

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA, AT MBARARA

CORAM: HON. JUSTICE A. TWINOMUJUNI, JA
5 **HON. JUSTICE S. B. K. KAVUMA, JA**
 HON. JUSTICE M. S. ARACH AMOKO, JA

CRIMINAL APPEAL NO. 151 OF 2004

[Appeal from the judgment of the High Court of Uganda at Mbarara (Maniraguha, J)
10 *dated 23rd January 2004 in Criminal Session No. 11 of 2002]*

MPAGI OBEDI:..... APPELLANT

VS

UGANDA:..... RESPONDENT

15 **Criminal law-** Robbery- ingredients of robbery - contradictions in evidence- effects thereof-
evidence- duty of first appellate court- **sentence** – whether death sentence too harsh.

The appellant was convicted of the offence of murder and was sentenced to death. He appealed against both conviction and sentence.

20 Held: (1) *The manner these items were scattered to various places shows a desire to hide them thus an indication of guilt. The explanation of the finding of the hidden iron sheets is also not acceptable in light of the father’s testimony that the accused person had bought them “recently” not in 1999 which the accused person says is a lie.*

25 (2) *But looking at the various anomalies in the accused’s version as against the strong prosecution case, the prosecution version is the more plausible explanation of the facts than that of the accused person. The accused hid his true identity, scattered the goods and the money, all indicators of guilt.*

30 (3) Even if any contradiction existed, it was minor in our view, and not material. In any case theft is theft. The amount stolen does not matter as long as the ingredient of theft has been proved.

(4) This being a first appeal, it is our duty to re-evaluate all the evidence on record and determine whether the conclusions reached by the trial court should stand.

JUDGEMENT OF THE COURT

The appellant, Mpagi Obedi, appeals against the judgment of the High Court of Uganda sitting at Mbarara where he was convicted of the offence of aggravated robbery and was
5 sentenced to death.

The case for the prosecution was that on the night of the 28th January 2001, at Biramba village in Ntungamo District, the complainant No. 057 PC Biryomumaisho Augustine (PW4), received Shs. 900,000 from one Henry Karyoko as part payment for his land which he had
10 sold to Mr. Karyoko. The appellant, who was the complainant's porter and night watchman at the material time, was present when the complainant was receiving the money. The complainant also had Shs. 300,000 in his house, of which the appellant was also aware.

That day, the appellant sharpened his panga as usual. Between 8 – 10 p.m. the complainant
15 had supper with the appellant. After supper, however, the appellant suddenly pulled the panga and cut the complainant until the complainant fell down. He also cut the complainant's wife on the left hand. Thereafter, he proceeded to steal the Shs. 1.2 million and a bag containing the complainant's clothes.

The complainant, after gaining strength, reported the incident to his neighbours who gave
20 them the necessary assistance and took them to Itojo Hospital for treatment. Later on, the matter was reported to Ntungamo Police and investigations led to the arrest of the appellant and the recovery of some of the stolen property and various items which he had acquired using the stolen money.

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At the trial, the items were tendered as exhibits and the prosecution maintained that it was the appellant who had stolen the complainant's money and property and that he had used a deadly weapon at the time of the robbery. He should be convicted as charged.

30 The appellant admitted cutting the complainant and his wife with a panga on the said day but pleaded that he cut the couple in self defence. He also denied stealing anything from the complainant's house that night. In his sworn statement, he stated that, that night, he returned to the complainant's house with the complainant after drinking at a nearby bar, when the complainant started quarrelling with his wife and fighting her. When he tried to separate

them, the complainant told him not to intervene, since he had caused the complainant's vehicle to get an engine knock. The complainant then got hold of him, threw him down and started beating him while sitting on him. There was a panga nearby and they fell on it. When the complainant tried to reach for it, the appellant got it first, and as he tried to wave the panga away, it landed on the complainant's head. As the complainant tried to free himself from the appellant's hands, the panga cut him on the arm and again on the head. When the complainant's wife (PW2) saw the husband bleeding, she got hold of a spear in order to spear him, but he defended himself using the panga which cut her on the hand. After cutting her, she fell on the appellant and the panga cut her head.

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He further denied taking PW1 to his father's home. His version was that it was the complainant who first went there, and later on took them including Kalanzi (PW2) to the home of his (appellant's) parents. At that home, the complainant and PW2 asked the parents to produce everything that belonged to him. They produced the iron sheets which he had bought using the money which the complainant had paid him when he was still working for the complainant in 1999. There were also some clothes which the complainant had given him that same year. The green bag which the complainant had lent him for carrying the said clothes was also found there.

20 As for the rest of the items, the appellant said in 2000, he had harvested coffee for his father who had given him Shs. 100,000. When he returned to his auntie's place where he was staying, she advised him to start a small shop with the money, which he did and he used Shs. 30,000 to stock a few items in the shop. He also bought a radio and a loud speaker from the balance. They were among the items exhibited in court.

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The learned trial Judge rejected the appellant's defence, accepted the prosecution's evidence, convicted him as charged and sentenced him as earlier stated. Aggrieved by the judgment of the High Court, the appellant appealed to this Court.

30 The memorandum of appeal contained the following two grounds of appeal:

- 1. The learned trial Judge erred both in law and in fact when he convicted the appellant without evaluating the evidence properly.**

2. The learned trial Judge erred both in law and in fact when he did not consider the defence evidence hence, reaching a wrong decision.

Mr. Bwatota Bashonga James, learned counsel for the appellant argued the two grounds
5 separately, and prayed this Court to allow the appeal, quash the conviction and set aside the sentence and set the appellant free.

On the first ground, Mr Bwatota contended that the learned trial Judge had convicted the
appellant wrongly without evaluating the evidence properly. Had he done so, he would have
10 come to the conclusion that two of the ingredients of the offence of aggravated robbery, namely, theft and accused's participation, had not been proved by the prosecution beyond reasonable doubt and he would not have convicted the appellant. According to Mr Bwatota, the evidence on record actually reflects that the offence of attempted murder was the one that had been committed by the appellant, instead of aggravated robbery. The learned trial judge
15 should not have relied on it.

Regarding theft, he pointed out that the evidence adduced by the prosecution was
contradictory and the trial judge should not have relied on it. While the complainant (PW4)
and the investigating officer, D/CPL Kalanzi told court that the appellant stole Shs. 1.2
20 million which was in a bag, the complainant's wife (PW2) stated that there was Shs. 600,000 in the bag.

He submitted further that, although the two police forms, Exhibits P1 and P2 indicate that
they were issued on the 29th January 2001, the Doctor's remarks on the reverse side indicate
25 that they were signed by the Doctor on the 27th March and 18th May 2001, respectively. In his view, this is a clear indication that these forms were tampered with and were deliberately backdated to the 29th January 2001 after evidence had been compiled, in order to make out a case of robbery.

30 He also submitted that even sketch map, Exhibit P3, was just reconstructed on the 4th April 2001 by PW1. This was long after the offence was allegedly committed. Therefore, it could not reflect the events as they happened on the 29th January 2001.

Lastly on this ground, Mr Bwatota argued that, even if there was a robbery, there is no explanation why the appellant only took the complainant's trousers and shirts leaving other household property including the wife's clothes. This shows that the appellant was truthful when he stated in his defence that he never stole those items and that they were given to him
5 by his boss in 1999.

On the second ground, Mr. Bwatota submitted that there is no evidence that the appellant participated in the offence of aggravated robbery at all. That although the learned trial Judge alluded to the property found hidden in the ceiling, especially iron sheets and concluded that
10 the way in which the property was scattered indicated the appellant's intention to conceal theft, the evidence of the appellant which is the one that reflects what happened that day is to the contrary. Had the learned trial Judge considered the defence evidence, he would not have reached this wrong decision.

15 In reply, Principal State Attorney Vincent Wagona opposed the appeal and supported the conviction and sentence. He submitted that the learned trial Judge had not only properly evaluated all the evidence on record but had considered the defence evidence as well, before convicting the appellant.

20 He contended that there is no contradiction between the evidence of the complainant (PW4) and of his wife (PW2). In his view, the only difference is that PW2 said the money had been kept in two different places in the house, but her evidence is that the total amount of money taken was Shs. 1.2 million.

25 His response to the criticism levelled against the dates on the medical reports is that, this evidence was agreed to and it formed part of the agreed facts. Nothing was disputed on it. The learned trial Judge was therefore right to rely on it since it was not challenged in any way.

30 Concerning the defence of the accused that he was given the clothes in issue by PW1, Mr. Wagona submitted that the issue had been properly addressed by the learned trial Judge at page 3 of his judgment where he stated that the issue had not been put to the complainant during cross-examination. The evidence showed that on that day, the appellant had sharpened the panga in advance and placed it strategically within his reach, which means he had planned

the attack earlier on during the day. The learned trial judge was therefore right, in Mr. Wagona's, when he believed the prosecution's evidence and rejected the appellant's defence.

5 In conclusion, Mr. Wagona submitted that all the issues raised by the appellant in this appeal were considered by the learned trial Judge especially on pages 4 – 6 of the judgment, and the learned trial Judge found the prosecution evidence believable after considering the defence and rejecting it. He prayed that both grounds should fail, the appeal should be dismissed and the conviction and sentence uphold.

10 This being a first appeal, it is our duty to re-evaluate all the evidence on record and determine whether the conclusions reached by the trial court should stand.

15 Regarding the first ground, we have to examine and re-evaluate all the evidence in respect of the ingredients of theft and accused's participation in order to determine whether it proved those ingredients to the required standard. We also have to review the judgment of the lower court to establish if the trial Judge did properly evaluate the evidence before reaching his decision complained of.

20 The prosecution witnesses were PW1 No. 17404 D/CPL Kalanzi, PW2 Enid Nansubuga the complainant's wife, PW3 Inspector Balyabasa Billy, PW4 Biryomumaisho Augustine the complainant and PW5 D/C Rwabogo Patrick.

25 PW4 testified that on the 29th January 2001 at about 10 pm, the appellant cut him and his wife with a panga and stole shs. 1.2 million and a green bag containing some clothes from his house. After his arrest, they managed to recover only two pairs of trousers and one shirt although many of his clothes had been stolen. One of the pair of trousers was for the jacket he was wearing in court on the day of trial and a green shirt with reddish stripes were recovered from the home of the appellant's father at a place called Bukiro in Nyongozi, Itojo. The other pair of trousers was blue with stripes. They recovered it from Rwentoyo village. The bag was 30 green with flowers inside and one of the four stands was missing. It was recovered at Bukiro at the home of the appellant's father. PW1 was able to identify all the recovered items which were exhibited in court.

The testimony of PW2 is basically the same as that of PW4. She narrated how the appellant, a porter in their home, attacked and cut them with a panga that fateful night and how he stole the husband's money which he had got from the sale of his land. That the money was shs. 900,000 and some shs. 300,000 which was already in the house which they had kept in a box and a bag. That after the attack, the appellant took the box, the bag and the panga he had used for cutting them. The bag had two pairs of trousers and one shirt belonging to the complainant.

PW3 testified that he recorded a charge and caution statement from the appellant at Ntungamo Police Station on the 10th April 2001 on the request of PW1. In the statement the appellant admitted having participated in the robbery with his friend called Mukiga. The trial judge admitted the charge and caution statement after conducting a trial within a trial.

The evidence of PW1 is very detailed because he is the one who investigated the case. The relevant part of his testimony is as follows:

“Biryomumaisho had got information that the accused had bought iron sheets and were at his home. Before that I had interviewed the accused who had denied.

Therefore, on 6/4/2001 I detailed D/C Bonyo, D/C Rabwogo to accompany me with the accused and the victim to Nyangozi the home of the accused. With the assistance of the LDU Commander of the area called Murinzi whom we picked at Itojo we proceeded to the area. Murinzi had been giving the complainant information since the time of the incident.

At the home of the accused, I tried to get an L.C official of the area but failed. We found there the father and mother of the accused. The accused was still staying with his father Mugaba Wilson and the mother.

We asked the father the full names of the accused as we knew him only as Michael. The father told us he was Mpagi Obedi not Michael. Before that the accused had told us his other name as Ahimbisibwe. The father allowed us to enter his house and search. We first saw iron sheets in the house which were in the ceiling. The father said they were of his son who had recently brought them into the house. We

continued searching the house while the father, wife, LDU and accused were present. The victim recovered some of his clothes. One was a trouser green with purple stripes, and the victim had the coat resembling the trouser, in other words it was a suit. The victim was at that time wearing the coat. There was a shirt, light blue with long sleeves with black stripes. We went ahead and recovered a bag which he also identified. It was green in colour. The victim still identified the bag because one of its stands was missing, of which the father of the accused said it was his son who had brought the property. I recovered the Baptism certificate to confirm that the accused was Mpagi Obedi. It was among the books that were in the room. The father said it was his as he had already told me the names.

Having recovered those, the accused changed his mind and said he had stolen those things and money and bought iron sheets using the money. He had bought twelve sheets in number. He mentioned that he was with his friend called Mukiga. He told us he had used all the money and other property was in Mbarara.

That they had stolen only Shs. 900,000 which he had shared with his friend at Shs. 450,000 each. He said he had started a business in Mbarara. He led us to Rwebikona side to his friend where he had left some property with him plus a big loud speaker. The small items were tea leaves, lifebuoy soap, petroleum jerry and others. The accused is the one who led us there. He further told us that there were other items in Rwanyamahembe sub-county on Ibanda road which he had left with relatives. The relative was a lady whom he calls aunt. She allowed us to enter. The accused had told us that there was a mattress he had bought, and a radio cassette, and when we searched the victim identified there another trouser blue in colour. The statement of the lady was taken. The statement of the accused's father and mother had also been recorded at their home. Even at Rwebikona we brought that person to Mbarara Police to record his statement as we proceeded to Rwanyamahembe. The lady also said the property including the trouser had been brought by the accused".

PW5 who was also stationed at Ntungamo Police Station at that time testified that he was among the people who accompanied those of PW1 and PW4 to search for the stolen items. That the appellant is the one who led them to the father's home. They had got information

that the appellant had bought iron sheets using the money. The father assisted them and they recovered twelve iron sheets. The father told them that it was the appellant who had bought the iron sheets. They searched the house and recovered a bag containing a trouser and a shirt. The trouser resembled the jacket that the complainant was wearing at that time and making it
5 a suit. After recovering those items the appellant admitted that was going to tell them the whole story, and even his father convinced him to do so. That is when he started revealing that he had kept some property in Nyongezi and Rwebikona and that he had used some of the money to open a shop in Mbarara. PW5 also identified the exhibits namely, the trouser, shirt, and bag which had been tendered in court as exhibits PVII, PVIII and PIX, respectively.

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It is further worth noting that immediately after PW1's testimony, counsel for the appellant informed court that the appellant had informed him, probably in view of the evidence he had heard in court that he wished to plead guilty to the offence of simple robbery. However, Counsel for the state objected to the request because of the nature of the injuries and the
15 weapon used. In the circumstance, the court had no choice except to proceed to full trial.

The learned trial Judge evaluated the evidence in respect of the ingredient of theft at page 3 of his judgment and we reproduce the extract below:

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“Looking at both sides carefully, it cannot be true that Biryomumaisho gave trousers that matched his jackets to the accused person in 1999 and retained the jackets one of which he was wearing in the course of the trial.

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This was not even put to the witnesses during their testimonies leaving the allegations of actually stealing the items unchallenged. See James Saawabiri & Another Vs Uganda Crim. Appeal No. 5/90 S.C.U (Unreported)

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Secondly, the manner these items were scattered to various places shows a desire to hide them thus an indication of guilt. The explanation of the finding of the hidden iron sheets is also not acceptable in light of the father's testimony that the accused person had bought them “recently” not in 1999 which the accused person says is a lie. But looking at the various anomalies in the accused's version as against the strong prosecution case, the prosecution version is the more plausible explanation

of the facts than that of the accused person. The accused hid his true identity, scattered the goods and the money, all indicators of guilt.

5 *On the other hand the father of the accused gave a consistent story as to his own son's true identity, his acquisition of the iron sheets to within the proximity of the time of the theft. The victims gave an acceptable story of how the money Shs. 1,200,000 had been acquired and the accused person knew of it as he was staying with them.*

10 *Considering all the evidence adduced by the prosecution and the detailed account given by D.C Kalanzi and D/C Rwabogo Patrick, backed by the extra judicial statement made by the accused person properly admitted and corroborated by the accused himself in court, there is no doubt, that theft was committed in these circumstances and the first ingredient has been established.”*

15 With respect to the appellant's participation, this is what the learned trial judge concluded at page 6 of his judgment after considering the defences put forward by the appellant and rejecting them:

20 *“Moreover, the fact that he was found with some stolen property hidden in various places without sufficient explanation connects him to the offence. Also he led the police to various places where he had stashed away the stolen property and items he had bought using the stolen money. This was good evidence to connect him with the offence”.*

25 From the foregoing it is crystal clear the learned trial judge evaluated the evidence before him properly and took into account the defence put forward by the appellant as well. He therefore came to the correct conclusion that the prosecution had proved all the ingredients of the offence beyond reasonable doubt.

30 Secondly, we find no contradiction between the evidence of PW1, PW4 and PW2 regarding the amount of money stolen. PW2 stated that:

“Biryomumaisho brought the money and I saw it. It was Shs. 900,000 he brought but there was Shs. 300,000 already in the house. We kept the money in two different places. We kept some in the box and the other in the bag. In the bag was Shs. 600,000 so also in the box.”

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PW4 stated that:

“The money I had received Shs. 900,000 from the person I had sold land... The other Shs. 300,000.”

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Even if any contradiction existed, it was minor in our view, and not material. In any case theft is theft. The amount stolen does not matter as long as the ingredient of theft has been proved.

15 Regarding the medical report, we agree with Mr. Wagona’s submission because the record shows that the medical reports (P.F. 3 Forms) were agreed upon at the commencement of the trial. They were in respect of PW4 and PW2. PW1 stated that he is the one who filled the P.F.3 forms and took them to Itojo Hospital, where he found PW4 and PW2 admitted. Although they were not signed by the Doctor on the same day, that is, on 29/1/2001 when
20 PW1 took them to the Hospital, the Doctor’s remarks on the reverse side clearly say that:

“The above complainant was admitted in Itojo Hospital on the 29/1/2001 with the above injuries, was treated and improved.”

The injuries indicated on the forms are clearly injuries as at the time of admission, not
25 discharge. The allegation by counsel that they must have been tampered with to make out a case of aggravated robbery is therefore unfounded.

Regarding the accused’s participation, we again find that the learned trial Judge evaluated all the evidence on record including the appellant’s defence that the appellant participated in the
30 robbery. There is the evidence of PW4 and PW2 who knew him very well. Their evidence is corroborated very well by that of PW1, PW3 and 5. There is his own admission that he was at the scene of the crime on the night of the incident and he actually cut the couple with a panga. His conduct was generally inconsistent with his defence. He used a false name to get

employment with the complainant in order to hide his true identity. He ran away and hid for several months after the incident. He kept the items in various places in order to hide them. When he was eventually traced by the complainant and during the time of arrest, when he saw the complainant he said:

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“ I thought I had left after killing you, yet up to now you are still following me.”

He even offered to plead to a lesser offence of robbery during the course of trial. There is his own charge and caution statement where he confessed that he actually carried out the robbery. That statement was admitted by the trial Judge after he had established during a trial within a trial that it was made voluntarily by the appellant and it was the true account of the events of that night. Part of the confession is as follows:

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“.....then I entered in with the panga belongs to my boss. I first cut my boss’s wife called Enid. Then I cut also the husband. Both of them were on the same bed. I cut them twice each. When I saw that they were weak I went out. Then I told Mukiga who entered in the bedroom and removed the bag contained money and the box contained clothes. We ran away with the property and we hid in the farm belongs to Barnard. We shared the money each took Shs. 44,000/= (four hundred four thousand shs). It believes the money was four hundred forty eight thousand only.” (Sic)

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In the premises, we are in full agreement with the learned trial Judge’s finding that the prosecution has proved the case of aggravated robbery against the appellant beyond reasonable doubt. Both grounds of appeal therefore fail.

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Regarding sentence, we find that the death sentence is too harsh in the circumstances of this case. We accordingly reduce it to life imprisonment.

30 Dated at Mbarara this02ndday ofDecember.....2010

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HON. JUSTICE A. TWINOMUJUNI
JUSTICE OF APPEAL

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HON. JUSTICE S. B. K. KAVUMA
JUSTICE OF APPEAL

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HON. JUSTICE M. S. ARACH AMOKO
JUSTICE OF APPEAL`