

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

**HCT-05-CR-SC-065-2006**

UGANDA.....PROSECUTOR

VS

A1 TUMWEBAZE DENIS)

A2 ASHABA RICHARD ).....ACCUSED

A3 GUMISIRIZA FRED )

**BEFORE: THE HON. MR. JUSTICE LAWRENCE GIDUDU**

**J U D G M E N T**

On the night of 17/11/04, Sunday George William (PW3) was asleep in his house. He was woken up by people already in his house. They assaulted him and his wife before robbing him of money and other household properties.

The following day, Tumwebaze Denis alias Kagyere (A1), Ashaba Richard (A2) and Gumisiriza Fred (A3) were arrested and charged with robbery contrary to sections 285 and 286 (2) PCA.

All the three accused denied the charges hence this trial.

The prosecution case is that when PW3 woke up, people whose number he does not know were already in the house. They demanded for money lest they kill him. They tied him and his wife with ropes on both the arms and legs. They assaulted them with the flat sides of pangas until they surrendered money which was in a bag hung on the wall.

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There were many bags on the wall and<sup>2</sup> so A1 who PW3 had known prior as a village mate asked him to show them the correct bag on the wall which he did.

The assailants also took a bicycle, 2 cameras and clothes. A1 asked PW3 if the neighbours were around and he said yes.

The assailants went to break a neighbour's house and when he raised an alarm, they ran away.

Sekayiba James (PW7) who was returning home late heard the alarm raised by PW3's neighbor and he also heard PW3's wife groaning in pain. PW7 in company of another went to PW3's house. They found property scattered in the compound. The door to the house was open with a burning candle in the bedroom. They went in and PW7 found PW3 and his wife tied up. He untied them. He left for his home.

The following morning PW3 reported to local authorities that A1 and others had robbed him. A1 was arrested and when he was taken to an LDU Commander of the area, that Commander ordered for the arrest of A2 and A3 since PW3 said there were two other robbers in A1's group.

A1 denied the charges and stated that on the night of 17/11/04 he was in his house which he shared with his sister Nakayima Cisy (DW1) and never left the house until the morning when he was arrested very early by LDUs in company of PW3.

A2 also set up an alibi that he was in his home with his parents on the night of 17/11/04. He was arrested on 18/11/04 by an LDU.

A3 opted to keep quiet but his aunt Asiimire Mauda testified that on that night (17/11/04) A3 stayed in her house and never went out. That on 18/11/04, she sent him to Hospital to take food to his father (A3's) who was in hospital and he never returned. That she learnt on 19/11/04 that A3 had been arrested for robbing PW3. She confronted PW3 who claimed that A3 had been implicated by A1 and the matter was now in "Police hands".

In criminal cases the burden is upon the prosecution to prove the case against the accused throughout the trial. The accused have no burden to

prove their innocence.

Once the accused plead not guilty, the prosecution assumes the duty to prove all the ingredients of the offence against each accused beyond reasonable doubt.

See. ***Uganda vs Dusman Sabuni [1981] HCB 1.***

On the indictment for robbery contrary to sections 285 and 286 (2) PCA, the prosecution must prove the following ingredients

- (a) That there was theft.
- (b) That there was use or threat to use actual violence
- (c) That there was use of a deadly weapon or death or grievous harm caused to the victim.
- (d) That the accused participated.

On the ingredient of theft, the prosecution contended that PW3 lost a bicycle, clothes, flask and Shs. 150,000/= to the robbers. PW4 who is wife of PW3 put the figure robbed at Shs. 80,000/= plus a mattress and other property.

The defence took issue with the contradiction between the amount stated by PW3 and PW4 and concluded that there was no theft since the two must have lied.

With respect, the items stolen did not only include money and even then the exact amount may not as in this case be an issue since the robbers did not count it before the witnesses before taking it. Other property like a bicycle, mattress, clothes, cameras, flask were taken and when PW7 went in to untie PW3 and PW4, he saw property and papers scattered in the compound. The scene was clearly evidence of a robbery.

PW4 explained the source of the money and its destination. I am satisfied that theft was committed in the home of PW3 and PW4 on that material night. The property has never been recovered.

The second ingredient is whether there was use or threat to use actual violence.

PW3 and PW4 were sleeping peacefully when assailants attacked them in the course of which they were bound up on the arms and legs before their property was taken.

PW7 is the one who untied them after hearing PW4 groaning in pain. PW4 sustained a blunt injury on the abdomen. PW3 stated that PW4 was pregnant and bled from her private parts. PW7 heard her groan in pain. PW4 testified she was taken to hospital and admitted due to abdominal pains. The defence contested the medical report that PW4 suffered a blunt

injury yet she only had pains. Again with respect, pain is usually caused by an injury and in this case, it is logical to believe that such pain was caused by the assault on the couple by the assailants.

It was the evidence of both PW3 and PW4 that when they were beaten, they showed the robbers the money in the bag.

The essence of the offence of robbery is an openly committed theft from or in the presence of someone. Usually, and as

evidence in this case shows, the robber<sup>5</sup> uses force and violence to obtain their property. On the evidence of PW3 and PW4 which was corroborated by that of PW7, I am satisfied that there was use of actual violence on the victims before and during the theft of their property. This ingredient has been proved beyond reasonable doubt.

As regards the issue of deadly weapon, it was the prosecution case that PW3 and PW4 saw the pangas with the assailants and they actually used them in not only intimidating but actually assaulting them. They used the flat sides and not the sharp edges that would have cut them. The defence did not specifically make a submission on this ingredient.

Though not exhibited, the victims felt the impact of the pangas on their bodies. There was also light not only from the torches but also from the lit candle in the bedroom which even PW7 found still lit when he went in to untie the couple. I have no difficulty in finding that pangas which are deadly weapons within the meaning of S. 286 (3) PCA were used in this robbery. This ingredient has been proved beyond reasonable doubt.

The final ingredient for consideration is participation. All the 3 accused denied participation and each set up an alibi.

The resolution of this issue turns on the identification of the accused by the witnesses. The attack took place at night and I warned the assessors to approach the issue of identification with caution to rule out mistaken identity. The state contends that there was light from the candle in the bedroom and torch flashes from the assailants. That PW3 recognized A1 very well, talked to him and in the morning, went with PW6 to arrest him (A1) after reporting to the local authorities that A1 was amongst the robbers. That A2 was identified by PW5 - Nabaasa son of PW3 as the man who used to palm his hair like a woman. That A2 flashed at himself and asked PW5 if he had recognized him where upon PW5 lied that no in order to avoid being harmed. That A3 was revealed by A1. The defence contended that conditions for identification were poor since torch light must have

blinded the witnesses since light was<sup>6</sup> directed to their eyes. That PW5 did not properly identify A2 and A2 was not identified at all.

That the alibi is intact and each accused had accounted for his whereabouts on that night.

The law with regard to identification has been stated in a number of cases from ***Abdalla Bin Wendo & Another vs R (1953) 20 EACA. 166*** and ***Roria vs Republic [1967] EA 583.***

A fact can be proved by the testimony of a single witness but there is need to test with the greatest care the evidence of such a witness respecting identification especially when conditions favouring a correct identification were difficult.

And in *Abdalla Nabulere & Another vs Uganda* [1979] HCB 72, the court should examine circumstances in which the identification came to be made particularly length of time, the distance, the light, and familiarity of witnesses with the accused. If the quality of these factors is good, the danger of mistaken identity is reduced but where the quality is poor the greater the danger.

Applying the above principles on the case before me, PW3 and PW4 knew A1 before the attack, PW3 talked to him when showing him the bag containing the money and in confirming that the neighbours were around. There was candle light lit during the robbery and when PW7 went in moments after the assailants had fled, he saw the light from the candle and untied the couple (PW3 & PW4). The distance between the witnesses and the accused was zero in that they were tied by the assailants an act that brings them into body to body contact.

The morning that followed the attack PW3 went to report to local authorities and by 7.00 a.m. PW6 had proceeded to arrest A1 from his home.

The defence referred to the conditions of identification as being difficult since torch light may have blinded the witnesses. Further, that the accused accounted for themselves through their respective alibi.

True, an accused who sets up an alibi has no duty to prove it.

It remains the duty of the prosecution to place the accused at the scene.

See *Uganda vs D. Sabuni* r 19811 HCB 1.

As regards A1, his sister DW1 stated A1 did not leave the house at all until morning when he went out for a short call and was arrested by LDUs.

It is A1 that PW3 and PW4 say they recognized in their bed room in company of others. Of course a person cannot be in two places at the same time but can so be at different times.

A1's arrest did not come after an investigation of the case but upon a direct report by PW3 to the local authorities upon day break. Could it be that PW3 was mistaken in his identification of A1? After examining the conditions for proper identification, I agree with the gentleman assessor that A1 was placed at the scene through visual recognition and voice identification and

when day break arrived, PW3 went and reported to the local authorities that A1 had together with others robbed him. From the evidence of both the prosecution and the defence, I do not find any ill motive or a grudge that would make PW3 to lay a false charge on the head of A1. The quality of identification was good and factors for correct identification were favourable. Candle light that burnt through out the ordeal provided ample light. Torch light improved the quality of identification. PW7 found light in the room and both PW3 and PW4 were bounded on their bed so they could not have lit the candle while the assailants had gone. It must have been before or during the robbery. Having found that A1 was positively identified and placed at the scene, then his claim or the alibi that he was sleeping in his house at the material time must fail. He could have retired to his house after the offence.

I now turn to the participation of A2. The only identifying witness was PW5 the son of PW3. PW3 testified that PW5 told him A2 was one of the assailants and PW6 who arrested them testified that it is the LDU Commander who ordered the arrest of A2 and A3 presumably because they were buddies or used to move together. The LDU Commander did not testify in regard to the basis upon which he reached that conclusion. Similarly A3 is also said to have been arrested by PW6 on the orders of the LDU Commander who did not testify in court.


The prosecution in final submissions contended that A2 and A3 were arrested and charged upon information from A1. A1 denied knowledge of A2 and though he knows A3 as a village mate, he denied being with him on 17/11/04.



Further, PW5 was a child of tender years who did not take an oath. His evidence requires corroboration under S. 40 (3) TIA. While PW3 testified that PW5 revealed to him that he had recognized A2, there is no evidence that A2 was arrested on the basis of this information by PW3. On the contrary, PW6 who arrested all the accused testified that A2 and A3 were arrested because the LDU Commander one Iga directed so.

Without much ado, I find no corroboration to support the identification of A2 by the evidence of PW5. The gentleman assessor who advised me to convict though cautioned of this requirement in my summing up notes did not appreciate this legal requirement when he advised me to convict.

For the reasons I have endeavoured to give above, I find that the prosecution has not proved the ingredient of participation against A2 and A3 beyond reasonable doubt and I acquit each one of them. However, the prosecution has proved beyond reasonable doubt the participation of A1 in the crime and I find A1 guilty of robbery contrary to sections 285 and 286 (2) PCA and I convict him accordingly.

  
Lawrence Gidudu  
Judge  
31/3/2009

31/3/2009 3 Accused in dock Kinalwa

for state

Dhabangi holding brief for Kentaro

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Ngabirano for translation

Court: Judgment read in open court.

**Allocutus**

Pros:

- Convict first offender
- Been on remand for
- The maximum sentence is death
- I pray that the maximum sentence be imposed

  
Lawrence Gidudu  
Judge  
31/3/2009

3 years and 11 months

Dhabanqi:

- Convict is aged 24 years old, has wife and children.
- He prays for lenience.
- Has been on remand for 4 years and four months

Tumwebaze Denis

- I have been on remand for 4 years and some months, I ask for a one year prison term. I am sorry for what happened.

**Reasons and Sentence**


- Convict is a first offender, has been on remand for 4 years and 4 months and is remorseful. These factors are taken into account.
- Yet the state prays for the maximum sentence but without elaboration. This court would not impose a maximum sentence except in the most rare cases where circumstance justify. The victims in this case were not killed and even

when pangas were used, the blunt sides were used to inflict injury. No cuts were inflicted.

- There were just village rascals who went on a robbing spree stealing house holds items. They are part a nuisance. Considering the factors in the convict's favour, I sentence the convict to 7 years in prison. This will give him a lesson to live responsibly in future.

Lawrence Gidudu  
J u d g e  
31/3/2009

Court: R/A within 14 days explained.



Lawrence Gidudu  
J u d g e  
31/3/2009

Court:

Pursuant to S. 186 (4) PCA the convict shall compensate the victim to the tune of Shs. 800,000/= for the property robbed and pursuant to S. 124 TIA the convict shall be under Police supervision for 3 years.

Lawrence 'Gidudu  
J u d g e  
31/3/2009