

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CRIMINAL SESSION CASE NO. 24/95

UGANDA :: PROSECUTION
VERSUS
POLLY SENANDA::ACCUSED
BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

The accused person Polly Semanda (A1) is indicted for robbery c/ss 272 and 273(2) of the Penal Code Act. He was originally indicted with another man called Sula Sendagire (A2) who was acquitted under section 71(1) of the T.I.D as no case had been made out for him to answer after the close of the case for the prosecution. This judgment is in respect of Semanda alone. The indictment states that on 1-5-94 the accused robbed one Jalia Bawaye of 1,800,000/= and that at the material time threat was made to use a deadly weapon in form of a knife. The accused pleaded not guilty to the indictment.

Prosecution called a total of 6 witnesses of whom only 2 were relevant in respect of this particular accused. The first witness was Seruwagi James (PW1) whose evidence was to the effect that on the evening of 1-5-94 he was sitting outside the shop of Jalia Bawaye and 2 men came there, they entered into the shop but after about a minute or two he heard Jalia raising an alarm and he saw the two men coming out of the shop. He chased one of them up to the taxi park where he caught him and brought him back to the shop. When he asked why he had run he explained that he run because he had seen somebody drawing out a gun. When the accused's bag was opened there was a knife and a cap. Jalia remarked that that was the man who had wanted to stab her with a knife. The other evidence relied upon by the prosecution was from Muliso Shafi (PW4) whose evidence is that on that evening he was in the shop with his mother (Jalia) and 4 people came in the shop, two remained on each side of the door and two went to the counter. Among the two who went to the counter was the accused who asked for a bag of sugar. When his mother was going outside to get somebody who could assist in taking out the sugar the accused grabbed her by the head and a scuffle ensued. This particular witness joined the struggle and kicked the accused who run out. In his

testimony he told the court that during the scuffle one of the men grabbed money from behind the counter and run out with the money, he did not recognise that person and according to him the accused had no knife. When the accused managed to disentangle himself he (accused) run out.

On his part the accused person who testified on oath told the court that on that particular day (1-5-94) he went to the shop with a view of buying a bag of sugar which he intended to use for his marriage introduction on 20-5-94. He paid for the sugar at 48,000/= but as the shop keeper was going to bring somebody who could take out the bag to a place where he could get transport 2 men entered the shop and one of them started assaulting him, there was a scuffle and the shop keeper started shouting for help. He then managed to escape and went out side; while he was outside some of the people who had come to answer the alarm asked him what had happened and he explained to them how he had been attacked in the shop but they did not believe his story and they alleged that he may be one of the thieves. He was mishandled despite the shop keeper's pleading for him that he was an innocent customer. He was eventually taken to police.

Judging from the above account of what happened it seems there are two questions which require the determination of this court. The first question is whether or not the offence of aggravated robbery was committed to the prejudice of Jalia Bawaye on 1-5-94. The second question is whether or not the accused was a party to that robbery. I will deal with the 2 questions in the 2 questions in which they are placed above.

The offence of aggravated robbery is committed when there has been theft and violence accompanied by actual use of a threat to use a deadly weapon. Concerning the first element of this offence there is the evidence of PW4 which shows that certain amount of money was in fact removed from his mother's shop without her consent. I believe him on that point and I hold that some money was actually stolen although the exact amount is unknown. (Among the witnesses who testified in court none was in a position to tell how much money was actually taken). As for violence both PW4 and the accused do agree that there a scuffle at that time. In my opinion that scuffle amounted to violence envisaged in section 272 of the Penal Code Act. Regarding the issue of deadly weapon being used, the indictment alleges that one of the robbers was armed with a knife but the evidence on record which is rather conflicting does not clearly show as to whether or not any deadly weapon was involved. According to the evidence of Seruwagi (PW1) he did not see any weapon until he opened the bag of the

accused when he saw the knife after he had allegedly caught the accused. He however says when he brought the accused to the shop the shop keeper Jalia Bawaye who unfortunately died of meningitis before she testified in the case, said: this is the man who wanted to stab me with a knife. PW4's statement is that he did not see any knife during the scuffle. Even if the story of PW1 is true that Jalia said somebody wanted to stab her with a knife that piece of evidence in the absence of Jalia's own statement is worthless as it is hearsay. It is true that the knife was found in accused's bag but that alone is not enough since at no time was it used or threatened to be used against anybody. PW4 who was in the shop would certainly have seen it if anybody had tried to make use of it. In these circumstances I find that prosecution has not satisfactorily proved the existence of a deadly weapon having been used in this case. In agreement with the opinion of the gentlemen assessors I hold that the offence of aggravated robbery was never committed but that of simple robbery was never committed. In coming to this conclusion I have found a great deal of comfort in the decision of this court in the case of: Uganda v Kamusini s/o Seku and Another (1976) HCB 159.

I now turn to the issue of whether or not the accused ever participated in the commission of this crime of simple robbery. In deciding this issue one has to consider the evidence as adduced by each side, it is also important to state from the very beginning that the accused does not deny having been at the scene of the crime when the crime was being committed what is in issue is only whether or not he was an innocent customer. As far as the accused is concerned he was an innocent customer in the shop, but prosecution has been adamant that he was part of the thugs who invaded the shop. Considering the evidence as given by PW1 and PW4 I am inclined to state that the story as told by the accused is more believable than that as told by the two prosecution witnesses (PW1 and PW4) for the following reasons:

- (1) The two prosecution witnesses conflicted themselves materially on three vital matters.
 - (a) While PW1 says that at the time this incident took place there was only Jalia and another woman in the shop, PW4 says he was alone with his mother Jalia and another child of about 4 years old and there was no woman at all apart from his mother;
 - (b) While PW4 says that 4 people in all entered the shop, 2 of them took positions on each side of the shop and 2 advanced to the counter, PW1 says only 2 people came to the shop;
 - (c) While PW1 says Jalia spoke of having been threatened with a knife, PW4 says he did not see any knife throughout the incident and he does not speak of any threat of stabbing his mother ever having been made. In my opinion these were major contradictions which went to

the root of the case as to what happened in that shop on that day. Those contradictions greatly served to weaken the prosecution case. There was no satisfactory explanation as to why these 2 witnesses contradicted themselves so much, in the absence of such an explanation one is inclined to conclude that the recollection of the two witnesses was faulty. The situation would possibly have been clarified had Jalia lived long enough to testify in this court as to what happened on that evening.

(2) The accused throughout maintained that he was an innocent customer and even Jalia pleaded for him. The only reason why he was arrested was that he insisted on getting his bag of sugar which he had paid for and had not been handed to him when the intruders came in. He told the story to PW1 when he asked him what he was doing in the shop, he replied that he had gone to buy sugar, when asked by the policeman PW5, about the matter he told him the same thing, in court he insisted that he was an innocent customer who was caught up in a incident which was not of his making. Ho was not shaken by the long and stiff cross examination by the learned counsel for prosecution Mr. Okwanga. He impressed me as a person who told the truth about this matter.

In all these circumstances I find that prosecution has not proved its case to the standard required to secure a secure conviction and as a result a doubt has risen in my mind regarding accused's guilt, I find the accused not guilty and I do acquit him. I have not followed the advice given to me by the gentlemen assessors to convict the accused of simple robbery because they did not appear to have addressed their minds properly to the evidence as produced by both sides.

The accused is to be released from prison forthwith unless he is being held there for some other lawful purposes. The 3 exhibits (a bag Exh.P1, a knife Exh.P2 and a cap Exh.P3) are to be handed to the accused as it is not in dispute that he is the lawful owner of that property. so I order.

C.M. KATO

JUDGE

15/8/1995