REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

(Corum: ***Oder, Tsekooko, Karokora, Mulenga and Kanyeihamba, JJ.S.C.)***

CRIMINAL APPEAL NO. 17 OF 2000

BETWEEN

1. KHEMIS RAJAB SENA)
2. SAITI MOHAMMED) ------------------------------ Appellants

VERSUS

UGANDA --- RESPONDENT

(Appeal from the decision of the Court of Appeal at Kampala (Kato, Mpagi-Bahigeine and Engwau, JJ.A.) dated 23rd February, 2000, in Court of Appeal Criminal Appeal No. 8 of 1999).

JUDGMENT OF THE COURT: This is a second Appeal. The appellants KHEMIS RAJAB SENA (the first appellant) and SAITI MOHAMMED (the second appellant) have appealed against the decision of the Court of Appeal which rejected their appeal against the decision of the High Court. In the High Court, Bamwine, J. tried and convicted the appellants of capital robbery c/s 273(2) of the Penal Code and sentenced them to death.

The facts in this case as accepted by the two courts below are simple. The two appellants lived on Kagote village, in Fort Portal Municipality, where the first appellant, who is father of the second appellant, was Chairman of Local Council I of the village. On the same village lived Twaha Byaruhanga (PW2) and his wife Fatuma Kabakumirira Twaha (PW3) victims of the robbery. They had a shop. On the night of 10th - 11th December 1995, at about 1.00 a.m., while Byaruhanga and his wife were

sleeping in their bed, Byaruhanga heard a loud bang on the main door of one of his houses. Byaruhanga woke his wife and dressed up. He realised he had been attacked by robbers. Byaruhanga and his wife made an alarm. As they made the alarm, the banging of the doors by robbers continued and further banging was heard on the outer door of the house where Byaruhanga and his wife were. Byaruhanga saw flash torch light in the sitting room where upon he took his bed and placed it against the door of their bedroom in an effort to prevent the robbers from entering the bedroom. The robbers had by then banged the bedroom door. The robbers again banged the bedroom door and split it into two. When they failed to gain entry into the bedroom, one of the robbers said in Swahili: "Kama anakata-maliza Yeye" meaning if he refuses to open finish him off or words to that effect.

There were three robbers at the scene. One remained outside while two, including the first appellant, entered the house. The robbers shot Fatuma in her arm with a gun as she attempted to hide under the bed. She became weak and sat down, bleeding. The robbers demanded for money and Byaruhanga's life. Byaruhanga deceived the robbers that he had kept money under the ground outside the house in his banana plantation. The robbers beat him up, used his shirt to tie him up and took him outside the house. After some exchange of words about the money, the robbers caused Byaruhanga to collect a hoe from the store/boys quarters. The robbers continued to beat and harass him while threatening to kill him unless he gave them money. He pleaded that because he was tied up, he could not get the money. They untied him and he led them to a spot in the banana plantation where he claimed he had hidden the money. He hit the ground once with his hoe and decided to escape. He run away naked and reported the robbery to neighbours one of whom (Muzoora) provided clothes to Byaruhanga to dress up.

After the robbers had taken Byaruhanga outside, Fatuma gained courage and also followed them.

After Byaruhanga had run away, the robbers returned with Fatuma inside the house, while demanding for money. She had no money. One of the robbers pointed a pistol at her. The robbers ordered her to lie down. The robbers decided to take away a motor-vehicle radio cassette and a hurricane lamp. Eventually, the robbers went away. Neighbours came to the scene later.

It was the prosecution case that Byaruhanga and his wife Fatuma were able to recognize two of their attackers. First both of them recognized the first appellant by voice as the one who uttered the words "Kama anakata - maliza yeye". Secondly they both identified the appellant as one of the two robbers who entered their house, because there was bright moonlight, and he stood only $2^{1}/_{2}$ metres from Byaruhanga. Thirdly when Fatuma followed outside, she was able to observe every thing clearly for a long duration because the robbers did not pay attention to her while they tortured her husband. It was during that time that she recognized the second appellant. She found him outside armed with a gun.

Meantime Fr. Kakuru reported the robbery to police in Fort Portal. The police visited the scene, probably at 5.00 a.m. Upon information provided by Fatuma, the police and neighbours of Byaruhanga together with Fatuma went first to the home of the first appellant who was found sleeping in his house. He was arrested and his home was searched but none of the stolen property was found there. The police next went to the residence of the second appellant who was also found sleeping. He was arrested and his house was also searched but none of the stolen property was found there.

At the trial the first appellant gave his defence on oath. The second appellant gave an unsworn statement. The two appellants denied the charge of robbery. They set up alibis that during the material night each was sleeping in his house. The first appellant also claimed that Byaruhanga implicated him in the robbery because of grudges arising from performance of his functions as LC1 Chairman. He listed six

instances of complaints made to him against Byaruhanga. Among the complaints made against Byaruhanga by residents was that his children fouled and spoiled a communal water well by cleaning dogs there. The first appellant decided the matter against Byaruhanga who did not like the decision. There were other complaints, for instance, dirtying the same water well by Byaruhanga's workers. Again when Byaruhanga failed to pay wages of his worker, called Rukundo, the first appellant attempted to persuade Byaruhanga to pay the wages, which the latter refused. The first appellant testified in effect that because of his role in attempting to settle disputes involving Byaruhanga, Byaruhanga threatened that he would cause the first appellant to be imprisoned.

Later the first appellant reported this threat to the police who treated it as an offence of threatening violence. After a few days, the robbery, the subject of these proceedings, was committed followed by the arrest of the first appellant. In effect the first appellant testified that his arrest arises from disagreements with Byaruhanga. At the conclusion of the trial, the two assessors advised that only the first appellant was guilty and that the second should be acquitted.

The learned trial judge accepted the evidence of the prosecution and disbelieved the evidence of the appellants. He convicted the two appellants of capital robbery and sentenced each of them to death. The two appellants appealed to the Court of Appeal against the conviction and the sentence on two grounds, which were similar to the two grounds in this appeal.

The learned Justices of the Court of Appeal upheld the conclusions of the trial judge and so dismissed the appeal. Against that dismissal the appellants have come to this Court and set forth two grounds of objections to the decision of the Court of Appeal.

The complaint in the first ground is that the learned Justices of Appeal erred in mixed law and fact in concluding that the

appellants were properly identified and that their alibis were destroyed. This ground, we have already observed, was also the first ground of appeal in the Court below.

In this Court, Mr. Nsibambi, counsel for the appellants, submitted in effect that circumstances at the time of the robbery were not conducive to proper identification of the robbers. Counsel contended that Byaruhanga was scared because of the robbery and the shooting. That his wife Fatuma must have been scared because she was shot at and injured. He submitted that the Court of Appeal failed to evaluate evidence on lighting conditions, contending that there was conflict in evidence, because, whereas Byaruhanga and Fatuma testified that light was from a full moon, Mariam Yasin (PW5) testified that light was from half moon. Counsel attacked the evidence of Fatuma on two other aspects. One aspect of counsel's submission, which is rather strange, was a contention that because Fatuma was too consistent in her testimony, she must have been couched and therefore should not be believed. The other criticism of Fatuma's evidence is that there was no corroboration of her evidence on the identification of the appellants as well as her evidence that she went outside the house and stayed there during the time when her husband was being beaten up by the robbers. Learned counsel argued that the evidence of Grasim Yasin (PW4) and of his wife Mariam Yasin (PW.5) contained contradictions about the size of the moon and the distances between the robbers and the house of these two witnesses. Learned counsel relied on the case of ***Roria vs. Republic (1967) EA.*** 583 in support of his arguments.

Mr. Wagona, Senior State Attorney, supported the decisions of the two Courts. On the first ground, Mr. Wagona submitted that Yasin (PW4) corroborated the evidence of Fatuma about her presence outside when her husband was being beaten. We agree. This evidence of corroboration is clear because Yasin testified that Byaruhanga sent Fatuma to collect keys from (him) Yasin. At page 47 of the record, Yasin testified as follows:

"-------Twaha told them that the keys were with me. His wife came for them and told me that she had been shot at. I passed them through the window."

This must mean that Fatuma had been outside at that time.

Mr. Wagona submitted that the learned trial judge considered all the surrounding circumstances before believing the prosecution evidence including the distances and lighting by the moon.

In his judgment, the learned trial Judge considered factors, which affect the credibility of witnesses in a robbery case such as this one. He considered separately the evidence against each of the appellants. As regards the first appellant, the learned judge analysed the evidence of Byaruhanga (PW2), Fatuma (PW3), Yasin and his wife (PW4 and PW5) before he concluded that each of the four witnesses properly identified the first appellant because of the moonlight. He ruled out mistaken identification. Secondly the judge accepted the evidence of the four witnesses that they recognized the voice of the first appellant.

The judge ruled out the possibility that Byaruhanga implicated the first appellant because of the alleged grudge mainly because the first appellant was arrested by police on suspicion of the commission of the robbery before Byaruhanga came out of hiding and before he talked to the police. The judge found that because of the evidence available, the alibi of the first appellant had been disproved.

Again the learned trial judge found that the incriminating evidence against the second appellant was that of Fatuma, a single identifying witness. The learned judge cautioned the assessors and himself on the need to be careful in relying on the uncorroborated testimony of a single identifying witness. He took into account the fact that Fatuma must have been surprised by the attack and the shooting resulting in her injury, and that the robbery was at night. He believed Fatuma that she stayed at the scene observing the robbers for nearly

two hours, and that as she was not tortured like Byaruhanga and there was bright moonlight which helped her to identify the second appellant, who was a village mate, her evidence was reliable. In our view the findings of the trial judge are borne out by the evidence.

We note that the Court of Appeal considered at some length the evidence against the second appellant more than that against the first appellant perhaps because more than one witness claimed to have identified the first appellant. Considering that the first appellant had made serious complaints against Byaruhanga, who happens to be the principal witness in these proceedings, we think that the first appellant was entitled to fresh and exhaustive scrutiny, by the Court of Appeal, of the evidence against him than was the case. We however note that the trial judge was not impressed by the demeanour of the first appellant and that of his key witness Swalike Musa. This, coupled with the fact that four witnesses whom the Judge believed identified the first appellant makes the case against him watertight.

There are two observations we must make arising from this ground. First, we are startled by the general statement made by the Court of Appeal about the colour of boots allegedly worn by the first appellant. The Court stated that:

> *"We are of the view that all light colours appear almost white at night while dark ones tend to be black. It could very easily have been possible for Kabakunira to mistake yellow for white in the fright of the moment."*

In so far as there was no authority for this general statement, we think, with great respect, that it is based on speculation.

Second, we are surprised by Mr. Nsibambi's contention that Fatuma should be condemned for being too consistent. We are not aware of any authority to support this strange view. On the contrary, we think that consistency in the evidence of Fatuma means that she was truthful and that is what the courts below found. We cannot find any sensible reason for

saying that she was couched. We agree with the two courts that Fatuma's evidence was consistent and showed that she spoke what she knew about the robbery.

Regarding lack of corroboration of the evidence of Fatuma in the identification of the second appellant, we note that the learned trial judge properly cautioned himself before he accepted her evidence. The Court of Appeal upheld his finding on that point. We have not been persuaded that the two courts or either of them erred in law or in fact in accepting the evidence of Fatuma on the identification of either the first or the second appellant or both of the appellants. In the result ground one must fail.

The complaint in the second ground of appeal is that the learned Justices of Appeal erred in law when they failed to properly re-evaluate all the evidence, before it upheld the findings of the trial court.

Mr. Mbabazi for the appellants contended that the Court of Appeal should have evaluated the evidence "line by line". We understand this to mean that counsel expected the court to analyse the words instead of the evidence. That if this had been done, the Court of Appeal would have found:

(a) that the arrest of the first appellant and the role of Fr. Kabura in reporting the robbery was not explained.
(b) That there was a grudge between the first appellant and Byaruhanga.

Mr. Wagona submitted that police got information from Fatuma before they arrested the appellants.

While we agree with Mr. Mbabazi's submission that the appellants were entitled to fresh and exhaustive scrutiny of the evidence by the Court of Appeal as a first appellate court, we do not accept the implication of his statement that the Court of Appeal should have re-evaluated the evidence on the basis of line by line. Mr Mbabazi cited no authority to support

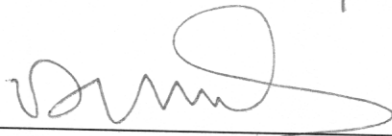
that view. Nor are we aware of any. Indeed that type of re-evaluation of evidence is not desirable even for a trial court. What is required is a re-appraisal of the evidence as a whole so as to establish whether the conclusions reached by the trial court are proper or not. This, in our view, is the import of Rule 29(l)(a) of the Court of Appeal Rules.

The part played by Fr. Kabura was alluded to in the statement of the evidence of P/C. Nuwagira Charles (PWl) which was received under the provisions of S.64 of the TID. Fr. Kabura reported the robbery and apparently drove the policemen to the scene of robbery. There was no dispute about this clear evidence.

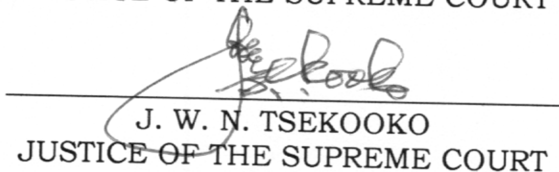
Ground two has no merit and it must fail.

For the foregoing reasons, we think that the appeal has no merit and it must be dismissed.

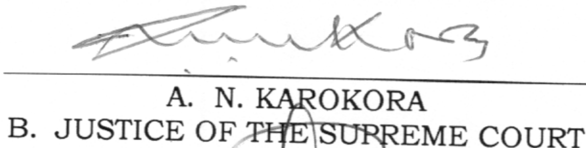
Delivered at Mengo this 27th day of September 2001.



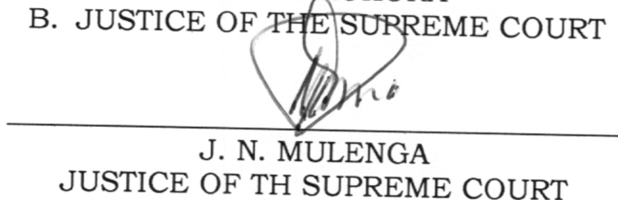
A. H. O. ODER
JUSTICE OF THE SUPREME COURT



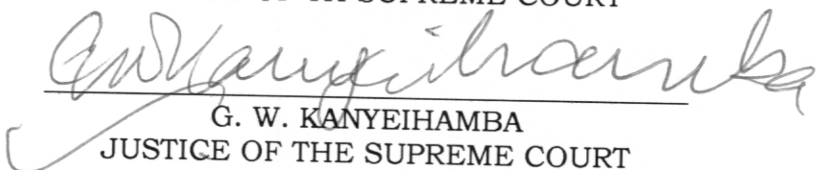
J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT



A. N. KAROKORA
B. JUSTICE OF THE SUPREME COURT



J. N. MULENGA
JUSTICE OF TH SUPREME COURT



G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

Appellant present
Y. Nsubambi for Appellant
Tugume C.A. for Respondent
Judgment delivered