THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: *MUKASA-KIKONYOGO, DCJ, BYAMUGISHA &KAVUMA JJA.*

CRIMINAL APPEAL NO.135/09

BETWEEN

CPT NUNYANGONGO CHRIS TUSHABE:::::::::::::APPELLANT

AND

UGANDA::RESPONDENT

[Appeal from conviction and sentence of the South Western High Court Circuit sitting at Kyenjojo **(Chigamoy Owiny- Dollo J)** *dated 12th June 2009 in HCCSC No85/03]*

JUDGMENT OF THE COURT.

This is a first appeal from the judgment and orders of the High Court sitting at Kyenjojo wherein the appellant was convicted of a minor and cognate offence of simple robbery and sentenced to 10 years imprisonment. He was also ordered to pay compensation to the victims of the crime.

The facts that led to the prosecution of the appellant and others still at large are that on 26th June 2002, Mubiru Kiyaga(PW1) Kakoko Zedekia and Sunday William(PW5) all employees of Co-Cola company left Fort Portal for Kagadi to deliver some products of the company. They were driving motor vehicle registration No.UAA 982A. They sold the products and collected a sum of Ugs 5.1 million. The money was put in a safe. On their way back along Kagadi-

Kyenjojo Road they noticed a small vehicle following them. It later overtook them. After a short distance it stopped and the occupants who were armed with guns and a grenade got out and ordered the vehicle to stop. When the vehicle stopped, the appellant and the other assailants ordered the complainants out of the vehicle and ordered them to lie down. The assailants entered the vehicle, broke the safe and took the money.

While this was still going on, another vehicle came and it was also stopped. The occupants were ordered out of the vehicle and ordered to lie down. They too, were robbed of mobile phones and money. During the course of the robbery, the appellant was recognized by PW 1 and PW5 who claimed that they knew him well as Benz. When the assailants left, the victims of crime also left and reported the matter to police. Inquiries were carried out and the appellant with his co-accused were arrested and charged.

During the trial, the DDP entered a *nolle prosequi* against the second and third accused and they were accordingly discharged.

The appellant in his defence denied all the allegations against him. He admitted that Benz is his nickname. He stated that PW1 and PW5 who claimed to have identified him at the scene of crime lied to court as on that day he did not leave Kasese to go anywhere else. He further stated that he was a well known personality because after he denounced rebellion he had been involved in mobilizing rebels of the Allied Democratic Front to abandon rebellion.

The learned trial judge rejected his defence and convicted him accordingly. Being dissatisfied with the conviction, the sentence imposed and the orders of compensation, he filed the instant appeal on the following grounds:

1. **The learned judge erred in law in holding that the appellant had been properly identified thereby occasioning a miscarriage of justice.**
2. **The learned judge erred in law and fact on assessment, interpretation and application of the law on contradictions and inconsistencies thereby occasioning substantial miscarriage of justice.**
3. **The learned judge erred in law and fact when he rejected the defence of alibi by the appellant thereby occasioning substantial miscarriage of justice.**
4. **The learned judge erred in law and fact when he allowed the prosecution to amend the indictment thereby occasioning substantial miscarriage of justice.**
5. **The learned judge erred in law and fact when he ordered the appellant to pay Ug. Shs 5.1 million and the equivalent of two nokia mobile phones thereby occasioning a substantial miscarriage of justice.**
6. **The learned judge erred in law and fact when he imposed harsh and excessive and unlawful sentence thereby occasioning a miscarriage of justice.**

7. **The learned judge erred in law and fact when he failed to properly evaluate the evidence thus arriving at a wrong decision occasioning a miscarriage of justice.**

Mr Ondumi represented the appellant on private brief while Mr Vicent Okwanga, Senior Principal State Attorney, represented the respondent. Mr Ondumi argued each ground of appeal separately. In dealing with the grounds, we shall combine those which are interrelated. In submitting on the first ground of appeal Mr Ondumi stated that the appellant was not properly identified at the scene of crime because the identifying witnesses were afraid and feared for their lives. He criticized the trial judge for having erroneously rejected the appellant's alibi and for failure to evaluate evidence.

Mr Okwanga on his part submitted that the appellant was properly identified by the two witnesses at the scene of crime. He pointed out that the appellant was known as Benz who used to ride a powerful motor bike going to the officers' mess. He further submitted that the offence took place in broad day light and the entire exercise took sometime. He supported the trial judge's findings on the appellant's alibi and the manner of evaluating the evidence.

The case for the prosecution depended on the visual identification of the appellant at the scene of crime. The incident took place at about 6 p.m or

thereabouts when it was still broad day light and visibility was good. PW1 testified that he knew the appellant very well since 2001 as he had seen him physically. He had also read about him in the local newspapers as a former rebel. He further testified that the appellant was a prominent man and very well known in Kasese and used to ride a motor cycle and frequented the military officers' mess. He testified further that at the scene of the attack, he had in the process of being pushed down by the gun man identified the said gun man as Benz.

P.W 5 clearly identified the first appellant as Benz first from For Portal and when Kichwamba Technical College was burnt by ADF rebels and the appellant was said to be involved. In the case of ***Uganda v George Ssimbwa (SCSA No.37/95)*** it was stated that where conditions favouring correct identification are difficult the following circumstances have to be taken into account in determining whether there was correct identification

- Presence and nature of light.
- Whether the accused person is known to the witness before the incident or not.
- The length of time and the opportunity the witness had to see the accused
- The distance between them.

When conditions favouring correct identification are unfavorable, what is needed is some 'other evidence' pointing to the guilt and from which it can

reasonably be concluded that the evidence of identification can safely be used and accepted as being free from possibility of error.

The learned trial judge in dealing with the evidence of identification, invoked the rule which was laid down in the case of ***Roria v Republic [1967] EA*** namely that proof of an offence charged, basing entirely on evidence of identification by a single witness is cause for unease, as there is greater danger of convicting an innocent person basing on such evidence. The court cautioned that while the evidence of a single identifying witness alone can suffice to found a conviction, it is less safe to do so than with multiple witnesses. The court must be cautious in dealing with evidence of a single identifying witness because such witness can be honest but mistaken.

In the matter now before us, there is no doubt that the trial judge addressed his mind to the law applicable on evidence of identification. The conditions for correct identification of the appellant at the scene of crime were present. The appellant himself in his testimony did not dispute the claim by PW 1and PW5 that they knew him. Although the witnesses were frightened at the time of the commission of the offence, they were able to identify the appellant. The conditions prevailing at the time were conducive for correct identification. The evidence of the two witnesses placed him at the scene of crime. His alibi was disproved by the prosecution. Grounds one, three and seven of appeal would fail.

As for the second ground of appeal on contradictions between the testimony of PW1 and PW5 as to whether the appellant was wearing a blue t-shirt and sunglasses or not, the law applicable is now settled. The law is that grave contradictions in the prosecution case unless satisfactorily explained would usually but not necessarily result in the evidence of the witness being rejected. Minor contradictions would not have similar effect unless they point to deliberate untruthfulness.

The evidence which is being challenged is whether the appellant was wearing a blue t-shirt and sunglasses. The contradictions between the testimony of P.W.1 and PW5 as to what the appellant was wearing are a minor difference. When several people are giving their versions of a transaction seen by them are naturally liable to disagree on immaterial points. The court has to bear in mind that there are contradictions of truth and falsehood. The duty of the court is to consider the broad aspect of the case when weighing evidence. The learned trial judge found and we agree with him, that the contradictions in the prosecution case were not major. On a proper appraisal of the evidence as whole, we consider the contradictions between the testimony of PW1 and PW5 as what the appellant was wearing minor. It does not affect the broad aspect of the case as a whole. This ground would fail.

With regard to ground four concerning the amendment of the indictment at the submission stage, learned counsel for the appellant criticized the trial judge for allowing the amendment without properly explaining to the appellant the provisions of sections 50 and 51 of the Trial on Indictments Act. He claimed that there was a miscarriage of justice.

Learned counsel for the respondent supported the amendment of the indictment at the submission stage. He stated that the appellant was given a summary of the case in 2003 when he was committed for trial and the summary of the facts mentioned a grenade as one of the weapons that were used by the assailants. He further pointed out that at the trial; the witnesses testified that the assailants had a grenade. He claimed that there was no miscarriage of justice.

Section 50 of the Trial on Indictments Act, so far as it is relevant to the issue raised by the appellant provides as follows:

"50 Orders for alteration of indictment.

(2)Where before a trial upon indictment or at any stage of the trial it is made to appear to the High Court that the indictment is defective or otherwise requires amendment, the court may make such order for the alteration of the indictment(by way of amendment or by substitution or addition of a new count) as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required alterations cannot be made without injustice: except that no alteration shall be permitted by the court to charge the accused person with an offence which, in the opinion of the court, is not disclosed by the evidence set out in the summary of the evidence prepared under section 168 of the Magistrate's Courts Act.

Section 51 of the same Act makes provision for procedure to be followed if the indictment is altered. It reads thus:

(1) "Where an indictment is altered under section 50-

(a)the court shall thereupon call upon the accused person to plead to the altered indictment;

(b)the accused may demand that the witnesses for the prosecution or any of them be recalled and be further cross-examined by the accused or his or advocate, whereupon the prosecution shall have the right to re-examine any such witnesses on matters arising out of such further cross-examination; and

(c) the accused shall have the right to give or to call such further evidence on his behalf as he or she may wish.

(2) Where an alteration of an indictment is made under subsection (1), the court shall, if it is of the opinion that the accused has been thereby prejudiced, adjourn the trial for such period as may be reasonably necessary

(3)The court shall inform the accused of his or right to demand the recall of witnesses under subsection (1) and that he or she may apply to the court for an adjournment under subsection (2).

(4)……."

The provision of 50 section gives discretion to the trial court to allow amendments of the indictment at any stage of the proceedings if such amendments do not prejudice the accused person.

In the instant appeal, the amendment to the indictment was made at the submission stage. It was vehemently opposed by counsel for the appellant. The learned trial judge overruled the objections to the amendment. However the provisions of section 51(supra) with regard to the rights of the accused were not complied with. The question is whether this occasioned a miscarriage of justice.

Section 34 of the Criminal Procedure Act spells out the powers of an appellate court. It reads:

"(1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, and in any other case shall dismiss the appeal, except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

The language of the section is clear in that an appellate court will set aside if it thinks that a wrong decision on any question of law has caused a miscarriage of justice. During the hearing of the appeal, it was not pointed out to us what injustice the appellant suffered as a result of the trial judge's failure to explain to him the provisions of section 51. The decision of the court was not based on the use of a grenade during the course of the robbery. It was based on the identification of the appellant at the scene of crime. Therefore this court will not interfere with the judgment of the lower court as we are not satisfied that a substantial miscarriage of justice actually occurred. Ground four will fail.

On the sentence that was imposed by the trial judge and the consequential orders made, counsel for the appellant submitted that the appellant spent over 5 years on remand and the learned judge did not consider this period before

passing the sentence of 10 years. He referred to Article 23(8) of the Constitution which enjoins courts to take into account the period spent on remand before imposing any sentence.

255 Learned counsel for the respondent supported the sentence that was imposed by the trial judge. He stated that it was neither illegal nor excessive in the circumstances of the case.

Sentencing powers are discretionary in nature. An appellate court will not
260 interfere with the exercise of that discretion unless it is shown that there was failure to exercise the discretion or wrong principles were followed. Furthermore it has to be shown that the trial court took into account irrelevant matters or overlooked a relevant factor which ought to have been taken into account. In the instant appeal counsel for the appellant submitted that the period
265 which the appellant spent on remand was not taken into account before the trial court imposed the sentence of ten years imprisonment in accordance with the provisions of the article in the constitution. The record of the proceedings shows that the trial judge did not indeed address his mind to the provisions of Article 28(8) before passing sentence. The question is whether this occasioned a
270 miscarriage of justice warranting interference by this court.

We consider failure by the trial judge to take into account the period of five years which the appellant spent on remand before passing sentence as having occasioned a miscarriage of justice.

The appellant having spent five years on remand was a relevant consideration before the trial court imposed the sentence. We shall therefore interfere with the sentence imposed and substitute it with a sentence of eight years from the date of conviction- 12-06-09.

The other consequential orders that the learned judge made were not commented on by counsel for the appellant. It would appear the ground was abandoned. The learned judge omitted to state the number of years that the appellant will undergo police supervision after serving his sentence. This is a mandatory requirement under the provisions of **section 124(1)** of the Trial on Indictments Act. This court is empowered under **section 11** of the Judicature Act to exercise all the powers vested in the court of first instance while hearing appeals.

In the result, the appeal against conviction is dismissed. The sentence of ten years is reduced and substituted with a sentence of 8 years imprisonment from the date of conviction. The orders of compensation would remain intact. The appellant to remain under police supervision for a period of three years after serving his sentence.

Dated at Kampala this.....day of.....2011

L.E.M. Mukasa-Kikonyogo
Deputy Chief Justice

C.K.Byamugisha
Justice of Appeal

S.B.K. Kavuma
Justice of Appeal