

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

HCT-05-CR-SC-111/2006

UGANDA.....PROSECUTOR

VS

A1 MUSHURO BURUHANI)

A2 TIBEMANYA ELIASAPH).....ACCUSED

B E F O R E : THE HON. MR. JUSTICE LAWRENCE GIDUDU

J U D G M E N T

Mushuro Buruhani and Tibemanya Eliasaph hereinafter referred to as A1 and A2 respectively are jointly indicted with robbery contrary to sections 285 and 286 (2) PCA. They both pleaded not guilty.

The prosecution adduced evidence to the effect that on the evening of 26/1/2005 while Karebwa John (PW1) was returning home at about 8.30 p.m. he was attacked by people who ordered him to stop. They flashed at him with a torch. He was hit with a gun and fell down. He raised an alarm. Some assailants ran away while others searched his pockets and removed Shs. 70,000/= which he had.

He struggled with one of the attackers until people came to his rescue and arrested A1. He was bleeding on the face and was taken for treatment. The scene was searched that night and a magazine of an UZI gun was recovered with eight bullets. A1 was taken to Police and charged. Later, A2 was arrested and jointly charged.

A1 denied the charges and in his sworn defence contended that on that

night, he was coming from Kamwezi heading to Ntungamo when he was attacked by unknown persons who beat him into unconsciousness. They took his cow which he had got from his brother. He regained consciousness after 3 days when he was in Itojo hospital. He was surrounded by policemen who arrested him and charged him.

A2 also denied the charges and contended that he was surprised to be arrested from his home by Policemen. He testified that on 27/1/2005 he went to dig a community road under the leadership of PW1 but PW1 told them to go back since he (PW1) had arrested a stranger on the village the previous night. On 1/9/2005 he was arrested from his home and denies the robbery charges.

Once the accused denied the charges, the burden lay on the prosecution to prove all the essential ingredients of the offence beyond reasonable doubt. The accused persons do not have a burden to prove their innocence and if there is reasonable doubt at the end of the trial, then the accused are given the benefit of the doubt and acquitted.

See Uganda vs. Dusman Sabuni [1987] HCB 1. And Sekitoleko vs Uganda [1967] EA 531.

To sustain an indictment for aggravated robbery, the prosecution must prove the following ingredients:

- (i) That there was a theft.
- (ii) That there was use or threat to use actual violence.
- (iii) That the assailant was in possession of a deadly weapon or caused death or grievous harm.
- (iv) That the accused participated.

See. Section 285 and 286 (2) PCA

As regards the element of theft, the prosecution is required to prove that an item capable of being stolen was taken from the complainant with the intention to permanently deprive him of the same. Susan Okalany, the learned Principal State Attorney submitted that PW1 who had given an account of how he came to possess 70,000/= was robbed of the same by the assailants and when PW4 and PW5 (Twebaze Agnes and Sgt.Tibesigwa) arrived at the scene, PW1 reported to them that 70,000/= had been robbed from him which confirms that theft occurred.

Lydia Ahimbisibwe, the learned defence counsel countered this submission by contending that PW1 could not have had that amount of money and other witnesses did not testify to that fact. From the evidence on the record, PW1 explained that he was in the business of buying and selling goats and so he always moved with money ready to purchase goats on sale. That when he fell down, Korwetisa and Twijukye Benon who were part of the gang searched his pockets and made off with 70,000/=.

PW4, Twebaze Agnes, who had been with PW1 that evening also testified that soon after she had parted company with PW1, she heard him raise an alarm and when she ran to the scene, she

found PW1 struggling with a man and told her the man was part of a gang that had robbed him of 70,000/=.

PW5. Sgt. Tibesigwa John, who went to the scene following a report to Kayonza Sub County Local Administration Police and effected the arrest of A1 also testified that PW1 who was bleeding reported to him that he had been robbed of 70,000/=. This money has never been recovered. With respect, the submission by the defence that other witnesses did not testify about the money is without foundation.

On the contrary, PW1 reported to his rescuers that he had lost 70,000/= to the attackers. This report was immediate and I believe and accept PW1's explanation of how he used to move with money of that amount in the village.

Consequently it is my finding that theft of 70,000/= occurred on that night on the person of PW1.

The second ingredient is whether there was use or threat to use actual violence. The prosecution evidence is that the attackers threatened PW1 with death and proceeded to assault him causing serious injuries on his face.

PW2 (Muhwezi) testified that he heard an alarm somebody calling that he was being killed. He went to the scene and recovered a magazine of an UZI gun which he handed to PW5. PW4 and PW5 testified that PW1 was bleeding on the face while PW9 (Dr. Mugisha) who tendered the PF 3 filed by his colleague Dr. Kworora who is indisposed and could not attend court testified that PW1 was examined on 2/2/2005 and found to have injuries on the forehead classified as dangerous harm. He also had a

wound on the left side of the head also classified as dangerous harm. He had a cut wound on the upper lip classified as harm. The wounds were

stitched and PW1 was given anti-biotics.

The defence submission did not come clear on this element save for imputing that it is A1 who was the victim of the violence and not PW1.

However, the testimony of PW1 is that when he was assaulted, he held onto one of the attackers and a serious struggle ensued as the attacker wanted to free himself. This struggle led to the magazine to fall off and one of the gum boots of the attacker came off one of his legs. In the process he was injured and bled seriously. There is no doubt that the scene which PW2, PW4 and PW5 also witnessed bore every sign of actual violence. This ingredient has been proved beyond reasonable doubt.

I now turn to the issue of whether the assailants were in possession of a deadly weapon, or caused death or grievous harm. The State contended that it had not established the fact of a deadly weapon but that PW1 who was the victim of the robbery suffered grievous harm as defined in S. 2 (f) PCA.

The defence submitted that the injuries suffered by PW1 were stitched at Rwahi Health Centre on 27/1/2005 and the classification by PW9 done on 2/2/2005 which is a week after could not be exact unless he opened up the wounds. PW9 testified that the injuries of PW1 were near the brain and that is why they were dangerous as they could lead to death. In cross-examination, PW9 testified that the danger depends on the part of the body the harm is inflicted.

There is no doubt that the head on which wounds that were stitched were inflicted houses the brain which is a very vulnerable part of the body. It is responsible for the functioning and coordinates all other organs of the body. It is a control centre so to speak.

Both Dr. Kworora and PW9 are qualified medical doctors whose knowledge about the injuries could not be disputed. I have no difficulty finding that the injuries suffered by PW1 amounted to grievous harm within the meaning of S. 2 (f) PCA. Accordingly this ingredient has been proved beyond reasonable doubt.

The last major issue for consideration is who robbed PW1 and inflicted the injuries he sustained?

The prosecution submission is that A1 was caught red-handed at the scene and the rescuers like PW2 and PW4 saw him and when PW5 came to arrest him, he recognized him. The defence contended that A1 was a victim who was robbed of his cow and assaulted until he became unconscious. He only regained life when he was in Itojo hospital from where he was surprised to be arrested by the Police.

An accused who denies the offence has no burden to prove his innocence. It remains the burden of the prosecution to prove him guilty by adducing evidence that places him at the scene of the crime and connect him to the offence.

In the instant case, the credibility of the A1's defence does not raise doubt in the prosecution case. His version that he was driving his cow through the village and was attacked and beaten

unconscious only to be arrested by Police that was waiting for his

recovery at Itojo hospital is incredible against the prosecution evidence that he was arrested at the scene by PW1 with the help of those who answered

the alarm like PW4 and others.

PW5 who is the first arresting officer knew A1 very well. PW5 was in company of P/C Biryomumaisho (PW8) when he went to the scene and arrested A1. They took him to Rwahi Police post. He was eventually charged with this offence as a result of this arrest. This evidence taken together with the testimony of PW1 is straightforward and clearly puts A1 at the scene and connects him to the offence charged. He was caught in the act of robbery and in agreement with the lady and gentleman assessors, I find that the prosecution has proved A1's participation in the crime beyond reasonable doubt.

As regards A2, he was identified by PW1 and reported this fact to PW4 who arrived shortly at the scene. PW1 named the assailants as Tibemanya, Byamukama, Sunday, Benon and Matovu.

The defence contended that A2 was not at the scene and PW1 could have been mistaken in identifying the voice of A2 as one of the assailants. A2 in his evidence testified that he saw PW1 on 27/1/2005 when he (PW1) was pinning up a notice telling villagers not to work on the community road that day because he (PW1) who is the area LC I Chairman had arrested an unknown person the day before. Again, I am mindful that A2 has no burden to prove his innocence and has no duty to prove his alibi.

The prosecution shoulders the burden to place him at the scene of the crime and connect him to the offence.

Like I warned the assessors, I warn myself that PW1 was the sole identifying witness in this case.

The court must approach PW1's evidence with caution and must be satisfied that PW1 was not mistaken and that his evidence is free from any possibility of error. Where identification is made under difficult conditions then the court should look for “ **o t h e r e v i d e n c e** ” to corroborate

the identification. This is because a witness may be honest and convincing but mistaken in regard to identification.

Factors to be evaluated include:

- Length of time the accused took observe the assailant.
- The distance between the witness and the accused.
- Conditions regarding source of light during the attack.
- Familiarity of the witness to the accused before the attack. See.

Abdalla Bin Wendo & another vs R 1953) 20 EACA 166.

See. Roria vs Republic [1967] EA 583

See. Abdulla Nabulere and others vs Uganda [9791] HCB 79.

See. Bogere Moses & another vs Uganda Criminal Appeal 1/1999 Supreme Court of Uganda.

In the instant case, the attack took place at night. It was 8.30 p.m. The attackers flashed a torch at PW1 and clearly, he could not see the assailants with certainty. As soon as PW1 was struck, he fell down and according to his evidence the others ran away save for two of them who searched his pockets and robbed him of 70,000/=.

In cross-examination, PW1 stated that he recognized A2 by face and even asked him why they wanted to kill him. That A2 replied that, yes they must kill him. When A1 struck him with a gun butt, A2 ran away. It is clear from this evidence that apart from the

voice commands given by A2; PW1 did not have sufficient contact with A2 during the scuffle. In this case, the prosecution requires other evidence pointing to the guilt of A2 from which the court can reasonably conclude that the evidence of identification by PW1 is free from the possibility of error.

PW4 who had been with PW1 that late evening testified that when she heard PW1 call her for help, she ran to the scene and PW1 named A2 as one of the attackers. He repeated the same name when PW5 arrived having received a report of robbery in the village.

PW6 D/C Betise who investigated the case and actually arrested A2 testified that when he received the police file in February 2005 PW1 had named A2, Sunday, Byamukama, Twijukye and another person as those who attacked him together with A1 who was already in court. All these suspects named by PW1 had ran away from their homes in the village and he could not arrest them.

Later when they returned, PW1 informed the Police and it was in August 2005 that PW6 got information they had returned.

On 1/9/2005 he went to Rwamirindi village and saw A2 on the opposite hill. He (PW6) went down the valley and met A2 who was armed with a panga. A2 was the area vice Chairman LC 1 while PW1 was the area Chairman LC 1. PW6 tricked A2 to lead him to look for somebody else and when A2 led the way, PW6 grabbed him and disarmed him of the panga and arrested him. This was over seven months from the date PW1 was attacked.

Since I am satisfied that indeed PW1 was robbed on 26/1/2006 and A1 was arrested and charged at that time, the possibility that

A2 was always available in the village until he was arrested on 1/9/2005 is remote. If A2 had always been available, he would have been arrested the following day since PW1 had named him to the Police while according to

PW6 was monitoring A2 and others whereabouts to arrest them.

A2's alibi is false and an afterthought. It is incredible that PW1 who was assaulted during that attack and was taken to Rwahi Health Centre while bleeding and was stitched could be seen by A2 in the village the following day on 27/1/2005 pinning up a notice stopping villagers from digging a village road because he (PW1) had arrested a stranger the day before.

The conduct of A2 and others at large by disappearing from the village soon after the attack on PW1 goes to show that A2 and others on the run were identified by PW1 on the night of the attack. Moreover, PW1 was the area LC 1 Chairman who knew his residents including A2 an LC official. PW1 must have recognized the voice of A2 who he knew very well and I have no doubt that these factors taken together offered correct identification. When he named A2 among the attackers soon after people came to his rescue proves that he was not mistaken. I am satisfied that A2 ran away from arrest and indeed when he reappeared, PW1 reported to the Police and PW6 arrested him. A2 was positively identified and placed at the scene of crime.

Finally taking the prosecution evidence as a whole for the reasons

I have given above, the defence of A1 and A2 collapses in view of overwhelming evidence against them.

The prosecution has proved the charge of robbery against A1 and A2 beyond reasonable doubt. Consequently, in agreement with the lady and gentleman assessors I find A1 and A2 guilty of the offence of robbery contrary to sections 285 and 286 (2) PCA and I convict each one of them as indicted.

Lawrence Gidudu
J u d g e

31/3/2009

31/3/2009

2 Accused present Pros –

Okalany Ahimbisibwe for

accused

3 Ngabirano - clerk

Court: Judgment read in open court.

Lawrence Gidudu

J u d g e

31/3/2009

Allocutus

Pros:

A1 - been on remand for four years and one month A2 - has
been on remand for 3 years and six months.

The convicts seriously injured the complainant. We pray for a long prison
term.

Ahimbisibwe:

Both accused are remorseful. They both have families. They should be given a lenient sentence.

A1

I am sickly and have T.B.

A2:

The period I have been on remand for over 3 years since September 2005. I pray for a lenient sentence so that I go and look after the children. I am now a saved person. I have learnt a lot in prison.

Reasons and Sentence

The convicts are first offenders

A1 is aged 61 years while A2 is aged 37 years. They have been on remand for 4 years one month and 3 years six months respectively.

In the course of the robbery, they inflicted grievous harm to the victim and took his money. Though a gun was in their possession, they did not use it by firing. The motive for the attack is still unclear but I consider a prison term to be appropriate rather than a maximum sentence of death.

Consequently I sentence each of the accused persons to five years' imprisonment.

Lawrence Gidudu

J u d g e

31/3/2009

Lawrence Gidudu

J u d g e

Court:

31/3/2009

R/A explained. 14 days file appeal to Court of Appeal.

Court:

Each one is to pay Shs. 35,000/= as compensation to PW1 and each is placed under Police supervision for 3 years.

Lawrence Gidudu

J u d g e

31/3/2009