THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

5 **CORAM:**

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE A.S. NSHIMYE, JA

10 ***CRIMINAL APPEAL NO 73/2003***
(HCT-04-CR-SC 265/2002)

MUSIITWA LUBEGA ::::::::::::::::::::::::::::: APPELLANT
VERSUS
15 **UGANDA ::: RESPONDENT**

JUDGEMENT OF THE COURT

This appeal is against the conviction and death sentence, passed on the appellant by the High
20 Court at Tororo, for the offence of robbery contrary to ***sections 285*** and ***286(2)*** & ***(3)*** of the ***Penal Code Act***:

The facts were as follows. On 18th August 2001, at around 9:00 a.m the appellant, No. RA 33904 Sgt Lubega Musitwa, was at Tororo special – hire stage where he pretended to hire motor vehicle
25 Registration No. 927 UCK from its driver, Angino Patrick, at a charge of Shs. 5,000/=, to go and carry his property from Rubongi barracks.

The driver, leaving behind his turn boy at the appellant's insistence, alone drove the appellant towards Rubongi barracks along Mulanda road. Before reaching the gate to the barracks, the
30 appellant asked the driver to stop which he did. The appellant got out and proceeded to a nearby garden to talk to some women who were digging. He returned shortly and, at gun point, forced

the driver out of the vehicle or else lose his life. The driver ran off and reported to Police. The appellant then sped off till the vehicle automatically stopped at a trading centre, some distance near Mulanda, due to lack of fuel.

He abandoned the vehicle there which made the villagers suspicious. They then set upon the appellant chasing him and apprehended him. As they were about to lynch him, the police which had been alerted about the robbery arrived and arrested him.

They escorted him back to where he had abandoned the vehicle. A search of the bush by the police and L.Cs revealed a pistol with three live ammunitions in a magazine of 7.65 Milimetres. He was charged accordingly.

In his charge and caution statement, the appellant admitted having stolen the vehicle but denied using a gun. In court, however, he gave a rumbling protracted denial by way of defence.

Mr. Wilfred Mulumba represented the appellant while Ms. Caroline Nabasa, Principal State Attorney, was for the respondent.

The memorandum of appeal, dated 21st-01-09, comprises five grounds, namely that:

1. ***The learned trial judge erred in law and fact when she held that the ingredient of theft was proved.***

2. ***The learned trial judge erred in law and fact when she held that a deadly weapon was used by the appellant.***

3. ***The learned trial judge erred in law and fact by convicting the appellant without sufficient identification.***

4. ***The learned trial judge erred in law to convict the appellant basing herself among other things on the appellant's defence weakness rather than on the strength of the respondent's case.***

5. ***The learned trial judge erred in law and fact in rejecting the appellant's alibi which had not been negatived by the prosecution and which ought to have raised a reasonable suspicion.***

Arguing ground No. I, Mr. Wilfred Mulumba, learned counsel, stated that the offence of theft had not been proved. The vehicle had not been proven to have been *'permanently taken away'*. It had been abandoned. The owner, Geoffrey Owor Olowo, PW2, told Court the vehicle had been recovered.

Mr. Mulumba further took issue with the fact that it had not been exhibited in court and that this unexplained omission created doubts as to whether there was an offence of theft committed. He prayed court to resolve this doubt in favour of the appellant.

Ms. Caroline Nabasa, learned Principal State Attorney, supported both the conviction and sentence. She submitted that the vehicle was indeed stolen from the driver, Angino Patrick, PW1, at about 7:30 a.m. It was recovered at around 3 p.m. having been abandoned at Namulanda. PW1, a single identifying witness drove the appellant who had hired him to take him to the Barracks. The appellant asked him to stop some distance, where he got out to talk to some women who were digging. Shortly he returned to put the driver at gun point, forcing the latter to get out while he got in and sped off till the vehicle stopped some distance away for lack of fuel. At around 3 p.m. the owner of the vehicle, Geoffrey Owor Olowo, was notified of the recovery of his vehicle, where it had been abandoned.

Ms. Nabasa submitted that that's clear evidence that the offence of theft was completed when the vehicle was grabbed from its driver and due to lack of fuel it was abandoned. She prayed court to reject ground No. I.

As to the failure to exhibit the vehicle, she pointed out that that aspect was never impeached in the lower court. The vehicle was identified by PW1 by its registration number. He was the one driving it. The police officers who recovered it identified it on basis of its registration No. 927 UCK. The robbery had been reported to them. In counsel's view failure to exhibit it, therefore,
5 was inconsequential.

The ***Penal Code Section 254*** defines theft as:

> ***"254(1)*** ***A person who fraudulently and without claim of right takes anything***
> 10 ***capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.***
>
> ***…***
>
> 15 ***(6)*** ***A person shall not be deemed to take a thing unless he or she moves the thing or causes it to move …"***

It is apparent that four elements constitute the offence of theft:

(i) ***dishonesty;***

20 ***(ii)*** ***appropriation or moving the property;***

(iii) ***property belonging to another and***

(iv) ***intention permanently to deprive or keep***.

The facts as established by the prosecution were more than sufficient to prove the offence of
25 theft that the appellant had dishonestly purported to hire motor vehicle Registration No. 927 UCK which he appropriated from its driver PW1 at gun point. This vehicle belonged to Geoffrey Owor Olowo, PW2. The appellant had intended to permanently keep it and use it until it accidentally ran out of fuel

30 Failure to exhibit it in court was inconsequential as neither its identity nor ownership/possession were ever disputed by the defence in the lower court.

We agree with the learned P/SA that ground No. I is devoid of any merit and is accordingly dismissed.

5 Regarding ground No. 2, Mr. Mulumba disputed the use of a deadly weapon by the appellant, arguing that according to the evidence it was never used. He pointed out that no one saw him hiding the said gun where it was recovered from; no finger-prints were lifted from the gun so as to link it with the appellant. He asserted that a gun was recovered a day after the incident thus creating a doubt as to whether it was the one used in this offence.

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Ms. Nabasa, however, contended that use of a deadly weapon was proved beyond reasonable doubt. The driver of the vehicle, PW1, saw the shot gun. It was recovered in the same area where the vehicle was abandoned due to lack of fuel. The appellant was arrested where the car was abandoned. A search of the surrounding area revealed footmarks which led to a bush and to fresh 15 human excreta under which the pistol was found. The circumstances were such that the appellant was arrested at the same spot where both the vehicle and the gun recovered from. All this could not have been sheer coincidence, she argued. The gun was examined by a ballistics expert, PW6. It was found to be in working order, capable of discharging ammunition in accordance with ***section 273(2)*** of the ***Penal Code Act***.

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The learned judge held:

> ***" …The accused was found in the vicinity in which the stolen vehicle was, the same day the vehicle was robbed, the gun (pistol) was found near a place where the fuel ran out from the vehicle …"***

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We consider that the driver, PW1, could not have so willingly handed over that vehicle to an unarmed person during broad day light, and just ran off. This sounds farfetched. It is the use of this gun which instilled fear into the mind of the driver forcing him to escape from the vehicle and ran to report to police and the owner of the vehicle PW2. The period the vehicle remained 30 under the control and possession of the appellant is immaterial. It is the intention to permanently

deprive the owner of the vehicle which was apparent that is material. It is the shortage of fuel which frustrated this plot.

We are of the view, therefore, that ground No. 2 also lacks merit and it is so dismissed.

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Concerning ground No. 3 that there was no sufficient identification of the appellant, Mr. Mulumba argued that the driver, PW1, had not known the appellant before and only recognized him in the dock. No identification parade was ever held after his arrest and PW1 was not present at the time of the appellant's arrest. He could not even remember the clothes he was putting on.

10 The appellant was thus not properly identified.

Ms. Nabasa, however, argued that the learned judge after properly directing himself as to the law regarding a single identifying witness under ***Abdulla Bin Wendo and Anr v R (1953) 20 EACA 166; Roma v R (1967) 583*** proceeded to observe that the robbery took place at around 7:00 a.m.,

15 and the entire ordeal lasted about one hour. During this time both the appellant and PW4 were talking amicably to each other before the appellant got out of the vehicle, only to return with the pistol. It is evident that PW1 was able to observe the appellant's face without any inhibition of fear. The circumstances were still serene and friendly.

20 We are also of the same view that identification of the appellant by PW1 was free from error. PW1 states in his evidence in chief:

" … I saw the accused approaching me that he wanted to hire me. He asked me if I was the driver of the vehicle and I answered in affirmative. He asked me how

25 much it was from town to Lubonge barracks. I replied to him that it was Shs. 7,000/=. He asked me to reduce but I told him that it was that one. Then he told me to go …, but before we left I called my turn boy. He had got into the car. He told me that he didn't want any person as its not permitted to have many people enter. I set off with him and other people remained including the turn boy. As I

30 was preparing to turn to the barracks he told me to go ahead that his wife lived beyond. He said that he wanted to pick the key from his wife and then he was

back. He went in the gardens where some women were digging leaving me in the vehicle. He went and talked to those women and when he came back he pulled his gun towards me. He asked me to choose between death and life. I didn't answer him. I got out of the vehicle and he entered the vehicle and drove away. I then ran faster I rang my boss one Owori Geoffrey and told him.

… I had not known the accused before. The whole ordeal took about one hour. It was bout 7:30 a.m. <u>I can recognize he is that one in the dock</u>:"

It was only a matter of a few hours later that the appellant was arrested by the mob who were proceeding to lynch him after watching him abandon a vehicle in their area. The police which had already been on alert stepped in before the mob could burn him. Sgt. Kasim Rajab No. 41511 a police officer attached to Tororo Police Station said:

" On 18-8-2001, I was at Murande Police Post I was O/C. I received information from the chairman L.C. 1 Tere telling me that someone has abandoned the vehicle and that the mob was following him. I went to the scene with another policeman called Etuket. I deployed the policeman to guard the vehicle. I followed the mob. Reaching a place in a distance, I found when the man had been arrested and they were going to burn him. I saved him and arrested him and brought him to CPS Tororo. Together with the accused, I recovered the motor vehicle and brought it to Tororo Police Station. I didn't record a statement from the accused."

It is No. 25701 D/Cpl. Ejadu Richard, PW5, of same Police Station who recorded the appellant's statement. He was also instructed to visit the scene of crime where the vehicle was abandoned. With the guidance of L.Cs. of the area, and following some footmarks into the bush they recovered the pistol some few metres from the main road. It had a black potte and it was Yugoslavian made. This was confirmed by D/AIP Wakoko Patrick, PW7. It was identified in court by Robinah Kilumya, PW6, a ballistics expert who examined it and found it to be capable of emitting ammunitions.

This goes to show that the sequence of events from robbery to arrest was never interrupted. The appellant never left his captors' custody. The identification is thus impeccable. The question of mistaken identity does not arise.

5 Thus ground No. 3 also fails.

Ground No. 4 was that the learned judge based the appellant's conviction on his defence weakness rather than on the strength of the respondent's strength, like the lies the appellant told the court. That this was an erroneous approach.

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Ms. Nabasa disputed this argument, pointing out that the learned judge was only evaluating evidence. The law does not tolerate lies in court. She was not biased.

The appellant in his defence denied ever having driven a car in his life. That he did not even
15 know how to drive. He also denied having had a pistol. He, however, did not challenge PW1's narrative of events leading to his arrest.

In assessing and evaluating the evidence the learned judge relied on ***Otti Sebastian Vs. Uganda (SCU) Cr. App. 5/90*** thus:

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> ***" That particular evidence went through unchallenged in cross-examination. The only inference for the omission by the defence to challenge the evidence in chief or a material or essential points by cross-examination would lead to an***
> 25 ***inference that the evidence is true.-"***

The learned judge noted:

> ***" The accused in his defence which was on oath denied having robbed the complainant at gun point. He said he didn't know how to drive. He pleaded he***
> 30 ***was a victim of circumstances because he was a soldier unknown to the***

villagers who arrested him. … thus is a case which depended exclusively on correct identification by a single witness…"

5 In view of the disjointed and long winded defence full of blatant lies the learned judge properly assessed all the evidence before her and reached the correct conclusion.
Ground No. 5 thus fails and stands dismissed.

Ground No. 5 was to the effect that the learned trial judge erred in rejecting the appellant's alibi.
10 Mr. Mulumba contended that the prosecution never negatived the appellant's alibi which was incumbent upon it so to do. He was arrested on mere suspicion by whoever arrested him.

Ms. Nabasa, however, argued that the appellant was correctly placed at the scene of crime by the driver, PW1. It was immaterial that PW1 himself was not around at the time of his arrest.
15 Nonetheless there was overwhelming evidence to connect the appellant to the offence.

This ground of appeal is amply covered under the foregoing grounds. The appellant was squarely placed at the scene of crime. This ground fails.

20 The appeal consequently fails and is dismissed forthwith.

Learned counsel for the appellant did not deem it necessary to address us on the issue of the sentence. The death sentence passed by the High Court is thus upheld.

25 Dated at Kampala this 23rd day of March 2009.

Hon. A.E.N. Mpagi-Bahigeine
JUSTICE OF APPEAL

30 **Hon. C.N.B. Kitumba**
JUSTICE OF APPEAL

Hon. A.S. Nshimye

JUSTICE OF APPEAL