

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CASE NO: HCT-00-CR-SC-0136 OF 2004

UGANDA ::: PROSECUTOR

VERSUS

MUTEBA FARUK & 2 OTHERS ::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

J U D G M E N T:-

The accused Siraji Mukobe, Muwoleka Mohamed and others still at large were jointly charged for robbery contrary to sections 285 and 286 (2) of the Penal Code Act.

The particulars of the indictment alleged Siraji Mukobe, Muwoleka Mohamed and others still at large, on 7th April 2002 at about 2.00a.m. at Bugoba village, Bukanga sub-county in Iganga District, robbed Kyakulaga Laban of cash shs.100,000/=, one small Sony radio, two lumber planers, three saws, two drills, plates and other house hold items, all valued at shs.400,000/= and at that time of the said robbery used deadly weapons, to wit a panga and gun against the said Kyakulaga Laban.

The prosecution case was as follows:-

Juma Tenywa (PW1) testified that he was the Defence Secretary where he was residing. He stated that the complainant was taken to him on complaint that he had been robbed. The complainant told him that he had identified one of the assailants Faruk Muteba. He gave them a letter to go to police. That night he went and arrested Frank Muteba. The following day which was 8/4/2002 the complainant told him that other suspects were Siraj Mukobe and Muwoleka Mohamed. He went to the police and arrested the two. They searched their houses but recovered no exhibits.

Dr Bamudaziza (PW2) testified that the complainant was taken before him for medical examination on PF3 and upon examination he found him with multiple cut wounds and bruises with soft tissue injuries (exhibit P1). He classified those injuries as Grevious harm inflicted by using cutting objects and sharp objects.

Kyakulaga Laban (PW3) testified that on 7/4/2002 he was at his home sleeping together with his wife and children when some robbers attacked them. They hit their door open using a big stone. As they were trying to gain access to their bedroom they held on the door until one of them Faruk climbed over the wall with a gun. From there they released the door open and Siraj and Mohamed entered in. Faruk then got a panga from Siraj and started cutting him on the head while Mohamed was standing near the door with a hidden weapon. Siraj and Mohamed had torches. He testified that they had left a hurricane lamp burning because they had a small baby to feed now and then. From that lamp they managed to identify Faruk, Siraj and Mohamed. As Faruk was cutting him, he pleaded with them not to kill him but to take some money instead of his life. He told them to get the money from his wife. The money was given to Siraj but Faruk grabbed it and pocketed it. It was shs.100,000/= . The assailants then went to the children's bedroom where they took away carpentry tools and other items. He concluded that the things which were robbed were recovered by the police and he identified them as his because he had marked them with letter "K" to signify his name.

Irene Kyakulaga PW4 made a similar testimony like her husband PW3. She stated that during the night of 7/4/2002 they heard a bang of a stone on the behind door of their house. Soon they heard the door to their bedroom being pushed. Her husband stood up and went and held it. She went to help him as they were making alarms. One of the robbers called Faruk jumped over the wall. They were forced to leave the door open. That was when the other two entered their room. Faruk then started cutting PW3.

PW3 pleaded that they should take money instead of his life. She was giving the money to Siraj, Faruk grabbed it. After that the robbers took away carpentry tools – planers. Drills, runners, etc. She concluded that Faruk had a gun while Siraj had a panga and a torch. Mohamed also had a torch. She stated that they had a lamp in the house. Later on they used the torchlight to identify the accused after they had blown the lamp. She stated that none of the accused went later to the scene and that the gun was not fired.

Mbago Julius PW5 testified that during that incident he managed to identify Faruk but not the other two assailants. He stated that Faruk hit one of his brothers with the gun on the head. He stated that the assailants took away carpentry tools from the house.

James Byakika PW6, testified that he was chairman LC1 of Bugoba village. He stated that on 7/4/2002 at 3.00a.m. his Defence Secretary (PW1) went to his home and told him that there was a problem in their village in that Kyakulaga had been robbed. He went to the Trading Centre where Kyakulaga was being treated in a clinic. He was bleeding from the head. Kyakulaga told him he knew his assailants as Faruk and Siraj. He wrote a letter and gave it to the Defence Secretary to take to police. Later on he heard that the accused were arrested.

No. 19468 P.C. Dandu (PW7) testified that on 7/4/2002 he reported on duty and his OC told him that he had arrested Faruk for robbing Kyakulaga of Bugoba of shs.100,000/=, carpentry tools and other household properties. He went and found Kyakulaga had returned from hospital. He had cut wounds on the head, arm and back. He was in great pain but managed to give his statement. Other people also wrote statements which included the LC1 chairman. Kyakulaga told him that it was Faruk and the two accused persons who had robbed him. At that time Faruk had been arrested while the two accused persons were still at large. He later arrested accused persons with the assistance of the Defence Secretary and other people. He searched their houses but recovered nothing. However he recovered parts of pari pari from the house of Faruk which Kyakulaga identified as his because he had marked them with letter "K" to signify his name.

The first accused Siraj Mukobe made unsworn defence where he denied the offence and relied on alibi which was supported by his wife Nandabe (DW1).

The second accused also relied on the defence of alibi in his sworn defence.

In the instant case the prosecution was to prove the following ingredients of the offence of aggravated robbery:

- (1) That theft of property had occurred;
- (2) That the theft was with violence or threat to use violence.

- (3) That there was use or threatened use of a deadly weapon or the theft resulted in death or grievous harm.
- (4) That the accused participated directly or indirectly in the said theft.

On the first ingredient PW3 and PW4 told court that their assailants robbed them of shs.100,000/=, three plates, three hand saws, two runners, dressing mirrors, pari pari, Sony radio, omega bag and a torch. They stated that the money was handed over to the assailants by PW4 after PW3 had pleaded with the assailants not to take his life but money instead. PW7 testified that he recovered parts of the pari pari which complainant later identified as his because he had put in identification mark.

With the same process I do agree with both assessors that the ingredient of theft had been positively proved beyond all reasonable doubt.

In regard to the use or threatened use of violence, the complainant PW3 and his wife PW4 testified that their assailants gained access to their house breaking the behind door using a big stone. After gaining general access they forced their bedroom door until they surrendered it open. That was when one of the assailants climbed over the wall with a gun. The assailants were therefore not ordinary visitors. They were violent.

As to the use or threat to use deadly weapons. Robbery becomes aggravated in terms of section 286 (2) of the Penal Code Act where there is a use of a deadly weapon or where it results with death or causing grievous harm.

In the instant case PW3 and PW4 testified that the assailants had a gun and a panga, among the weapons they saw. The gun was however not fired. Therefore it could not qualify to be a deadly weapon under section 286 (2) of the Penal Code Act: See **Wasajja**.

However, according to PW3 and PW4 the assailants had a panga which they used for cutting the complainant (PW3). Dr Bamudaziza (PW2) who examined the complainant testified that he had multiple cut wounds on the scalp of various sizes. There were also bruises and soft tissue

injuries on the back and upper limbs (the arms). He classified those injuries as grievous harm and that both sharp and blunt instruments were used to inflict them. The defence did concede that from the wounds which the complainant sustained, there was proof that the panga was a deadly weapon. Considering the above evidence in totality I do agree that the prosecution has proved that whoever robbed the complainant did have a deadly weapon, which was a panga.

I now proceed to the last but most crucial ingredient whether the accused participated in the alleged offence.

The evidence upholding the accused was from PW3 and PW4 who testified that they saw and identified the accused person plus another person called Faruk (who escaped from custody). They stated that they knew all the accused persons and were able to identify them using a lamp which they had in the house and torches used by the accused.

Both accused persons denied the offence and set up alibi in defence. The evidence against the accused was based on visual identification. It is trite law that court can convict on this category of evidence but after cautioning itself and the assessors of the dangers that may result as a result of mistaken identity. The task of the court is therefore to look into the circumstances under which identification took place whether they were favourable for proper identification. The above principle was developed since the decision of **RORIA Vs R.**

In the instant case I find that the identification of the accused was free of error. Both witnesses knew the accused before as coming from the same village. There was hurricane lamp in the house, which enabled them to identify the accused person. The incident took some time to give the witness opportunity to observe the assailants. The assailants blew off the lamp after they had been identified. PW3 had time to request the assailants to spare his life and told them to get money from PW4. PW4 then gave the money to Siraj but Faruk grabbed it from him. From that point I cannot say that the witnesses were too scared to be able to identify their assailants. All these were emphatic that they identified the assailants and I do believe they did.

I therefore find that the accused were among the gang who robbed Kyakulaga. Their defence raised could not be believable. They were positively identified at the scene that night.

It was not true that the accused ever went to the scene nor to the place where the complainant was taken for treatment. In conclusion, I find that the prosecution witnesses were credible witnesses who positively identified the accused persons. I also find that all the accused persons acted in concert during their raid on the complainant. As Faruk was with Siraj Mohamed was standing at the door. Therefore the accused persons action in concert in terms of section 20 of the Penal Code Act. I therefore find both of them guilty as charged and convict them accordingly.

RUBBY AWERI OPIO

J U D G E

17/3/2005.

Court:-

There is only one sentence upon conviction of aggravated robbery. The accused are sentenced to death in the manner and procedure determined by our law.

RUBBY AWERI OPIO

J U D G E

17/3/2005.