THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA.

CRIMINAL APPEAL N0. 139/2003

KIMUMWE PATRICK ::::::::::::::::::::::::::::::::::::APPELLANT

VS

UGANDA ::RESPONDENT

Coram **Hon Justice S.G. Engwau, JA**
Hon Justice A. Twinomujuni, JA
Hon Justice A.S. Nshimye, JA

JUDGMENT OF THE COURT

The appellant was originally indicated for aggravated robbery c/s 272 and 273(2) of the Penal Code Act. However the trial judge found him guilty of a lesser charge of simple robbery c/s 272 and 273(1) (b) of the Penal Code and sentenced him to 14 years imprisonment and ordered him to pay compensation to the complaint of shs 500,000/=.

The brief facts as accepted by the trial court were as follows:

The appellant Kimumwe Patrick also known as Kazungu John and others on 20th November 2000 at Minister village, Martyrs way Ntinda, Nakawa division, robbed Lucy Kenkwanzi, a lady whose premises he was guarding, of two motor vehicles Reg. N0. 303 UEC RAV 4 green in colour, UAB 424 R Toyota corolla FX Black in colour. They also stole one Sony Television

21inches, a sharp video Deck, one multi choice Decoder, one compact computer, two AIWA music systems, one Sharp Music System, one grey lady bag, several pairs of ladies shoes, one carpet, cash shs 20,000/= plus jewelry worth 4,000,000/= and at/or immediately before or immediately after the said robbery used a deadly weapon to wit a gun on the said Lucy Kenkwanzi. The appellant disappeared from his guard place with the robbers and shifted from his known place of residence at Kinawataka.

The police found him in Kawempe Division and arrested him. He made a charge and caution statement in which he confessed to the commission of the crime and implicated others. In his defence he stated that he was attacked by robbers who rendered him senseless. The following day, he found himself tied to an electric pole in Bugolobi, implying that he did not participate in the robbery. For reasons given by the trial judge, his defence was rejected, hence his appeal to this Court against both conviction and sentence.

Through his counsel, he raised three grounds of appeal.

1. ***The learned trial judge erred in law and fact in finding that the offence of simple robbery had been proved beyond reasonable doubt against the appellant.***

2. ***The learned trial judge erred in law and fact in rejecting the appellant's defence and convicted the appellant on unreliable, contradicting, inadequate uncorroborated prosecution evidence.***

3. ***The learned trial judge erred in law and fact when he passed an excessive sentence and harsh orders in the circumstances against the appellant***.

During the hearing of the appeal, Mrs Kasande- Mulangira appeared for the appellant on state brief while Mr. Alule Gilbert, Principal State Attorney appeared for the respondent.

Counsel for the appellant preferred to argue grounds 1 and 2 together and ground 3 separately.

She submitted that the learned judge erred, because there was no sufficient evidence to sustain a conviction on simple robbery. It was not disputed that property was stolen and violence was used but his client who was on guard duty was disabled by robbers. It was therefore wrong for the trial judge to ignore the defence of the appellant that he did not participate in the robbery. For example even P.W. 5 and P.W.6 said in their testimonies that the appellant was not one of the people who entered. The fact that he was unconscious would have been resolved in his favour. With regard to property which was found in the appellant's house and recognized to be part of the stolen property, counsel argued that the appellant was not present when it was recovered.

Secondly one Mbabazi said to have been the wife and present when the property was recovered was not called. It was also not proved that the house where the property was found belonged or was hired by the appellant.

In evaluating the evidence of a confession, counsel urged us to consciously bear in mind that it was watered down by his unconsciousness.

On the third ground, counsel submitted that the sentence of 14 years was harsh though legal. The judge made other orders without giving supporting reasons. She prayed that the appeal of her client be allowed, conviction quashed and sentence and other orders be set aside.

In reply Mr. Alule opposed the appeal and supported the conviction and sentence. He referred us to the page 6-7 of the judgment in which the trial judge addressed the issues of participation and identification. The judge also dealt with the issue of a single identifying witness. The appellant was a guard in that place and was known by the witnesses very well.

The trial judge also considered and looked for corroborating evidence to that of a single witness. The appellant disappeared from his work place and also changed location of his residence. Counsel submitted that the trial judge was justified in concluding that the conduct of the appellant was not conduct of an innocent person. Secondly, he observed that the confession was so detailed that it must have been of an insider.

In his view the appellant was properly and positively identified therefore grounds one and two ought to fail.

On sentence, he submitted that the maximum sentence is 20 years. The judge in exercise of his discretion gave him 14 years and other consequential orders. The sentence was legal and not harsh in the circumstances. He prayed that we also disallow ground three and dismiss the appeal.

We have read the record of proceedings, heard and considered the submissions from both counsel. As a first appellate Court, Rule 30 of the Judicature (Court of appeal Rules) Direction requires us to appraise all the evidence which was adduced in the lower court and come to our own conclusion whether the decision of the lower court should be supported or not. However we are bearing in mind that we have not had the same opportunity as the trial court did of watching the witness testify to access their demeanor. See also **Pandya VR [1957] EA 336, Bogere Moses V Uganda Supreme Court Cr appeal N0. 1 /1999.**

Grounds one and two having been urgued together, in our view, the gist of the complaint is that the appellant did not participate in the robbery. His counsel argued that as a guard, he was incapacitated and rendered unconscious by the real robbers.

In dealing with participation of the appellant, the learned trial judge stated on page 8- 9 of his judgment

> ***"The accused was on 20/11/2000 deployed for guard duties at plot 40 Martyr's Way Ntinda, a fact admitted by the accused himself in his defence. He was seen by P.W.5 Kenkwanzi and P.W.6 Flora Mugisha at their residence before the robbers struck. P.W.7 Bitature knew the accused before the incident. The distance between him and the accused favored correct identification in a situation where the two were not strangers to each other. I found P.W.7 a composed credible and truthful witness. However, notwithstanding all these positive factors, considering the time of the attack the poor visibility conditions were unfavorable for unreserved identification. In Moses Kasana Vs Uganda criminal Appeal N0. 12 of 1981 the Supreme Court underscored the need for***

supportive evidence where the conditions favouring correct identification are difficult. What is needed in such a situation is other evidence, direct or circumstantial which goes to support the correctness of identification and to make the trial court sure that there was no mistaken identification.

I have considered the evidence of P.W. 5 Lucy and P.W. 6 Flora that the following robbery, the accused also disappeared. Their testimony finds favour in that of Martin Etanu, P.W.I, the official from Task Force the accused' s employer. He visited the scene of crime that night and noted that accused was missing. The following day, the hunt for the accused went under way. P.W.I Etanu went to Kinawataka where the accused was known to live but he was not there. For about 2 weeks, the accused's whereabouts remained unknown. Thereafter the witness got information that the accused was living in Kawmpe. He went to Kawempe and in the presence of policemen, the accused's new residence was searched and property which P.W. 5 Kenkenzi identified to Police as part of her stolen house hold property was recovered. I found P.W.I Etanu a credible and truthful witness. I am satisfied that he took part in looking for the accused soon after the robbery. In the premises, accused's testimony that he went back to his employer a day after the robbery at P.W. 5's place is a lie. His disappearance from the place where he had been deployed that night, his abandonment of work and the shifting from Mbuya to Kawempe immediately after the robbery were all not acts of an innocent man. It was conduct that provided corroboration to the evidence of P.W.7 Bitature that the accused had also participated in the robbery".

We entirely agree with the reasoning of the learned trial judge and find no fault in his conclusion that the prosecution proved beyond reasonable doubt that the appellant participated in the robbery. He inexplicably fled from his place of work and at the same time shifted from his place of residence. Some of the stolen property was recovered by the investigating officer from his new residence in the presence of his wife who told the investigating officer, that they belonged to the appellant. We agree that all this circumstantial evidence together with his confession

provided adequate corroborating evidence to that of P.W.7 see **Muzaya Thomas and Mukasa George Supreme Court Cr. Application N0. 03/2006**.

We find no merit in grounds one and two and they automatically fail. The maximum sentence for the offence of simple robbery is 20 years. In our view, a sentence of 14 years imprisonment was not harsh and we uphold it.

In the result, the entire appeal is dismissed.

Dated at **Kampala** this 3rd of May 2010.

HON S.G. ENGWAU
JUSTICE OF APPEAL

HON A. TWINOMUJUNI
JUSTICE OF APPEAL

HON. A.S. NSHIMYE
JUSTICE OF APPEAL