

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA**

HCT-05-CR-CSC- 0029-2005

UGANDAPROSECUTOR

VS

A1. NTUNGUURA JAMES)

A2 TUSIIME DENIS)ACCUSED

A3 TWINOMUJUNI LEONARD)

BEFORE: THE HON. MR. JUSTICE P K MUGAMBA

JUDGMENT

Ntunguura James (A.1), Tusiime Denis (A.2) and Twinomujuni Leonard (A.3) are jointly indicted for aggravated robbery, contrary to sections 285 and 286 (2) of the Penal Code Act. The prosecution called four witnesses to prove its case. PW1 was Alex Muhimbise, PW2 was Nalongo Aisha, PW3 was No. 21024 D/Cpl Joseph Byakagaba while No. 19100 D/Cpl Eric Rwakatooke testified as PW4. All three accused persons gave their defence statements on oath. They did not call witnesses.

The prosecution case is that on the night of 17th March 2004 the three accused persons mounted an illegal road-block at Kyegwisa village and in the course of the exercise stopped vehicles and robbed money, cell phones and shoes from passengers while threatening to use a gun they carried. Later all accused persons were arrested and charged with the instant offence. The prosecution has the onus to prove the charge against an accused person beyond reasonable doubt. See *Sekitoleko vs Uganda* [1967] EA 531. Where the charge is aggravated robbery the prosecution ought to prove beyond reasonable doubt that there was theft on the occasion, that there was violence or a threat to use violence then, that a deadly weapon or deadly weapons was/were used or threatened to be used and that all the accused persons or any one of them participated in the crime.

It was the evidence of PW1 that at the road-block he was accosted by men who took his Panasonic cell phone GD 55, his Shs. 164,000/= and the shoes he wore. The cell phone was received in evidence as Exhibit P.1. On the other hand PW2 testified that the men at the same roadblock first took Shs. 40,000/= from her and later took a further Shs. 700,000/= also from her. That money was never recovered. But PW1 and PW2 reported the respective thefts to Police. This evidence was never contested. I am satisfied the prosecution has proved that there was theft on the occasion beyond reasonable doubt.

Both PW1 and PW2 in their respective testimonies stated that the thugs at the road-block forced them to come out of their vehicles and lie on the ground as they demanded for money. As a matter of fact the thugs took with them the shoes that PW1 was wearing at the time. The evidence of PW2 shows after she had handed over Shs. 40,000/= to the thugs the thugs said if any more money were discovered they would shoot. She said that is when she handed over Shs. 700,000/= to them. From the above testimonies I am satisfied the prosecution has proved beyond reasonable doubt that there was a threat to use violence.

Where the charge is aggravated robbery it behoves the prosecution to prove that a deadly weapon was used or threatened to be used. For the record no bullet was discharged at the scene. It was also the evidence of PW1 that what appeared like a gun held by the thugs was actually a stick. It has been conceded by the prosecution itself that it could not prove there was a deadly weapon at the scene. Given all the above I find the prosecution has not proved beyond reasonable doubt that a deadly weapon was used or threatened to be used on the occasion.

Ultimately the prosecution must prove that the accused persons or any of them participated in the alleged offence. It was the evidence of PW1 that he identified A.1 at the scene. He said he was able to identify A.1 because A.1 stood in front of the car in which PW1 sat and light emitted by the truck parked behind the car enabled PW1 identify A.1. PW1 testified that both he and A.1 at the time worked for Ibanda Town Council where A.1 was one of about 50 LDU in the Council's employ.

PW1 further testified that he had known A.1 in that capacity since the year 2000 and knew him to be a resident of Kyabarende. As soon as he could do so PW1 had told Police that night that he

had identified A.1 amongst the thugs. The evidence of PW1 is of identification. In Roria v Republic [1967] E.A. 583, 584 the Court of Appeal for East Africa noted:

‘A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner LC. said recently in the House of Lords in the course of debate ----“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases of them — if they are as many as ten — it is on a question of identity” — That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.’

In Moses Kasana vs Uganda [1992-1993] HCB 47, 48 court observed:

‘Where the conditions favouring correct identification are difficult there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and a fabricated alibi.’

Needless to say the identification is said to have taken place at night and PW1 testified he was able to identify A.1 owing to light from the truck parked behind him, It was the evidence of PW2 that as soon as the truck arrived at the road-block they were ordered to turn off its lights. It is not clear in the circumstances how such opportunity PW1 had to identify A.1 given that lights had to be switched off abruptly. In his defence accused stated that he never went to the scene at the time alleged because he was at his home. Indeed later that night accused was arrested at his house. When an accused person sets up a defence of alibi he is not under a duty to prove it. It is the responsibility of the prosecution to disprove the alibi by adducing evidence which destroys it and places accused at the scene of crime. See Sentale vs Uganda [1968] EA 365. I have considered the uncorroborated evidence of identification by PW1 alongside the defence of alibi. Given the circumstances prevailing then it is possible it was mistaken identity. I do not find the alibi to have been disproved. A.1 has not been proved beyond reasonable doubt to have participated in the alleged crime.

With regard to A.2 no evidence contradicts his defence of alibi. I do not find he ever participated in the alleged crime therefore.

Concerning A.3 it is the evidence of PW4 that he arrested him on suspicion of being 'a wrong person' in the area. Whatever that means. When A.3 was searched by PW4 two cell phones were found on him, one of which was identified to be the one which had been stolen from PW1 during the robbery. It is Exhibit P.1. Consequently A.3 was detained and charged with the offence of having been found with property suspected to have been stolen and thus a possible participant in the robbery. In his defence A.3 denied having had the alleged cell phone on him. It was his evidence he was arrested from Kasese and brought to Ibanda by Police. He said he was not at the scene of the robbery on the night in issue but that he was in Kasese where he lived. As noted earlier when accused sets up a defence of alibi he does not bear the responsibility to prove it. The evidence against him is that of having been found with the cell phone which was stolen from PW1 in circumstances already reviewed. Even if A.3's denial of having been found with the cell phone were to be disregarded evidence of him being found with the item and therefore culpable is but circumstantial. For once there could be a possibility of the phone having been passed on to him through purchase. It was about two months since the robbery and a cell phone can be described as a 'hot item' he could have received second or third hand. I am therefore mindful that there could be co-existing circumstances which could weaken or destroy the inference of accused's guilt of receiving stolen goods with guilty knowledge. See *Abudu Kyagulanvi vs Uganda* [1988-1990] HCB 16. Taking everything into account I do not find the prosecution has proved beyond reasonable doubt that A.3 participated in the alleged robbery.

The two assessors in their joint opinion advised me to find A.1 and A.3 guilty as charged but to acquit A.2. I do not wholly agree with their considered opinion. For the reasons I have given in the course of this judgment I find all accused persons not guilty. They are acquitted of the charge.

P.K. Mugamba

Judge

17th April 2008

