

UGANDA / JUDGMENT

Mwesigwa Semu & Anor v Uganda

(Criminal Appeal No. 221 of 2003)

[2009] UGCA 10 (31 March 2009)

[2009] UGCA 10

COURT

Court of Appeal of Uganda

CASE / FILE NUMBER

Criminal Appeal No. 221 of 2003

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\par }{\b\insrsid11995958\charrsid864276 the High Court at Masindi (Bamwine, J)}
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\par }{\b\insrsid11995958\charrsid864276 dated 21}{\b\super\insrsid11995958\charrsid864276 st}
\b\insrsid11995958\charrsid864276 November, 2003 in Criminal Session Case No.49 of 2003.}
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\par }{\b\ul\insrsid15691718\charrsid864276 JUDGMENT OF THE COURT:

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\pararsid864276 {\insrsid11995958\charrsid864276 This is an appeal against conviction}
\insrsid14171064\charrsid864276 and sentence whereby the High C}{

\insrsid11995958\charrsid864276 ourt of Uganda sitting at Masindi tried the two ap}
\insrsid3015739\charrsid864276 pellants and convicted them of S}
\insrsid11995958\charrsid864276

imple Robbery and sentenced them to 12 years imprisonment on three counts of that offence. }
\insrsid15691718\charrsid864276 In }{\insrsid3015739\charrsid864276 addi}
\insrsid11995958\charrsid864276 tion}{\insrsid15691718\charrsid864276

, he ordered that the victim}{\insrsid3015739\charrsid864276 s}{\insrsid15691718\charrsid864276
be paid compensation totalling to Ug.shs.280,000/=. The High Cour}
\insrsid16406610\charrsid864276 t also convicted the }{\insrsid11995958\charrsid864276

first}{\insrsid16406610\charrsid864276 appellant of the offence of rape and sentenced him to 12
years imprisonment. The sentences of imprisonment were to run concurrently.}
\insrsid15691718\charrsid864276

\par }{\insrsid16406610\charrsid864276

\par The background to the trial as outlined by the DPP in a summary of the case which
accompanied the indictment was as follows:

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 {\b\insrsid4468965\charrsid864276 of 20}{\b\super\insrsid4468965\charrsid864276 th}{

\b\insrsid4468965\charrsid864276 at Kirya}{\b\insrsid14171064\charrsid864276 mwongo village in the Masindi D}{\b\insrsid4468965\charrsid864276 istrict, a series of robberies were committed by a gang of thugs armed with an AK-47 assault r

ife. Many valuables were robbed which included mainly cash, some sodas, biscuits, a wrist watch, a radio belonging to different people that }{\b\insrsid11995958\charrsid864276 is}
 {\b\insrsid4468965\charrsid864276 ARIMPA ROBBERT}{

\b\insrsid14171064\charrsid864276 ,}{\b\insrsid4468965\charrsid864276 CHANDIA MARY, MADR}
 {\b\insrsid14171064\charrsid864276 A SAM, MAGARET AMVIKO, JADRI Y.}
 {\b\insrsid4468965\charrsid864276 YOSIA, IRUMBA FRED, MADIRA GIFT AND MUTONGANI

FRED. Some of the victims }{\b\insrsid11995958\charrsid864276 were}
 {\b\insrsid4468965\charrsid864276 injured in the course of the robberies. One woman was raped namely ASABA CHRISTIN}{\b\insrsid14171064\charrsid864276 E}{

\b\insrsid4468965\charrsid864276 . }{\b\insrsid11995958\charrsid864276 The two accused persons were identified and the matter was reported t}{\b\insrsid14171064\charrsid864276 o}
 {\b\insrsid11995958\charrsid864276 police hence their arrest. }

\b\insrsid14171064\charrsid864276 T}{\b\insrsid4468965\charrsid864276 he other}
 {\b\insrsid14171064\charrsid864276 s}{\b\insrsid4468965\charrsid864276 fled on a motorcycle.\'94}
 {\b\insrsid16406610\charrsid864276

\par }{\b\insrsid4468965\charrsid864276

\par }\pard \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0\pararsid864276 {\insrsid4468965\charrsid864276 The appellants were originally indicted with eight counts of Robbery C}{\insrsid14171064\charrsid864276

/S 272 and 273(2) of the Penal C}{\insrsid4468965\charrsid864276 ode Act (now S. 285 and 286 (2) of the Penal Code. The first appellant was also indicted of Rape }{\insrsid14171064\charrsid864276 C/S }{\insrsid4468965\charrsid864276

117 and 118 of the Penal Code (now ss.123 and 124 of the Penal Code Act.).

\par }{\insrsid26096\charrsid864276

\par At the trial, the prosecution failed to lead evidence on counts 3, 4, 5, 6 and 7 of the indictment. The appellants wee acquitted of those changes. The prosecution led evidence in respect of counts 1, 2, 8 and 9 of the Indictment. The

y were convicted and sentenced to 12 years imprisonment as aforesaid. Hence this appeal.

\par

\par }{\insrsid14171064\charrsid864276 The M}{\insrsid26096\charrsid864276 emorandum of Appeal contained the following two grounds of appeal:-

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\insrsid11995958\charrsid864276 The}{\insrsid26096\charrsid864276 learned trial judge erred in law and fact when he convicted the 1}{\super\insrsid26096\charrsid864276 st} {\insrsid26096\charrsid864276 appellant of rape w

ithout sufficient proof that the rape was committed.

\par {\listtext\pard\plain\insrsid26096\charrsid864276 \hich\af0\dbch\af0\loch\f0 2.\tab}The learned trial judge erred in law and fact when he held that the appellants had been properly identified.

\par }\pard \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0 \pararsid864276 {\insrsid26096\charrsid864276

\par At the hearing of the }{\insrsid11995958\charrsid864276 appeal} {\insrsid26096\charrsid864276 Ms Matovu Rita}{\insrsid14171064\charrsid864276 represented the appellants on S}{\insrsid26096\charrsid864276 tate brief and Mr. Mulin}{

\insrsid14171064\charrsid864276 dwa Badru, a State A}{\insrsid26096\charrsid864276 ttorney } {\insrsid11995958\charrsid864276 with the}{\insrsid14171064\charrsid864276 D} {\insrsid26096\charrsid864276

irectorate of Public Prosecutions, represented the respondent.

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\par For convenience, we propose to deal with the 2}{\super\insrsid26096\charrsid864276 nd} {\insrsid26096\charrsid864276 ground of appeal first which raises the issue of } {\insrsid11995958\charrsid864276 identification}{\insrsid26096\charrsid864276

of the appellants at the scene of crime. Ms }{\insrsid11995958\charrsid864276 Rita} {\insrsid26096\charrsid864276

Matovu strongly argued that throughout the entire series of robberies, there was no sufficient light to enable the victims to identify the appellants. She submitted that torch light and moonlight which were mentioned as being present at the

scene of the robbery were not sufficient in the circumstances. She complained } {\insrsid16337279\charrsid864276 that}{\insrsid26096\charrsid864276

key witnesses gave hearsay evidence on identification and others claimed to have identified the appellants by voice none of which is adequate to put the appellants at the scene of crime. She asked us to re-evaluate

the evidence and agree with her that the case against the appellants was not proved against them beyond reasonable doubt as required by law.

Mr. Mulindwa f of the respondent supported the conviction of the appellants. He submitted

that there was sufficient evidence to support the conviction. First, there was the evidence of a hurricane

lamp which enabled PW1 and PW6 to see the two appellants at the scene of crime. They had previously known the appellants and one of them was a classmate of PW6. The

appellants themselves had torches which they kept on flashing around. Secondly, the robbery took almost three hours. The witnesses had a lot of

opportunity to observe the appellants. }

Thirdly, throughout the robbery,

the prosecution witnesses were in close proximity with the appellants and given the presence of the other factors already mentioned above, they could not have made a mistaken

identification. The learned trial judge considered the evidence of identification along with that of alibi adduced by the appellants. He concluded as follows:-

From the prosecution evidence, this was a group of robbers with a common intention which can be inferred from their joint conduct, their presence together at the scene of

crime and their acts generally that night. They were properly identified. The conditions under which they operated favoured

correct identification. The evidence of PW1, PW2, PW3 and PW6 considered together excludes any possibility of mistaken identity

. Weighing this evidence and the accused persons alibis, I do not hesitate to come to the conclusion that the alibis are false. I reject them.

Earlier on, the learned trial judge had considered the evidence which the defence had attacked as contradictory. He observed:-

Earlier on, the learned trial judge had considered the evidence which the defence had attacked as contradictory. He observed:-

I have considered what has been pointed out by the defence as instances of

contradiction. Though not pointed out as such, it was PW5's failure to

distinguish A1 and A2 at the trial. Considering the other evidence on record, I did not consider this a major contradiction

in the prosecution case. I did not get the impression that PW5 told court any deliberate falsehood. I have also considered the fact that although Asaba's

evidence is that she knew Semu's names from A2, this is not reflected in the first part of her statement to the Police. The addendum to the statement contains Semu's name. This

not being a self recorded statement, it could as well be that the recording officer wrote what he considered to be material and not what Asaba herself considered to be material

\b\insrsid7747938\charrsid864276 evidence. In fact, about Kaahwa\rsquo s name not appearing in the statement, her explanation was that she could not have said }

{\b\insrsid11995958\charrsid864276 what Police}{\b\insrsid7747938\charrsid864276

did not ask her. There is no indication that she was ever asked about the }

{\b\insrsid11995958\charrsid864276 identities}{\b\insrsid7747938\charrsid864276

of her assailants and she exhibited ignorance of them. Considering the prosecution evidence as a whole, I would equally disregard this omission in the prosecution evidence.\'94}

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\par }{\insrsid11995958\charrsid864276 It is the duty of th}{\insrsid16337279\charrsid864276 is court, under Rule 30 of the Judicature (Court of Appeal R}{\insrsid11995958\charrsid864276 ules) Direction and under the authority of }{

\b\ul\insrsid11995958\charrsid864276 Pandya vs R [1957] EA 336 }

{\insrsid11995958\charrsid864276 and }{\b\ul\insrsid11995958\charrsid864276 Bogere Moses vs Uganda Cr App. No. 1/1997 (SC) }{\b\ul\insrsid3015739\charrsid864276 (}{

\insrsid11995958\charrsid864276 unreported}{\insrsid3015739\charrsid864276)}

{\insrsid11995958\charrsid864276 , being 1}{\super\insrsid11995958\charrsid864276 st}

{\insrsid11995958\charrsid864276

appellate court, to re-appraise all the evidence which was adduced before the trial court and to come to its own conclusion as to whether the decision of the lower court should be supported or not. }{\insrsid6773026\charrsid864276 In doing so, the 1}{

\super\insrsid6773026\charrsid864276 st}{\insrsid6773026\charrsid864276 appellate court must always bear in mind that it did not have the opportunity, which the trial court }

{\insrsid11995958\charrsid864276 had, of}{\insrsid6773026\charrsid864276

seeing the witnesses give evidence in court and of assessing their demeanour.}

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\par With this in mind, we now examine the }{\insrsid16340832\charrsid864276 evidence of }{\insrsid11995958\charrsid864276 identification}{\insrsid16340832\charrsid864276 which was adduced along with the appellants alibi.}{\insrsid16284553\charrsid864276

\par }{\insrsid16340832\charrsid864276

\par PW1 was Arimpa Sande Robert. He claimed that the robbers started at his shop where they found him with Irumba, Tabu, Richard and }{\insrsid11995958\charrsid864276 Asaba}

{\insrsid16340832\charrsid864276 }{\insrsid11995958\charrsid864276 Christine}{

\insrsid16340832\charrsid864276 (PW6). He testified that there was a hurricane lamp, small size which helped him to see the 1}\super\insrsid16340832\charrsid864276 st}{\insrsid16340832\charrsid864276

appellant whom he had seen before. He said that the first appellant was joined by the 2}\super\insrsid16340832\charrsid864276 nd}\insrsid16340832\charrsid864276 appellant, }{\insrsid2957752\charrsid864276 Kaahwa}\insrsid16340832\charrsid864276

, and Kiiza who had a gun but was never arrested. He described in detail how the robbers tied them together and went with them from house to house robbing and raping their victims. The operation took about three hours after which the victims, includ

ing PW1, were set free. }\insrsid3015739\charrsid864276

\par

\par }\insrsid16340832\charrsid864276 PW1 recorded a statement at the police station early the next morning. It}\insrsid3015739\charrsid864276 was exhibited in court as D. }{\insrsid16340832\charrsid864276 Exh.1}\insrsid11995958\charrsid864276 .}{

\insrsid3015739\charrsid864276 }\insrsid11995958\charrsid864276 }{\insrsid3015739\charrsid864276 I}\insrsid11995958\charrsid864276 n}{\insrsid16340832\charrsid864276

that statement he stated that the two robbers who first appeared were strangers to him and he had never seen them before.}\insrsid3015739\charrsid864276 }\insrsid16340832\charrsid864276 However, }\insrsid11875648\charrsid864276

as time went on during the robbery, he recognised the voices of two robbers }{\insrsid11995958\charrsid864276 whom}\insrsid11875648\charrsid864276

he knew very well as BYAMANI and KIZZA whose faces he did not have opportunity to see. Both of them were never arrested nor are they indicted in this trial

. The question is: if PW1knew the appellants as he claimed in court, why did he fail to mention their names to the police on the first opportunity. Why did it take him two years \endash up to the time of trial,}\insrsid11688355\charrsid864276

to state that he had seen and recognised the two appellants whom he had known before? We shall return to the evidence of this witness after examining the other identifying evidence. However, the evidence of this witness is highly tainted by this }\insrsid11688355\charrsid864276

\insrsid11995958\charrsid864276 apparent}\insrsid11688355\charrsid864276 lapse of memory for two years.}\insrsid16340832\charrsid864276

\par }\insrsid11688355\charrsid864276

\par PW2 was Chandia }{\insrsid11995958\charrsid864276 Mary}
{\insrsid11688355\charrsid864276 , alias Chandiru Mary. She stated that on the date in question}
{\insrsid3015739\charrsid864276 ,}{\insrsid11688355\charrsid864276 at about midnight}{

\insrsid3015739\charrsid864276 ,}{\insrsid11688355\charrsid864276 her home was }
{\insrsid11995958\charrsid864276 attacked}{\insrsid11688355\charrsid864276

by many robbers included the two appellants. She claimed that she recognised them because she
had seen them before but she did not know }{\insrsid11995958\charrsid864276 their}
{\insrsid11688355\charrsid864276 n

ames. She said she saw clearly with the help of torches which they carried and flashed about as
they went about the robbery. Under cross-examination, she admitted that she had told police that
she recognised a tiny }{\insrsid8676634\charrsid864276

man. She then said in court that she h

ad recognised a short, stout man but she failed to point among the appellants which of them
answered that description. She admitted that after the robbery, PW1 told her the names of the
robbers but she could not retain or remember them at the trial. For

}{\insrsid3015739\charrsid864276 what}{\insrsid11995958\charrsid864276 ever}
{\insrsid8676634\charrsid864276 this evidence is worth, this witness cannot be said to have
recognised the appellants on the night of the robbery.}{

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\par }{\insrsid8676634\charrsid864276

\par PW3 was a lady named Nyanjura Asia Mutongani. This witness claimed that her house was
attacked at 2.00 am on the night in question

and robbed of a number of shop goods and money. He husband (PW4) was not at home having
spent the night at the home of another wife. She heard a }{\insrsid11995958\charrsid864276
motorcycle}{\insrsid8676634\charrsid864276

outside her shop. The robber stopped and called Fred, the name of her husband. They said they
w

anted a torch to check on their fuel. PW3 did not move out of her bedroom. The robbers kicked
the door open and two of them entered. She recognised the voice of the first appellant, who never
entered the house. She had seen him around many times near

and at }{\insrsid11995958\charrsid864276 their}{\insrsid8676634\charrsid864276 shop but she
never saw him that night. }{\insrsid2957752\charrsid864276 She said she recognised one Kaa}
{\insrsid8676634\charrsid864276 hwa ({

\insrsid11995958\charrsid864276 2}\super\insrsid11995958\charrsid864276 nd}
{\insrsid11995958\charrsid864276 appellant}\insrsid8676634\charrsid864276) who entered her
bedroom and threatened to kill her whereby the 1}}

\super\insrsid8676634\charrsid864276 st}\insrsid8676634\charrsid864276 appellant pleaded for
her from outside that she should not be killed. }\insrsid11995958\charrsid864276 When the
robbers left, she sent for her husband whom she told everything. }}

\insrsid8676634\charrsid864276 Under }\insrsid11995958\charrsid864276 cross}
{\insrsid8676634\charrsid864276 -examination, she said she told the police that the robbe}
{\insrsid16270615\charrsid864276 rs were the two appellants. PW4 who is PW3\rqoute

s husband gave hearsay evidence as to what she had experienced. Though his version is similar to
that of his wife, it is not of much value. He also contradicted }\insrsid3015739\charrsid864276
her }\insrsid16270615\charrsid864276

in several particulars relating to what exactly was stolen from the house. }
{\insrsid8676634\charrsid864276

\par }\insrsid16270615\charrsid864276

\par }\insrsid2957752\charrsid864276 PW5, Hellen Drateru}\insrsid16270615\charrsid864276
testified that thieves came to her house between midnight and 1.00 am. She

had already gone to bed. The thieves called her by name and kicked her door open. Many of them
entered. They demanded for money }\insrsid11995958\charrsid864276 while}
{\insrsid16270615\charrsid864276

beating her. She stated that the two appellants were among the robbers. She said she knew only
one of them by the name Kaahwa (2}\super\insrsid16270615\charrsid864276 nd}
{\insrsid16270615\charrsid864276

appellant). When asked to point him out in court, she pointed at Mwesigwa, (the 1}
{\super\insrsid16270615\charrsid864276 st}\insrsid16270615\charrsid864276

appellant). She insisted that she knew Kaahwa and that even his father was called Aforo and that
she had known him since childhood. When asked in }\insrsid11995958\charrsid864276 cross}
{\insrsid16270615\charrsid864276 -ex

amination to point out in court that person she had known since childhood, she again, said it was
the person in a yellow shirt and pointed at Semu }\insrsid11995958\charrsid864276 Mwesigwa}
{\insrsid16270615\charrsid864276 (the)}

\insrsid3015739\charrsid864276 1}\super\insrsid3015739\charrsid864276 st}
{\insrsid3015739\charrsid864276 }\insrsid16270615\charrsid864276 appellant). Clearly if she
failed to identify the }\insrsid11995958\charrsid864276 person}{

\insrsid16270615\charrsid864276 she said she had known }{\insrsid11995958\charrsid864276 since}
{\insrsid16270615\charrsid864276 childhood, she could not possibly identify the 1}
{\super\insrsid16270615\charrsid864276 st}{\insrsid16270615\charrsid864276

appellant whom she had never seen before.

\par

\par Finally}{\insrsid2957752\charrsid864276 , }{\insrsid16270615\charrsid864276 we deal with the
evidence of PW6 Asaba }{\insrsid11995958\charrsid864276 Christine}
{\insrsid16270615\charrsid864276

. Contrary to what PW1 told court that she was with him at his shop when the thieves }
{\insrsid2957752\charrsid864276 s}{\insrsid16270615\charrsid864276 truck, she herself t

old court that she was already in bed in her room. Many people knocked and kicked the door
open. They had torches of various sizes which they flashed around. They took her to PW1}
{\insrsid3015739\charrsid864276 \rquote s}{

\insrsid16270615\charrsid864276 , shop and tied her and started beating her together with other
people. Four of them were tied on one rope. The thugs were four. She claimed }
{\insrsid3015739\charrsid864276 that }{\insrsid16270615\charrsid864276

during the progress of the robbery, she recognised Kaahwa and Semu (appellants). She claimed
that she was Kaahwa\rquote s schoolmate and they had grown up together. She recognised him
when the robbers paraded their victims outside the shop of PW5. }{

\insrsid11995958\charrsid864276 He}{\insrsid16270615\charrsid864276 came to her and told her
that Semu}{\insrsid5973861\charrsid864276

(whom she did not know) wanted her. He then untied and told her to remove her knickers and go
to Semu. She refused and Kaahwa beat her up. She decided to }{\insrsid11995958\charrsid864276
go to Semu}{\insrsid5973861\charrsid864276

who was waiting on the other side of the shop. Semu who was armed with a panga demanded for
sex and threatened to cut her up. She surrendered and he had sex with her forcefully. She
recognised him as }{\insrsid11995958\charrsid864276 Semu}{

\insrsid5973861\charrsid864276 because Kaahwa had told her}{\insrsid3015739\charrsid864276
that,}{\insrsid5973861\charrsid864276 that was his name and he was also flashing a torch.}
{\insrsid3015739\charrsid864276 }{\insrsid5973861\charrsid864276

She pointed at the 1}{\super\insrsid5973861\charrsid864276 st}{\insrsid5973861\charrsid864276
appellant as the man who raped her and at the 2}{\super\insrsid5973861\charrsid864276 nd}
{\insrsid5973861\charrsid864276 appellant as the person she }{

\insrsid11995958\charrsid864276 knows}{\insrsid5973861\charrsid864276 and grew up with.

\par

\par The next day after the robbery, PW6 recorded a statement at the police station.

n. In her statement which was exhibited as Exhibit DEX 2, she did not mention any name of any person she had recognised during the robbery. She just described how her room was forced open, how she was pulled out and tied together with other victims and

how she was moved around while the attackers carried the robberies. She did not say she had been raped. When she was released she just went home and slept. She signed the statement. Later on, on the time and date not indicated, an }

\insrsid11995958\charrsid864276 additional}\insrsid5973861\charrsid864276 statement was recorded from \insrsid8132180\charrsid864276 of her. She was made to just cancel } \insrsid5973861\charrsid864276 her signature and to continue.

\par

\par It is clear from the statement that what followed was recorded by a different } \insrsid11995958\charrsid864276 handwriting}\insrsid5973861\charrsid864276 by two different officers. PW6 then added to her original statement:-

\par

\par }\pard \qj \li720\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\ri0\lin720\itap0\pararsid864276 {\b\insrsid1593175\charrsid864276 '93 On } \b\insrsid11995958\charrsid864276 addition}\b\insrsid1593175\charrsid864276

to the above one of the robbers ordered someone whom I don't

know by names to remove my knickers. He removed it and I was ordered to hold it. I stayed there with it and later another robber ordered me to go with him. I refused and he kicked me. He then

enforced me and I went with him aside. Reaching there, I found somebody }

\b\insrsid11995958\charrsid864276 there}\b\insrsid1593175\charrsid864276 who pulled the knife and said to me that if you don't sleep with, (sic) I am going to cut }

\b\insrsid11995958\charrsid864276 you}\b\insrsid1593175\charrsid864276 . }

\b\insrsid11995958\charrsid864276 He then touched in the pockets of the jacket and removed a condom. }\b\insrsid1593175\charrsid864276 He put it on

and later pushed me down. He then had an intercourse with me. After the above, he told me to join the rest. The person who }\b\insrsid11995958\charrsid864276 raped me} \b\insrsid1593175\charrsid864276

, I know him by face and on inquiry he was found to be Mwesigwa}

{\b\insrsid3015739\charrsid864276 . That is all}{\b\insrsid1593175\charrsid864276 .\94}

{\b\insrsid5973861\charrsid864276

\par }\pard \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0
\pararsid864276 {\insrsid1593175\charrsid864276

\par Looking at this statement, it is clear that the recording officer or officers were forcing her to
say what she did not want to volunteer. She was being forced to say she }
{\insrsid11995958\charrsid864276 was}{\insrsid1593175\charrsid864276

raped which she did not want to say and she was being forced to say she had recognised the
robber and the rapist, which she refused to accept. }{\insrsid11995958\charrsid864276

The additional statement contains many cancellations, alterations and insertations which make it
look like an outright forgery. }{\insrsid1593175\charrsid864276 This is totally unacceptable.
Incidentally, PW1\quote s statement was equally }}

\insrsid11995958\charrsid864276 tampered}{\insrsid1593175\charrsid864276 with. At the end of
his statement, he stated

\par

\par }\pard \qj \li720\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin720\i
tap0\pararsid864276 {\b\insrsid1593175\charrsid864276 \93}{\b\insrsid410025\charrsid864276 I
know the voices of the two men but I did not see their faces. }}

\b\insrsid410025\charrsid864276 [Left a small space]}{\b\insrsid410025\charrsid864276
that\quote s what I can apparently state.\94}{\b\insrsid1593175\charrsid864276

\par }\pard \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0
\pararsid864276 {\b\insrsid410025\charrsid864276

\par }{\insrsid410025\charrsid864276 A different policeman with different handwriting inserted in
the small }{\insrsid11995958\charrsid864276 space}{\insrsid410025\charrsid864276 indicated the
following:-

\par

\par }\pard \qj \li720\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin720\i
tap0\pararsid864276 {\b\insrsid410025\charrsid864276 \93N. B. }

{\b\insrsid11995958\charrsid864276 While at Bayo\quote s place the thugs ordered Jadri with\85

\85to play sex on one Margaret which he did. }{\b\insrsid410025\charrsid864276 When he finished
they cut him for he finished early.\94

\par

\par }\pard \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0
\pararsid864276 {\insrsid410025\charrsid864276 Here again the police appear to have been
forcing PW1 to say he witnessed a rape which he had formerly
refused to reveal.

\par

\par Finally, the learned trial judge, with respect seems to have read a lot from an allegation that
the two appellants were found together at a trading centre the morning after the }
{\insrsid11995958\charrsid864276 robbery}{\insrsid410025\charrsid864276

and were arrested. The policeman and the L. C. Chairman who }{\insrsid11995958\charrsid864276
are}{\insrsid410025\charrsid864276

said to have been present did not give evidence on the matter. The allegation was made in court
by PW4 whose evidence mostly consisted of what his wife told him ({
{\insrsid11995958\charrsid864276 Hearsay}{\insrsid410025\charrsid864276

evidence). The evidence of arresting officials was very necessary in the circumstances of this
case.

\par

\par We have endeavoured to deal in }{\insrsid11995958\charrsid864276 detail}
{\insrsid5046492\charrsid864276

with all the evidence on record on which the learned trial judge relied to hold that the appellant
were sufficiently identified. We are not satisfied that he gave due weight to the }
{\insrsid11995958\charrsid864276 inconsistencies}{

\insrsid5046492\charrsid864276 and the }{\insrsid11995958\charrsid864276 contractions}
{\insrsid5046492\charrsid864276 contained in the testimony of these witnesses. He did not
evaluate properly the shocking number of witnesses }{

\insrsid3015739\charrsid864276 who told court that they had}{\insrsid5046492\charrsid864276
clearly identified the appellants two years after the event when they failed or negl

ected to disclose the identity of the attackers on the morning of the robberies and alleged rapes.
The arrest of the appellants seems to have been }{\insrsid11995958\charrsid864276 engineered}
{\insrsid5046492\charrsid864276

by PW4 on the information of his wife who did not see the person she claimed to have identified.
In our view, the learned trial judge did }{\insrsid11995958\charrsid864276 not}
{\insrsid5046492\charrsid864276

subject the whole evidence to scrutiny to the extent that he should have. The prosecution evidence left so many gaps {\insrsid11995958\charrsid864276 unexplained} {\insrsid5046492\charrsid864276 t}{\insrsid8132180\charrsid864276 h}{

\insrsid5184223\charrsid864276 at we think it would be dangerous for us to support the conviction of robbery. There was a failure to prove the {\insrsid11995958\charrsid864276 identity} {\insrsid5184223\charrsid864276

of the assailants. We allow the second ground of appeal.}{\insrsid410025\charrsid864276

\par }{\insrsid5184223\charrsid864276

\par Regarding the ground of rape, we have already dealt with the evidence of PW6, the victim of the rape when considering the evidence of identification. This witness gave evidence that she had grown up with the 2}{\supersid5184223\charrsid864276 nd}{

\insrsid5184223\charrsid864276 appellant and had identified him at the scene. But in the statement she recorded the next morning. She made {\insrsid11995958\charrsid864276 no mention}{\insrsid5184223\charrsid864276

of him at all. It is not enough for her to say that she was not asked about him. She was supposed to be assisting the police to solve the robbery and the rape she was supposed } {\insrsid11995958\charrsid864276 to}{\insrsid5184223\charrsid864276

be a victim of. It is also noteworthy }{\insrsid11995958\charrsid864276 that} {\insrsid5184223\charrsid864276 the next morning she did not report that she had been raped. She is only forced at an unknown time and date to record an }{

\insrsid11995958\charrsid864276 additional}{\insrsid5184223\charrsid864276 statement to } {\insrsid11995958\charrsid864276 say}{\insrsid5184223\charrsid864276 that she was raped.

\par

\par Even then she did }{\insrsid11995958\charrsid864276 not}{\insrsid5184223\charrsid864276 mention the person who did it. She was, as I indicated above forced to include in } {\insrsid11995958\charrsid864276 their}{\insrsid5184223\charrsid864276 }

\insrsid11995958\charrsid864276 statement}{\insrsid5184223\charrsid864276 that:

\par

\par }{\pard \qj \li720\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\ri0\lin720\itap0\pararsid864276 {\b\insrsid5184223\charrsid864276 \93The person who raped me, I know him by face and on inquiry he was found to be Mwesigwa.\94

\par

\par }\pard \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0
\pararsid864276 {\insrsid5184223\charrsid864276 This statement could }
{\insrsid11995958\charrsid864276 not}{\insrsid5184223\charrsid864276

have voluntarily come from the head of PW6. In evidence in court she contradicted herself to say that she knew she was raped by Mwesigwa because Kaahwa told her that, that was his name. }
{\insrsid11995958\charrsid864276 Why then did

she not tell the police the next morning that she was raped by a person she was told by Kaahwa to be Mwesigwa? }{\insrsid5184223\charrsid864276 Whose }{\insrsid11995958\charrsid864276 inquiries}{\insrsid5184223\charrsid864276

were these that found that it was a person named Mwesigwa who raped PW6. We think that the prosecution did not establish beyond reasonable doubt that}{\insrsid11995958\charrsid864276 the Mwesigwa Moses now in the dock participated }{

\insrsid2691752\charrsid864276 in the events of that night. If}{\insrsid11995958\charrsid864276 he had, the victim PW6 would have reported it at the earliest opportunity.}
{\insrsid5184223\charrsid864276

\par }{\insrsid11995958\charrsid864276

\par We also note that there was no attempt to establish by medical evidence that

PW1 was a victim of a sexual assault on the night of the robbery. Though she testified that she was medically examined after a few days, we have no explanation why the evidence was suppressed. We can only guess that if it had been produced, it would ha

ve been adverse to the prosecution case. The learned trial judge did not consider this aspect of the case at all. He may have believed the testimony of PW6, but as we have shown above, it was not worthy of such credit.

\par

\par In our view, the evidence of penetration was not proved beyond reasonable doubt.

\par

\par In the result, we allow this appeal, quash the conviction and set aside the sentences. The appellants sh}{\insrsid2691752\charrsid864276 ould go free unless held on othe}
{\insrsid11995958\charrsid864276 r lawful charges.

\par }\pard \qc \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0
\pararsid864276 {\insrsid11995958\charrsid864276 Dated at Kampala}
{\insrsid2691752\charrsid864276 this }{\insrsid14964494\charrsid864276 31}{

\super\insrsid14964494\charrsid864276 st}\insrsid14964494\charrsid864276 }
\insrsid11995958\charrsid864276 day of }\insrsid14964494\charrsid864276 March }
\insrsid11995958\charrsid864276 2008.

\par }\pard \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0
\pararsid864276 {\insrsid11995958\charrsid864276

\par }\pard \qc \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0\itap0
\pararsid864276 {\insrsid11995958\charrsid864276 Hon. Justice L. E. M. Mukasa-Kikonyogo,

\par }{\b\ul\insrsid12789705\charrsid864276 DE}{\b\ul\insrsid11995958\charrsid864276 PUTY
CHIEF JUSTICE}\insrsid11995958\charrsid864276

\par

\par Hon. Justice A. Twinomujuni,

\par }{\b\ul\insrsid12789705\charrsid864276 JUSTICE OF APPEAL}
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