

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CR-SC-0110-2001

UGANDA:..... PROSECUTOR

VERSUS

MACHIKA:..... ACCUSED

BEFORE: THE HON. MR. JUSTICE V. A.R. RWAMISAZI-KAGABA

JUDGMENT:

Machiika Muhammad who I shall refer to as the accused in the rest of my judgment is indicted for robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

The particulars of the offence are that, Machiika Muhammad alias Meddy and others still at large, on the 2nd day of July, 2000 at Entebbe town, in Mpigi District, robbed Kijoma George of cash USD 28000 and immediately before or immediately after the said robbery threatened to use a deadly weapon, to wit a pistol, to the said Kijoma George.

The accused denied the charge and was represented at his trial by Abdu Katuntu while Mrs. Susan Nafula Bukenya represented the state.

The prosecution called five witnesses to prove its case. The first witness was Dr. Nsereko who testified that he examined the accused on P.F 24 on 25/10/2000. The doctor found the accused 29 years, he had no injuries and was mentally normal. His evidence is contained in exhibit P1.

The next witness was Logojo Wilson (PW2) who told court that the accused was introduced to him as a dealer in gold by one Hussein Kibwaka in June 2000. A meeting was arranged between the accused, Logojo, Hussein and Kijoma during which the accused offered to sell 50 dollars of gold at \$ (USD) 40000. The accused gave 15 dollars of gold to Logojo as a sample and informed Logojo that the balance of the gold was in Entebbe. Logojo made advance payment of USD 12000 at Logojo's house at Kibuli in Kampala.

On the 2/7/2000, Logojo hired a vehicle of Vincent Walugembe and directed his brother George Kijoma to travel to Entebbe with the accused in Vincent Walugembe's car to collect the balance of 45 dollars of gold and to pay the accused \$ (USD) 28000 the balance of the purchase price, on the accused delivering 45 dollars of gold to him. The three left Kampala for Entebbe at about 1.00 p.m.

Later the day Logojo received a phone call from Kijoma that the accused had robbed him of USD 28000 which the witness had been given to pay on receipt of the remaining 45 dollars of gold. He reported the robbery to Kampala Central Police Station on the 3/7/2000 though PW6 —D/C Twesigye said Logojo reported on me on the 26/7/2000. PW3 Kijoma George told court that on reaching Entebbe with the accused, at a place called Kitoro, Kijoma handed the accused USD 28000. The accused told Kijoma and Walugembe to drive back to town, and wait near Entebbe Grade II hospital where he would join them and give them gold. Kijoma stated that the accused came in a car on which there were two other men. One pointed a pistol at him whereupon Kijoma got frightened and run away towards Grade II hospital. After some minutes he rang Logojo to inform him that he had been robbed of the USD 28000. He returned to Kampala and reported to Logojo of the robbery. He left for his village home in Iganga the following day. PW4 —Vincent Walugembe, was hired by Logojo to take the accused and Kijoma to Entebbe. He said he saw Kijoma hand the accused some money in an envelope near Entebbe Grade II hospital. The accused walked towards the Airport road. The accused returned where he had left him with Kijoma. The accused was in a saloon car in which there were two other men.

Kijoma walked to the car where the accused was and one of the men in that car pointed a pistol at while saying to Kijoma — “what do you want, your life or money”. The witness saw Kijoma ran towards the hospital in a frightened state. Walugembe drove to Kampala alone, reported to Logojo, whom he found on William Street, what happened to them at Entebbe.

PW5 — Usama Tariq - told court that he met the accused at Jinja and agreed to sell a corolla saloon for U. Shs.12,500,000/=. The vehicle in question was registered as UAB 062T. The accused paid shs.8,000,000/= on the 5/8/2000 and the balance of shs.4,500,000/= two months after. The photograph of vehicle UAB 062T, the bank statement showing the entry on which USD 5000 was banked, and the sale agreement for the car were admitted as exhibits P2, P3 and P4 respectively. He gave the information about the sale of motor vehicle UAB 062T to

the police who were making inquiries about purchase and ownership of that vehicle.

PW6 — D/C Twesigye Ben received a report of robbery from Wilson Logojo and Kijoma George on the 26/7/2000. The robbery concerned the USD 40000 which the accused robbed from Kijoma at Entebbe on the 2/7/2000. The robbery concerned the USD 40000 which the accused robbed from Kijoma at Entebbe on the 2/7/2000.

In the course of his investigation, DIC Twesigye found Machiika had recently bought motor vehicle UAB 062T. He went to ask PW5 about the car. He got access to the exhibits P3 and P4. (the bank statement and sale agreement). He also recovered the sale agreement transferring the car from Machiika to Sunday Mukoova. The sale agreement was drawn by M/S Liga and Company Advocates and was dated 20/8/2000; on the instructions of the accused. A receipt No. 756 was issued by the same firm of advocates for the legal fees paid by the accused for drawing the sale agreement. The receipt was dated 20/8/2000, though those before it bore the month of September 2000. The sale agreement, the receipt book and the receipt itself No.756 were admitted as exhibits P6, 7 and 8 respectively.

Later, the police officer went to the accused's house at Jinja and collected from there (1) a television set (2) music system (3) two gents bags (4) a ladies handbag and (5) the receipt for the rent paid to the landlord. All these items were exhibited in court.

In the course of his investigations, the officer had collected motor vehicle UAB 062T from Jinja Police Station and brought it to Kampala Central Police Station where the accused came to claim it as his. Because of prior information about the vehicle and the accused, the witness arrested the accused and detained him in police cells. He however later released the vehicle to Logojo on the instructions from the Director of Public Prosecutions.

In his defence, the accused denied robbing Kijoma of USD 28000 and entering into a gold selling deal with Logojo. He said he was asked by Logojo to repair Logojo's money making machine, which repairs were not successful. The charges for repairing the money — minting machine was shs.2,000,000/=, out of which Logojo paid him 900,000/=. When the accused failed to repair the machine, Logojo accused him of having removed some parts. Logojo asked the accused to contribute shs.25,000,000/= towards the purchase of the missing spare parts. The accused refused to release any money for this purpose whereupon Logojo told him

“they were going to show him Kampala” [no meaning was attached to this expression but I would understand it to imply that Logojo was going to do something bad to the accused in retaliation for accused removed some parts from Logojo’s machine.

The accused denied ever going to Logojo’s house at Kibuli, denied ever dealing in gold and denied going to Entebbe and or receiving USD 12000 from Logojo and USD 28000 from Kijoma.

In all criminal cases the burden of proof rests on the prosecution. The prosecution must prove every ingredient of the offence and the guilt of the accused generally beyond reasonable doubt. The prosecution shall succeed on the strength of its evidence and not on the weakness of the defence or the lies told by the accused. Where, after considering the prosecution case or the evidence as a whole, a reasonable doubt is created about the guilt of accused, that doubt must be resolved in favour of the accused, and he must be acquitted.

See: (I) Woolmington Vs. The D.P.P (1967) AC 462

(ii) Sekitoleko Vs Uganda—(1967) EA 531.

The accused is indicted for robbery contrary to section 272 and 273 (2) of the Penal Code Act. The indictment involves the proof of three ingredients namely;

- a) that there was a theft of some property capable of being stolen.
- b) that at, or immediately before or immediately after the said robbery a deadly weapon was used.
- c) that the accused participated in the theft and use of a deadly weapon.

See: (1) Uganda Vs Mawa Alias Matua (1992—93) HCB 65.

(2) Wasajja Vs Uganda (1975) EA 18

A deadly weapon is defined in the proviso of section 273 (2) of the Penal Code as an instrument made and adapted for shooting, stabbing or cutting, and any instrument, which, when used for offensive purposes, is likely to cause death.

See: Dirumba Vs Uganda Criminal Appeal 32/89 (S.C).

In this case it is alleged that a pistol was pointed at Kijoma when the accused returned to their car with two other men. The pistol was never fired at the scene of crime, was not produced in court, was not scrupulously described in court and no report from the ballistic expert was available to the court to prove whether the pistol (that was pointed at Kijoma) was capable of being fired. It could turn out to have been a toy pistol.

Failure by the prosecution to prove that a deadly weapon was used during the robbery, leaves in the offence of robbery contrary to sections 272 and 273 (2) unproved.

See: Masalantini Vs R - Criminal Appeal 20/1 994 (E.A.C.A).

As to whether any violence was inflicted on the Kijoma during or after the robbery. It is a fact that pointing a pistol at a person with view of forcing that person to behave is a way contrary to his wishes in violence.

But this would depend on the circumstances of the case and the effect on the mind of the person to whom the pistol was pointed.

In this regard, whether a pistol was pointed at Kijoma or not is no longer a relevant issue for consideration since I have already held that the prosecution has failed to prove whether a deadly weapon was or was not used during the robbery.

But proof of violence depends on a wider consideration; and whether that factor is supported by credible evidence. The evidence relating the violence came from PW3 and PW4 —Kijoma and Walugembe respectively.

According to Kijoma, he walked to the vehicle where accused was with two men. The man who was seated on the front seat forced him to enter the car and pointed a pistol at him. He resisted and retreated towards the hospital. The man spoke in Swahili.

But according to Walugembe (PW4) who was standing ten metres from Kijoma, the man who pointed a pistol at Kijoma, told him (PW3) “what do you choose, your life or money?” This threat was never mentioned by Kijoma.

I find it difficult, between the evidence of Kijoma and Walugembe, which to believe or reject.

This case largely depends on the credibility of the prosecution witnesses. The court must decide whether the prosecution witnesses are truthful or not. For it is upon their testimony that the court must resolve whether the ingredients of the offence have been proved or not. I will highlight some of the contradictions and the strange behaviours which the prosecution evidence did not resolve.

- a) Whereas Logojo testified that the journey to Entebbe was preceded by other meetings attended by Kijoma and accused at Kibuli, Kampala, Kijoma alluded to only one meeting of 2/7/2000.
- b) Kijoma, instead of reporting to Entebbe Police Station, near which he was robbed or to Kampala Central Police Station either that day or next day, opted to go to his village home on the 3/7/2000. He returned to Kampala pm the 25/7/2000 and both reported to the Central Police Station on the 26/7/2000. Why did Logojo or Kijoma keep away from reporting to any police station for over three weeks? Was this conduct consistent with an aggrieved and robbed person or persons?
- c) Logojo said he received USD 12000 on a date before Kijoma left for Entebbe – Kijoma said Logojo was paid \$12000 on 2/7/2000 just before ‘they left for Entebbe.
- d) Logojo said he received 15 dollars of gold before Kijoma and accused left for Entebbe but Kijoma denies this. All the gold was to be received at Entebbe according to Kijoma.
- e) Logojo said he deposited the 15 dollars of gold at the Central Police Station Kampala but PW6 — D/C Twesigye did not support him in this.
- f) Logojo told court that he got the money which he converted into dollars from Stanhope Forex Bureau, but to PW6, D/C Twesigye - he bought the dollars from different money dealers in town.

As between the evidence of Kijoma (PW3) and Walugembe (PW4) the following inconsistencies are noticeable:-

- a) Kijoma said they travelled to a Motel near Kitoro where the money \$28000 was handed over, but Walugembe said “money” in an envelope was handed to the accused near Entebbe Grade II — hospital.
- b) Walugembe said the accused walked toward the Airport Road, left him and Kijoma near Grade II hospital after receiving money from Kijoma.
- c) According to Walugembe — they never went to Kitoro area and the money — be it \$28000 or not was not paid there. Walugembe referred to money in an envelope only.
- d) Kijoma never said that the pistol man uttered threatening words to him, but he said that man with a pistol was speaking to him in Swahili and ordering him to enter their car, which order Kijoma refused to obey but ran away towards Entebbe Grade II hospital in panic.
- e) The words “chose between your life and your money” were heard by Walugembe but not Kijoma, to whom they were intended and addressed.

The law relating to contradictions is that court may ignore them if they are minor. But where the contradictions are substantial, the court shall ask itself whether they are very so grave and or are intended to conceal the truth from the court. Do those grave contradictions point to the untruthfulness of the prosecution witnesses?

As Masika C.J. held in **Uganda Vs Abdalla Nukur [1982] HCB 1**, in assessing the evidence of a witness and reliance to be placed on it, his consistency or inconsistency is a relevant consideration. Where grave inconsistency occurs the evidence may be rejected unless satisfactorily explained while minor inconsistency may have no adverse effect on the testimony unless it points to deliberate untruthfulness.

The evidence of Usama Tariq (PW5) and that D/C Twesigye (PW6) would have served as corroborative circumstantial evidence if the evidence of Logojo, Kijoma and Walugembe was free from the defects I have listed above.

All that the evidence of Tariq contains is that the accused bought motor vehicle UAB 602T on the 5/8/2000. The prosecution did not endeavor to prove that the money paid to Usama on the 5/8/2000 was part of the money stolen from Kijoma on 2/7/2000. Nor was there evidence, led by the prosecution to prove that the items D/C Twesigye (PW6) collected from the accused's house were paid for with the money taken from Kijoma.

I therefore find the evidence of PW5 and PW6 of little assistance as far as proving the theft or robbery in this case is concerned.

In his defence, the accused has denied robbing or stealing the alleged \$28000 from Kijoma. He has told court the both himself and Logojo were engaged in the illegal and criminal activities of making counterfeit currency. Their activities are punishable under the currency Notes Act — Cap 151 — sections 6 and 7). Equally, neither the accused nor Logojo was licensed to sell or buy gold. Their activities offend some other laws but are not robbery as stipulated under sections 272 and 273 (2) of the Penal Code Act.

I must observe the prosecution witnesses, namely PW2 — Logojo, PW3 — Kijoma and PW4 Walugembe did not impress me as truthful witnesses. The contradictions in their testimony

are so many and substantial that it would be unsafe for this court to treat that evidence seriously and as a basis for convicting the accused of the offence of robbery — as indicted.

To sum up the contradictions in the prosecution case, I will borrow the words of Berko J (as he then was) in the case of **Uganda Vs Edirisa Ssali** and three others [1991] HCB 40 where the learned Judge held:

- (I) The inconsistencies and contradictions between the complainant's evidence in court and his previous statements to the police could not be said, to be minor. They were so contradictory, inconsistent and confusing that it was impossible to say that he was talking about the same event.
- (II) The prosecution evidence was so unreliable and tainted with discrepancies and contradiction that no reasonable tribunal could act on them to convict the accused persons on any of the offences charged or any other offence at all.

I therefore find that the evidence of PW2, 3 and 4 is so tainted with grave contradictions, inconsistencies and unexplained conduct and circumstances. I reject it as untruthful and unreliable.

In conclusion, I find the conduct of PW2, PW3 and PW4 strange after the occurrence of the robbery. The conduct of the witness or accused may be very good and circumstantial evidence in proof some event having taken or not taken place.

In as much as the conduct of an accused person before or after the commission of the offence can provide good circumstantial evidence as to his guilt, the conduct of the witness before or after the commission of the offence can be relied on to draw an inference of the event (offence) having taken place or not. In this regard, the conduct of PW2, PW3 and PW4 is strongly suggestive of no robbery having taken place.

See: (i) Uganda Vs Simon Onen [1974] HCB 7.

(iii) Uganda Vs Alfunsio Obonge [1976] HCB 25.

After considering all the evidence for the prosecution and defence, I have found that the prosecution has not produced credible and reliable evidence to prove any offence under sections 272 and 273 (l) (b) of the Penal Code Act. Similarly, I cannot find the accused guilty

of any other minor and cognate offence, such as theft or obtaining by false pretences because there is no reliable prosecution evidence to base any other conviction upon.

In agreement with both assessors, I find the prosecution has not proved the charge of robbery against the accused to the required standard and he is therefore acquitted for the offence of robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

Since no useful evidence was led to prove that the car UAB 602T and the items which D/C Twesigye collected from the accused's house were not his property (accused's) it is hereby ordered that his car, and its ignition key, television set, music system, two gents bags, ladies handbag and the receipts and agreements recovered from him be returned to him.

V.A.R. RWAMISAZI -KAGABA

JUDGE

24/10/2002