

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

**HCT-04-CR-SC-004/2002**

**UGANDA .....PROSECUTOR**

**VERSUS**

**KIMEKYE EZRA..... ACCUSED**

**BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI**

**RULING**

The accused person was indicted for capital robbery contrary to section 272 and 273(2) of the Penal Code Act. The particulars of the offence were that the accused and others not before court on 31<sup>st</sup> July 2001, at Buzemunwa village, in Mbale district robbed one Kisombo Moses of shs. 300,000/-, two radio cassettes, clothes, and personal documents, and that during the said robbery, they used a deadly weapon on the said Kisombo Moses, to wit a gun. The accused person denied the offence.

The prosecution produced three witnesses in the attempt to prove the indictment. Florence Mwonje the wife of the complainant in this case told court that she was in her house with her husband, Kisombo Moses and their four young children when after supper, she decided to go outside to feed their dog. As soon as she opened the door, she saw three men, one of whom had a gun and he immediately put her at gunpoint. She yelled and her husband who was seated in the sitting room stood up, and the attacker shot at him injuring him in the right hand.

She run back into the house and the attacker followed. He was the accused person in the dock. She told court that he demanded for money which her husband had brought as he had seen the money voucher. He demanded to know the whereabouts of the husband, but she deceived him that he had gone to Mbale. The attacker made her lay down and she did so face down.

The attacker then asked the children where their father was and they repeated what their mother had said. The attacker ordered the children to go to sleep, and as he herded them into their bedroom, he saw blood, and that was when he realised that the husband was in that room. The attacker dragged him from the room back into the small sitting room, and demanded for money.

Her husband PW2, directed her to give them the bag containing the money, and she got up, went to the bedroom got the bag from the bed and gave it to the attacker. The attacker went out with it but returned soon and demanded that the husband open it, which he did. The attacker went outside but returned and complained why she had deceived him about the presence of the husband.

The attacker asked the husband PW2 if indeed she was his wife and he responded in the affirmative. He demanded for more money, which she said she did not have, he removed her skirt, her blouse and her knickers. She pleaded with him not to rape her and she even passed urine apparently in fear. She surrendered her wristwatch and he left. He talked of killing the husband but his colleagues outside restrained him. He got from them the house keys and left after locking them inside.

He took with him two radios which were later found abandoned outside the house. The attacker also took a handbag, a skirt, towel, and a second bag containing her husband's documents. These were also recovered later some distance away from the house by Masiga and taken to the LCs. The incident lasted between one and half to two hours. There was a pressure lamp inside the house all the time during the incident. The witness had seen the attacker at Kamu's place where he used to do business.

PW2 Kisombo Moses the complainant in this case told court that he collected teachers salary from Mbale UCB that day. He handed over the bag containing the money, shs. 300,000/-, to his wife PW1. After supper the wife went out of the house to feed the dog, and while there, attackers pounced upon them. They shot him in the arm, shattering his fingers. He showed court the right arm with two fingers missing.

He run into the children's bedroom and his wife run into their own bedroom. The attacker entered the house and went into their bedroom, where he demanded for money. He took two bags

from the bedroom and returned to the sitting room where the children were huddled together. He ordered them to go to sleep and their mother tried to restrain them from her spot in the bedroom. The attacker herded them to their bedroom where their father was hiding.

At this point the attacker saw blood and realised the father was inside. He dragged him into the sitting room, and demanded for money. He instructed his wife who was in the bedroom to hand over the money, but she told him that the attacker had already taken the bag containing the money.

The attacker took off with the two radios and some household items and his wife's clothing. He locked them inside the house and ordered them not to make any noise.

The witness got out of the house using the back door, and reported to a neighbour, with whom they went to Kamu police post. They did not find police men, and they proceeded to Sironko Police station, and later to Mbale regional Hospital. He was later treated at Kibuli Hospital. He recorded a statement to the police in which he told of the identity of his attacker.

The attacker was someone whom he knew very well prior to the incident. He was a person who was always at Kamu's place. He knew him for more than 2 years. He used to see him when he went to Kamu's place to wait for transport. In any event, the accused used to assist in the shop of a soda dealer, whenever he went there to buy drinks as he; the witness at that time was selling beers. The witness said the incident lasted for about 40 minutes and there was a lantern lamp burning in the house throughout the whole period.

The last prosecution witness arrested the accused on 10th July 2001 from Bulegeni police post. That was the prosecution case.

At the close of the case for the prosecution, court is required to make a ruling whether a prima facie case was made out from the evidence to require the accused to make his defence. In *Ali Fadhul v. Uganda* SC. CR. App. No. 30 of 1989, the court said that, 'At the close of the case for the prosecution, the trial judge is enjoined by section 71(1) of the Trial on Indictments Decree to decide whether a case has been made out against the accused person sufficiently to require him to make a defence.'

For a no case to answer ruling to be made and upheld, it must be shown that the prosecution evidence adduced before the court does not make out a prima facie case against the accused person. A prima facie case is not made out if an essential ingredient of the offence charged is not proved by the evidence, or if the evidence is so discredited in cross examination or is so manifestly unreliable that no reasonable tribunal properly directing its mind to the law and the evidence would convict the accused person on it. *Bhatt V. Rep.* [1957] E.A. 332.

In *Semambo and Anor. V. Uganda* Cr. App. No. 76 of 1998, (C. A.), the court held that, “a prima facie case means a case sufficient to call for an answer from the accused person. At that stage the prosecution evidence may be sufficient to establish a fact or facts in absence of evidence to the contrary, but is not conclusive. All the court has to decide at the close of the prosecution case is whether a case has been made out against the accused just sufficiently to require him or her to make his or her defence.”

The offence of robbery as charged has the following essential ingredients which must be proved by the prosecution beyond reasonable doubt.

- a) that there was a theft;
- b) with violence;
- c) that there was use or threat to use a deadly weapon during, immediately before or after the theft, or causing death or grievous harm; and
- d) that the accused persons participated in the theft.

See *Wassajja vs. Uganda* [1975] HCB 181.

The evidence that the accused person participated in the theft was from the testimony of the complainant PW2 and his wife PW1. Kisombo Moses PW2 told court that he knew the attacker very well prior to the incident. He was a person from the trading centre whom he used to see frequently, at least twice a week, as he went to wait for transport, or to transact business at Kamu’s place, and that was where the accused used to stay. He had known him for more than two years.

During the night of the attack, Kisombo told court that he was shot at, but when he run into the children's bedroom, he was able to see the attacker clearly as he demanded for money from his wife. There was a lantern burning in the sitting room. H e was able to identify him further from his voice as he asked the wife and later the children his whereabouts. He later identified him as he came into the children's bedroom where he was hiding while he was flashing a torch. The accused led him back into the sitting room where the lamp was and demanded for money. Later he came very close to him with the bag of money and ordered him to open it which Kisombo did and handed to him the money. This was in the full light from the lantern lamp. The identification was so correct, so clear and so true that the witness was practically singing it in court.

But at the police statement recorded on 18<sup>th</sup> July 2001, at Sironko police station which was admitted in evidence as DE1, Kisombo stated that he might be able to identify his attacker from his facial appearance, since the attacker stayed in the house for a long time flashing around. In other words, Kisombo might be able to recognise his attacker if he was to see him again since the attacker remained in the house for long flashing around. Kisombo did not state anywhere in that statement that he identified his attacker during the time of the attack.

That was a very serious shortcoming in the prosecution evidence. It meant that Kisombo did not identify the attacker during the attack, but would or was able to do so later when asked by the police. That means that he told court lies that he identified his attacker during the incident. All his testimony of voice recognition, knowing him from long ago and identifying him from the lantern lamp inside the house was pure lies.

His wife PW1 told court that she did not know the attacker. But later she stated that she knew him after all, and even knew his brother. That was not being consistent. She told court that the attacker, with whom she spent about two hours, and with a pressure lamp lighting the whole place, wore police like uniform. But her husband, another eyewitness saw the attacker wearing spotted army uniform. These are completely different colours and style of attire and it is not possible to mistake one for another in the kind of light conditions which existed.

PW1 the wife told court that she was made to lay face downwards, and when her husband was brought from the children's bedroom, he ordered her to give the attacker money. She got up,

went into their bedroom and got the bag containing the money, and handed it over to the attacker. But the husband told court that when the attacker dragged him into the sitting room and demanded for money, he instructed his wife who was in the bedroom to hand over the money. She replied that the attacker had already taken the bags including that containing the money. That was another serious contradiction in the prosecution case.

The husband was emphatic that the wife did not leave their bedroom from the time the attacker entered the house and followed her into the bedroom. She only came out as he went out of the house through the back door. That is when she asked for him fearing that maybe he was dead, but he assured her that he was only injured. That contradicted the wife's testimony that she was made to lie inside the sitting room, and had to get up, go into their bedroom for money and back.

PW2 the husband insisted that he could hear whatever the attacker talked to his wife. He however never heard, or at least never told court about the attackers demand to know whether or not she was indeed his wife, his attempt to rape her after undressing her, and her successful plea for mercy. It would be an extremely uncaring man who did not get concerned about an attempt to rape his wife, and kept quiet about it, but only recalled the events concerning money. The wife narrated these matters to court. This was another inconsistency which created a doubt in the prosecution evidence.

These were grave inconsistencies which went to the issue whether indeed the accused was identified at the scene of crime that night as alleged. The prosecution evidence in this regard was so riddled with contradictions that a strong doubt was created in my mind whether these two witnesses were not just making up the evidence of identification of the accused as the person who attacked them that fateful night.

I am aware that at this stage, court is not called upon to make a final decision whether the case has been proved beyond reasonable doubt. All that the prosecution needs to show at this point is that a prima facie case has been made out from the evidence adduced to require the accused to make their defence. The question whether the case has been proved beyond reasonable doubt comes at the end of the evidence for the prosecution and for the defence. It is arrived at upon a consideration of the totality of the evidence on both sides.

Lord Parker in *PRACTICE NOTE* [1962] 1 All. E.R. 448 laid out the principle that no prima facie case will be held to have been made out where the prosecution has failed to prove an essential part of the offence charged or where the evidence of the prosecution has been so discredited in cross examination or was so manifestly unreliable that no reasonable tribunal could act on it.

The test laid out in *Bhatt V. R. (supra)* as to what amounts to a prima facie case, is that it must be one on which a reasonable tribunal properly directing its mind to the law and evidence could not convict if no defence was offered.

From what I have stated above, it was not made out by the evidence that the accused was the person who attacked the complainant, shot him in the right hand, and took the teachers money. Because of my serious doubts regarding the evidence of the participation of the accused, and applying the above test in the *Bhatt case*, I am satisfied that no reasonable tribunal properly directing its mind to the evidence and the law would convict the accused person if he were to elect to offer no evidence.

I accordingly find that there was no prima facie case made out by the evidence to require the accused person to be put to his defence. The court hereby returns a finding of not guilty in respect of the accused person for the offence of robbery contrary to sections 272 and 273(2) of the Penal Code Act. He is accordingly discharged and set free and at liberty forthwith unless he is otherwise lawfully held.

**RUGADYA ATWOKI**

**JUDGE**

**27/11/2003.**