

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CASE NO: HCT-00-CR-SC-0035 OF 2003

UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

MUGISHA DEO alias COMMANDER ::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE LAMEKA MUKASA:

JUDGMENT:

The accused Mugisha Deo alia Commander was charged with Aggravated Robbery contrary to sections 272 and 273 (2) of the Penal Code Act. The particulars of the offence are that the accused on the 29th day of October 2001 at Luwum Street in Kampala District robbed Apire Peter of his mobile phone Nokia 3210 valued at Uganda shillings 320,000/= and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a knife on the said Apire Peter.

The Accused pleaded not guilty to the charge. He was represented by Mr. Pracy Wadidi. The State was represented by State Attorneys Ms. Angelina Maria Namakula, Ms. Sarah Karwengi and latter by Mr. Brian Arinaitwe.

The prosecution called six witnesses to prove its case, namely Dr. Nsereko Mukasa (PW1), Peter Apire (PW2) the complainant, Sempa Paul (PW3), No.23794 D/Constable Ndeire Franco, (PW4) the Investigating Officer, Mpirirwe John (PW5), and Jinaro Onzi (PW6).

Peter Apire PW2, testified that on 29th October 2001 at around 7.30 p.m., as he normally used to do while going home after work, he went to Luwum Street to take a public transport motorcycle, commonly known as boda boda, home. At the stage the witness got his usual transporter PW3, to take him home. That as he was boarding the motor cycle the witness felt something hitting him hard on the left side of his head below the eye above the cheek. The blow forced him off the motorcycle and he fell down unconscious. That he regained consciousness while at his home and noticed that his face was swollen and he was bleeding on his thigh. He also found out that his mobile phone Nokia 3210 was missing from his belt where he had clipped it. There only remained part of the clip on the belt.

That as he was being nursed by his wife, PW3, Sempa Paul, came and told him that the man who had assaulted the witness and stolen his mobile phone had been arrested and he told the witness to go to the police and make a statement. He went to Central Police Station where he was shown the accused who was in the police custody as the man who had assaulted him and stolen his mobile phone. The witness has never recovered the phone.

PW3, Sempa Paul, testified that he is a boda boda operator, operating from the boda boda stage at Luwum Street at the junction joining Luwum Street and the road from Kampala Road down to Nakasero Market. That on 29th October 2001 at around 7.30 p.m. he was approached by his usual client, PW2, asking the witness to take him home. As PW2 was boarding the motorcycle the accused boxed PW2 around the neck which blow forced PW2 to fell down unconscious. That the accused grabbed a mobile phone from PW2's waist and ran off with his colleagues towards temple village. The witness attended to his client who was made to sit on the boda boda and the witness rode him up to his home and handed him over to his wife. That PW2 gained some consciousness when they were about to reach PW2's home.

The witness testified that when he came back he found that the accused had been arrested and was at Nakasero Police Post. The witness went to the Police post and he was asked to collect PW2, which he did.

PW5 Mpirirwe John testified that he is a special police constable attached to Central Police Station, Kampala. That on 29th October 2001 he was assigned to patrol the area around Entebbe Road, Market Street, Button Street, William Street, Luwum Street, Nakasero Market, shoprite area and part of Kampala Road. That while on duty at around 7.30 p.m. while moving up Dunstur Street towards the junction of Luwum Street and Dunstur Street when he had passed Tourist Hotel in a distance of about 50 yards from where he was, at the boda boda stage, the witness saw a man boxing a man who was boarding a boda boda. That he noticed and identified the man who had boxed as the accused who the witness said he had known as a thug who operated in that area commonly known as Kanyugunya.

The witness rushed towards the scene but before he could reach the scene he saw a group of about five people running in different directions, the one who had boxed the other man run towards the witness. That as that man approached the witness; he crossed to the opposite side and run along Luwum Street towards Entebbe Road. The witness ran after him. He was joined in the chase by one Simon a bouncer at Sux Pub. The two chased the accused and as he was approaching

Entebbe Road Simon run faster than the accused passed him went in front of him and tried to arrest him. That at this stage the accused removed a knife from his pocket threatened to Pierce Simon with it. Simon shouted that the man had a knife and that he wanted to Pierce him. With it. The witness fired a bullet in the air, which made the accused drop the knife. That the accused then turned and ran back wards along Luwum Street. The said Simon continued chasing the accused. The witness picked the knife and once again joined the chase. When they reached California Bar and Restaurant the accused run down the corridor along the bar, which joins Market Street. The witness and the said Simon continued with the chase, they pursued him through Nakasero Market and down Entebbe Road. That at Nakasero Mosque the accused made as to enter the Mosque but the gates were closed. The witness fired two bullets at the stones on the wall of the gates to scare the accused into stopping. That still the accused turned passed the witness and run towards the Railways Goods shade. That at this stage the chase was joined by patrol policemen who were on a Police vehicle along Entebbe Road. That even the general public had joined the chase. That the accused gave in and sat down on Entebbe Road between Nakasero Mosque and the Good shade. The witness arrested the accused put him on the police patrol vehicle and was taken to central police station. That the following day the witness made a statement at Central Police Station and handed over the knife.

D/Constable Ndeire Franco testified that he received a knife from PW3 and exhibited it on 30th October 2001 and handed it to the store man at Central Police Station. PW6 Jinaro Onzi, the store man at Central Police Station tendered in the knife, which was received as exhibit P2.

PW1 Dr. Nsereko Mukasa testified that on 31st October 2001 he examined Apire Peter, PW2, and his finding were:-

- There was bruising, swelling, and abrasions upon the left zygoma – bone below the left just above the cheek.
- There was bruising, swelling and laceration of the lower lip of the mouth.
- There was a linear abrasion upon the middle aspect of the left thigh measuring 14 cms long.

The witness classified the injuries as harm and to his observation they were consistent with assault with a bare hand. The medical report on PF3 was tendered as exhibit P1.

The accused made an unsworn statement in which he denied involvement in the offence indicted with. He stated that he was arrested in a graduated tax defaulters operation.

The cardinal principle as laid down in the case of Woolington vs. DPP (1935) AC 462 and followed by courts since thereafter is that in all criminal trials the burden of proof rests entirely upon the prosecution to prove the case against the accused person beyond reasonable doubt. This burden rests upon the prosecution throughout the trial and never shifts to the accused. The accused is presumed innocent until proved guilty by the prosecution or pleads guilty. See Article 28 (3) of the Constitution.

In the offence of aggravated robbery contrary to sections 272 and 273 (2) of the Penal Code Act the prosecution has to prove beyond reasonable doubt each and every one of the following ingredients:-

1. That there was theft of some property.
2. That there was use or threat to use violence during the theft.

3. That there was use of a deadly weapon immediately before, during or after the theft or causing death or grievous harm to any person during the execution of the theft and.
4. That the accused participated in the theft.

The first ingredient is whether there was theft of some property. Theft is defined under section 245 (1) of the Penal Code Act as follows:

“A person who fraudulently and without claim of right takes anything capable being stolen or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen is said to steal that thing.”

Under subsection (2) (a) of the above section theft is deemed committed if a person who takes “anything capable of being stolen” does so with an intention to permanently deprive the owner of the thing of it.

PW2, Peter Apire, in his testimony stated that as he was boarding a boda boda he felt something hitting him hard on the head and he fell down unconscious. That

when he regain consciousness he realized that his mobile phone a Nokia 3210 which he had chipped on his belt was missing. That as he was being nursed, PW3 came to the witnesses' home and informed him that the man who had stolen his mobile phone and assaulted him had been arrested. He has never recovered his mobile phone. PW3, whose boda boda PW2 was boarding, testified that as PW2 was boarding, the boda boda he was boxed by an attacker, he fell down unconscious and the attacker grabbed PW2's mobile phone from his waist and ran off with it. I am satisfied and agree with the gentleman assessors that on the above evidence prosecution has proved beyond reasonable doubt that a mobile phone Nokia 3210 belonging to Peter Apire was stolen.

The second ingredient is whether the thief used or threatened to use violence during the theft. The victim PW2 stated that as he was boarding the boda boda he was hit hard forcing him to fell off board. He did not know what happened next. When he regained consciousness he realized that he was already at home with a cut on his thigh, which was bleeding, and his face was swollen. The injuries sustained by the witness were corroborated by the evidence of PW1, the Doctor who examined him. There is further corroboration in the evidence of PW2, the boda boda rider whose testimony was that as PW2 was boarding the witness's boda boda he was boxed by an attacker and the blow forced PW2 off the boda boda and he

fell down becoming unconscious. The above evidence considered together I found that there was use of actual violence during the theft. The prosecution has proved the second ingredient beyond reasonable doubt.

The third ingredient is whether the attacker used a deadly weapon immediately before, during or immediately after the theft or caused death or grievous harm to any person during the execution of the theft. There was no death caused during the theft, neither was grievous harm caused to anybody. PW1, the Doctor who examined PW2 classified the injuries sustained by PW2 merely as harm.

According to the doctor's opinion the injuries sustained were consistent with assault by bare hands. This corroborates PW2 and PW3's testimony that PW2 was only boxed. Therefore there was no use of any weapon, let it be deadly or not, immediately before or during the theft.

The prosecution exhibited a half knife without a handle as exhibit PW2. PW5 Mpirirwe John testified that as he jointly with one Simon pursued the accused along Luwum Street up to Entebbe Road, the accused drew a knife from his pocket and threatened to Pease the said Simon with it. That Simon shouted out that the man had a knife and wanted to Pierce him with it. That at this stage the witness fired a bullet which scared the accused and he threw the knife down as the accused turned

and run backwards along Luwum Street to where they had come from. The witness stated that he picked the knife and again joined the chase. The knife exhibited is about seven inches in length and about one inch in width with no handle. It is unbelievable that one could handle such a knife and use it to stab or cut anybody without injuring himself. Secondly it is unbelievable that the witness whose mind was focused on arresting the accused, instead of turning to continue with the chase would have stopped to waste time picking the knife and let the accused gain distance from him. Thirdly it is PW3's testimony that after arresting the accused on 29th October 2001 he took the accused to Central Police Station where he was detained. However the witness did not hand in the knife, which he had recovered from the accused as he handed him over. His testimony is that he handed in the knife the following morning. I am not satisfied by the witness' explanation that he did not handover the knife immediately because he was still on duty and he had not yet made his statement. I find that the witness mishandled the exhibit by failing to immediately hand it over as he reported and handed over the accused. Such conduct makes the witness's testimony in regard to the knife doubtful whether actually had the knife at the time the witness made the first report to the police and handed in the accused. Thus making his testimony un reliable in this regard. Lastly, the said Simon who was allegedly threatened with the knife was not called as witness. Probably his testimony would have provided

corroboration to PW5's testimony and helped to strengthen it. I agree with the gentleman assessor whose opinion was that the prosecutions evidence left a lot of doubt as to whether the accused had a knife at the time of the theft. Prosecution has failed to prove this ingredient beyond reasonable doubt.

The last ingredient is whether the accused person participated in the said theft. In resolving this issue the evidence regarding the identification of the accused must rule out any possibility of honest mistaken identity. The test as laid down by the authorities is whether the evidence can be accepted as free from the possibility of error. In this regard court has to satisfy itself on whether the conditions under which the identification was made were or were not difficult. Court must warn itself, as I now do, of the possibility of error and consider the evidence of factors favouring correct identification together with those rendering it difficult. See Bogere Moses & Anor vs. Uganda Supreme Court of Uganda Certified Criminal Judgments (1996 -2000) 185, Uganda vs. Genge Wilson Simbwa SC Crime App No. 37 of 1995, William Kalyesubula vs Kayanja Kizito (1994) 11 KALR 113.

Where the basic issue is that of identification the need for care is required even where there is more than one eyewitness. In Abdala Nabulere & Another vs. Uganda Cr. App. No. 1978 (1979) HCB 77 court set down the factors that should

be considered when determining as to whether or not a witness has positively identified an accused person. Those facts are:

- (i) Whether there was light.
- (ii) Whether the witness knew the accused before or he was a complete stranger.
- (iii) Whether the witness had sufficient time to look at the accused or only had fleeting glance.
- (iv) The distance between the witness and the accused at the time of the recognition and
- (v) Any other distinctive features, which might have helped in the recognition by the witness.

According to the testimony of PW1, the complainant, he arrived at the scene of crime at around 7.30 p.m. and had not stayed there long when the incident happened, for he states that when he arrived at the stage he went to his usual transporter and immediately as he was boarding the boda boda he was attacked. PW3 and PW5 also put the incident around the same time. It was therefore night time. PW5 testified that the boda boda stage is at the junction joining Luwum Street with Dunstur street at the corner on the side of the road opposite sux pub. It was this witness's testimony that there is a street light at the small round about in the junction, and in addition there were security lights on the buildings around the scene, which provided sufficient light. I believe the witness in this regard.

As to whether PW3 and PW5 knew the accused before the incident PW3 who was at the scene of the attack at the material time stated that he had been operating from that stage for about four years. That in the course of his operations in the area he had seen the accused for about two years in the area. The witness testimony that the accused was a notorious thief, or pick pocket thief to be more precise, operating from within and around the locality of the stage. That he operated in a group in which the accused was known as the group's commander and commonly known as "Man". Though the witness recognized the accused in the dock as the

person he was referring to in his testimony, the witness stated that the accused was a heavy man, big, muscular and brownish. I observed that the accused is short but not heavily built, not muscular and dark in colour. However the accused's present state can be explained by his stay on remand since 5th November 2001, the conditions in the prison and lack of exercise. PW5 testified that he had known the accused for about two years as one he used to see in a group of thugs operating along the Kampala streets. When a person stays long in an area he is bound to know at least by appearance the common figures in the area. It is the testimony of both witnesses that they recognized the accused as a common person in the area. I have no reason to doubt the witnesses' testimony in this regard. I must however observe that both witnesses had a prior conserved knowledge and belief that the accused was a thief operating along Kampala streets. Therefore these witnesses' evidence as to the identification of the accused in connection with the particular offence for which he is charged must be evaluated with extra caution. Such conserved knowledge and belief could very easily lead to honest but mistaken identification.

According to PW3's testimony the attack and the theft all happened at a very fast speed. By his estimation the whole incident took about four minutes. It is the testimony of PW3 and PW5 that the accused used to operate in a group with

others. PW3 testified that after securing the mobile phone from PW2 the attacker and his colleagues run off. It is also his testimony that all the people around including his fellow boda boda operators at the stage run for their life. The witness does not say whether he was able to recognise any other person in the attackers group so as to associate it with the accused as his usual group. The attack and theft was at close range. However other circumstances have to be considered which might have affected the witness' ability to recognize the attacker. In his testimony the witness stated that the attack on his client was as the client was boarding the witness's boda boda. It is the witness's testimony that at the time of the attack he was either already seated on the boda boda or standing with the boda boda between his legs getting ready to take his client. That when PW2 was boxed he fell down and the witness fell down with him. I imagine the motorcycle must have also fallen down. The witness does not say he recognized the accused as he came to attack but claims to have recognized the accused when attacking PW2 and removing the mobile phone from his waist. In such circumstances the witness must have been fumbling to get up and the incident was within a flash of four minutes. It is unbelievable that the witness did recognize the attacker. The witness only associated the accused with the attack when he came back and found the accused already arrested. This witness's testimony in this regard would have become credible if there had been other supportive evidence. In the instant case if

the phone had been recovered from the accused on his arrest such evidence would have sufficed. Further, if the accused was actually the attacker and the one who had removed the phone from PW2, there is no evidence to show how he disposed of the phone. The above circumstances considered together make PW3's evidence as to the identification of the accused open to honest but mistaken identity.

The testimony of PW5 renders no supportive evidence to PW3's testimony either. PW5 testified that when he was in a distance of about 50 yards from the scene ahead of him he saw a man boxing a man who was on a motorcycle. The man boxed fell off the motorcycle. And as the witness moved towards the scene to see what had happened the witness saw a group of about five people running in different directions. The witness states that the man who had boxed him run in the witness's direction, that is towards the witness and that as that man, who happened to be the accused, was approaching the witness he turned crossed to the opposite side and run along Luwum street towards Entebbe Road and the chase by the witness and one Simon started which resulted into the accused's arrest. It is PW5's testimony that when the accused was arrested nothing was recovered from him. He therefore had no mobile phone with him. This witness, apart from seeing the man box another and that other falling down, does not say anything more happening to that man who fell down, he doesn't say anything about the phone and

says nothing about the rider the boda boda. This shows that the witness did not see what else, as is stated by PW3, took place at the scene during the commission of the offence. I am inclined to agree with the submissions of counsel for the accused that this witness did not actually see what happened at the scene of the crime. This witness must have started chasing the accused because he saw him running from the scene and happened to be a person the witness had a pre-conceived knowledge and belief as a common thug on Kampala streets. The accused's conduct of running from the scene must be considered in light of the evidence by PW3 that every body, was running from the scene including the other boda boda riders. There is also the evidence of PW5 that there was heavy human traffic, which must have interfered with the witness's ability to clearly recognize the attacker and what else happened at the scene. When PW5 says that the accused started running in the opposite direction because the accused had recognized the witness and knew him as a security person this is a mere expression of the witness' opinion. The accused's decision to run and in what direction was a state of mind which only the accused can testify about and not any body else.

For the reasons I have already given above I differ from the gentlemen assessors and find that the prosecution has failed to prove beyond reasonable doubt that the accused participated in the theft for which he is charged.

The accused in his testimony stated that he was arrested during a graduated tax defaulters operation. He does not give the date and time of his arrest. However it is trite law that weakness in the defence evidence or luck of it cannot be used to strengthen the prosecutions case.

Where one of the ingredients of the offence the accused is indicted is not proved beyond reasonable doubt the accused would in the circumstances be entitled to an acquittal. In the final result I differ from the gentlemen assessors, one of whom advised me to convict the accused as indicted and the other to convict the accused of simple robbery, and I find the accused not

guilty. The accused is set free unless he is liable to be held on other existing or lawful charges. I so order.

Lameck N. Mukasa

AG. JUDGE

29/7/2003