THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA FORT PORTAL

HOLDEN AT MASINDI

CRIMINAL HIGH COURT SESSION CASE NO. 36 OF 2003 CRB 174 OF 2001

UGANDA :: PROSECUTOR

VERSUS

A I ADUPA NELSON – ALIAS OPILO
AII ADUPA FERALD – ALIAS OJEE
AIII MUGARURA ALEX – ALIAS MUGABO :::::::::::::::::: ACCUSED

BEFORE: THE HON. MR. JUSTICE LAMEKA N. MUKASA

JUDGMENT:

The three accused persons are jointly charged with robbery with aggravation contrary to sections 285 and 286 (2) of the Penal Code Act. The particulars of the office are that Adupa Nelson alias Opilo, Adupa Gerald alias Ojee, Mugarura Alex alias Mugabo and others still at large on 31st July 2001 at Kiryangura village Masindi District robbed Barigye Petero of Ug. Shs 9,000,000/=, cloths and documents and at or immediately before or after the said robbery used a deadly weapon to wit a strong, elongated and rough device, and also threatened to use a gun on the said Barigye Petero.

All the accused persons pleaded not guilty. They were represented by Mr. David Kibanda. The State was represented by the Resident State Attorney Masindi Mr. Angozosi Serwadda.

The prosecution's case rested on the testimonial of Petero Barigye (the complainant) (PW1) Kabagambe Paul (PW2), Katambala David (PW3) and D/AIP Oneka Ali Andrew (PW4): By consent of both parties under the provisions of section 66 of the Trial on Indictment Act a Medical Examination Report in respect of Petero Barigye on PF3 dated 1st August 2001 was received in evidence as Exhibit P1.

Petero Barigye (PW1) testified that in the night of 30th July 2001 at around 1.00 a.m. while sleeping in his house, he heard a bang on the door to the house and the door fell inside. The attackers immediately entered the house and started demanding for money as they assaulted the witness with a heavy stick (club) on the head and he started bleeding. In the course of the attack the attackers removed a metallic suitcase from under the witness bed which they went away with. That in the suitcase was the witnesses' money in the sum of Ug. Shs 9,000,000/=, two radios, cloths and other things which the attackers also took with them. That in the course of the attackers the witness identified among the attackers the voices of Mugabo A3 and Opilo A1.

PW2 Kabagambe Paul testified that at the material time he was occupying a house in the same homestead with PW1. His house and that of PW1 were about ten metres apart. That one night at around 1.00 a.m. the witness heard a bang on the door of the house of PW1. He heard PW1 crying and voices of the attackers demanding for money from PW1. That the witness came out of his house and saw Mugabo (A3) standing at the side of PW1's house. The witness saw another person holding a gun and moving towards him. Due to fear he run and hid in the bush. After about

one hour the witness came back from hiding and took PW1 to Kiryandongo Hospital.

PW3 Katambala David testified that in the night of 31st July 2001 at around 1.00 a.m. while at his house he was woken up by PW2 who told him that PW1 had been attacked. The witness went to PW1's home but as he was approaching he saw four people in the compound near PW1's house, one of whom was holding a gun. The witness feared the gun and run away and hid himself in a shrub at the sides of the path leading from PW1's home. That while in hiding the attackers passed by as they moved from PW1's home. The witness from his hiding place identified Pilo (A1), Ojjee (A2) and Mugabo (A3) and another one whom the witness did not know. That A1 and that other one who the witness did not know, were each armed with a gun.

D/AIP Oneka Ali Andrew (PW4) testified that on 31st July 2001 the witness and his team accompanied by PW2 and PW3 arrested the three accused persons.

Adupa Nelson (A1) gave sworn evidence. In his testimony he denied participating in the robbery at Barigye's home in the night of 31st July 2001. He testified that he was arrested on 28th July 2001.

Adupa Gerald (A2) chose to make an unsworn statement. He stated that he was arrested on 28th July 2001 at 9.30 a.m. while on his way to hospital. He denied knowledge of the robbery.

Mugarura Alex (A3) gave sworn evidence. He denied participation in the robbery of Barigye's property. He testified that he had worked for Barigye for two months – that is January and February 2001. That he was arrested on 30th July 2001 by the Local Defence at Kitwara. That he spent the whole day and night of 29th July 2001 at his home in Kitwara.

The cardinal principal as laid down in the case of Woolimington V/S DPP (1935) AC 462 and since thereafter followed by courts 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) (a) of the Constitution of the Republic of Uganda.

In an offence of Aggravated Robbery contrary to sections 285 and 286 (2) of the Penal Code Act the prosecution must prove beyond reasonable doubt each and every one of the following ingredients:-

1. that there was theft of some property capable of being stolen.
2. that there was use or threat to use violence during the theft,
3. that there was use of or threat to use a deadly weapon immediately before, during or immediately after the theft or that death was caused or grievious harm to any person during the execution of the theft, and
4. that the Accused persons or any of them participated in the theft.

The first ingredient is whether there was theft of some property. Theft is defined under 254 (1) of the Penal Code Act as:-

> "A person who fraudulently and without any claim of right takes anything capable of 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."

And under sub-section (2) of the above section theft is deemed committed if a person who takes anything capable of being stoled does so with;

> " (a) an intent permanently to deprive the general or special owner of the thing of it;
>
> (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he or she may intend afterwards to repay the amount to the owner."

To prove the ingredient of theft the prosecution relied on mainly the evidence of PW1 who testified that in the night of 30th July 2001 attackers gained entry into his house and made off with his metallic suit case. That in the suitcase which he had kept under his bed was his money in the sum of shs 9,000,000/= which he had got from the sale of cattle for the purposes of buying a piece of land. Also contained in the suit case was his two radios, his cloths and those of his wife and children and a number of other things. That none of his said property was recovered. PW3 testified that the suitcase was discovered abandoned with its lock broken about 100 metres from PW1's house but that the money and other property were not recovered. Evidence shows that the complainant Barigye Petero was permanently deprived of his money and other properties. There is no

evidence to show that the attackers had any right or claim to the money or property. I am satisfied in the circumstances that the prosecution has proved beyond reasonable doubt that the attackers show that the attackers had any right or claim to the money or property. I am satisfied in the circumstances that the prosecution has proved beyond reasonable doubt that the attackers stole PW1's money and other properties.

The second ingredient is whether the attackers used or threatened to use violence during the theft. PW1 testified that the attackers gained entry into his house by banging the door which fell inside the house. That when the attackers entered they tortured and assaulted him as they demanded for money. That one of the attackers assaulted the witness with a heavy stick (club) on his head and he started bleeding profusedly and the blood which run down his face blinded him. PW2 testified that in the night of the attack he heard a bang on PWI's door and he could hear PWI crying as voices of the attackers demanded for money. PW4, the Police Officer who investigated the case, testified that when he visited the scene he noticed that the door to the complainant's grass thatched house had been broken. This is evidence that the attackers used actual violence in the course of the theft. I therefore find that the prosecution has proved the ingredient of violence beyond reasonable doubt.

The third ingredient is whether the attackers used or threatened to use a deadly weapon immediately before, during or immediately after the theft or causing death or grievous harm to any person during the execution of the theft. In the instant case there was no death caused. As already seen hereinabove Pw1 was assaulted with a club and he sustained injury on his

head causing him to bleed. On the Medical Examination Report (Exhibit P1) the injuries sustained by PW1 were classified as bodily harm. Section 2 of the Penal Code Act defines “grievous harm” as:-

> “…any harm which amounts to a main or dangerous harm or seriously or permanently injures health or which is likely so to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense.
>
> “main” means:-
>
> “The destruction or permanent disabling of any external or internal organ, in embrace or sense,”
>
> “dangerous harm” is defined to mean
>
> “harm endangering life,” and
>
> “harm” is defined as:-
>
> “any bodily hurt, decease or disorder whether permanent or temporary.”

The medical evidence on record shows that PW1 suffered harm short of grievous harm. I therefore find that there was no grievous harm caused to anybody.

That leaves me with the issue whether there was use or threat to use a deadly weapon during, immediately before or after the theft. Under code section 286(3) of the Penal Act “deadly weapon” includes any instrument made or adapted for shooting, stabbing, cutting and any instrument which, when used for offensive proposes, is likely to cause death.

According to the testimony of PW1 the attackers assaulted him with a club on the head. The club was not recovered and therefore not exhibited in Court. The Clinical Officer’s opinion, according to exhibit P1, the injuries could have been inflicted with a device or instrument or weapon strong enough and elongated and fairly with rough surfaces. Such opinion where the weapon is stated to have been elongated contradicts the complainant’s testimony that the weapon was a club – rather a heavy stick. In the circumstances I am unable to find that the complainant was assaulted with a deadly instrument.

PW1, PW2 and PW3 testified that at least two of the attackers were armed with guns. However there is no evidence to show that any gun was used immediately before or during the theft. It is the testimony of PW1 that he heard one of the attackers telling his colleagues that they had come to steal and nor to kill. This is evidence that this attacker was cautioning his colleagues against the use of deadly weapons which could cause death.

PW1 testified that the attackers as they were leaving, while still in his compound, fired a gunshot which he heard while hiding under his bed. That he again heard another shot as the attackers reached the road. That he heard only these two gunshots. PW2 testified that after about 30

minutes when he was in hiding he heard three gunshots coming from the side of the road which he said was about 150 metres from their home. PW3 also testified that he heard three gunshots fired after the attackers had passed him and reached the road. One cannot be sure whether the three gunshots heard by PW2 and PW3 were actually fired by the attackers who had attacked and stolen from PW1. PW1's testimony as to the gunshot fired while in his compound is contradicted by the testimony of D/AIP Oneka Ali Andrew who visited the scene in the morning of 31st July 2001. He testified that they had been informed that the attackers had fired two bullets. On that information the witnesses carried out a search around the scene but did not recover any cartridge which is evidence that no bullets had been fired at the scene. I find that there is no evidence to show that guns were used immediately after the theft. I therefore agree with the two assessors that the prosecution has failed to prove beyond reasonable doubt the third ingredient of use or threat to use a deadly weapon or causing death or grievous harm.

The last ingredient is whether the Accused persons or any of them participated in the theft of PW1's property. In their respective defences each of the accused persons raised the defence on alibi.

In ***R –vs- Chemulon Wero Olango (1937)*** 4***. EACA 46*** it was stated:-

> "The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed act."

According to all the prosecution witnesses the attack took place during the night of 30th July 2001 at around 1:00 a.m. Both Adupa Nelson (A1) and Adupa Gerald (A2) stated that each was arrested on 28th July 2001. They therefore stated that on 31st July 2001 when the offence was committed they were both in Police Custody. Mugarura Alex (A3) testified that he had spent the whole night of 29th July 2001 at his home in Kitwara, where he was arrested on 30th July 2001. That he had ceased working for and residing at Basigye Petero's home in February 2001.

It is trite law that by setting up an alibi, the Accused doesn't thereby assume the burden of proving its truth so as to raise doubt in the prosecution case. To the contrary the burden is upon the prosecution to disprove the accused's alibi. See ***Festo Androa Assema and Kakoza Joseph Denis –vs- Uganda SCCA 1 of 1998 (1SCD (CRIM) 1996/2000 pg 91), Ntale –vs- Uganda [1968] EA 365, Sekitoleko –vs- Uganda [1967] EA 531 and L. Anisheth –vs- Repulic [1963] EA 206***.

In respect of A1 and A2 the Prosecution would have been expected to call evidence to show whether or not the two Accused persons had been locked in the police cells on 28th July 2001. But this was not done. However the Prosecution could still discharge the burden cast upon it by adducing evidence which, beyond reasonable doubt, puts the Accused persons at the scene of crime at the time the crime was committed. What amounts to putting an accused at the scene of crime was discussed by the Supreme Court in ***Bogere Moses and Kamba Robert –vs- Uganda SCCA No. 1 of 1997 (1SCD) (Crim)1996/2000 pg 185)*** where their Lordships stated:-

"----- the expression must mean proof to the required standard that the Accused was at the scene of crime at the material time.

To hold that such proof has been achieved the Court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence showing that the Accused person was at the scene of crime and the defence not only denies it, but also adduces evidence showing that the Accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of the acceptable perse the other version is unsustainable."

The prosecution relied on the testimonies of the three eyewitnesses PW1, PW2 and PW3. When dealing with evidence of identification by eyewitnesses in criminal cases Court must satisfy itself from the evidence whether the conditions order which the identification is claimed to have been made were difficult or not difficult. Then warn the Assessors and itself, as I did warn the Assessors and as I now warn myself, of the possibility of mistaken identity or error. In so doing Court must consider the evidence favouring correct identification together with that rendering it difficult. This requires a close and careful examination of the circumstances in which the identification came to be made particularly with

regard to the length of time, the distance, the light conditions and the familiarity of the witnesses to the Accused. Where the conditions favouring correct identification are found difficult consideration must be given to other supportive evidence on record. The cardinal aim is to rule out any possibility of mistaken identity and to determine whether the evidence can be accepted as free from the possibility of error. See ***Abdala Nabudere and Another –vs- Uganda[1977] HCB 79, Bogere Moses and Kamba Robert –vs- Uganda (Supra)***.

According to the three eyewitnesses the attack was at night around 1:00 a.m. when they all had gone to sleep in their respective houses. PW1 and PW2 lived in the same house stead, their houses about 10 to 20 metres apart. PW3's house was about 100 metres away. It is the testimony of all the three witnesses that that night there was bright moonlight which enabled each one of them to see clearly. PW1 testified that he occupied a two-roomed house. That when the door was banged open he came out from his bedroom into the sitting room. The witness saw three attackers. Two of the attackers entered the house flashing a touch while the third remained in the doorway. That by the light from the torch, the attackers were flashing around, the witness noticed that one of the attackers who had entered was armed with a gun and a club. That the third attacker who had remained in the door way was armed with a gun. The witness testified that one of the attackers hit him with the club and blood started running down his face and he could thereafter not see properly. The witness testified that he managed in the course of the attack to identify two of the attackers by their voices, namely Opilo (A1) and Mugabo (A3). The witness testified that when the attackers had gone out of his house he identified Opilo's

voice who was speaking in Swahili. He testified that he had known A1, whom he remembered only as Opilo, for about one and half years. That the accused lived in the witness's neighbourhood and used to come to his home to do casual work, and was the son of the witness neighbour the late Obira and he used to talk to him. PW2, a grandson of PW1, who occupied the same homestead with PW1, testified that he had before the incident known A1 for about one and half years, whom he knew only as Opilo. That Opilo lived in the neighbourhood about half a kilometre away and used to come to their home to do casual work for PWI, PW3 testified that A1, whom he knew as Pilo, was his neighbour and he had known him for about two years.

A1 in his testimony testified that he was arrested from his paternal uncle's home called Obira Kranima at Kiryampugula Village, the same village where PW1, PW2, and PW3 resided.

It was his testimony that he used to visit his uncle where he used to come to sell fish and go away. That this was his third visit and he had stayed for a week. I find that PW1's testimony is corroborated by the testimony of PW2 and PW3 as well as that of the Accused, that A1 was not a stranger to the three prosecution witnesses.

PW1 testified that he identified the voice of A3, whom the witness knew only as Mugabo, when he heard him say that we have come to steal and not to kill. That A3 was his herdsman whom he had employed for about four to five months. That in the course of A3, employment with the witness A3 used to stay in the witness' home occupying the same house with PW2

and they could talk to each other. His testimony is corroborated by that of PW2 and PW3 who testified that A3 was PW1's herdsman. PW2 testified that he had known A3 for about 3 years, first in Buruli where he had first seen him and later when he came to work for PW1. That while working for PW1, A3 was occupying the same house with PW2. PW3 testified that before the incident he had known A3 for about three months as PW1's herdsman and that A3 stayed in the same homestead with PWI. In his testimony A3 admits having worked for PW1 as a herdsman for about two months during which period he was staying at PWI's home. Therefore A3 was also not a stranger to the three witnesses.

It was PWI's testimony in chief and at first in cross-examination that he did not hear A2's voice whom he knew only as Ojee a brother of A1 and son of his neighbour. When pressed further in cross-examination the witness admitted that in his statement to the police made on 31st July 2001 he had stated that he had also heard the voice of A2. On the basis of this evidence Mr.David Kibanda, counsel for the Accused persons, invited court to find PWI an untruthful witness. I do not agree with him. PW1 was giving evidence two and half years after the incident. With lapse of time he was reasonably likely to forget some facts. Secondly PWI's statement to the police was not exhibited in court therefore its contests did not form part of the evidence on record. Thirdly PW1 impressed me as a straight forward and truthful witness. I therefore find and agree with PW1 in his evidence in Chief that he did not in any way identify A2 in the course of the attack, whether by voice or otherwise.

PW2 Kabagambe Paul testified that when he heard PW1 crying and people demanding for money from PW1 he came out of his house. That by the bright moonlight he managed to identify one person, A3 who was about 20 metres from him at PW1's house holding a club. That the witness saw two other people in the compound whom he did not identify. He could hear the attackers in the house of PW1 torturing him. The witness noticed that one of the attackers had a gun so in fear he run first to PW3's home to notify him and then into hiding. As already seen herein above PW2 was familiar with A3 whom he had known for three years and occupied the same house with for all the period A3 worked for PW1. PW2's testimony that A3 was outside in the course of the attack is corroborated by PW1's testimony that he heard and identified the voices of A1 and A3 as the attackers were going out of his house.

PW3 Katambala David testified that on receiving the information from PW2 of the attack on Pw1 he went to PW1's home. That as he was approaching PW1's compound he saw four people one of whom was holding a gun. That he run and hid in a shrub at the sides of the path leading from PW1's home. That from his hiding place he managed to identify A1, A2, A3 and another person whom he did not know. That at this stage he noticed that A1 had a gun and that other unknown person had a gun. The witness testimony in court contradicts what he stated in his statement to the police, exhibit D1, which he made on 31st July 2001the day following the night of the attack. In that statement he stated that as he moved near to PW1's home he saw four people of whom he knew only A3 and A1. That when he saw that the attackers were armed with guns he run away making an alarm and went to report to the Chairman. It is doubtful whether PW3 at all hid in

a shrub nearby and saw the attackers as they moved along the path from PW1's home. If at all PW3 had seen the attackers he would have been the first person to know that they had left and come to PW1's rescue. Instead it was PW2, who had hid a distance away, who came back home after about an hour and helped PW1 to take him to the Local Council Executives to report and invetually to hospital. In exhibit D1, PW3 actually states that when he was coming with the Chairman they met PW1 going for treatment. I therefore do not believe PW3's testimony on the identification of the Accused persons from a hiding place

PW2 testified that he used to occupy the same house with A3 but that in the night of the attack the accused did not stay in the house. Further it is the testimony of PW2, PW3 and PW4 that they went to effect the arrest of the accused persons on 31st July at around 10.00 a.m. they found A1 and A3 in A1's house sleeping. The witness had earlier arrested A2 whom they had found along Kiryandongo Road proceeding to Kiryapugura Trading Centre. It can not be by mere coincidence that A1 and A3 were found together in A1's house sleeping at such hour of the morning. It goes to show that the two had had a sleepless night.

The three accused persons in their respective defences put up the defence of alibi. The law is that the defence of alibi should be disclosed at the earliest possible opportunity. See **Rvs Sukha Singh s/o Wazir Singh & others (1939) 6 EACA 145, Festo Androa Aseme & Kakoza Joseph Denis Vs Uganda (Supra).** In their respective defence A1 and A2 stated that they were each arrested on 28th July 2001. PW2, PW3 and PW4 testified that the Accused persons were arrested on 31st July 2001. None

of the three witness was cross examined about the accused's arrests on 28th July 2001. I find the accused's statements in this regard after thoughts raised just to misleading court and I reject their alibi. A3 in his defence said that by the night of the attack he was no longer staying at PW1's home, that he had left his employment with PW1 in February 2001 and had spent the night of 29th/30th July 2001 in his home at Kitwara where he was arrested on 30th July 2001 by the Local Defence. PW2, PW3 and PW4 who testified that they effected A3's arrest were not cross-examined about this fact. PW1 was also not cross-examined about the period when A3 had left employment with him. He was only cross-examined about the period when he had offered A3 employment which in his reply the witness testified that it could have been in January or February 2001. Neither was PW2 or PW3 cross-examined about this fact. I therefore reject A3's defence of alibi as an afterthought. I am also satisfied that A1 and A3 were positively identified by PW1 by their respective voices during the commission of the crime and that A3 was positively further identified by PW2. I however find that the prosecution has failed to adduce evidence which equally puts A2at the scene of crime at the material time.

Section 81 of the Trial or Indictments Act provides:-

" When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it".

In the final result I partially agree with one of the gentlemen assessors who had advised me to convict all the three accused persons of simple robbery.

I find that the prosecution has proved beyond reasonable doubt that Adupa Nelson alias Opilo (A1) and Mugarura Alex alias Mugabo (A3) participated in the commission of the offence of robbery contrary to sections 285 and 286 (1) (b) of the Penal Code Act. I accordingly find Adupa Nelson alias Opilo and Mugarura Alex Mugabo guilty and convict each one of them of the offence of Simple Robbery and acquit each one of the them of offence of aggravated robbery.

I however partially agree with the gentleman assessor who had advised me to find all the three accused persons not guilty and acquit them. I find that the prosecution has failed to prove beyond reasonable doubt that Adupa Gerald alias Ojee participated in the robbery and I accordingly acquit him of the offence as indicted. Adupa Gerald alias ojee is accordingly set free unless unlawfully held on other charges.

Lameck N. Mukasa.
AG. JUDGE.