Hon. Justice Oder

THE RPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER - JSC, TSEKOOKO - JSC, KAROKORA - JSC, MULENGA - JSC) AND MUKASA-KIKONYOGO - JSC,

CRIMINAL APPEAL NO. 1 OF 1999

B E T W E E N

1. BAHEMUKA PATRICK
2. BAGWETE MUSTAFA :::::: :::::: :::::: :::::: APELLANTS

AND

UGANDA: :::::: :::::: :::::: :::::: RESPONDENT

{Appeal from the judgment of the Court of Appeal of Uganda at Kampala (Okello, Twinomujuni and Kitumba - JJ.A) dated 15-12-98, in Criminal Appeal No. 24 of 1997}

REASONS FOR ODRDERS

This is a second appeal. The appellants were convicted by the High Court sitting in Fort Portal of the offence of aggravated robbery, contrary to sections 272 and 273(2) of the Penal Code Act and sentenced to death. They appealed to the Court of Appeal. That appeal was unsuccessful. Consequently, they appealed to this Court. We heard the appeal and dismissed it, reserving our reasons for doing so, which we now proceed to give.

The facts of the case, simply, are that on 6-6-91, at 10.00 a.m. the complainant, Clovis Bahemuka (PW1), and his brother Julius Tusiime (PW5) were seated in the home of the complainant (PW1) listening to radio cassette music. The two appellants together with four other men, including a soldier who was carrying a gun, entered the home and asked whether PW1 and PW5 had a receipt for the radio. PW1 produced the receipt, which the soldier pocketed. The six men demanded for money and assaulted the complainant and PW5 with sticks and the butt of a gun. Afterwards, the soldier went

outside the house and fired two gun shots in the air and returned to the house. The gun shots attracted the attention of Edison Kabukekya (PW6) the father of the complainant and PW 5. PW6's home was a few hundred yards away from PW1's home. He went to PW1's home to find out what was happening. He found PW1 and PW5, both his sons, under attack. They were being beaten by the appellants and their companions. PW6 recognised the two appellants among the attackers. He and PW5 knew them before. The attack and the assaults continued. PW6 was also assaulted. The attackers searched the whole house and removed Shs. 30,000= from PW1's mattress. Assaults on PW1, PW5 and PW6 continued until 6.00 p.m. when the appellants and their companions left the scene, taking away with them PW1's radio cassette, Shs. 30,000= and a chicken. Next morning PW1, PW5 and PW6 reported the incident to the local RCI Chairman who forwarded them with a letter to RCII and RCIII Chairmen. Finally, they reported the incident to the Police. As a result, a Police Officer, P/C Dema Modesito (PW4) of Ntandi Police Post, who happened to know the appellants, arrested them. They were eventually charged, tried and convicted as indicated earlier in these reasons.

The appellant's appeal to the Court of Appeal was based on four grounds, namely:-

1) ***That the learned Judge erred in law and in fact when she found that the appellants were properly identified.***

2) ***The learned trial Judge erred in law and in fact when she found that there had been a theft of the complainant's property.***

3) ***The learned trial Judge erred in law and in fact when she found that there was common intention between the appellants to commit the offence.***

4) ***The learned trial Judge erred in law and in fact when she found that a deadly weapon was used during the alleged robbery.***

The Court of Appeal heard arguments from Counsel of both sides in the case and dismissed the appeal..

The appeal to this court was based on one ground. It was that:

"The learned Justices of Appeal erred in law and

fact in that they failed in their duty as a first appellate court when they did not subject the evidence before them to a fresh and exhaustive scrutiny, thereby coming to the wrong conclusion that the Appellant had been properly identified at the scene of crime."

In his oral submission, the appellants' learned Counsel, Mr. Tibaijuka, contended that although the learned Justices of Appeal said in their judgment that they re-appraised the evidence, it appears that no such a re-appraisal was done. If the Court of Appeal had gone into the evidence it would have come to a different conclusion. The learned Counsel gave reasons for his contention. Firstly, PW1's evidence of identification should not have been relied on because he said in his testimony that he did not know the Appellants' names, yet their names were mentioned in a letter dated 8.6.1991 (exhibit P.1), written by the R.C.III Chairman forwarding the complainant to Kasitu Sub-county Police Post. That letter was written before the appellants were arrested at the instance of the complainant. The testimony in cross-examination of R.C.I Chairman, Tomasi Kidikiti (PW3) was also to the effect that when the complainant (PW1) reported the incident to him, PW1 mentioned the names of the two appellants.

Secondly, there were some inconsistencies in the evidence of arrest. According to PW1, he went with Police so that they could see the appellants' identity. PW1 and the Police met the appellants on the way and the Police arrested them. On the other hand P/C Dema Modesito (PW4) said in cross-examination that the first appellant, Bahemuka Patrick, was not present when the second appellant, Bagwete Mustafa was arrested.

Thirdly, PW1 testified that he had never seen Mustafa before. He saw him for the first time on the day of the robbery. In the circumstances, the appellants' learned Counsel contended, an identification parade should have been held.

Finally, it was submitted that although Edison Kabukekya (PW6) said that he knew both the appellants before the incident because they used to work at the Gombolola Headquarters, PW6 did not say for how long he had known them. Only one other

prosecution witness said that the second appellant Mustafa used to hang around at the Gombolola Headquarters. This was Julius Tusime (PW5), whose evidence, according to the learned Counsel, was clouded with hearsay.

In view of the inconsistencies to which he referred, the appellants' learned Counsel submitted that the appellants' alibis had not been disproved.

For the Respondent State, Mr. Vincent Wagona, learned Senior State Attorney, supported the appellants' convictions and the Court of Appeal's decision upholding the convictions. He contended that contrary to Mr. Tibaijuka's submission, the Court of Appeal, in fact, re-evaluated the evidence and made some findings and conclusions. The Court of Appeal considered the evidence of identification at length. The Court also found that the learned trial Judge had evaluated and subjected the evidence of identification to great scrutiny and had directed herself and the assessors properly. He contended that the Court of Appeal would not have made the findings it did if it had not subjected the evidence to a fresh and exhaustive scrutinity.

Regarding the evidence of arrest, the learned Senior State Attorney submitted that the effect of the evidence of P/C Modesto (PW4) appears to be that the appellants were arrested on another date, different from the date on which PW1 said the appellants were arrested, when PW1 was not present. In any case the inconsistencies in the evidence of arrest did not weaken the prosecution evidence of identification of the appellants, especially as PW5 (Julius Tusime) and PW6 (Edison Kabukekya) testified that they knew the appellants before. The evidence of identification destroyed appellants' alibis.

As regards the submission that as PW1 did not know the names of the appellants, and that he could not therefore have revealed the names to the R.C. III Chairman who wrote exhibit P1, the learned Senior State Attorney replied that available evidence showed that PW1 did not go to the RC Chairmen alone. He went with other witnesses who knew the appellants' names. According to the RCI Chairman, Tomasi Kidikiti (PW3), Serwano Karusoke (PW2), went with PW1 to him to report the incident. If there were any

inconsistencies in the evidence of arrest, such inconsistencies did not weaken the prosecution evidence of identification of the appellants.

Finally, the learned Senior State Attorney submitted that the evidence of identification destroyed the appellants' alibis.

The duty of the Court of Appeal to re-appraise evidence on an appeal from the High Court in its original jurisdiction is set out in rule 29 of the Court of Appeal Rules, which provides: ***"29(1)*** **On any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the Court may:**

(a) re-appraise evidence and draw inference of fact.

(b) ....."

This Court recently restated the application of this rule in the case of: ***Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997, (SCU)(unreported).***. It said:-

> ***"We agree that on first appeal ... the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it when the question arises which witness to be believed rather than another and that question turns on manner and demeanor, the appellate Court must be guided by the impression made on the Judge who saw the witness but there may be other circumstances quite apart from the manner and demeanor which may show whether a statement is credible or not which may warrant a Court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs R (1957) EA; Okono vs Republic (1972) EA; and Charles B. L. Bitwire vs Uganda, Criminal Appeal No. 23/85 (SCU) (unreported)"***

In the same case, the Court further said:

> ***"It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like a first appellate Court. On second appeal, it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles. See: Pandya vs R (1957 EA*** (supra); ***Kairu vs Uganda 1978) HCB 123."***

The same principles were echoed by this Court in the subsequent cases of: ***Bogere Moses and Anor vs Uganda, Criminal Appeal No. 1/97 (SCU) (unreported; and Bogere Charles vs Uganda Criminal Appeal No. 10/98 (SCU)*** (unreported).

In the instant case, the issue of identification of the appellants, formed the first ground of appeal before the Court of Appeal. The court considered the submissions of Counsel on both sides and evidence on the issue and said this in its judgement:

> ***"The learned trial judge considered the question of identification at great length. She evaluated and subjected the evidence of PW1, PW5 and PW6 to great scrutiny. It is true that PW1 said he knew the names of the appellants at the Police station, but this did not mean that he had never seen them before. In fact he categorically stated that he had known Bahemuka Patrick for about one year. The learned trial judge found however that both PW5 and PW6 had known the appellants both by name and appearance for a long time before the day of the robbery. She correctly directed herself on the law of identification as explained in the case of: Abdalla Nabulere versus Uganda (1979) HCB. 77 and found that the conditions for favourable identification existed. We have as a first appeal court re-appraised the evidence that was before the trial judge and we have no hesitation in our mind in finding that the learned trial judge properly directed herself and the gentlemen assessors on the issue and her conclusion that the appellants were correctly identified is correct. This ground of appeal fails."***

In view of what the Court of Appeal said in the passage of its judgment above referred to we, with respect, are unable to accept the contention of the appellants' learned Counsel that the Court of Appeal did not re-appraise the evidence concerning identification, because it specifically said that it in fact did so. There is no standard format or method which should be applied by a first appellate court in re-evaluation of evidence. The task

may be carried out in different ways depending on the circumstances of each case. It is also a matter of style. In the circumstances, with respect, our view is that the criticism of the Court of Appeal in this regard is not justified.

The appellants' learned Counsel attacked inconsistencies within PW1's evidence and between PW1's evidence and that of other prosecution witnesses regarding whether or not PW1 knew the appellants before and inconsistencies in evidence about the appellants' arrest. This attack is made in the context of the criticism that the Court of Appeal did not appraise the evidence and, therefore, came to the wrong conclusion that the appellants were properly identified at the scene of crime.

The learned trial Judge did, in fact, consider what she called ***"discrepancies"*** or ***"contradictions"*** in the prosecution evidence in the following passage of her judgment.

> ***"The law is that where discrepancies or contradictions are found in evidence to be serious or grave unless reconciled will result in the rejection of the evidence. However, should they be minor, unless they point to deliberate untruthfulness, they are ignored. Uganda vs Bikamikire 1972 HCB. 144. In the instant case, there were few inconsistencies which I did not find to be serious. ..... I have therefore, found that inconsistencies in the evidence of the prosecution witnesses were minor and of no consequence."***

The Court of Appeal did refer to PW1's evidence that he came to know the names of the appellants at the Police Station and the court expressed the view that such evidence did not mean that PW1 had never seen them before. The Court of Appeal did not specifically refer to the other inconsistencies and discrepancies which the appellants' learned Counsel mentioned. However, since it said that it re-appraised the evidence in the case, we are unable to say that the evidence it re-appraised did not include the discrepancies and inconsistencies referred to by the learned Counsel for the appellants. In our view, the passage of the Court of Appeal's judgment which we set out in these reasons, means that the discrepancies and inconsistencies in the prosecution evidence notwithstanding, the appellants were properly identified at the scene of crime. We see nothing wrong with that conclusion. The evidence of identification from PW5

and PW6 on which the learned trial Judge also relied clearly indicated that the two witnesses knew the appellants very well before and recognised them during the incident. They could not have been mistaken as to the appellants' identity.

Even if the evidence of PW1 regarding the appellants' identity and their arrest was disregarded, the evidence of identification of the appellants by PW5 and PW6 established the appellants' identity beyond any doubt. This, we think, is the meaning of the passage from the Court of Appeal's judgement we have referred to already. In other words the weaknesses in PW1's evidence which the learned counsel mentioned did not affect other available evidence regarding the appellants' identification.

In the circumstances, we held the view that the single ground of appeal had no merit. In the result, we dismissed the appeal.

Dated at Mengo this: 7th ***Day of:*** April ***2000.***

A. H. O. ODER
JUSTICE OF THE SUPREME COURT

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

J. N. MULENGA
JUSTICE OF THE SUPREME COURT

L. E. M. MUKASA-KIKONYOGO
JUSTICE OF THE SUPREME COURT