THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL SESSION CASE NO.200 OF 2006

UGANDA ::PROSECUTOR

VERSUS

1. **RA 161787 PTE SEKIRANDA MUSA**
2. **190026 PTE SENTOOGO K. ABUBAKARI} ::::::::::::::::::::ACCUSED AND OTHERS**

Before: Hon. Mr. Justice E.S Lugayizi

JUDGMENT

The indictment, etc:

RA 161787 Private Sekiranda Musa (AI) and 190026 Private Sentoogo K. Abubakari (A2) and others still at large were indicted for the offence of aggravated robbery contrary to sections 285 and 286 (2) of the Penal Code Act (Cap. 120). The particulars of the offence in the indictment were as follows:

"PARTICULARS OF OFFENCE

... RA* 161787 *PTE Sekiranda Musa ... and ... 190026 Private Sentoogo K. Abubakari and others still at large during the night of the 5th day of October 2005 at Kimotozi village in the Nakaseke District, robbed MUZAARE BENON of cash shs.* 1.25 *million (One million Two hundredfifty thousand) and at or immediately before or immediately after the said robbery used a deadly weapon to wit a gun against the said Muzaare Benon. "

On arraignment the accused persons denied the above offence. Therefore, Court proceeded to try them.

The State's
case, etc:

In a bid to prove its case against the accused persons the State called the following witnesses: **Muzaare Benon (PW1), Byabagambi Simon (PW2), Major Kitayimbwa Willy (PW3); and Dr. Kayondo Moses (PW4).**

In very brief terms the above witnesses testified as follows:

During the night of 5th October 2005 at around 1.00 a.m. in Kimotozi village in Nakaseke district an attacker broke into Muzaare's house and entered it. The said attacker carried a

torch that he flashed around. He also had a gun and wore army boots. In his brief encounter with Muzaare the attacker hit Muzaare and finally made off with Muzaare's money amounting to a sum of shillings I.25/=m. Soon afterwards, Muzaare heard an alarm coming from the direction of his brother's home. The brother (i.e. Byabagambi) lived 80 meters away from Muzaare's home. Byabagambi's narrative touching the events that took place at his home during the night in question was as follows: At around 1.00 a.m. that night an attacker entered Byabagambi's house. The said attacker carried a gun; and flashed a torch around. The torch was tied on the gun. The attacker, then, hit Byabagambi several times telling him to wake up. In turn, Byabagambi jumped out of bed; and grabbed the attacker. Thereafter, the two men struggled with each other. They eventually fell down, rolled out of the house and strayed into the compound. Byabagambi raised an alarm hoping that some one would come to his rescue. However, no one turned up. Eventually the attacker, who had by now let go of the gun, reached out for a knife and stabbed Byabagambi in the ribs. Byabagambi bled profusely, but continued to hold the attacker firmly. Subsequently, the attacker raised an alarm; and called for help. At this point, another attacker appeared at the scene. He came from the direction that the torch lit up well. The second attacker quickly advised his friend to release Byabagambi. Following that advice the first attacker lifted Byabagambi and threw him into a nearby bush. The two attackers, then, disappeared from the scene of the struggle. People gathered; and took Byabagambi to hospital where he received treatment. However, during the above events Byabagambi was able to recognise Al and A2 as his attackers because the scene of the struggle was well lit by light from AI's torch. Byabagambi also knew A 1 and A2 before the attack in question took place, for he had seen the duo at the army barracks and at his home where they used to buy chickens. On his part, Muzaare testified that a person called Muhindo was his attacker during the night in question.

The defence
case:

In their respective defences Al and A2 denied the State's case. They each suggested that they were framed.

The burden of proof and the standard of proof:

One of the cardinal principles of our law is that in criminal cases the burden of proving that an accused person committed a given offence lies on the prosecution. This burden known as *"the **burden** of proof*' does not shift upon the accused person unless statutory law clearly says so. (See Woolmington v DPP (1935) AC 462; and Bigirwa Edward v Uganda Criminal Appeal No. 27 of 1992 (Unreported».

Another important principle of our law is that the standard of proof in criminal cases is *"beyond reasonable doubt."* This is a very high standard. However, it does not mean that to meet it the State must adduce such evidence as would prove its case to the hilt (i.e. beyond any shadow of doubt). Instead, it means that the State must present a strong case that reflects a high degree of probability that the accused committed the offence in question. In Miller v Minister of Pension (1947) 2 All ER 372 at pages 373-374, the judge pointed out that where the evidence against a man is so strong as to leave only a remote possibility in his favour,

which can be dismissed with the remark that *"0/ course it is possible but not in the least probable"*, then the State has proved its case.

Other important principles of law that are relevant to this case:

There are a number of other important principles of law that are relevant to this case, but at this point Court will mention only one of them; and it is as follows: In a case of this nature (where several persons are jointly tried for committing a given offence) in determining culpability Court has a duty to handle the State's case against each of them separately and individually. If Court does not do so, but resorts to handling matters in an omnibus way such procedure could prejudice all the accused persons or some of them.

The ingredients of aggravated robbery:

The ingredients of the offence that the State had to prove in order to succeed in the case against Al and A2 were as follows:

(a) that there was a theft against the victim during the night in question;

(b) that the attackers used violence or threatened to use violence against the victim during the theft;

(c) that the attackers used or threatened to use a deadly weapon against the victim at or immediately before or immediately after the said offence; and

(d) that A1 and A2 participated in committing the above offence.

(see sections 285 and 286(2) of the penal code Act cap. 120)

Failure to prove any of the above ingredients would mean failure, on the part of the State, to prove the indictment.

Court will below discuss each of the above ingredients in relation with the law and the evidence on record.

(a) The first ingredient
(*that there was a theft against the victim on 5th October 2005):*

The law:

The law relating to theft is rather complicated, but it is found in **sections 253 and 254 of the Penal Code Act (Cap. 120).** For the sake of brevity and clarity, Court will summarize the nature of theft projected in the indictment as follows: That type of theft is committed once the following things are in place:

(a) a person takes away from another person an inanimate, movable thing that is capable of

being stolen;

(b) the person who takes away the above thing must do so without a claim of right; and

(c) an intention to use the money at his or her will must accompany the above acts.

(d) *The State's case:*

The State solely relied on the testimony of **Muzaare (PW1)** III a bid to prove this particular ingredient of the offence.

On 5th October 2005 at round 1.00 a.m. as Muzaare was sleeping at his home in Kimotozi village an attacker entered his house. He took away from Muzaare a sum of shillings 1.25/=; and vanished.

AI's and A2 's *respective defences:*

The decision of Court in re of the 1st ingredient:

Court believes that Muzaare was a truthful witness; and that his testimony to the effect that the attacker took away a sum of shillings 1.25/= from him represents the truth. Court further believes that money is an inanimate, movable thing that is capable of being stolen. Besides, the attacker had no claim of right upon Muzaare's money; and it seems that in taking away the money in question his intent was to use it at his will. For thereafter, Muzaare lost control over the said sum of money. In short, therefore, what the attacker did during the night in question amounted to an act of ***"theft"*** against Muzaare.

All in all, Court is satisfied that the **State proved beyond reasonable doubt that there was a theft against the victim on 5th October 2005.**

(b) The second ingredient

(*that* the *attackers used violence or threatened to use violence against the victim during the theft):*

Definition of the word violence:

Before Court considers the evidence relating to this aspect of the case, it thinks it is appropriate to define the key word in this area (i.e. the word ***"violence"***). Webster's New **World Dictionary (2od College Edition)** defines the word ***"violence"*** *as* follows:

> ***"Physicalforce used so as to injure, ... ; extreme roughness of action ... or explosively powerful force or energy."***

The State's case:

In a bid to prove this aspect of the case again the state relied on Muzaare's testimony.

Briefly Muzaare's testimony was as follows;

In night in question an attacker entered Muzaare's house. He hit Muzaare before he made off with his money.

AI's and A2's respective defences:

In their respective defences A1 and A2 denied the state's case.

The decision of Court in re of the 2nd ingredient:

Earlier on, Court made a finding that Muzaare was a truthful witness. Therefore, Court has no difficulty in believing that the above part of Muzaare's testimony that shows that the attacker hit Muzaare before he stole the money in question, represents the truth. In other words, the attacker used physical force (i.e. violence) that was directed to injure Muzaare during the theft.

All in all, Court must find that **the State proved beyond reasonable doubt that the attacker used violence against the victim during the theft.**

(c)The third ingredient

(*that the attackers used or threatened to use a deadly weapon against the victim at or immediately before or immediately after the said offence)*

The State's case:

Under this ingredient the State once again relied on **Muzaare's** testimony in a bid to prove its case.

In a nutshell Muzaare's testimony was as follows:

The attacker who stole the money in question carried a gun at the material time.

AI's and A2's respective defences:

In their respective defences A1 and A2 denied the state's case.

The decision of Court in re of the 3rd

ingredient:

> It *"includes any instrument made or adaptedfor shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. "*

From the above definition it is apparent that a gun would only qualify to be called a deadly weapon if it is capable of shooting or firing with a likelihood of causing death. (See Wasajja v Uganda (1975) E.A. 181) Therefore, the all important question to answer here is whether the gun that the attacker carried at the material time was capable of shooting or firing with the likelihood of causing death. The evidence on record does not provide an answer to that important question. Indeed, it is even possible that the alleged gun was simply a toy! In any case Mr. Od it, in his final submissions, conceded that the State did not succeed in proving this particular ingredient.

All in all Court has no choice, but to make a finding that the State failed to prove beyond reasonable doubt that the attacker used or threatened to use a deadly weapon at or immediately before or immediately after the said offence.

(e) **the fourth ingredient** (*that Al and A2 participated in committing the above offence):*

The State's case against AI:

The state relied solely on **Byabagambi's** testimony in a bid to prove its case against A1.

Briefly Byabagambi's testimony was as follows:

The attacker who entered Byabagambi's house during the night of 5th October 2005 at around 1.00 a.m was AI. Byabagambi knew Al before by name, as Sekiranda. He struggled with Al for I hour or so; and was able to recognize him because torch light lit the scene of the struggle.

AI's defence:

In his defence A1 denied the state's case: ad suggested that it was a frame up.

The decision of Court in re of AI:

Court is of the opinion that Byabagambi was a truthful witness. However, courts have time and again insisted that the evidence of identification by a single witness, especially, in difficult circumstances must be tested with greatest care before relying on it to convict an accused person. The reason for that insistence is the danger of the likelihood of victimizing an innocent person as a result of mistaken identification. Consequently, where a court is faced with the above situation it must first of all warn itself of the above danger. If, thereafter, it is satisfied that the conditions existing at the time of the offence were conducive to correct identification of the accused it would proceed to act upon the above evidence. However, where a court is not satisfied that such conditions existed at the time of the offence, it would then look for some *"other evidence"* circumstantial or direct that would support the evidence of identification before it proceeds to act upon such evidence. **(See Abdulla Bin Wendo and another v R (1953) 20 E.A.C.A 166; Roria v Republic (1967) E.A. 583; and Abdulla**

Nabulere and others v Uganda Criminal appeal No. 9 of 1978 reported in the 1979 HCB at page 77, which are the leading authorities in this area of criminal jurisprudence.)

This Court is mindful of the danger it has pointed out above; and is of the opinion that the factors that favoured correct identification of Byabagambi's first attacker were as follows: (a) torch light lit the scene of the struggle as the first attacker engaged Byabagambi; (b) the first attacker was not a stranger to Byabagambi. (Byabagambi knew him by name and used to see him at the nearby army barracks and whenever he would visit Byabagambi's home to buy chickens before the above events happened); and (c) the whole episode lasted 1 hour or so.

On the other hand, the factors that disfavoured correct identification of the above attacker were as follows: (a) the above events took place at 1.00 a.m (i.e. deep into the night); (b) the attack was sudden and it must have taken Byabagambi, who had been asleep, by surprise; (c) the first attacker carried and wielded something that looked like a gun; and (d) in the course of the struggle the first attacker stabbed Byabagambi with a knife in the ribs and seriously wounded him.

After carefully considering all the above factors Court is of the opinion that the factors that favoured correct identification by far outweighed the factors that disfavoured it. Indeed, Byabagambi knew Al before; and torch light lit the scene of the struggle at the material time. Besides, the whole episode lasted a very long time. For those reasons, Court is satisfied that Byabagambi correctly identified the first attacker as AI.

However the above finding is not the decisive factor in determining AI's culpability in respect of the offence in the indictment. For the events Byabagambi narrated above were separate and different from the incident that took place at Muzaare's home; and is the subject of the indictment. In addition, the evidence on record also reveals that Byabagambi's home lies 80 metres away from Muzaare's home. Therefore, in the absence of cogent evidence connecting A I to the offence that was committed at Muzaare's home during the night in question, it would be wrong to jump to an unfounded conclusion. Consequently the crucial question to pose here is this: Is there cogent evidence on record that the State led, which connects A 1 to the offence in the indictment?

The State thought there was such evidence; and that it was founded on this premise: The persons who attacked Byabagambi during the night in question were the same persons who attacked Muzaare that night. After all, Muzaare's testimony also suggested that his attacker had connections with the army because he wore army boots and had a gun at the material time.

After carefully considering the above view or submission Court thinks that it is not helpful in establishing that there is cogent evidence on record connecting Al to the offence in the indictment. This is particularly so, since the said view or submission is speculative and largely founded on suspicion. (**See Israili Epuka s/o Achieto (1934) 1 E.A.C.A. 161 at page 168.)** This means that the State did not succeed in leading cogent evidence to connect Al to the offence that was committed at Muzaare's home during the night in question.

All in all, therefore, Court is satisfied that **the State failed to lead sufficient evidence to prove that Al participated in committing the offence in the indictment.**

The State's case
against A2:

Again the State solely relied on **Byabagambi's** testimony in a bid to prove its case against A2.

Soon after (AI) entered Byabagambi's house during the night in question Byabagambi grabbed him. The two men fought and later fell down. They rolled from the house into Byabagambi's compound; and continued to struggle for a very long time. Eventually, Al called for help. Soon afterwards a second attacker appeared at the scene of the struggle. Byabagambi was able to recognize him as A2 (i.e. Sentoogo). He knew A2 before; and he saw him with the help of torch light that lit the scene of the struggle. A2 quickly advised Al to release Byabagambi. In turn, Al lifted Byabagambi and threw him into a nearby bush. A I and A2 then vanished from the scene of the struggle.

A2's defence:

In his defence A2 denied that state's case; and suggested that it was a frame up.

The decision of Court in re of A2:

Like in A I' s situation above, Byabagambi' s evidence of identification in respect of A2 is evidence of a single witness in difficult circumstances. Consequently, the same law Court applied in AI's situation above also applies here with equal force.

The factors that favoured correct identification of Byabagambi's second attacker were as follows: (a) torch light lit the scene of the struggle at the time the second attacker appeared thereat; and (b) the second attacker was not a stranger to Byabagambi. (Byabagambi knew him by name and used to see him with Al at the nearby army barracks and whenever Al went to buy chickens from Byabagambi's home before the above events happened.)

On the other hand, the factors that disfavoured correct identification of Byabagambi's second attacker were as follows: (a) the above events took place at 1.00 a.m (i.e. deep into the night); (b) the attack was sudden and it must have taken Byabagambi, who had been asleep, by surprise; (c) weapons carried and wielded against Byabagambi during the attack included something that looked like a gun ; (d) by the time the second attacker came to the scene of the struggle Byabagambi had fought A I for a very long time and Byabagambi was, by then, very tired and seriously injured; and (e) the second attacker did not spend a long time at the scene of crime before he vanished.

After considering all the above factors Court is not sure that at the time the second attacker came to the scene of the struggle Byabagambi was, physically and mentally, in a position to identify that attacker correctly. To make matters worse, it seems the second attacker visited the scene of the struggle only fleetingly. It is also possible that after recognizing A I, as the first attacker, when the second attacker appeared at the scene of the struggle Byabagambi simply jumped to the conclusion that the said attacker was A2. This is particularly so, since in some area of his evidence Byabagambi testified that before the events in question took place he often saw Al and A2 moving in each other's company.

In view of the foregoing, Court thinks that it is only fair to give A2 the benefit of doubt. This means that Byabagambi did not correctly identify the second attacker, as A2. Therefore, unlike AI's situation above it is unnecessary to consider here whether there is cogent evidence on record connecting A2 to the offence that was committed at Muzaare's home during the night in question.

All in all, Court is satisfied that **the State failed to lead any evidence to prove that A2 participated in committing the offence in the indictment.**

Conclusion:

In conclusion, it is apparent that out of the four ingredients of the offence in the indictment the State managed to prove only two of them (i.e. the 1st; and the 2nd ingredient). It failed to prove the rest of the ingredients (i.e. the 3rd and the 4th ingredient). Therefore, in full agreement with the lady and gentleman assessors (for the reasons given above) Court must acquit Al and A2 of the offence in the indictment; and it is so ordered.

Comment:

However, before Court takes leave of this matter it wishes to comment on two things:
Firstly, whether or not Al committed any offence against Byabagambi is not a matter that this judgment was supposed to deal with. This is particularly so, since there is no specific count in the indictment covering the events that could have given rise to such offence. Further more, it is also doubtful that such offence might fall under the description of a minor cognate offence of the offence in the indictment in the absence of a clear nexus between the above two offences.

Secondly, in cases of this nature, the absence from the court record of evidence (of any police officer) relating to the arrest of the accused persons, etc, leaves a bad taste in the mouth. **(See Bogere Moses and Kamba R. v Uganda - Criminal Appeal No. 1 of 1997 - a Supreme Court decision.)**

E.S Lugayizi (J)

8/2/2008

Read before: At 2.45 p.m.
Al and A2
Mr. Odit (PSA) for the DPP
The 2 assessors
Ms. P. Nsaire c/clerk