THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.137/99

OJANGOLE JOHN MICHAEL::APPELLANT

VERSUS

UGANDA:::RESPONDENT

(Appeal from a judgment of the High Court of Uganda at Soroti (Kania,J.) dated 25/11/99 in C.S.C. No.13/98).

CORAM: HON. JUSTICE C.M. KATO, JA.
HON. JUSTICE S.G. ENGWAU, JA.
HON. JIJSTICE C.N.B. KITUMBA, JA.

<u>JUDGMENT OF THE COURT:</u>

The appellant was indicted for two counts in the High Court at Soroti. The first count was for murder, contrary to sections 183 and 184 the Penal Code Act, he was convicted and sentenced to death on this count. The second count was for aggravated robbery, contrary to sections 272 and 273(2) of the Penal Code Act, he was convicted for simple robbery but he was never sentenced on this count

A summary of the facts of this case is as follows. On the night of 27/10/96 the deceased, Ojilong Constant, was sleeping at his home. The appellant with a group of other people went to his home and ordered him to open the door which he did. He was then ordered to go out. The attackers led him away to the home of Okiria (PW3) together with a video deck and 60,000/= which they had taken from his house. While at the home of Okiria, the appellant and his group robbed him of a bicycle, a radio, video deck and 10,000/=. The appellant was allegedly armed with a gun. From Okiria’s home they went with the deceased whose body was found hanging on a mango tree the following morning of 28/10/96. Dr. Ocira (PW1) examined the body on the same day and found that the deceased was strangled before his body was taken to the mango tree.

The matter was reported to the authorities. The appellant and three other suspects were arrested and charged. Two of his colleagues escaped before the trial while one was acquitted. At the trial the appellant put up a defence of alibi which was rejected by the trial judge. He now appeals against both the convictions and sentence on the following grounds:

(i) The learned trial Judge erred in fact and law when he held that the appellant was properly identified whereas the conditions were not proper for correct identification and hence came to a wrong decision.

(ii) The learned trial Judge erred in fact and law when he accepted written submissions from both counsel for the accused and the State thereby depriving the assessors of the chance of listening to the submissions and advising the judge properly which occasioned a miscarriage of justice

(iii) The learned trial Judge erred in fact and law when he held that the deceased was murdered whereas there was no sufficient evidence to prove that fact and hence came to a wrong decision.

(iv) The learned trial Judge erred in fact and law when he held that the appellant had been placed at the scene of the crime whereas the alibi set up by the appellant had not been disproved by the prosecution.

At the hearing of the appeal grounds two and three were abandoned and grounds one and four were argued together.

Mr. Mutabingwa, learned counsel for the appellant, submitted that the learned trial judge was wrong to hold that there were conditions favouring correct identification of the appellant at the scene of crime and that he did not consider the defence of alibi raised by the appellant in his defence. This submission can conveniently be divided into two parts. The first part relates to identification and the second concerns the defence of alibi.

On the issue of identification, he argued that the evidence of Alugeresia Ikedi (PW2), that of Okiria Cuthburt (PW3) and that of Odeke Joyce (Pw4) should not have been relied upon by the trial judge to convict the appellant. He attacked the evidence of each of the three witnesses on the ground that the conditions under which they observed the appellant on that fateful night could not have enabled them to correctly identify the appellant. In his view there should have been

some other evidence, other than that of the three witnesses, to connect the appellant with the commission of the alleged offences.

On his part, Mr. Okwanga learned counsel for the respondent, contended that there was overwhelming evidence to prove that the appellant was properly identified by the three witnesses who saw him on the fateful night as these witnesses knew him before, he was with them for a long time that night and in the case of PW2 there was a candle light. He further argued that since the appellant was the last person seen in company of the deceased that supported the allegation that he had been correctly identified.

It is trite law that when the prosecution case is solely based on the evidence of identification, such evidence must be viewed with caution to avoid basing a conviction on a mistaken but honest identity especially where the incident takes place at night as was the case in the instant case. The trial judge was fully alive to the existence of this principle of the law and he dealt with it at length as may be seen in the following passage of his judgment

> **'When the case against the accused is based solely on identification which is disputed the judge has to warn himself and the Assessors of the need of caution as an identifying witness or a number of identifying witnesses may be very convincing and yet mistaken. It calls for the conditions under which the identification was made in to be examined. In the event the conditions of identification are poor the court will look for evidence corroborating such evidence. If the conditions of identification are favourable for correct identification free of error or mistake then the court may act on such identification evidence in the absence of corroboration. The court has over the years laid down conditions which favour correct identification in <u>Abdalla Bin Wendo & Anor Vs R [1953] 20 EACA 166, Rorta Vs R [1967] EA 583 Abdalla Nabulere & 2 Ors Vs Uganda [1979] HCB 77 and Wassajja Vs Uganda [1975] EA 181.</u>**

These conditions are:

1. The familiarity of the accused to the witness at the Time of the offence.
2. The conditions of lighting

3. The distance between the witness and the accused, when the latter was under observation.
4. The length of time the witness observed the accused."

After considering the evidence of the three prosecution witnesses who testified about the identity of the appellant the learned trial judge concluded as follows

> **"All in all, considering that the accused was very familiar to the witnesses, there was bright moonlight and as far as PW2 Alugeresia is concerned, candle light, the accused was at one time or other close to the witnesses for a considerable period of time. I find that the conditions then prevailing were favourable for correct identification free of error or mistake. I also find as a fact that the accused was correctly identified as part of that gang that attacked the homes of the deceased and PW3 Cuthbert Okiria on the night of the 27/10/96."**

In our view, the learned trial judge was justified in his finding on the issue of identification. There was overwhelming evidence to show that the appellant was correctly identified at the homes of the deceased and Okiria.

Regarding the defence of alibi raised by the appellant, Mr. Mutabingwa submitted that the trial judge did not refer to that defence in his judgment, he only made mention of it after he had already made up his mind about the guilt of the appellant. Mr. Okwanga was, however, of the view that the appellant having been placed at the scene of crime by evidence of identification, the judge was right in rejecting the defence of alibi. He submitted that the mere fact that this defence was considered at the end of the judgment does not mean that the judge did not have it in his mind when considering the prosecution evidence.

We find that the appellant's defence of alibi was dealt with after the prosecution evidence had been concluded and the judge had decided that the appellant had been properly identified. This approach was irregular He should have considered that defence along with the prosecution evidence but not after he had made up his mind about the appellant's participation in commission of the alleged offences. We are of the view that the irregularity did not prejudice the appellants case because even if the judge had considered the defence earlier he would still have come to the same conclusion in view of the overwhelming evidence of identification The fact that the judge

considered the defence, albeit belatedly, means that he had it in mind all along. We find no merit in both grounds I and 4 and they must fail.

In the course of the hearing of this appeal, it came to our notice that the appellant was not sentenced in respect of the second count of simple robbery. The record shows that the sentence on count 2 was suspended, but in fact there was no sentence imposed on that count. The judge ought to have imposed a sentence on this count and then suspended it. We asked both counsel to address us on the matter and each of them left it to the court to decide what would be an appropriate sentence.

This court has power to impose a sentence where the trial Court has omitted to do so under section 12 of the Judicature Statute 1996, Rule 31 of the Rules of this court and section 331 of Criminal Procedure Code. We feel this is an appropriate case in which the above provisions of the law may be invoked. We shall accordingly proceed to sentence the appellant who was convicted for simple robbery on count 2. This offence carries a maximum of life imprisonment if the trial was by the High Court as it was the case here. The appellant was arrested on 2/11/96 and his case was concluded on 25/11/99, which means that he had been on remand for about 3 years. Considering all the facts surrounding the commission of this offence, we consider a sentence of 5 years imprisonment appropriate. The appellant is accordingly sentenced to five (5) years imprisonment with five strokes of the cane. He is to report to the police station of his area for 3 years after serving the sentence. The appellant is to pay compensation to Okiria equivalent to the value of the property robbed from him, namely 10,000/=, video deck, a bicycle and radio.

The sentence and orders made in respect of count 2 are suspended because the appellant is sentenced to death in Count 1. The order by the trial judge purporting to suspend a non-existing sentence for count 2 is set aside.

In the result, the appeal is dismissed.

Dated at Kampala this 23rd day of August 2000.

C.M. Kato

JUSTICE OF APPEAL.

S.G Engwau

JUSTICE OF APPEAL.

C.N.B. Kitumba

JUSTICE OF APPEAL.