

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CR-SC-0067 OF 2003

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

VERSUS

**A1. MUTAMBUZI LAWRENCE
A2. MATSIKO GORDON
A3. MWEBEMBEZI GABITO
A4. ATUKWASE ROBERT
A5. MUGISHA WILLIAM ALEX** } **:::::::::::: ACCUSED**

BEFORE: HON. MR. JUSTICE PAUL K. MUGAMBA

JUDGMENT:-

Mutambuzi Lawrence (A1), Matsiko Gordon (A2), Mwebembezi Gabito (A3), Atukwase Robert alias Wycliff (A4) and Mugisha William Alex (A5) are charged with

aggravated robbery, contrary to sections 285 and 286 (3) of the Penal Code Act.

Four witnesses were produced by the prosecution to prove its case: Kyomugasho Gaudensia (PW1), Nyamihanda Jovasi (PW2), Garangira David (PW3) and Enos Kamugisha (PW4). Medical evidence of examination of PW3 and PW2 was agreed upon and admitted in evidence as exhibit P1 and P2 respectively. In their defence the accused persons made sworn statements but called no witnesses.

Briefly the prosecution case is that on the night of 28th/29th November 2002 the accused persons went first to the home of PW1, daughter-in-law to both PW2 and PW3. There they forced their way into her house. After they stole her shs.15,000/= they ordered her to lead

them to the home of PW2 and PW3. The intruders carried two torches and two pangas and stole a third panga from PW1's house. They told PW1 that on her arrival at the house of PW2 and PW3 she should call out that her child was sick and that she needed assistance. She did as she was told and PW2 did open the door to the house. Thereupon accused persons entered the house and inflicted multiple injuries on PW2 and PW3 before escaping with PW2's shs.50,000/= and PW3's shs.350,000/=. Each of the accused persons was arrested elsewhere afterwards.

In their defence statements made on oath each of the accused persons set up an alibi. The prosecution has the legal burden to prove the case against each of the

accused persons beyond reasonable doubt. See: ***Okethi Okale and Others Vs Uganda [1965] EA 555.***

In so doing all the ingredients of the offence must be proved. Ingredients in aggravated robbery are:

- That there was theft of the some property;
- That there was violence accompanying the theft;
- That there was use or threat to use a deadly weapon or that there was death or grievous harm; and
- Participation of the accused persons or any of them.

According to PW2 and PW3 the person who attacked them stole shs.50,000/= from PW2 and shs.350,000/= from PW3. This evidence is nowhere contradicted. I am satisfied that this ingredient has been proved by the prosecution beyond reasonable doubt.

Regarding the second ingredient, both PW2 and PW3 testified to being cut and injured by the intruders. Exhibits P1 and P2 were admitted in evidence and show injury on PW3 and PW3 respectively. The injuries were cut wounds. In ***Kenan Owori and Stephen Olowo Vs Uganda [1975] HCB 223*** this court held that where the complainant was held by force and slapped in order to obtain money, such was sufficient violence to support the charge of robbery. I am satisfied that in this case prosecution has proved that on the occasion there was violence.

The third ingredient concerns whether there was a deadly weapon used or threatened to be used or whether grievous harm resulted. Fortunately no death resulted in this case. A deadly weapon is described by section 286

(3) of the Penal Code Act as including any instrument made or adapted for shooting, stabbing or cutting and any instrument which when used for offensive purposes is likely to cause death. Needless to say a panga is in the category of a deadly weapon when used for offensive purposes. PW1 testified that the intruders carried it with them. Both PW2 and PW3 testified that the intruders inflicted injury on them using pangas. Exhibits P1 and P2 describe the wounds inflicted on PW3 and PW2, respectively, as cut wounds. I must note also that exhibit P1 shows that the cut on PW3's right knee was grievous harm. The prosecution has proved beyond reasonable doubt that a deadly weapon was used on the occasion.

Finally it leaves the prosecution to prove that the accused persons or any of them perpetrated that crime alleged against them. The evidence proffered by the prosecution

is that of identification by PW1, PW2 and PW3. I hasten to add that that identification was at night. PW1, PW2 and PW3 testified that they were able to identify the attackers because of light from torches which the intruders carried. These intruders were well known to the witnesses as they were residents in the same neighborhood. According to PW1 she was able to see and identify A1, A2 and A5. She said that at first A1 and A2 were visible to her because they were inside the house but that later she was able to recognize A5 as she accompanied the intruders to the home of PW2 and PW3. The evidence of PW2 is that she saw all the five accused on the night in issue. She first saw A1 as he flashed a torch on the side. She was able to see the four others also. According to her A1, A2 and A3 cut PW3 while she herself was cut by A5. In his testimony PW3 stated that although he knew all the five accused

persons he had identified only A1 and A2 on the night in question and that the two cut him.

Where the case against an accused depend wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can be mistaken. See ***Abdullah Nabulere and Others Vs Uganda [1979] HCB 79.*** Consequently I have to warn myself, as I did warn the assessors, of the requirement for caution regarding conditions for correct identification. Factors such as the source of light, the

distance between the witnesses and the intruders and whether the intruders were known to the witnesses prior to the invasion are cardinal.

The accused persons in their defence set up alibis. When an accused person sets up a defence of alibi which does not assume the duty of proving it. The prosecution must disprove and destroy that alibi by adducing evidence which places the accused squarely at the scene of crime. In their respective defences which were given on oath each and every one of the accused persons stated that they were not at the scene at the time in issue. As a matter of fact none of the accused persons was arrested at the scene.

I have related to the testimonies of PW1, PW2 and PW3 concerning their identifications of the accused. Only PW2

stated in her testimony that she saw A3 and A4 on the night in issue. PW2 does not mention A4 playing any active role in inflicting injury though she mentions the participation of others. In fact PW2 is silent about what A4 did or did not do. I note also that it is only she of all the three witnesses who say they saw A3 and A4 that night and that her identification is nowhere corroborated. For example she states that A1, A2 and A3 cut PW3 which in his part PW3 testified that he was cut by A1 and A2 only. I find that most likely A3 and A4 did not participate in the robbery.

Nevertheless A1 and A2 were seen and identified by PW1, PW2 and PW3 not only at the home of PW2 and PW3 but also by PW1 at her house. A5 was identified by PW2 at her house and by PW1 on the way to the house of PW2 and PW3. All the witnesses stated they were able to

identify the accused with assistance of light from the torches, which the accused carried. PW1 saw A1 and A2 inside the confines of her house, which rendered the distance between her and the two close. She was able to see A5 because she traveled together with him and others to the house of PW2 and PW3 and torchlight enabled her to identify him. The accused persons entered the house of PW2 and PW3 particularly in the bedroom and PW2 and PW3 had ample opportunity to identify them owing torch light. I must not that the time was sufficient for the intruders to be able to collect money from both PW2 and PW3. Needless to say the intruders had been known to the witnesses before. I am satisfied and that A1, A2 and A5 were correctly identified. Consequently I find their alibi disproved by the prosecution. However I am not satisfied that A3 and A4

were properly identified and find the prosecution has not disproved their alibi.

The gentlemen assessors in their joint opinion advised me to find A1, A2 and A5 guilty of the offence and to convict them. They advised me to acquit A3 and A4. For the reasons I have given in the course of this judgment I agree with that opinion. I find A3 and A4 not guilty and acquit them. However I find A1, A2 and A5 guilty of aggravated robbery and convict them accordingly.

PAUL K. MUGAMBA

JUDGE

23rd April 2004.