

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

**HCT-03-CR-SC-0092 OF 2010**

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

**VERSUS**

**A1. BIZIBU VICENT**

**A2. KULABAKO KAYONDO RICHARD ::::::::::::::::::::::: ACCUSED**

**BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGMENT**

The accused **Bizibu Vincent and Kulabako Kayondo Richard** and others still at large were indicted for aggravated robbery contrary to **Section 285 and 286 (2) of the Penal Code Act.**

The particulars of the indictment alleged that the accused and others still at large on the 12<sup>th</sup> December, 2008 at Bisaka village in Kayunga District robbed Mayanja Ben of cash Shilling one million, Aron Bicycle, four bags of coffee, one mobile phone Nokia Serial Number 358961819435, one cap and at the time of the robbery used a deadly weapon to wit a panga on the said Mayanja Ben.

The background facts of the case were as follows:-

On the night of 12<sup>th</sup> December, 2007 the accused persons broke into the house of Mayanja Ben with pangas, torches and straight away demanded for money from the victim which he had allegedly got from the proceeds of coffee sales. The accused persons cut both feet of Ben Mayanja and tied him with ropes. They robbed one million Shillings, bicycle, four bags of coffee, a mobile phone and one cap from Ben Mayanja. They also cut the fingers of Mayanja's wife. They further attacked one of the neighbours of Mayanja and brought him to the house of victim to show him a lesson. The whole village got incensed because of the rampant thugs in the village. They immediately organised a search to follow up the robbers. Following the tyre marks of the bicycle, foot marks and the drops of coffee they traced the accused up to their homes. They found the victim's bicycle and three bags of coffee in Bizibu's house. Another sack of coffee was found in Monay's house (Monday pleaded fully to simple robbery). "A jacket of one of the victims with blood stains and Kayondo's bank's Bank Card was also recovered from Monday's house. Many stolen items were recovered from the homes of the accused persons and many people recovered items which had earlier been robbed from them. The accused persons were arrested and charged accordingly.

When the accused persons were arraigned, they pleaded not guilty. Having pleaded so, the law as warranted by the Constitution provides that the charge against the accused persons ought to be proved beyond reasonable doubt: See Article 283 of the Constitution.

Generally speaking proof beyond reasonable doubt requires that:

- (a) Before any verdict, the court should consider the evidence as a whole to determine the guilt of an accused person.
- (b) The Court shall not examine facts in issue separately and in isolation.
- (c) That where the issues of credibility arise between the evidence of prosecution and the defence, it is not necessary to believe the defence evidence on a vital issue, it is sufficient if in the context of all the evidence, a state of reasonable doubt is left as to the guilt of the accused: See **Suleiman Katusabe vs Uganda Supreme Court, Criminal Appeal No. 7 of 1991.**

In that case the Court held inter alia that the trial Judge should look at the evidence as a whole.

**“It is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt in it. Indeed no single piece of evidence should be looked at in isolation.”**

Another point to note is that proof beyond reasonable doubt does not mean proof beyond shadow of doubt. Lord Denning made this clarification in **MILLER v Minister of Pension {1947} 2 AER 372 at 373.**

**“That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would**

**fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence....” “of course it is possible but not in the least probable” then the case is proved beyond reasonable doubt nothing short will suffice.”**

With the above principles in mind, the following are the ingredients of the offence of aggravated robbery:

(1) Proof that theft took place.

(2) Proof that theft was accompanied with violence.

(3) Proof that a deadly weapon was used or threatened to be used.

(4) Proof that the accused persons participated in the theft: See **Mbaziira Siragi & Another v Uganda {2007} Vol. 1 HCB 9.**

In an attempt to prove the above ingredients beyond reasonable doubt, the prosecution relied on the evidence from five witnesses. The accused persons on this part made unsworn defence of total denial and Alibi.

As far as the ingredient of theft is concerned, it is trite law that theft of property is the essence of robbery. It must be proved that theft took place. In the instant case Mayanja Ben Pw<sub>1</sub> testified that his home was invaded by assailants who demanded for money which he had got from the sales of coffee. They broke into the house through one door. They assaulted him and because of the pain he

showed them where the money was. They got Shillings one million, a bicycle, 4 bags of coffee, a Nokia phone 1600 and a cap. He testified that some of the stolen items were recovered from the homes of the accused persons. Vincent Cido Pw<sub>2</sub> also testified that he was also a victim of the thuggery during the material night. He stated that on 12/12/2007 his home was attacked at around 11.00 p.m. four assailants broke into the house and ordered him to sit down. They robbed him of Shs.9,000/= and a jacket before taking him to the home of Mayanja Ben Pw<sub>1</sub>. Some of the items were recovered in the presence of Fuma Bashir Pw<sub>3</sub> who was one of those who pursued the robbers. They said items were recovered in the presence of Madada Idirisa Pw<sub>4</sub> who was the Local Council Chairman of Kitatya. Those items were recovered and exhibited in Court by Kanereje Muhammed Pw<sub>5</sub>. From the above evidence there is overwhelming evidence that theft occurred to the prejudice of Mayanja Ben Pw<sub>1</sub> and Vincent Gido Pw<sub>2</sub>.

Use of violence and use of a deadly weapon:

Violence is defined in Black's Law Dictionary as unjust or unwarranted exercise of force normally with all accompaniment of vehemence, outrage or fury.

Violence is meted to the victim of robbery in order to obtain or retain the thing stolen or to overcome resistance to its being taken: See **Sarapio Tinkamalirwe v Uganda Supreme Court, Criminal Appeal No. 27 of 1980** (Unreported).

In the instant case not only violence was meted against the victims but the assailants used deadly weapons against the victims. Ben Mayanja Pw<sub>1</sub> testified that the assailants stormed his house and demanded for the money and when he did not produce it, they cut both his feet and head with pangas while demanding

for the money. The court was shown the injuries which the victim sustained during the robbery. They were very grave injuries. He managed to see the pangas because his lamp was on and because the assailants had torches. Mayanja's evidence was corroborated by that of Vincent Cido Pw<sub>2</sub> who testified that he was similarly attacked by men wielding pangas who demanded money from him. When he resisted to reveal where the money was they dragged him to the house of Mayanja Ben Pw<sub>1</sub> in order for him to see for himself what they had done on him (Mayanja) for failure to heed to their demands for money. Upon reaching Mayanja's house he found him tied up on a bed and was in pool of blood with injured on his head and feet. He (Cido) was also tied up. The defence did not contend the above evidence or produce any contrary evidence challenging it. All this goes to show that there was use of violence and deadly weapon in the execution of the robbery. Accordingly it is my conclusion that the prosecution has proved beyond reasonable doubt that there was the use of violence and a deadly weapon in the course of the robbery in the instant case.

**Participation of the accused persons:**

The prosecution relied on two pieces of evidence: Evidence of visual identification and the Doctrine of recent possession.

As far as visual identification is concerned, Mayanja Ben Pw<sub>1</sub> testified inter alia that he managed to identify the assailants because he had a lamp on in his house and the assailants had torches which they flashed at themselves while asking him whether he knew them or not. He stated that he infact knew one of them Kulabako Kayondo as a teacher at Bisaka but he said at that time that he did not know them for fear of his life. Vincent Cido Pw<sub>2</sub> also confirmed that he recognized Kulabako Kayondo A<sub>2</sub> as one of his assailants whom he knew as a

teacher in the village. He also managed to identify Bizibu A<sub>1</sub> as one of the assailants.

Evidence of Mayanja Pw<sub>1</sub> and Cido Pw<sub>2</sub> above was challenged by Mr. Emmanuel Chadia who represented the accused persons, on the basis that in their Police Statements they were emphatic that they did not identify their assailants.

In *Walakira Abas & Others v Uganda Supreme Court*, Criminal Appeal No. 25 of 2002 it was held that;

**“The Court may rely on identification evidence given by an eye witness to the commission of an offence to sustain a conviction. However it is necessary especially where the identification be made under a difficult condition to test such evidence with greatest care, and be sure that it is free from possibility of a mistake. To do so the court evaluates the evidence harmony regard to factors that are favourable, and those that are unfavourable, to correct identification. Before convicting solely on strength of identification evidence, the court ought to warn itself of the need for caution, because a mistaken eye witness can be convincing; and so can several such eye witnesses.”**

I am aware that what a witness tells Court under oath should be taken more seriously. However as far as the law on visual identification is concerned, where a witness states in his or her first opportunity that he did not identify his or her assailants and later he contradicts that statement such a testimony should be examined with a caution. From the evidence on record it was clear that the attack on the victim were sudden and very violent as seen from the injuries inflicted on Mayanja Pw<sub>1</sub>. Vincent Cido Pw<sub>2</sub> was taken to Mayanja's home to

see for himself the level of violence the assailants had meted on Mayanja. For the above reasons I find that the evidence of visual identification cannot be relied upon. I cannot be sure that it was free of possibility of a mistake.

The prosecution relied on the evidence of recent possession of stolen property. The prosecution led evidence to show that the stolen property were recovered from the home where accused persons were residing. The doctrine of recent possession was recently restated in the case of **MBAZIIRA SIRAGI & Another v Uganda {2007} Vol. 9** as follows:-

**“1. ....**

- 2. 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 stolen goods after they are stolen raises a presumption of fact that that person was the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession.”**
- 3. The starting point for the application of the doctrine of recent possession of 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.**
- 4. In re-evaluating the evidence adduced against each Appellant, the Court must consider it from this 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.”**



In an attempt to implicate the accused persons the prosecution using the above document relied on the evidence of Mayanja Ben Pw<sub>1</sub>, CIDO Vincent Pw<sub>2</sub>, funa Bashir Pw<sub>3</sub>, Medada Idrisa Pw<sub>5</sub> and Kulareje Mohamed Pw<sub>6</sub>. Ben Mayanja Pw<sub>1</sub> testified inter alia that on the fateful night robbers stormed his home and stole 4 bags of coffee, a Nokia phone 1600, and shs.1,500,000/= from the sales of coffee and Avon bicycle. He testified that all the above items were recovered from the home of the accused persons except the money. CIDO Vincent Pw<sub>2</sub> confirmed that he was also robbed of his jacket by the accused persons during the same night together with Mayanja. After the robberies many people gathered at the scene. The vigilant villagers then decided to follow the assailants immediately. He was among those who braved the mission. They used footmarks and bicycle marks to track the assailants because that night it had rained. They were further aided by the drops of coffee beans the assailants had already robbed. All those led them to the home of one Ojjo who was the father of the accused persons. From there they recovered his jacket plus Mayanja's coffee, phone and a bicycle among other things. Funa Bashir Pw<sub>3</sub> who was Mayanja's younger brother also testified that he was among those who tracked the robbers following their footmarks and bicycle marks up to Kitatya up to the home of one Ojjo, the father of the accused person. From there they recovered a jacket which contained Kulabako's Post Bank Identity Card. During the search Bizibu took off but was chased and arrested. All the stolen properties which were recovered included bicycles, bicycle spare parts, mattresses, radio and coffee. Another suspect was arrested but was lynched. A Nokia phone belonging to Mayanja and Shs.600,000/= was recovered from him. Mayanja's properties were handed over to his brother Bashir Pw<sub>2</sub>. The above evidence was confirmed by that of Pw<sub>4</sub>.

The prosecution further relied on the evidence of Madada Idrisa Pw<sub>4</sub> who was the Chairman LC I Kitatya village where both accused used to reside. He stated

that during the night of 12/12/2007 he got information that robbery had taken place in a neighbouring village called Bisaka and those who did it were suspected to be from Kitatya B village which was under his jurisdiction. Following that robbery a gang of people from Bisaka village stormed his home with spears, pangas, sticks, etc. they were angry because the robbers were said to have assaulted one of their sons very badly. He later came to know the victim as Mayanja. The gang ordered him to search the houses of the suspects which he agreed. He searched the house of Bizibu where he recovered two sacks of coffee, wet trousears and shorts. That it had rained the previous night. The brother of Mayanja identified the coffee as belonging to Mayanja. They searched Kulabako's house and recovered a mattress which Nalongo claimed was hers. Kulabako's house was being used as a store for stolen things because they found there so many strange things which he did not expect the accused to have. He stated that Bizibu tried to run away but he was chased and arrested. Kulabako was arrested from Nkokonjeru.

Lastly the prosecution relied on the evidence of IP Kalereje Mohamed. He testified that on 13/12/2007 he received information at around 10.00 a.m. while at Kayunga Police Station that robbers had attacked villagers at Bisaka village, Kitimbwa Sub-county and assaulted their victims grievously. He came to know one of the victims as Ben Mayanja Pw<sub>1</sub>. He proceeded to the scene with some Police Officers up to the home of LC I Kitatya, a one Madada, where he got a crowd of angry villagers. From there he got a lot of property which had been collected from the houses of Kayondo Kulabako A<sub>1</sub>, Bizibu Vincent A<sub>2</sub> and Mande (who pleaded guilty and was convicted) and Perekunjo who was on the run. That the LC I and his officers informed him that they were present when those items were being collected. Those items included bicycles, mattresses, clothes, dry coffee, (Kisiko) a mobile phone (Nokia) and many other things. He told the victims to proceed to the Police Station to identify their property

because the situation at the scene was volatile. Those who responded included CIDO Pw<sub>2</sub> who identified his blue jacket which was recovered from Mande's house. The said jacket had blood on it and had Post Bank Card belonging to Kayondo Kulabako Richard. The property of Mayanja Ben were also recovered. They included Avon bicycle with Hero mudguard; Nokia 1600 phone. He testified that he was told that the assailants were traced up to their home by the villagers from the home of Cido and Mayanja using their footmarks, bicycle marks and coffee droppings up to the house of Bizibu Perekunjo, Mande and their father Ojjo.

Both accused persons denied the offence. Vincent Bizibu A<sub>1</sub> made unsworn defence of total denial. He stated that the alleged stolen items were not recovered from his house but were recovered from the house of Mande.

Kulabako A<sub>2</sub> on his part also made unsworn defence where he relied on defence of total denial and alibi. He stated that on 13/12/2007 he was at his home when a group of people approached him asking him where his brother Perekunjo was. He replied that Perekunjo was not residing with him. From here those people arrested him and took him to Kayunga Police Station where he got his brother Bizibu. He admitted that the Post Bank Card which was allegedly got at the scene belonged to him but that he used to keep it at his father's home at Kitatya. He concluded that nothing was recovered from his house.

From the evidence outlined above there is overwhelming evidence that robbery did take place to the prejudice of Ben Mayanja Pw<sub>1</sub> and Vincent Cido Pw<sub>2</sub>. Among the items stolen were Avon bicycle, Nokia Mobile phone, jacket, shirts, bags of coffee, etc. Among those Avon bicycle, Nokia Mobile phone, two bags of coffee all belonging to Ben Mayanja were recovered. A jacket belonging to Cido Vincent was also recovered. According to the prosecution witnesses the

robberies involved a gang of between 1-4 assailants who were armed with pangas.

There was overwhelming evidence from the prosecution witnesses that the assailants were tracked through their footmarks, bicycle marks and the coffee droppings up to the home of their father one Ojjo where he said items were recovered from the house of Mande, (who pleaded guilty and was convicted); Bizibu; Perekujo and Kulabako Kayondo. The said items were recently stolen because they were recovered after a hot pursuit of the assailants. While Bizibu was arrested as he was fleeing, Kulabako Kayondo was implicated because of his Post bank Card was recovered in Cido's jacket from Mande's house. While the rest of the assailants fled to their safe haven, one of them however did not live to enjoy the fruits of their crime. He was lynched by the mob. As far as Bizibu is concerned I do not have any doubt that he was among the assailants because the coffee belonging to Ben Mayanja was recovered from his house and also because he was said to have fled from the scene and arrested by the angry mob. He did not give any explanation as to how he came into possession of the said bags of coffee and also how other stolen items were recovered from their home. In view of the above overwhelming evidence I find the defence of Bizibu a total sham and an afterthought. He was placed squarely at the scene of crime by the prosecution witnesses.

As far as Kulabako Kayondo Robert A<sub>2</sub> the evidence against him was that his Post Bank Card was recovered in the jacket which was recovered at Mande's house. That jacket belonged to Cido Vincent Pw<sub>2</sub>. His explanation was that he used to keep the said document at the home of his father Ojjo.

I consider that a plausible defence although it may or may not be true. The law is that a defence may not be true but if it raises doubt in the prosecution case,

the doubt has to be resolved in favour of the accused. For the above reasons I do not agree with the assessors that the prosecution had failed totally to prove the case against the accused persons. It was the case against Kulabako which was not proved to the right standard. He is accordingly acquitted. The case against Bizibu was proved beyond reasonable doubt. He is therefore convicted as charged.

**HON. MR. JUSTICE RUBBY AWERI OPIO**

**JUDGE**

**8/11/2010**

**9/11/2010**

Accused present.

Judgment read in Open Court.

**Masinde:** I have no record of previous conviction. However I pray that he be given a deterrent sentence. He meted terror on the convict. He injured him badly. I so pray.

**Senkobe:** the accused has spent over 4 years on remand. He is remorseful. He is ashamed of his acts. He has a family of 3 children. The wife left him. We pray for a lenient sentence. I so pray.

**Alloculus:** I pray for one more chance. I have learnt my lesson. I pray to go and look after my family. I have spent some time in prison. I will be a good ambassador. That is all.

**SENTENCE:**

The accused was among a gang which terrorised villagers using deadly weapons. The accused injured badly one of the victims. The acts of the accused almost led to death. There is therefore need for a deterrent sentence to teach the accused. Although the things stolen were recovered, the circumstances under which the offence was committed were very serious. The accused and his gang almost killed their victims. After

considering the period of about 2 years when he was in custody it is my conclusion that the accused be sentenced to a period of fifteen years.

**HON. MR. JUSTICE RUBBY AWERI OPIO**  
**JUDGE**  
**9/11/2010**

**ORDER**

He compensates the victim Mayanja with Shillings (3) three million for the injuries sustained. The Identity of Kulabako is to be returned.

**HON. MR. JUSTICE RUBBY AWERI OPIO**  
**JUDGE**  
**9/11/2010**