

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA**

HCT-05-CR-CO-0051-2001

UGANDA..... PROSECUTION

-VS-

A1 BOGERE JOSEPH)

A2 MUHEREZA PATRICK)

A3 MUGISHA ISSA)ACCUSED

A4 BYARUHANGA DAVID)

JUDGMENT

Bogere Joseph (A1), Muhereza Patrick (A2), Mugisha Issa (A3) and Byaruhanga David (A4) are all indicted for aggravated robbery, contrary to sections 272 and 273(2) of the Penal Code Act in the first count. In the second count A1 is indicted further for defilement, contrary to section 123(1) of the Penal Code.

The prosecution called four witnesses to prove its case. These were PW1 Dr. Monday Araali Christopher, PW2 Katushabe Allen, PW3 Maria Goretti Kyosiimire and PW4 Yafesi Kikaraamu. In their defence the accused persons made sworn statements except A3 who made an unsworn statement: They called no witnesses.

The facts in the prosecution case are briefly as follows:

On the night of 23rd August 1999 the accused persons together with others not before court attacked the house of PW3 where they used deadly weapons to rob PW3 of money. At the same time A1 had sexual intercourse with PW2, a girl whose age was below 18 years. All the accused persons were arrested away from the scene of crime and charged accordingly.

Each of the accused persons in their defence's state that they were never at the scene of crime.

In order for the prosecution to succeed in having the accused persons convicted of the offences alleged against them it must prove all the ingredients of the offences alleged beyond reasonable doubt.

The first count concerns aggravated robbery. The ingredients of aggravated robbery are:

- (a) that there was theft;
- (b) that theft was accompanied by violence;
- (c) that a deadly weapon was used;
- (d) that the accused persons participated in the commission.

Regarding theft, the indictment shows that Shs. 1,520,000/= was stolen on the occasion in question. According to PW2 she heard PW3 tell the assailants that all she had was Shs. 10,000/= according to her statement to Police which was admitted as Exhibit D1. PW3 had proceeded to hand over that money to the assailants. In her testimony PW3 told court that in addition to Shs. 20,000/= she had given the assailants on demand they had taken some Shs.1,500,000/= which her husband had left in the house. Whatever the quantum of the money taken I am satisfied the prosecution has proved beyond reasonable doubt that there was indeed theft of some money. The first ingredient has been successfully proved.

The second ingredient concerns violence. This is a vital ingredient in robbery. See Opoya - vs- Uganda [1967] EA 752.757. Both PW2 and PW3 testified that PW3's hands were tied up by the assailants who proceeded to beat her up while demanding for money. In Kenan Owori and Another - vs- Uganda [1975] HCB 223 this court held that where a complainant was held by force and slapped violence had been occasioned to support the charge of robbery. I am satisfied that in the present case the prosecution has proved this ingredient beyond reasonable doubt.

The third ingredient concerns use of a deadly weapon. S. 273 (2) of the Penal Code defines a deadly weapon as including any instrument made or adapted for shooting, stabbing or cutting and any instrument which when used for offensive purposes is likely to cause death. Both PW2 and PW3 testify that they saw the assailants with knives on the night in issue. They are however categorical that, knives were not used or even hinted at being used against any of them in the

exercise. The prosecution has not proved that a deadly weapon was used and as such this ingredient is not proved beyond reasonable doubt.

The final ingredient of the offence regards the identity of the accused persons. As I have stated earlier none of the accused persons was arrested at the scene and none was arrested on account of independent incriminating evidence. Consequently evidence of identification is key to proof of this ingredient. PW2 first testified that she saw two assailants, Al and another called Charles Katondwaki. Later in the course of her testimony she said that six people had been involved in attacking their homestead. PW2 made a statement to Police on 23rd August 1999 soon after the incident. She did not give the identity of the attackers. She stated however that the attackers were two in number. In her additional statement made on 26th August 1999 she stated that she had identified Katondwaki and another person she did not know before but one whom she could identify if she saw him. This statement which was received in evidence as Exhibit D1 would give a lie to her testimony here in court where she stated that she had known Al before. On her part PW3 made a statement to Police on 24th August 1999. She does not give the identity of her attackers save that she states they were two in number. In her additional statement made on 26th August 1999 she stated that she had identified the attackers as Katondwaki and Al. Significantly she stated in her additional statement.

‘—I managed to identify Katondwaki of Mugarusya and Bogere of Kamushoko and when they were arrested I managed to identify them’. It appears PW3 identified the two men after their arrest and not on the occasion of the attack on her house. Yet in her examination in chief PW3 had this to say, ‘There was light from the torch which they carried. I recognized them. There was David (A4), Good (A3), Muhereza (A2) and Bogere (A1). The other was Charles Katondwaki. Another called Musiime ran away’. While it is of interest how the identity of the attackers became clearer to the witness by the day I find no basis for the apparent clarity evident. If it was that PW3 identified the accused after arrest, giving her the benefit of doubt she did not know them before, then an identification parade should have been organized in accordance with the rules.

See *Sentale - vs- Uganda [1968] EA 365, 369* and *R - vs- Mwangi s/o Manaa (1936) EACA 29*.

I must note that as it was night time conditions for correct identification were not favourable. A witness may be truthful and his evidence apparently reliable and yet there is still the risk of an

honest mistaken identification. Given the various contradictions pointed out between the testimonies of PW2 and PW3 with their Police statements I find their professed identification of the accused persons a creature of their imagination. What is more, there is no other evidence pointing to the guilt of the accused persons. The accused persons in their defence have each set up an alibi. Where an accused sets up a defence of alibi it is not his responsibility to prove it. Prosecution must disprove and destroy it by adducing evidence which puts the accused person at the place of crime.

See *Uganda - vs- Phostin Kvobwengye [1988-1990] HCB 49*. I find the prosecution has not discharged this burden and has therefore failed to prove this critical ingredient.

In the result I find the prosecution has not proved the offence of aggravated robbery against any of the accused persons and in agreement with the joint opinion of the assessors I acquit them all of count 1.

It is only A1 who is indicted for defilement under count 2. It is not contested by the defence even that the prosecution has successfully proved that at the time of the alleged offence PW2 was below 18 years of age nor is it disputed that she did have sexual intercourse on the occasion alleged. What is contested is that A1 participated in the commission of the offence. The prosecution bases the case against A1 on identification. In the course of evaluating evidence of identification in the first count I have shown that the evidence of PW2 and PW3 concerning identification of persons who came to their house on the night in issue is unreliable. It is as unreliable in the generality of the assailants of that night as it is in particular to A1. I find the prosecution has not proved that A1 participated in the commission of the crime either through being identified or through some other independent evidence. His defence of alibi has not been disproved as it ought to be by the prosecution.

Consequently I am in agreement with the opinion of the assessors that the prosecution has not proved the charge in count 2 against A1. He is accordingly acquitted of this offence also.

P.K. Mugamba

Judge

23rd January 2003

Mr. Mwene-Kahima for A2

Mr. Magoba for A1, A3 and A4

Mr. Murumba State Attorney

All accused in court

Ms Tushemereirwe court clerk

Court: Judgment read in court.

P.K. Mugamba

Judge