

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MUKONO**

CRIMINAL SESSION CASE NO. 0091 OF 2010

THE REPUBLIC OF UGANDA ::::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

1. A₁ - KULABAKO KAYONDO RICHARD	}	::::::::::::: ACCUSED
2. A₂ - BIZIBU VICENT		
3. A₃ - OMONGIN SAMUEL MANDE		

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

The accused persons were indicted for Robbery contrary to **Section 285 and 286 of the Penal Code Act**. The particulars of the offence alleged that the accused and others still at large on the 4th day of December, 2007 at Namirembe village in the Kayunga District robbed Muyomba Margret of cash 5 million (five million), one land line phone, Air time and clothes and at or immediately before or immediately after the said robbery used a deadly weapon to wit a panga to the said Muyomba Margret.

The background facts to the indictment were that on the 4th December, 2007 at midnight in Namirembe village, Busana Sub-county the accused persons broke into the complainant's house and robbed assortments of items including a radio, clothes and mobile phone. At the time of the incident the complainant who is the husband of the victim was away on patrol duty as Local Defence Unit. The accused persons were armed with a panga which they used to threaten the

victim. The victim identified one of her assailants as the accused person. The following morning the victim reported the incident to one of her neighbours and later to her husband who later reported the matter to the Police.

On 13th December, 2002 the accused persons were arrested and some of the items which had been stolen from the victim were recovered in their houses. The accused persons were charged accordingly with this offence.

When the accused were arraigned before Court they denied the offence. By denying the offence, the duty of proving the charge against the accused became pertinent. The law is that the burden to prove the charge against an accused person squarely lies on the prosecution. This is a cardinal principle of our criminal procedure. The standard of proof to secure a conviction is beyond reasonable doubt. An accused person does not bear the duty to prove his or her innocence. This is also an established principle in our criminal law which has been followed since the decision in **Woolmington vs DPP [1935] A. C. 462**. The above principle holds true even where an accused person sets up an alibi as his defence to the charge. It is still upon the prosecution to disprove the alibi by leading evidence which places the accused at the scene of the crime: See **Francis Sekitoleko v Uganda [1967] EA 351**.

In that case, Sekitoleko was charged with robbery contrary to **Section 272 and 273 (2) of the Penal Code Act**. His defence was alibi. In the course of his judgment the trial Magistrate said that the burden of proving the alibi lay on the accused. Sekitoleko was convicted and sentenced to three years imprisonment. He appealed.

On appeal it was held that as a general rule of law, the burden on the prosecution to prove the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is alibi or something else.

Lastly, the Constitution of this country further provides under **Article 28 (3)** that every accused person shall be presumed innocent until proved guilty.

In order to secure a conviction of an accused person of aggravated robbery the following ingredients of the offence must be proved beyond reasonable doubt.

- (1) That there was theft of property.
- (2) That there was violence. —
- (3) That a deadly weapon was used or threatened to be used.
- (4) That the accused participated in committing the crime.

To prove the above ingredients the prosecution adduced evidence from five witnesses. The accused made sworn defence.

Whether there was theft of property:

The essence of robbery is theft of property. In the instant case Margret Muyomba Pw₁ testified that on the 2nd day of December, 2007 at about midnight, she was sleeping in her house when some assailants stormed her house with pangas. They ordered her to lie down. They broke into the adjacent shop and took Shillings 5 million, a land line phone, airtime, a radio and some clothings among others. Muyomba Isaac Pw₂ on the other hand testified that on the material night he was away on patrol duties leaving his wife Margret Muyomba (Pw₁) at home. When he returned home on the 3/12/2007 he found people gathered at his home. He later learnt that during the night robbers attacked his home and made off with cash Shs.5 million, call box, sugar, radio,

panga and a belt. Later he was informed that some thieves had been arrested from Kitatya and many stolen items were recovered from them. He proceeded to Kitatya and managed to recover his radio and a panga. From the above evidence the defence did not contest that theft took place. In fact the defence conceded that theft had taken place. I therefore find that the prosecution has proved beyond reasonable doubt the first ingredient of the offence of robbery.

Use of violence:

It is upon the prosecution to establish that there was violence in the act of robbery in order to obtain or retain the thing stolen or to overcome resistance to its being stolen. See: **Sarapio Tinkamalirwe v Uganda, Supreme Court Criminal Appeal No. 27 of 1989.**

In that instant case Margret Muyomba Pw₁ testified that on 12/12/2001 at around midnight she was accosted by some people armed with pangas. They broke into her house and demanded for money. They slapped her and hit her several times. They ordered her to lie down on the ground. In the process stole cash 5 million Shillings; radio, clothings, land line and several items. The action of those intruders above clearly point to the occasion of violence.

Use or threatened use of a deadly weapon:

According to **Section 286 (3) (a) of the Penal Code (Amended) Act 2007**, a deadly weapon includes any instrument made or adopted for shooting, stabbing or cutting and any imitation of such an instrument.

According to Margret Pw₁ the assailants broke into her house wielding pangas. They ordered her to lie face down. They terrified her and her children. A panga

can be put in the category of a big knife. In Tinkamalirwe (Supra) it was held inter alia that whatever its type and however small it might be, a knife falls within the definition of a deadly weapon.

In this case the victim was accosted with pangas. The defence did not contend or produce contrary evidence challenging it. Instead the defence conceded that the use or threat to use a deadly weapon had been established beyond reasonable doubt. It is equally my conclusion that the use or threat to use a deadly weapon to wit a panga had been proved by the prosecution beyond reasonable doubt.

Participation of the accused persons:

In an attempt to prove this important ingredient, the prosecution relied on the evidence from five witnesses: Margret Muyomba Pw₁ testified that during the material night people armed with Pangas broke into her house and demanded for some money. They were carrying torches which they flashed around. That she was able to identify one Omoding Samuel who was one of the robbers who had a torch. She had earlier seen him when he bought some kavera from her shop and her husband Muyomba Pw₂ had pointed him out as being a murderer. After days later they received information that some thieves had been arrested in Kitatya and a lot of suspected stolen property recovered from their residences. Following that information her husband Isaac Muyomba Pw₂ went to Kitatya where he recovered property which had previously been robbed from them. They included Makula radio, panga, belt and shorts. Isaac Muyomba Pw₂ confirmed that he recovered the above items from the houses of Kulabako A₁ and Bizibu A₂ in the presence of the area Chairman LC I (Mr. Madada) Pw₄ and the Police D/IP Katerega Mohamed Pw₅. CIDO Vincent Pw₂ testified inter alia, that during the material night he was one of the victims of robbery. He was

robbed of Shs.9.000/= and a jacket. After the robbery they followed the foot prints and tyre tread marks of the bicycles the robbers used as it had rained that night. They followed those marks to Kitatya village up to the home of a Ojjo where both accused were staying. From there they recovered bicycle and coffee which had been stolen from Ben Mayanja. When they approached the house belonging to Kulabako A₁ and Bizibu A₂ some four people ran out prompting the villagers to chase them. They arrested Bizibu. However one Charles who was among those who fled was arrested and lynched by the mob. In one of the houses belonging to Samuel Omoding Mande A₂ they recovered a jacket which was robbed from him. In that jacket Post Bank Card belonging to Kulabako was recovered. The jacket was wet from the rain.

Another implicating evidence was from Madada Idirisa Pw₄ who was the local area Chairman. He testified that on 13/12/2007 people from Busika village stormed his home with sticks, spears, etc claiming that he was hiding robbers in his village. They singled out the family of Ojjo as being robbers and rounded them up. They ordered him to search their houses. In the house of Omoding Samuel Mande A₂ (who pleaded guilty) they recovered two sacks of coffee and a jacket belonging to Cido Pw₃. In that jacket was found Post Bank Card for belonging to Kulabako A₁. The mob recovered a bicycle which they claimed belonged to one of their residents. They also recovered a land line set phone which Muyomba claimed belonged to him. As they were still searching another group came with Bizibu.

Later on they proceeded to the home of Ojjo but found that he and his family had fled. In Bizibu's house they recovered two bags of coffee. They also found clothes which were wet. They later went to Perekujo's house where they recovered very many suspected stolen things: 5 mattresses, shop goods, etc. In Ojjo's house they found a big hole where they recovered several dismantled

bicycles, bicoyi clothes for women and many other things. He concluded that Bizibu was arrested while trying to run away while Kulabako was arrested from Nkokonjeru where he was teaching. He stated that they recovered coffee from the house of A₂ and A₃.

Lastly IP Katerega Pw₅ testified that on 13/12/2007 he was dispatched to investigate a case of robbery in Kitatya. He arrived at Kitatya and found that they had arrested Bizibu A₂. He found recovered items at the home of LC I Chairman, Mr. Madada. He found that the houses of the assailants had been destroyed by irate villagers. One of the robbers had been killed in a nearby garden and a mobile phone recovered from him. He loaded all the recovered items in the Police motor vehicle. They included bicycles, mattresses, clothes, mobile phone. Muyomba Isaac was among those who claimed to have been robbed by Bizibu Mande and Kayondo. Cido and Muyomba identified their property from the Police Station.

During the proceedings Omoding Samuel Mande A₃ decided to change his plea to that of guilty and was convicted and sentenced accordingly. In his allocutus he stated that he committed the offence with one Perekujo but not with Bizibu nor Kulabako.

Kulabako Kayondo A₁ made unsworn defence of total denial and Alibi. He stated that on 13/12/2007 he was at his home in Nkokonjeru when a group of people came and asked where his brother Perekujo was. He told them that he did not know where Perekujo was because Perekujo was staying at Kitatya and not with him. They insisted on him that if he did not tell them where Perekujo was they were going to arrest him. When he failed to show them where Perekujo was they arrested him and took him to Wabwooko Police Post. At the Police Post someone claimed a belt he was wearing as his and the belt was

removed from him. He denied staying at Ojjo's home. He stated that he used only to visit Ojjo. He concluded that he used to keep all his documents at the home of his father Ojjo.

Bizibu Vincent A₂ in his unsworn defence stated inter alia that on 13/12/2007 at about 6.00 a.m. he was at his home when he saw a crowd of people had surrounded his father's house. They had spears, arrows, clubs, etc. He got scared and informed his wife and decided to report to the LC Chairman. On his way he heard an alarm from behind and thought they had arrested someone. When he reached the home of the LC he asked him where Perekujo was. He told the LC that he had not seen Perekujo. He returned with the LC where they found many people had gathered there. They had surrounded Perekujo's house where he recovered very many things. When the Police came he was ordered to be arrested just because he was a brother to the robbers who were at large. The Chairman searched his house but recovered nothing. Later they took him to the Police Post together with things recovered from Perekujo's house. From there he met Kulabako with whom he was transferred to Kayunga Police Station and charged with this offence. He denied being arrested while trying to run away.

In the instant case from the record, the two evidence up hearing the accused can be placed in two categories:

(a) The evidence of visual identification.

(b) The doctrine of recent possession.

The law in regard to evidence of visual identification has been put beyond doubt since the case of **ISAYA BUKUMU v UGANDA, Supreme Court Criminal Appeal No. 24 of 1989.**

The Court stated the law as follows:

*“In considering whether the Appellant was or not properly identified as the person who struck the fatal blow on the head of the deceased, we have in mind the principles which have been laid down by this Court and its predecessors in cases such as **Puria v Republic [1967] EA 533; Tomasi Omukono v Uganda, Criminal Appeal No. 4 of 1977 (Unreported); Nabudere v Uganda [1979] HCB 77 (CAU) and Emmanuel Nsubuga v Uganda, Criminal Appeal No. 16 of 1988 (CAU) (Unreported)**”*

Briefly stated, the principles are that in a case resting entirely on evidence of identification, the Court has a duty to satisfy itself that in all the circumstances of the case it is safe to act on such evidence, which must be free from mistake or error on the part of the identifying witness or witnesses. The evidence of such witnesses must be tested as to its truthfulness and any possibility of mistake or error excluded. Where conditions for correct identification are favourable such task will be easier. But where conditions are difficult it would be unsafe to convict in the absence of some other evidence connecting the accused with the offence.

While Margret Muyomba Pw₁ claimed that she identified Omoding Samule A₃ as one of the assailants Cido Vincent Pw₃ testified that he identified all the accused persons as his assailants. However the conditions under which he identified the assailants could not be said to have been favourable for correct identification. The attack on Cido was so sudden and did not allow him to make an alarm because they were ordered to lie down very fast. He testified that the assailants ordered their heads to face down and pangas were placed on their heads. He stated that as the two of the accused were tying his hands the third one was hitting his head so that he should not look up. From the above

evidence I find that the witness was not given chance to identify his assailants. He stated that he identified Kulabako because he was a teacher in their area. However, he did not elaborate the circumstances under which he identified Kulabako apart from merely stating that he was a teacher. Moreover in his testimony he stated that he had never dealt with the accused persons before. In the premises I find it very unsafe to rely on the evidence of identification to convict the accused persons.

(b) The next piece of evidence up heating the accused persons was the fact that they were allegedly found with recently stolen items. This category of evidence is referred to as doctrine of recent possession and it is a category of circumstantial evidence and its application depends on the principles which apply in the ordinary rule relating to circumstantial evidence. This was restated in **MBAZIIRA SIRAGI & Another v Uganda [2007] VOL I HCB 9**. In that case the Supreme Court held that:

“The Doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a presumption of fact that that person is the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession.

The starting point for the application of the doctrine of recent possession is proof of two basic facts beyond reasonable doubt; namely, that the goods in question were found in possession of the accused and that they had been recently stolen.

“In re-evaluating the evidence adduced against each Appellant, Court must consider it from two perspectives; namely whether the evidence proves that the found items (or any of them) were stolen during the robbery in question, and whether any of the appellants was in possession of any of the found items.”

From the evidence on record it is clear that a gang of robbers stormed Busika village and robbed the Muyomba family and Cido. They were tracked up to the home of Ojjo the father of the accused persons. A search involving the LC of Kitatya was carried out where a lot of suspected stolen property were recovered from the houses of Ojjo, Bizibu, Mande (who was convicted) and Perekujo. Muyomba Isaac and Cido managed to identify their properties among the heap that were suspected to have been stolen. Although the properties were recovered about one week after the recovery they could still be considered as recently stolen as what amounts to recent possession is a question of fact depending on each particular case. I am therefore satisfied beyond reasonable doubt that Bizibu was found with property of Muyomba and Cido which had recently been stolen and that he did not explain how he came by those property.

As far as Kulabako is concerned his defence was of total denial and Alibi. He stated that the Post bank Card which was recovered among the stolen jacket was being kept at his father's home. That may or may not be true. All the same there is a scintilla of doubt and the law is that where any slight doubt is raised the benefit goes to the accused. I would have needed some independent evidence to place Kulabako squarely at the scene. As matters stand that piece of doubt has not been resolved. In the end I find that the prosecution has only proved the case against Bizibu to the required standard. I therefore find him guilty as charged. As for Kulabako the evidence against him leaves him as a

suspect but suspicion however high does not lead to a conviction. In the premises the accused Kulabako not guilty and he is acquitted accordingly.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

8/11/2010

9/10/2010

Judgment read in Open Court.

Mr. Masede: The accused has a previous conviction of aggravated robbery. In that regard I pray that he be given a deterrent sentence. He has caused terror to people. He was in a previous session.

Mr. Senkumba: I am holding brief for Mr. Claudio in mitigation. The Counsel informed me that he was not convicted the charge was dismissed. He is pleading for mercy. He has been on remand for over 4 years. He left home a family with three children. We therefore pray for a lenient sentence to enable him go back home. We so pray.

Bizibu: I pray for leniency. I pray that the period I spent in remand be considered. I left children. My mother is old.

SENTENCE:

This offence carries maximum of death sentence. The offence is on the increase. This type of offence normally results in loss of lives. According to evidence on record the accused had a terrorist gang. Therefore there is need to disband this gang by a deterrent sentence. However Court will look at the fact that he is 1st offender. The Court will also look at the value of the property, most of which were recovered. Court will also consider the fact that he has been in Custody for about 2 years. All in all the accused is sentenced to 12 years imprisonment.

Right of Appeal explained.

HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGE

9/11/2010