

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT TORORO**

HCT-04-CV-SC-281/2002

UGANDAPROSECUTION

VRS

ONYANGO MOSES.....ACCUSED

BEFORE THE HON. LADY JUSTICE FAITH MWONDHA

JUDGMENT

The accused was indicted on a charge of robbery c/s 272 and 273(2) of the Penal Code Act. It was alleged by the prosecution that Onyango Moses and two others still at large on the 17th day of Mary 2002 at Mile two Tororo Road in Tororo District robbed a motorcycle Registration No. UDC 086 worth shs. 1,600,000= from one Onyango Okungu and at or immediately before or after threatened to use or used a deadly weapon to wit a panga on the said Onyango Okungu.

As usual in all criminal cases the prosecution has always the burden to prove the case beyond reasonable doubt in order to bring the guilt of the accused person home.

In a robbery case the following ingredients have to be proved:-

1. That there was theft.
2. That at or immediately before or after the said robbery there was use or threat to use a deadly weapon.
3. That it was the accused who participated in the robbery.

The prosecution brought three witnesses to discharge the burden.

As far as the first ingredient was concerned PW1 told Court that a motorcycle was stolen from him on the material day. That this was after he had been cut at the back of his dead. That the motorcycle was Registration No. UDC 086 G and the owner was one Okello George. PW2 was

George Okello who told Court that he recovered the same along Mera Road after a search together with PW3.

The accused was the one who had it and despite his trying to run away, he was arrested together with the motorcycle and was taken to Tororo Police. I was satisfied that this ingredient was proved.

On the 2nd ingredient, whether or immediately before or after the said robbery there was use or threat to use a deadly weapon, the evidence on record is to the effect that when PWI reached a certain spot, the accused held him in the chest and demanded that he be left there. That at that spot there were three men armed with pangas. That they had torches which they were flashing at him and the accused persons. That the accused cut him at the back of the head. That he had used his (PWI's) shirt to tie his hand. That with the help of the other men they removed his trouser and tied his feet. That they threw him in the bush and they went with the motorcycle. Section 272 (2) of the Penal Code Act defines deadly weapon to include any instrument made or adapted for shooting, stabbing or cutting and any instrument which when used for offensive purposes is likely to cause death.

The production or non production of medical evidence or panga was irrelevant much as PWJ told Court that he was cut by the accused at the back of his head, there was no evidence adduced that the accused by the time he hired PWI to carry him was armed with anything or carrying anything. The evidence shows that it was the three men at the spot where the accused directed PWI to leave him who were armed with pangas. There was no panga recovered and exhibited by the prosecution.

PWI demonstrated in Court how the accused, how he was standing when he cut him, it was evident that the accused was behind him and therefore it couldn't have been possible for him to see him (accused) cutting him at the back of the head. Given the kind of light that was there since it was already becoming dark i.e the torches which the other men were flashing at him and the accused, it couldn't have been possible for him to see the accused cut him. However there was certainly use of a deadly weapon as provided in the law cited. There was a cut on PWI and PW2 said that he said him bleeding. Since there was no challenge on this evidence, the tying of the

hands by the accused and throwing PWI in the bush plus the cut wound showed that there was actual violence used probably by a deadly weapon, which was not proved as already said above.

On the 3rd ingredient of whether the accused participated in the robbery. PWI testified that it was about 7:00p.m when he was thinking of going home, being a motorcycle rider. That the accused approached him and wanted to take him home. That the accused was going the same direction where PWI resided. That he started off the journey. That while on road the accused held him tight on the chest and demanded that he be left at that spot. That at that spot there were three armed men with pangas. That he had known the accused a week before the incident i.e before he came to him to be his passenger. That he had seen him with one Higayi a fellow motorcycle rider.

That the accused removed PWI's shirt and tied his hands. That with the help of the other three men they removed his trouser and they tied his legs. That he was thrown in the bush That he managed to untie himself and walked to town That he found a Police Patrol vehicle with Police Officers to whom he reported the robbery.

That he told them the direction the suspects had taken. That he together with the Police drove and reached mile 5 Mbale Road in a Trading Centre. That they met PW2 the owner of the stolen property. That PW2 was informed of the robbery. PW2 and PW3 said that they got a vehicle and started to trace for and/or search for the motorcycle. That they found the motorcycle along Mera Road when it was being pushed by the accused. That PW2 had identified it as his vehicle as it had the same Registration number. That the accused tried to run away abandoning the motorcycle but he was chased and he was arrested about 10 meters from where he had abandoned the same. That both the accused and the motorcycle were taken to Police Tororo

PW3 also testified to the same effect like PW2. This evidence established the doctrine of recent possession in this case.

In the case of *Bogere Moses and Another vrs Uganda [SCU] Criminal Appeal No.1/97* (Unreported) it was stated:

“It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession the evidence is even stronger and more dependable than eye witness identification in a natural event. This is specifically so because invariably the former is independently verifiable while the later solely depends on credibility of the eyewitness.”

In the Instant case the victim [PWI] had sufficiently identified the accused person as the accused pretended to be a passenger or customer of the witness. This was just about 7:00p.m as PWI was intending to retire home. He had known the accused for a week before the incident. He even talked together and carried him on his motorcycle. The facts which had to be taken into account to lead to proper and positive identification to rule out the possibility or mistaken identity by a single identifying witness existed as far as the evidence was concerned to my satisfaction. See Abdulla bin Wendo and Another vrs R [1953] EACA 166, Roria vrs Republic [1967] E.A 583, Abdalla Nabulere Cr. App. 12/81(Unreported)

When the evidence of PW2 and PW3 was introduced it was additional to PWI’s testimony to prove the ingredient of participation. When one considers the nature of property stolen, I was satisfied that it’s the kind that readily passes from hand to hand. When the trade of the accused is taken into account to which he belongs.

In the instant case the accused said that he was a smuggler, I had no doubt on my mind that he participated in the theft. See *Andrea Obonyo vrs Republic [1962] E.A 542, Johnson Kanya Wavamuno and 2 Ors vrs Uganda Cr. App. No. 2/99 Unreported.*

There was no innocent explanation offered by the accused person as to how he came to be in recent Possession of the same. This property was stolen at around 7:00p.m and the same was found with him at around 8-9:00p.m the same day/night The explanation he gave during his defence that, he was just carrying his smuggled merchandise on a bicycle when he was arrested couldn’t be believed. He also said in his defence as an explanation that he found the motorcycle at the Police after he had been arrested. That he was directed to wash it. That the

Police took a photograph of him while carrying it I couldn't believe this explanation as it was not innocent and was just a mere concoction of lies.

PWI's evidence as regards the way he was familiar to the accused was not shaken. The way he came in contact with him on the material day/night was not challenged during cross-examination. The defence of the accused just strengthened the prosecution case in that, it implied that the accused was in town in the earlier hours of the evening/day before the robbery was committed which led to him being found in possession of the stolen property between 8- 9:00p.m.

In his defence he said he was carrying his smuggled goods to town that late because he was avoiding being arrested by the URA Officials. I was satisfied that the accused participated in the theft.

Having said that I find that both the first ingredient and the 3rd ingredient were proved beyond reasonable doubt but the 2nd ingredient was not. For much as the accused stated that he met armed men with the pangas and that it was the accused who cut him, it was very difficult given the position in which PWI was standing to see that it was the accused who cut him.

As I said earlier in this judgment, there was no evidence to the effect that when the Witness PWI carried the accused on the motorcycle, the accused had a panga PWI was standing in front of the accused and the accused had tied his hand. He even demonstrated to Court how, he was standing. However, there is evidence on record that, the accused held PWI tightly as he demanded that he be left at the spot where the armed men were found. That the accused used the shirt of PWI to tie his hand as and with the help of others, the accused removed the trouser of PWI and they tied his legs. That he was then thrown in the bush. That evidence falls within the definition of robbery proved by S 272 of the Penal Code Act and S.273 (1) (b) of the Penal Code Act.

The law under S.86 of the T.I.D provides for conviction of the accused of a minor cognate offence though he was not charged with it as long as the facts prove that it exists. The Assessors gave separate Opinions in which the first one advised me to acquit the accused, as the 2nd ingredient was not proved. The 2nd Assessor advised me to convict the accused that the prosecution has proved its case.

As I said earlier above in this judgment the 1st and 2nd ingredients were proved but as to particulars that the accused person used a deadly weapon at or immediately before the said robbery was lacking as he couldn't identify who exactly cut him. I therefore proceed under S.86 of the T.ID and convict the accused of simple robbery c/s 272 and 273 (1) (b) of the Penal Code Act. I acquit the accused on the charge of having committed robbery c/s 272 and 273(2) of the Penal Code Act.

F. MWONDHA

JUDGE

7/4/03

Accused present

Ola for State

Natsomi holding brief for Magirigi

Right of appeal explained.