THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

CRIMINAL APPEAL NO.177/2003

MUSOGA GERALD…….APPELLANT

V E R S U S

UGANDA ……..RESPONDENT

[Appeal from a conviction and sentence of
the High Court of Uganda at Masaka (Hon. Justice Eldad Mwangusya)
dated 14th August 2003 in Original C.S.C. No.232/2002]

JUDGMENT OF THE COURT:

This is an appeal arising from Masaka Criminal Session Case No.232/2002 in which the appellant Musoga Gerald was convicted and sentenced to death on an indictment of aggravated robbery c/s 272 and 273(2) of the Penal Code Act.

The particulars of the indictment are that Musoga Gerald, the appellant, on the 16th day of August 2002 at Biyerima village Kirumba in Rakai District robbed Namuleme

Mary of her travelling bag, dresses, 10 radio tapes, 2 pairs of female shoes, 2 shirts, 2 blouses, I pair of bed sheets, 2kg of salt, 1 bar of soap and cash of shs.24,000/= all valued at approximately shs.180,000/= and at the time or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a panga on the said Namuleme Mary.

Prosecution called 6 witnesses in support of their case. The appellant in his defence denied having robbed the complainant of her property and put up an alibi.

At the conclusion of the trial, the appellant was convicted of aggravated robbery and sentenced to death.

The memorandum of appeal contains 3 grounds of appeal which are as follows:-

1. **The trial judge erred in fact and law and misdirected himself in finding that the offence of aggravated robbery was proved beyond reasonable doubt.**
2. **The trial judge erred in fact and law in rejecting the appellant's defence and convicted him on contradictory, inadequate and uncorroborated evidence.**
3. **The trial judge erred in fact and law when he passed the death sentence based on a wrong conviction.**

Ms. Eva Luswata Kawuma, represented the appellant on State brief while Mr. Kaamuli, a Principal State Attorney with the Directorate of Public Prosecution represented the respondent.

Ms. Kawuma argued grounds No.1 and 2 together and then grounds No.3 separately. Mr. Kaamuli did the same. Both counsel made lengthy arguments and submissions which we have studied carefully. We do not in this judgment, go into details of the arguments. However, we refer to them from time to time in the following re-evaluation of evidence exercise that we are duty bound to carry out under rule 30 of the Court of Appeal Rules.

GROUND 1 AND 2.

Counsel for the appellant argued that two of the ingredients constituting aggravated robbery were not proved i.e. use of a deadly weapon and participation of the appellant in the robbery. Counsel claimed that since there was no proper identification parade done, then the prosecution never proved that it was the appellant who participated in the robbery. Counsel complained the fact that there was no identification parade carried out and that when the appellant was brought out to be identified he came out alone which created bias in the mind of the complainant.

Counsel further argued that since there was only one-single identifying witness, her evidence needed corroboration and the judge should have warned himself against the dangers of convicting the appellant on such evidence, which he did not.

On recovery of the property, it was found in possession of another person named Galiwango who claimed to have received it from the appellant. However, the trial judge did not consider the fact that Galiwango was never called as a witnesses and yet it could have been possible that he committed the robbery. All these points to the fact that participation of the appellant in the robbery was never proved.

Secondly, counsel argued that in light of the appellant's defence of alibi should have believed it.

Thirdly, counsel argued that the deadly weapon used or claimed to have been used was never recovered at the scene. That there were no injuries inflicted upon the complainant and therefore no panga was ever used. In support of his arguments, counsel relied upon the authority of **Kyomuhendo David & Anor. Vs Uganda Crim. Appeal No.3/2003** for the proposition that failure to produce a panga at the trial left the court in doubt as to whether a deadly weapon was actually used.

In reply, the learned counsel for the respondent argued and supported the conviction and sentence. Regarding participation of the appellant in the robbery, she relied on the evidence of PW1 who actually saw the appellant. Secondly, on the issue of identification, still, the evidence of PW1 was of great importance because she is the

complainant in this matter and was able to see the appellant. The witness said that light from the torch was bright enough to help her identify her attacker and also the fact that they spent one hour together moving from one room to room with the attacker. Her evidence was corroborated by that of PW2 (the boda boda rider) who transported him from the stage to his home with the stolen property.

On the issue of the deadly weapon, the panga, the Principal State Attorney replied that actually the panga was used and it was evident because he had cut the complainant's door in order to run out of the house. Also PW4 claimed to have seen the panga at the scene of crime the following day.

After hearing both sides and reading the record, we have reminded ourselves of the duty of this court as a first appellant court. That is to say, to subject all the evidence which was adduced in the trial court to a fresh appraisal and come to our own conclusion. See: **Pandya vs R(19570) E.A.336, Bogeree Moses vs Uganda SC. CR. Appeal No.1/1997 and Mwesigira & Ano. Vs Uganda C.A.C.A 221/2003.**

The learned trial judge, in his judgment properly stated the ingredients of the offence of robbery with aggravation. That is to say, the prosecution must prove beyond reasonable doubt the following:-

a) That there was theft.
b) That it was accompanied with violence.
c) That a deadly weapon was used.
d) The participation of the accused persons.

During the hearing counsel for the appellant challenged ingredient (c) (d). We shall therefore concentrate on only these ingredients.

We shall first deal with the issue of a deadly weapon namely a panga. The learned trial judge, after stating the law that a panga is a deadly weapon stated that, the relevant prosecution witnesses namely PW1 and PW4 all testified that they saw a panga at the scene. They had this to say:

PW1

"He told me that he wanted shs.60,000/= or else he would cut my neck. He wanted to cut me but I held the panga. He held me by my left arm and led me to the sitting room. He pushed the panga in a form and told me that if we went to the bedroom and I did not give him shs.60,000/= he would come back and cut me……."

It is clear from the above testimony that the complainant's assailant threatened to use a panga which is a deadly weapon and this satisfies the definition of s.272(2) of the Penal Code Act.

PW4 is also recorded to have said;

"…….After reporting to the L.C., we went back to the scene. The remaining property was removed and kept at mine. We found a panga at the scene. We did not recover it from the scene."

It is also clear from the above evidence that the appellant used a deadly weapon in committing the robbery.

Secondly, we will deal with the last ingredient which is whether the appellant participated in the commission of the offence. The learned trial judge carefully evaluated the evidence on this issue as follows:-

"I will begin with the evidence of identification. The law with regard to identification has been stated in numerous decisions of our courts and this is that although a fact can be proved by testimony of a single witness this does not lessen the need of testing with the greatest care the evidence of such a witness respecting identification especially when the conditions favouring correct identification were difficult. In such circumstances what is needed is 'other evidence' pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error. *(See Abdalla Bin Wendo and Another V.R.(1953) 20 EACA 166 and RORIA V Republic [1967] E.A. 583).* The factors to be considered to determine as to whether or not conditions favouring correct identification were difficult include the length of time a

witness takes to look at his or her attacker, the distance between witness and the attacker, the light and the familiarity of the witness with the accused. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger See *Abdalla Nabulele and Another (1979) HCB 79.*

In this case the conditions were that there was light in form of torchlight which according to the witness enabled her to look at the assailant and was able to observe a gap between his upper teeth and a scar on his clean shaven head. Court observed that the accused has these features. It was also her description of her attacker that led to the arrest of the accused. Her attacker took sometime as he was asking her for money as they moved from the sitting room to the bedroom. So she did not take a fleeting glance at him but had sufficient time to look at him and be able to describe his appearance. All these were factors favouring correct identification and the only factor against was that the assailant was not a familiar face because the witness did not know him before this incident. In addition to these factors favouring correct identification the prosecution adduced 'other evidence' to connect the accused with the offence and this evidence consisted of the following:-

First of all on the day following the night of the robbery Kiyimba Ronald (PW2) carried the accused on his motor cycle. The accused was carrying a bag which was later recovered and the complainant identified it as hers. Both the complainant ant this Kiyimba identified exh. P as that bag which was robbed from the complainant and accused was carrying. The accused denied having used Kiyimba's motorcycle or having carried the bag in question. But I believed that Kiyimba did not fabricate this evidence as he had no reason for doing so.

Secondly the bag in question, a pair of shoes and a radio belonging to the complainant were recovered from one, Galiwango and one Joseph on the information of the accused. Neither Joseph nor Galiwango were called to testify and according to Mr. Sensuwas this weakened the value of this

evidence because Galiwango and Joseph could have been the thieves. I do not agree. S.29A of the Evidence Act provides as follows:-

'Notwithstanding the provisions the provisions of S.24 and 25 of this act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.' **The recovery of these items were as a result of information from the accused and the fact is proven even without the testimony of Galiwango or Joseph.**

Lastly, according to Manzi Emmanuel (PW.5) the accused led him to the home of the complainant and identified her house as the house from which he had robed the items that had been recovered. It is noteworthy that the testimony of Manzi was not challenged on this point and I believe it."

We are unable to fault the learned trial judge on this analysis. We are satisfied that the evidence on record put the appellant squarely on the scene of this robbery. The judge was correct to hold that participation of the appellant in the robbery was proved beyond reasonable doubt.

Lastly, we will consider ground No.3 which is that the trial judge erred in law and fact when he passed the death sentence based on a wrongful conviction. Counsel for the appellant argued that if the ingredients of aggravated robbery were not properly proved, then the appellant should have been acquitted altogether. Counsel asked this court to allow the appeal and acquit the appellant and that should the appellant be found guilty, then the sentence should be reduced.

Learned counsel for the respondent did not agree. He submitted that robbery is a very serious crime which was proved at the trial beyond reasonable doubt. He called upon us to uphold both the conviction and sentence.

We agree with the learned trial judge that there was sufficient evidence to justify conviction of the appellant for the offence of robbery with aggravation. In the result, we uphold the conviction of the appellant for the offence.

In light of the Supreme Court decision in **Kigula & Others vs Attorney General** which was pronounced when this appeal was pending in this court, we shall defer consideration of the sentence till we have heard allocutus from the appellant and the response of the respondent.

Dated at Kampala this 12th day of February 2010.

Hon. Justice L.E.M. Kikonyongo

DEPUTY CHIEF JUSTICE.

Hon. Justice A. Twinomujuni

JUSTICE OF APPEAL.

Hon. Justice C.K. Byamugisha

JUSTICE OF APPEAL.