

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGGO

(CORAM: ODER, TSEKOOKO, KAROKORA, MULENGA, MUKASA-

KIKONYOGO, JJSC)

CRIMINAL APPEAL NO. 9 OF 2000

BETWEEN

1. RAMATHAN SITUMA)
2. BUKOMA STEPHEN Alias WANYAKALA)
3. ALI WANYAKALA)
APPELLANTS)

VS

UGANDA RESPONDENT

(Appeal from the decision of the Court of Appeal of Uganda before Kato, Berko, Twinomujuni, JJA delivered on 24th November, 1999 in Criminal Appeal 47 of 1999)

REASONS FOR COURT'S DECISION.

This is a second appeal. The appellants were convicted by the High Court sitting at Mbale of the offence of aggravated robbery contrary to Sections 272 and 273(2) of the Penal Code and were sentenced to death.

Subsequently, the Court of Appeal confirmed the conviction and the sentence, where upon the appellants appealed to this court. When the appeal came up, we heard Counsel for appellants, and dismissed the appeal without hearing Counsel for respondent and reserved our reasons to be given later. We now give the reasons.

The facts of the case are that on 6/9/96 at about 8:00pm the complainant Nabeta Siraji (PW1) was approached by two people who wanted to hire his taxi Reg. No. 954 UBR to take them to Nabumali. Hiring charges were agreed at Shs. 7,000/= . After the two men entered the car, he drove them

Their defence was that they had taken the vehicle with the complainant's consent after he had agreed to sell it to them at Shs. 2,500,000/=. They said that they paid him shs. 500,000/= and the balance of Shs. 2,000,000/= was to be paid to him in Kampala. The learned trial Judge rejected the appellant's story and accepted the prosecution case, convicted them and sentenced them to death. Their appeal to the Court of Appeal was dismissed on 24/11/1999 and hence this appeal.

On the following day the vehicle was recovered at Kawempe near Kampala in the compound of Ramathan Situma (A1). All the three appellants were arrested at the home of Ramathan Situma and later they were transferred to Mbale where they were charged with the offence of robbery.

He later regained consciousness and through difficulty got transport back to Mbale Town where he was admitted at Mbale hospital for treatment.

to Palace Hotel in Mbale Town where he found Ali Wanyakala (A3) and another person. These two joined them in the car. One of the two men had a bag. Situma (A1) provided money for fuel. After fuelling the vehicle at Total Petrol Station, the complainant drove them in accordance with the agreement to Nabumali Trading Centre. Instead of the passengers getting out of the vehicle, they persuaded the driver to drive them further. After going for some distance one of the occupants at the back threw a rope around the complainant's neck while the other passengers hit him with a hammer on the head. A struggle ensued. The complainant was able to get rid of the rope and managed to get out of the car. He was hit with a hammer and a spanner used for opening water pipes. When he tried to run away, he was hit again and fell down. After beating him and leaving him for dead they made off with the vehicle.

- 1- That the learned Justices of Appeal made an error of mixed law and fact when they held that the inconsistencies in the testimonies of PW2 and PW4 were minor and had been rightly disregarded by the trial Judge.
- 2- The learned Justices of Appeal made an error of mixed law and fact when they found that violence was proved to have been used during the alleged theft.
- 3- The learned Justices of Appeal made an error of mixed law and fact when they upheld that deadly weapons were used during the alleged theft, hence wrongly upholding the conviction of the appellants for capital robbery.
- 4- The learned Justices of Appeal erred in law when they found that the judgment of the lower court was tainted/prejudiced by reliance of hearsay evidence and in so doing, wrongly upheld the said judgment.
- 5- The learned Justices of Appeal made an error of mixed law and fact when they summarily rejected the appellants' alternative prayer for conviction for simple robbery.
- 6- The learned Justices of Appeal made an error of mixed law and fact when they upheld the finding of the trial

The appeal to this court was based on six grounds, namely:-

On the issue of contradictions in the evidence of Kiyingi Christopher (PW2) and D/Sgt Muganga (PW4) as to who recovered the exhibits from the house of Situma 1st appellant, the Court of Appeal addressed itself to the contradictions and found that these were minor and had not been deliberately made in order to mislead the court. The Court of Appeal relied

miscarriage of justice.

On the issue of hearsay, the Court of Appeal held that it was true that the evidence relating to what Lukiya Ssonko told PW2 and PW4 was hearsay. However, the Court of Appeal held rightly, in our view, that since in reaching his decision the trial Judge relied on some other evidence which was not hearsay at all, the portion of hearsay evidence was severable. In any case we do not accept the contention that hearsay evidence occasioned any

Court.

The thrust of grounds 1 and 4 was that if the Court of Appeal had properly exercised its duty as first appellate court and re-evaluated the evidence as required under Rule 29 of the Rules of the Court of Appeal, 1996, the Justices of Appeal would have found that the inconsistencies in the evidence of Siraji Nabeta (PW1) and D.Sgt Muganga (PW4) were major. He contended that in view of those inconsistencies and the hearsay evidence, it was wrong for the Court of Appeal to uphold the judgment of the High

3, 5 and 6 were argued together.

In arguing the appeal, Mr. Tusasirwe who appeared for the appellants argued grounds 1 and 4 together. Ground 2 was argued separately whilst grounds

question had been used to assault the complainant.

Judge that the tests results tendered by the prosecution sufficiently corroborated the allegation that the tools in

on the case of *Tajjar v Uganda 1969 EACA No. 167 of 1969 (unreported)* for the above proposition. We agree with the conclusion of the Court of Appeal on the issue of contradictions. In any case, we do not see any substance in the complaint concerning the contradictions since Situma (A1) admitted that the exhibits were picked from his residence.

In the result we found that grounds 1 and 4 must fail.

The issue of whether or not the appellants used violence in taking the vehicle from the complainant, was clearly raised and considered by the trial court and the Court of Appeal. We agree with the findings of both courts that if the complainant had sold the vehicle as claimed by the appellants, they would not have assaulted him, inflicting cut wounds on his head and abandoning him for dead at night in the bush around Nabumali. The signs of struggle at the scene of the robbery as observed by William (Pw5) during the investigation of the case was evidence that the vehicle was not voluntarily handed to the appellants by the complainant. This evidence coupled with the absence of the number plates from the vehicle when they parked it outside 1st appellant's residence at Kawempe in Kampala was clear indication that the appellants could not have got the vehicle with the consent of the complainant.

Clearly, the conduct of the appellants in the whole exercise was rightly construed by the two courts below as not of ordinary buyers but of robbers. In the premises, we found that ground 2 must also fail.

We now turn to grounds 3, 5 and 6 which were argued together. The prosecution evidence which was accepted by the trial court was that the appellants assaulted the victim with a hammer which is used in crushing

In the instant case, the weapon used was a hammer used in crushing stones. The issue was whether it was a deadly weapon within the meaning of Section 273(2) of the Penal Code. In our view, a hammer weighing about 2 Kg which was exhibited, when used for offensive purpose on the victims' head, was capable of smashing the victims' skull, resulting in his death. We would not interfere with the holding of the lower court on that issue. Consequently, we cannot fault the Court of Appeal's finding that the weapon used in the robbery was deadly. We agree with the Court of Appeal that the absence of medical evidence on the nature of the injuries sustained by the victim of the robbery was immaterial as the victim of the robbery need not sustain injuries in the robbery. It is enough to show that the robbers used or threatened to use a deadly weapon. In this case, there was ample evidence that the appellants used a deadly weapon in the process of taking the complainant's vehicle. The appellants' alternative prayer for a

uphold the conviction for aggravated robbery. The Supreme Court could not in the circumstances robbery nor fire tested. The Supreme Court could not in the circumstances used in the robbery was not produced in court and was neither fired in the from the instant case, for similar reasons. The pistol alleged to have been *Uganda (SC) cr. Appeal No. 32 of 1989 (unreported)* is also distinguishable robbery by the trial court was upheld. The case of *Birumba & Anor v* prove whether or not it could fire ammunition. There the finding of simple not been fired in the course of the robbery nor had it been fire tested to the trial to prove that it was a deadly weapon and secondly the pistol had in that case, the alleged pistol used in the robbery had not been produced at *Wasajja v Uganda (1975) EA 181* is distinguishable from this case, because was capable of causing the death of the victim. In our view, the case of if the hammer was used for offensive purpose on the head of the victim, it to weigh about 2 Kgs. In our view, the learned trial Judge rightly held that stones and a spanner used by plumbers. The hammer which was estimated

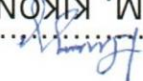
Dated at Mengo this 21st Day of November 2000.

conviction of simple robbery was therefore unsustainable and was rightly rejected by the Court of appeal.

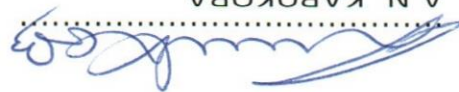
We think, however, that the criticism raised in ground six has substance. Clearly there was serious omission on the part of the investigating officer who submitted blood samples and blood stained exhibits to the Government chemist for analytical examination. He submitted the complainant's blood samples only but failed to submit the appellants blood samples to rule out any possibility of the blood stains on the exhibits being that of any of the appellants. We have to stress that if the prosecution had intended to prove that the blood stains on the exhibits was the victim's blood, it was necessary to submit to the Government chemist blood samples from both the victim and the suspects (appellants) together with blood stained exhibits for analytical comparison. That way it would have been determined if the blood stains on the hammer was not that of any of the appellants. As it happens this was not done with the result that the evidence of the blood test results is not as weighty corroboration as it would otherwise have been.

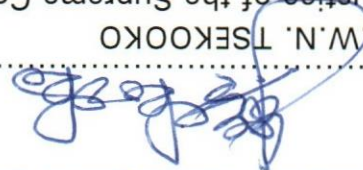
However, in our view, the omission to submit blood samples from the appellants for analytical examination by Government chemist did not weaken the prosecution case as there was overwhelming evidence by PW1 that a hammer and a spanner were used by the appellants to hit him on his head during the robbery.

In the circumstances, we found no merit in the appeal and dismissed it.

Justice of the Supreme Court
L.E.M. KIKONYOGO,
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Justice of the Supreme Court
J.N. MULENGA,
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Justice of the Supreme Court
A.N. KAROKORA,
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Justice of the Supreme Court
J.W.N. TSEKOOKO
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Justice of the Supreme Court
A.O.H. ODER,
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