THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

HOLDEN AT KAMPALA

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA.
HON. MR. JUSTICE S.G ENGWAU, JA.
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

CRIMINAL APPEAL NO. 108 OF 1999

MUKULU JOHN ::APPELLANT

VERSUS

UGANDA ::RESPONDENT

(Appeal against both the conviction and sentence
(Maniraguha Ag.) dated 29.9.99 in Mbale High Court
Criminal Session Case No.50 of 1998).

JUDGMENT OF THE COURT

The appellant, Mukulu John, was tried and convicted by the High Court at Mbale of robbery with aggravation, contrary to sections 272 and 273 (2) of the Penal Code Act and was sentenced to death.

The facts of the case are that on 26.2.97 at around 2 a.m. Kadapawo Samuel, PW1, was awakened by some thieves who broke into his shop. He heard the lock of the door being cut. Kadapawo got up, opened the middle door and flashed his three batteries torch into the shop. He recognised the appellant, Muslimu and Kawuya whom he had known before. They were removing shop items from the shelves and ferrying them outside. When the thugs became aware of his presence, PW1 heard the appellant ordering one **"Opedun"** who was outside to shoot. Two gunshots were fired which prompted Kadapawo to raise an alarm. Neighbours answered by drumming to indicate that there was danger in the area. The attackers were chased and two of them (Muslimu and Kawuya) were killed in the process.

Dudu Sam, an L.C I Chairperson of the area (PW2) answered the alarm. He also heard drums and gunshots. On reaching Kadapawo's shop at Nasuleta Trading Center, Kadapawo confided on PW2 as an L.C I official that the appellant, Opedun, Muslimu and Kawuya were among the robbers who ransacked his shop of assorted items including a sewing machine, two weighing scales, bicycle spares and five dozens of dry cells. Both PW 1 and PW2 reported the matter to Butebo Police Post where they mentioned the same names of attackers to the police.

Three days after the robbery (29.2.97) the appellant was arrested from Mukongoro Sub-County in Kumi District. On 16.4.97 Opedun Kasani was arrested from Jinja market in connection with this robbery by No. 25239D/C Omoding Peter, PW3, on a tip off by an informer. Both the appellant and Opedun Kasani were jointly and severally charged with aggravated robbery. Both of them pleaded the defence of alibi. The learned trial Judge accepted Opedun's defence and acquitted him but rejected the appellant's defence on the ground that the prosecution evidence of identification puts him squarely at the scene of crime.

There are four grounds of appeal, namely: -

1. "THAT the learned trial judge erred in fact and law in holding that the offence of robbery had been proved beyond reasonable doubt in spite of uncorroborated evidence of the complainant by the evidence of other prosecution witnesses due to serious inconsistencies and contradictions

2. THAT the learned trial judge erred in fact and law in holding that a deadly weapon, to wit a gun, was used in the said robbery within the meaning of section 273 (2) of the Penal Code Act yet no such gun and or its cartridges were found at the scene of robbery and no explanation was offered as to why these items were not exhibited in court.

3. THAT the learned trial judge erred in fact and law in holding that the appellant participated in the robbery by relying on the identification by a single witness when conditions were not favourable for correct identification.

4. THAT the learned trial judge erred in fact and law when he rejected the appellant defence of alibi and accepted that of his co-accused who, according to evidence of the complainant, had fired the gun."

On ground 1 relating to inconsistencies and contradictions in the prosecution case, Mr. Mark Anthony Bwengye, learned Counsel for the appellant, singled out only two instances as being major contradictions affecting the prosecution case. Firstly, that in his testimony, PW1 stated that it was the appellant who ordered Opedun to fire a gun, contrary to the immediate information PW1 gave to PW2 that Opedun was ordered to fire a gun by unknown person. Learned Counsel contended that there was therefore no consistency in the evidence of both PW1 and PW2 on that point which grossly affected the prosecution case.

Secondly, Mr. Bwengye submitted that in his 5 testimony, PW 1 said that he saw the thieves through the middle door which he had partially opened but PW4 testified that PW 1 opened the door after the thieves had left the scene of crime for fear. According to Counsel, this is a major contradiction which goes to the root of the prosecution case and yet the learned trial judge considered it as minor and rejected the same.

Mr. Vincent Okwang, Senior state Attorney, submitted rightly, in our view, that the above contradictions were considered by the learned trial judge who rejected them as minor. After reviewing the evidence on record, we are unable to fault the learned trial judge on this point. Ground 1 of this appeal therefore fails.

As regards the second ground of appeal, Mr. Bwengye's complaint was that the learned trial judge was in error when he held that a deadly weapon, to wit a gun, was used in the alleged robbery within the meaning of section 273 (2) of the Penal Code Act yet no such gun and or its cartridges were exhibited in court. Learned Counsel submitted that at least according to the evidence of PW1, PW2 and PW4, two empty cartridges were retrieved at the scene of crime. Nevertheless they were not exhibited in court and the prosecution did not give a clear explanation for not doing so. It was the contention of Counsel that the prosecution did not exhibit the cartridges because no gun was fired at the scene of crime in the name of a deadly weapon within the meaning of section 273 (2) of the Penal Code Act.

Mr. Okwang responded quite rightly, in our view, that once a gun is fired at the scene of robbery and it is not recovered, it is nevertheless deemed a deadly weapon within the meaning of section

273 (2) of the Penal Code Act. In the instant case, PW1 and PW2 heard gunshots on the night in question and this was followed by drumming in the village. We think that the learned trial judge was justified to hold that a deadly weapon, to wit a gun, was used during the robbery. The prosecution did not exhibit the gun in court because it was not recovered. We find this explanation satisfactory. However, we think that where a gun or empty cartridges are recovered from a scene of robbery, it is necessary and desirable for the prosecution to exhibit them in court. Failure to do so, in our view, is neither fatal to the prosecution case nor does it occasion a miscarriage of justice to the appellant. Ground 2 also fails.

Mr. Bwengye's complaint in the third ground of appeal relates to evidence of identification of the appellant. Learned Counsel contended that the learned trial judge was wrong to rely on the evidence of a single identifying witness when the conditions were not favourable for correct identification. According to Counsel, the alleged robbery took place in the shop at night at around 2 a.m. when the complainant, PW1, was sleeping in another room. The complainant woke up afraid when he heard two gunshots and the middle door between the shop and his sleeping room was a barrier for him to observe the thugs properly as he claimed for two minutes. Under these difficult conditions, it was the contention of Counsel that there was no proper visual identification of the appellant by PW1 as there was no sufficient light at the time of the said robbery. In support of his argument, Counsel relied on the guidelines stated in **Abudala Nabulere & 2 others V. Uganda [1979] HCB 77.**

We agree with Mr. Okwang, Senior State Attorney that the learned trial judge was justified in believing the evidence of the complainant, PW1, as a single identifying witness on the ground that conditions were favourable for him to identify the appellant. The appellant was known to PW1 before the incident. PW1 saw the appellant, Muslimu and Kawuya in the shop at a distance of about 3 meters away with the aid of a torch light of 3 new dry battery cells. He observed them for 2 minutes when the middle door was partially opened. He mentioned them by names to L.C I Chairperson, PW2, who answered the alarm and both PW1 and PW2 in their report repeated the same names to the police. In pursuit of the thieves that same night, Muslimu and Kawuya were killed in the process. In the circumstances, we find also that the third ground of this appeal lacks merit and fails.

On the last ground No. 4, Mr. Bwengye for the appellant submitted that the learned trial judge was wrong when he rejected the appellant's defence of alibi and accepted that raised by the co-accused, Opedun Kasani, A2. According to Counsel, the complainant, PW1, testified that it was the appellant who ordered one Opedun who was outside the shop to shoot and two gunshots were fired. In his unsworn statement, Opedun said that on the night in question, he was at Jinja where he had gone to collect his sister to act as a baby seater and this defence of alibi was accepted by the learned trial judge. It was the contention of Counsel that the learned trial judge wrongly rejected the appellant's defence of alibi as the appellant was also at Mukongoro Sub-County in Kumi District at the Material time and held that the prosecution had put the appellant squarely at the scene of crime.

In the 3rd ground of this appeal, we have been persuaded by the evidence on record that the appellant was properly identified at the scene of robbery. In the same vein, we are unable to fault the learned trial judge on this point. The reasons why the trial judge accepted Opedun Kasani's defence of alibi were because there was no direct eye witness who saw him at the scene of robbery and also because he was not the only person with the name "Opedun" in that village. Unlike Opedun, the appellant was properly identified at the scene of robbery. The learned trial judge, in our view, was justified to hold so. Accordingly ground 4 must fail.

In the result, we find no merit in this appeal which we dismiss.

Dated at Kampala this 9th day of February 2001.

A.E.N. MPAGI-BAHIGEINE,
JUSTICE OF APPEAL.

S.G. ENGWAU,
JUSTICE OF APPEAL

C.N.B. KITUMBA,

JUSTICE OF APPEAL.