THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 34 OF 2005

*[Arising from criminal case No. 90 of 2004 against the judgment of Justice J.B.A Katusti dated 13th February 2005 at Kampala***]**

SSENOGA SEMPALA JAFARI::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::RESPONDENT

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE,
HON. JUSTICE S.B.K. KAVUMA, JA
HON. JUSTICE A. S. NSHIMYE, JA

REASONS FOR DECISION.

This is an appeal against the conviction and sentence passed by the High Court at Kampala (J.B.A. Katusti J) on 13th February 2003. The appellant was convicted of simple robbery contrary to **section 285 and 286 (1) (b).** He was sentenced to 10 years imprisonment.

We heard this appeal on 17-11-2009 when we summarily dismissed it reserving our reasons which we now give.

The back ground facts are that on the night of 21st of September 2002, at Bugonga Village, in Entebbe Municipality, Wakiso District, unknown persons attacked the house of one Ddungu Christine (PW1). The attackers put her at gunpoint and robbed her of various household properties. On October 26, 2002, the complainant's daughter, Rachel Mukwaya (PW2), identified the appellant as one of the attackers who had robbed them. She caused his arrest by a security man who happened to be nearby.

An identification parade was organised at Entebbe Police Station, at which PW1 identified the appellant, who was subsequently charged with robbery c/ss. 285 & 286 (2) of the Penal Code Act. At his trial the appellant denied having committed the offence. The trial Judge, however, rejected his defence, convicted him of simple robbery, and sentenced him to 10 years imprisonment. Hence this appeal.

Mr. Stephen Mungoma appeared for the appellant while Mr. Vincent Ogwanga, Senior Principal State Attorney, (S/PSA) represented the respondent.

Three grounds of appeal were raised, namely that:

1. **The trial Judge erred in law and fact when he held that the appellant was properly identified.**

2. **The learned Judge erred in law and fact when he admitted the evidence of an identification parade which was irregularly organised.**

3. **The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record causing miscarriage of Justice.**

Mr. Mungoma, learned counsel, argued all the three grounds together. He contended that the conditions of identification were not conducive for PW1 and PW2 to identify their attackers correctly. The appellant was a total stranger to the witnesses. Besides, the incident took place at around 2:00 a.m. Although Bugonga municipality is always lit, the attackers never switched on the lights as claimed. Even the trial Judge expressed surprise

in his Judgment whether the appellant could have switched on the lights only to facilitate their identification.

Learned counsel argued that since PW1 failed to identify the appellant at that first parade, it means that the eventual identification of the appellant at the second parade was erroneous. Worse still, the parade was not conducted in accordance with the guidelines set out ***Sentale v. R. (1968) EA 365 at 369.*** He further contended that the fact that the appellant took off when he was being arrested was just a natural reaction to a surprise arrest which is inconsistent with guilt.

He therefore prayed this Court to allow the appeal, quash the conviction and set aside the sentence.

Mr. Vicent Okwanga, learned S/PSA, supported both the conviction and sentence. He contended that the grounds of appeal were devoid of any merit. He maintained that the appellant was properly identified by at least two eye-witnesses, PW1 and PW2. Although, the attack took place at night, there was sufficient light in PW1's room, which the robbers themselves had switched on. The appellant was confident when he was assured that there was no man in the house and this is when he decided to switch on the light. The duration of the attack was about 30 minutes. The appellant stood nearby PW1 when his co-assailant was ferrying out the property. This afforded PW1 and PW2 the opportunity of identifying the appellant. PW2 was thus able to pick the appellant out in the street on her way from work and subsequently PW1 was able to pick him out at the identification parade.

Mr. Okwanga pointed out that the conduct of the appellant at the time of his arrest was inconsistent with that of an innocent person. When PW2 recognised the appellant, he ran away and he had to be chased for over 150 meters. He had no cause to run away if he was innocent.

Learned counsel did not agree with the appellant's contention that the identification parade did not conform to the law. In his view, it is not a must that all the rules in ***Ssentale v. R.(supra)*** must be followed at the same time but only to adhere to them as much as possible according to the circumstances of the case. Although the appellant needed an advocate or a relative to be present at the parade, nonetheless their absence did not affect the quality of the parade. The appellant himself was satisfied with the parade and did not raise any questions.

Mr. Okwanga prayed this court to dismiss the appeal.

Being the first appellate court, this Court is clothed with the duty of reviewing the whole evidence on record afresh, giving it an exhaustive scrutiny and draw its own conclusions, warning itself that it did not see or hear the witnesses. This Court should not disregard the judgment appealed from but must carefully weigh and consider it and not shrink from overruling it. See ***s. 11 of the Judicature Act (Cap.13), r. 30 of the Judicature (Court of Appeal Rules) Directions S.I. 13-10,*** and ***Pandya v. R [1957] EA 336.***

Turning to the submissions of both counsel, it is noteworthy that with the exception of the participation of the appellant in the crime, the rest of the ingredients of the offence are not in dispute.

The participation of the appellant largely depends on his identification by PW1 and PW2. The principles applicable to such a case where the guilt of an accused person depends solely on identification evidence have been laid down in numerous cases by this court and the Supreme Court. In ***Walakira Abas & Others v. Uganda SCCA No. 25 of 2002*** the Court observed:

> **"The court may rely on identification evidence given by an eye-witness to the commission of an offence, to sustain a conviction. However, it is necessary, especially where the identification is made under difficult conditions, to test such evidence with greatest care, and be sure that it is free from possibility of a mistake, and those that are favourable, to correct identification. Before**

convicting solely on strength of identification evidence, the court ought to warn itself of the need for caution; because a mistaken eyewitness can be convincing; and so can several such witnesses…As much as possible therefore, the court must evaluate not only material that supports the accuracy of identification, but also material which tend to raise doubt on it."

When considering whether the circumstances in which the identification was made were favourable or not, the Court has to consider the length of time the accused was under observation, the distance, the light and the familiarity of the witness with the accused. See ***Sabiiti Vincent & 2 Other v. Uganda CACA No. 140 of 2001.***

In the instant case, the conditions favouring positive identification were the presence of light in the room where the robbery was committed, so that PW1 and PW2 observed their attackers for about 30 minutes. The attackers were very close to the witnesses, as they were talking to them inquiring who else was in the home, whether there was any man. Nonetheless the unfavorable conditions for correct identification were that the attack took place at night and the attackers were complete strangers to PW1 and PW2.

The trial Judge ruled on the issue of the appellant's identification as follows:

"The question that remains to be answered is whether accused at the bar participated in that robbery. The submission by learned counsel that as there is no evidence that the accused took out of the house any article and therefore cannot be found guilty is equally laughable. If it is found that he was at the scene and guarding the witnesses as his friend carried out property then he will be held liable for robbery. I have given anxious attention to the evidence adduced by the prosecution. At first it looked to me a bit out of the ordinary that robbers would switch on lights to enable their victims to identify them. However accepting the evidence of PW1 Christine that she was asked whether there was a man present in the house and on being assured there was none, the robbers seemed to have been of the impression that they would

commit the robbery with impunity. I accept the evidence that lights were switched on during the whole exercise of the robbery. Rachel was able from a distance to see and recognise the accused as the man that had participated in the robbery. She went for assistance. I accept the evidence of Akia PW4 that on seeing them the accused attempted to flee. This is not the reaction of a person that is innocent."

We should, perhaps for emphasis, point out that in carrying the parade, the rules in **Sentale v. Uganda (1968) E.A 365 at 369** must be observed as much as possible depending on the circumstance of the case. However, failure to observe one or two of them does not render the identification a nullity. The parade was conducted properly.

In this case the trial Judge observed:

"The parade might not have strictly been in accordance with the recommended practice but it was held and fairly adhered to the suspect to be identified had a lawyer present or at least a relative present to ensure transparency. However under the circumstances of this case where the accused denies ever participating in the identification, that denial when considered along side the fact that actually he did participate in the parade to one irresistible conclusion that he denies being in the parade because he was properly picked by the witnesses. I hold therefore that his participation has been proved beyond reasonable doubt."

We are therefore of the view that the trial Judge correctly rejected the appellant's claim that he never attended any identification parade. The evidence of PW1 and Dt. CPL Bamulanzeki Patrick (PW3) together with exhibit P.1 showed that an identification parade was actually organised. PW1 identified the appellant as one of the men who attacked her house and robbed her of various personal belongings. The appellant did not raise any question about the whole exercise.

For the foregoing reasons we were in no doubt that the learned trial judge reached the correct finding that the appellant was properly identified by PW1 and PW2. We accordingly dismissed the appeal, upheld the conviction and the sentence of the lower court.

Dated at Kampala this 15th day of December 2009.

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

Hon. Justice S. B. K. Kavuma
JUSTICE OF APPEAL

Hon. Justice A.S. Nshimye
JUSTICE OF APPEAL