision of Hon. Justice Lawrence Gidudu
at Mbarara High Court in Criminal Session Case No. 0221
of 2008 delivered on 13.10.2010*

TWESIGYE STEPHEN :::APPELLANT

VS

UGANDA :::RESPONDENT

**Coram: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Byabakama Mugenyi Simon, JA
Hon. Mr. Justice Alfonse C. Owiny-Dollo, JA**

JUDGMENT OF THE COURT

This is an appeal from the conviction and sentence of the High Court of Uganda Holden at Mbarara before Hon. Justice Lawrence Gidudu in **Criminal Session case No. 0221 of 2008**.

The appellant was tried and convicted of aggravated robbery contrary to **Sections 235 and 286(2) of the Penal Code Act**. He was sentenced to 10 years imprisonment.

The facts as accepted by the trial Judge were that, on the 6th of July 2005, at about 1:00 am, the appellant and others attacked the home of the complainant John Kanyabusenzi (PW2) while armed with a panga and a knife. The assailants

... tied him up together with his wife and demanded for money while threatening to cut them. The thugs robbed shs. 380,000/- from the complainant who identified the appellant by voice.

The appellant was arrested whereupon he confessed to robbing the complainant with two other assailants. He was indicted, tried and convicted of aggravated robbery and sentenced to 10 years imprisonment. Dissatisfied with the decision of the trial judge, he appealed to this Court against both conviction and sentence on the following grounds;

- (1) That the learned trial Judge erred in law and in fact when he held that the appellant was properly identified by PW2 and PW3 whereas not thus reaching a wrong decision.**
- (2) That the learned trial Judge erred in law and fact when he held that there were favourable conditions to identify the appellant whereas not thus reaching a wrong decision.**
- (3) That the learned trial Judge erred in law and fact when he ignored major contradictions in the prosecution's evidence of PW1, PW2, PW3, PW4, and PW5 in relation to identification and handing over the money thus reaching a wrong decision and miscarriage of justice.**

- (4) That the learned trial Judge erred in law and in fact when he believed and relied on the evidence of PW1 which was full of contradictions and inconsistencies to convict the appellant thus causing miscarriage of justice.**
- (5) That the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and materials on record thus reaching a wrong decision.**
- (6) That the learned trial Judge erred in law and fact when he sentenced the appellant to a harsh and excessive sentence of 10 years imprisonment and compensation of shs. 380,000/- thus causing miscarriage of justice.**

At the hearing of this appeal, Mr. Agaba Jadison appeared for the appellant on state brief and Ms. Tumuheise Rose Principal State Attorney, appeared for the respondent.

Counsel for the appellant abandoned ground No. 6 and argued the other grounds together. He submitted that the appellant was not properly indentified considering that the factors at the scene were not favourable for correct identification.

While PW2 and his wife (PW3) stated they identified him by voice, in Counsel's view, this was inadequate since neither

witness disclosed what the appellant spoke at the scene that could have enabled them to recognise his voice.

Counsel further submitted that the trial Judge erred when he relied on the retracted confession statement of the appellant that was not corroborated. He invited Court to allow the appeal, quash the conviction, and set aside the sentence.

Counsel for the respondent opposed the appeal. She submitted that though the appellant was not visually identified, PW2 and PW3 who knew him very well ably identified him by his voice. There was also the charge and caution statement wherein the appellant fully confessed to participating in the robbery. Counsel argued that the said statement was corroborated in material particulars, without pointing out the evidence that provided corroboration of the confession statement. She prayed that this Court upholds the conviction and sentence.

We have carefully perused the record and considered the submissions of both counsel. We are alive to the fact that this Court has a duty as the first appellate Court to re-appraise the evidence and come up with its own conclusions:- See **Rule 30(1)(a) of the Rules** of this Court. In **Begumisa and others Vs Tibebaga SCCA No. 17/2002**, the Supreme Court held that:

“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal Court its

own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appellate Court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inferences and conclusions."

We shall therefore proceed to re-evaluate the evidence on record before drawing our own conclusions.

It was the evidence of PW2 and PW3 (victims) that while the other assailants entered the house, the appellant remained outside. PW2 stated that before they entered the house, the assailants proclaimed they were Local defence unit personnel who had come to arrest his son Kakuru. He recognised one of the voices as that of the appellant who was living in the same village. During cross-examination PW2 stated:

"..... I recognised his voice..... I did not see A2 save for his voice...."

The evidence of Consolata Bamwine (PW3) was that:

"I recognised the voice to Twesigye because I know him well. A2 is even a friend of my son Kakuru. I used to interact with him (A2)."

The legal position on identification of a person by his or her voice is laid out in **SARKAR ON EVIDENCE, FOURTEENTH EDITION, 1993** at page 170 as follows:

“If the Court is satisfied about the identification of persons by evidence of identification of voice alone, no rule of law prevents its acceptance as the sole basis for conviction. Possibilities of mistakes in identifying persons by voice especially by those who are closely familiar with the voice could arise only when the voices heard are different from the normal voices on account of the situation or when identical voices are possible from other persons also....”

The Supreme Court in **Sharma Kooky & another Vs Uganda** [2002]2 EA 589 held that:

“Identification becomes a crucial issue if the identifying witness is unable to physically see the speaker whose voice she claims to identify and therefore it is necessary for the trial Court to consider the identification with greatest care and caution. There is a possibility of mistaken identity by voice where it is claimed that the person identifying has never had face to face discussion with the person being identified.”

In a latter decision, the **Supreme Court in Sabwe Abdu Vs Uganda Criminal Appeal No. 19 of 2007**, held that;

“To identify a person’s voice, one does not necessarily have to have talked to that person.”

In that case, the Court considered that the voice identifying witnesses were familiar with the appellant because he lived about a quarter mile from their home, they always passed by his home as they went to school and they used to hear him speak to other people. The appellant also used to come to their home where they would hear him speak to their father. The Court therefore agreed with the trial Judge's finding that given those circumstances, the identifying witnesses would be able to identify the appellant by voice even if they had never directly talked to him.

In the instant case, both PW2 and PW3 stated that the appellant was well-known to them which was not disputed by the appellant in his defence. They particularly singled him out although he did not enter inside the house. In cross-examination they were consistently assertive that they identified him by his voice. It was not suggested to them that the voice could have been of another person but sounding like that of the appellant. On the basis of the evidence on record, we are satisfied that PW2 and PW3 were familiar with the appellant's voice and their identification evidence could safely be relied upon to place the appellant at the scene of crime.

The other evidence relied upon by the Trial Judge to convict the appellant was the retracted confession statement of the appellant. It was the contention of counsel for the appellant

that the statement could not be relied upon considering that it was retracted and uncorroborated.

The law is that when a confession is definitely and categorically retracted/repudiated, it is unsafe for the Court to act upon it without corroboration unless after enquiring into all the material points and surrounding circumstances the Court is fully satisfied that the confession cannot but be true. see **Tuwamoi Vs Uganda [1967] EA 84.**

The Trial Judge, in the instant matter, considered several aspects of the confession statement before he came to the finding **“it was a plain admission of full participation in the crime.”**

We have on our own scrutinised the said statement. It is full of detail as to how the robbery was executed and the sharing of the stolen money thereafter. Quite significantly, several aspects in the statement tally with the evidence of PW2 and PW3 in particular. They can be summarised as follows;

1. The confession reveals that the appellant and two others made a plot to steal shs. 500,000/- from Kanyabushozi (PW2) which had been paid to him as dowry in marriage of his daughter on 2.7.2005 at a function attended by the appellant. This was corroborated by the evidence of PW2 to the effect that the assailants demanded for shs.

500,000/- that was paid as dowry and that the appellant attended the function as well.

2. The confession reveals that there were three assailants. The two entered the house while the appellant remained outside for fear of being identified. This tallies with the evidence of PW2 and PW3 when they stated there were three assailants, the appellant did not enter the house and that only two assailants did so.
3. The confession reveals that the assailants armed themselves with a knife for purposes of threatening the complainant (PW2). Indeed, the evidence of PW2 and PW3 was to the effect that the attackers threatened them with a knife.
4. The confession reveals that the attack took place between 11pm and midnight. Both PW2 and PW3 stated it was about 1:00am. In essence the attack occurred deep in the night.

Having evaluated the evidence on record, we find that the confession statement was corroborated in material particulars and the learned trial Judge correctly relied on the same to convict the appellant.

We find no merit in grounds 1, 2, 3, 4, and 5 of this appeal and we dismiss them. We accordingly uphold the conviction and confirm the sentence.

We so order.

DATED AT MBARARA THIS ^{6th}.....DAY OF ^{November} NOVEMBER 2016.


HON. JUSTICE KENNETH KAKURU,
JUSTICE OF APPEAL


HON. JUSTICE BYABAKAMA MUGENYI SIMON,
JUSTICE OF APPEAL


HON. JUSTICE ALFONSÈ C. OWINY-DOLLO,
JUSTICE OF APPEAL