

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT RUKUNGIRI

CASE NO: HCT-05-CR-SC-0027 OF 2003

UGANDA ::::::::::::::::::::::::::::::::::::::

PROSECUTOR

VERSUS

A1. BAGOROGOZA JOHN }
A2. KABAREEBE EMMANUEL }::::::::::::::::::

ACCUSED

BEFORE: HON. MR. JUSTICE PAUL K. MUGAMBA

JUDGMENT:-

Both Bagorogoza John (A1) and Kabareebe Emmanuel (A2) are charged with aggravated robbery, contrary to sections 285 and 286 (2) of the Penal Code Act.

It is the prosecution case that the two together with others still at large robbed Yoweri Kigandeire of a mattress, a pair of bed sheets and shs.101,500/= cash and that at the time immediately before and immediately after the robbery they used deadly weapons which were a gun and pangas. The prosecution called five witnesses to prove its case. PW1 was Makoma Joseph AIP, PW2 was Samali Tamazariro, PW3 was Twinomwanya Emmanuel, PW4 was Karugaba Nathan while PW5 was Emmanuel Tumuhimbise. Medical evidence sought to be relied on by the prosecution was abandoned after the report was found lacking the identity of the person who made it.

In their defence both accused made statements on oath denying involvement. They called no witnesses.

The prosecution has the onus to prove the case against any of the accused person beyond reasonable doubt. It is not the duty for the accused person to prove his innocence. See **Oketh Okale Vs R [1965] EA 555**. In the instant case the prosecution ought to prove the following ingredients:-

- (i) That there was theft.
- (ii) That there was violence or threat to use violence.
- (iii) That there was violence or threat to use violence.
- (iv) That a deadly weapon was used or threatened to be used, and
- (v) That both the accused or any of them were responsible.

The first ingredient concerns theft. According to the indictment a mattress, a pair of bed sheets and shs.101,500/= cash were stolen from Late Kigandeire and

PW2. In her testimony PW2 stated that a mattress, a pair of bed sheets and shs.101,500/= cash were stolen. In court PW2 identified the mattress produced in court as one which Late Kigandeire, her husband, used to sleep on. She testified that a mattress was stolen the night they were attacked by robbers. Counsel for the defence disputes the identification saying as the mattress belonged to Late Kigandeire PW2 was not the right person to identify it to court.

Respectfully I do not agree. She was wife to the owner of the mattress who has since died and if any wonder it would be if she failed to identify the family mattress. Since the mattress was taken away and recovered elsewhere I am satisfied the prosecution has proved the first ingredient beyond reasonable doubt.

The next ingredient to prove by the prosecution is that there was violence. PW2 was witness to the attack by robbers. She testified that both she and her husband were assaulted by the robbers. PW3 testified that both Kigandeire and PW2 had been badly assaulted and that property had been scattered all over the place when he visited the scene. PW4 had heard an alarm raised by PW2 and her husband and when he answered it, he was told by both Kigandeire and PW2, that the assailants had assaulted them. PW5 also testified that he had found both PW2 and her husband had been assaulted. From the above I am satisfied that there was use of violence on that occasion.

The prosecution must prove that a deadly weapon was used or threatened to be used on that occasion. According to PW1 a spent cartridge with powder was

recovered from the house of A1. This piece of evidence was never exhibited. PW2 who was present at the time of the attack testified that, she was slapped by the intruders with something she thought was a panga. She does not exactly say she saw a panga or pangas. No panga was recovered as a matter of fact. PW2 said further that the intruders had a gun which they used to assault her. No gun was recovered and none was fired at the scene. From the above evidence I do not find the prosecution had proved this ingredient beyond reasonable doubt.

Finally the prosecution must prove that the accused persons or any of them participated in the crime. None of the accused persons was identified at the scene. The evidence the prosecution goes by is circumstantial. Mere evidence is circumstantial in order to justify an inference of guilt the inculpatory facts must be incompatible with

the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of guilt. See **Simon Musoke Vs R [1958] EA 715.**

The reason A2 was arrested and charged is because A1 after being arrested had mentioned him as his accomplice. A2 denies involvement and says he was never at the scene. When an accused person sets up a defence of alibi it is not his responsibility to prove it. The prosecution must disprove the alibi by adducing evidence which places accused squarely at the scene of crime.

In this case the prosecution has not adduced evidence connecting A2 to the offence. His alibi has not been disproved at all.

Concerning A1, PW1 testified that he saw footmarks leading from Kigandeire's house to that of A1, a distance of more than 1 kilometre. PW3 also testified that he saw footmarks leading from the house of Kigandeire to that of A1. It was the evidence of PW3 that the mattress exhibit P2 was recovered in the house of A1 laid between two other mattresses. The exhibit is that mattress which PW2 identified as one stolen from their house the previous night. PW4 also testified that they had found exhibit P2 in the bedroom of A1. It was the evidence of PW4 that he had earlier seen Kigandeire sleeping on exhibit P2 and the witness had immediately recognized it at the house of A1. When a person is found to be in possession of property which had been stolen recently he is regarded as one who had stolen it unless he gives a satisfactory explanation of how that property came to be in his possession. See **Andrea Obonyo & Others Vs R**

[1962]. There has been no explanation by A1 who at the time of the recovery of the mattress from his house had run away as to how he came to be in possession of a mattress belonging to Kigandeire. As the mattress had been stolen only the previous night A1 was in possession of recently stolen property.

There is evidence of PW3, PW4 and PW5 showing that accused had been running away from his house after he saw them. This shows that A1 felt guilty.

The defence of A1 also is of alibi. It is not his duty to prove the alibi but the prosecution has the responsibility to disprove it by adducing evidence which places accused at the scene of crime. As accused was found in possession of recently stolen property without him giving satisfactory explanation I find the alibi disproved. I find A1 participated in the crime alleged.

The assessors in their joint opinion advised me to convict A1 as charged and to acquit A2. For the reasons I have given in the course of this judgment I do not agree wholly with that opinion. I find A1 guilty of Simple Robbery Contrary to Section 285 and 286 (1) (b) of the Penal Code Act and convict him accordingly. I find A2 not guilty and acquit him.

PAUL K. MUGAMBA
JUDGE
12th August 2004.