THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0207 OF 2010

UGANDA ..... PROSECUTOR

VERSUS

A1. KIRABIRA SSALONGO ABASI

A2. NSUBUGA BOSCO ..... ACCUSED

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI

Criminal law – aggravated robbery c/s 285 & 286 (2) of the Penal Code – criminal law – ingredients of aggravated robbery.

Evidence – non recovery of stolen property– whether in the event of non recovery of stolen items the offence of aggravated robbery is not proved – evidence – identifying witness.

The two accused persons were indicted of robbery c/s 285 &286 (2) of the Penal Code Act. They were both convicted as charged.

JUDGMENT

The accused persons, Kirabira Ssalongo Abasi (A1) and Nsubuga Bosco (A2), are charged with the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act.

The particulars of the offence for which the accused persons are charged read as follows:

> "Kirabira Ssalongo Abasi, Nsubuga Bosco and others still at large on the 15th day of August 2009 at Kabanyolo village, Busukuma Sub-county in Wakiso District Nakulabye robbed one Mugerwa Mustafa of Ushs. 190,000/=, two mobile phones Nokia 2600 and Nokia katorch, and immediately before or immediately after the time of the said robbery threatened to use (a) deadly weapon to wit a gun and a panga on the said Mugerwa Mustafa.

The accused persons both pleaded 'not guilty' to the above charge.

To constitute an offence of aggravated robbery the following elements should be proved:

1. Theft

2. Use or threat of violence

3. Possession, use or threat of use of a deadly weapon. Section 286(2) of the Penal Code Act – specifically refers to "possession of a deadly weapon or cause death or grievous harm".

The burden of proof in criminal proceedings such as the present one lies squarely with the Prosecution. Notwithstanding the defences available to an accused person, the primary responsibility to prove the allegations against such a person remains with the Prosecution.

The Prosecution in this case was required to prove each ingredient that constitutes the offence of aggravated robbery beyond reasonable doubt. I must reiterate that proof beyond **reasonable** doubt is not synonymous with proof beyond **any shadow of doubt**. In the event of reasonable doubt, such doubt must be decided in favour of the accused and a verdict of acquittal returned. Hence, inconsistencies or contradictions in the evidence of prosecution witnesses which are major and go to the root of the case must be resolved in favour of the accused, but where they are minor they shall be ignored, save for instances where there is a perception that they are deliberate and intended to mislead court.

In this case, no facts or documents were agreed upon by the parties. All the allegations made against the accused persons were disputed by them. I shall now revert to an evaluation of the evidence that was adduced before this court. I shall evaluate this evidence in its totality against the ingredients that comprise the offence of aggravated robbery.

Theft:

Simply stated, the law defines the offence of theft as the dishonest and permanent dispossession of a person of an item that ordinarily does not belong to the dispossessor. See section 254(1) of the Penal Code Act.

In proof of this ingredient, the Prosecution relied on the sworn evidence of 3 witnesses. PW1 testified that in an incident that took place on 14th August 2009 he was involuntarily dispossessed of a Nokia Cell phone 2600 model, as well as Ushs.190,000/=. PW2 testified that in the same incident he was involuntarily dispossessed of Ushs. 154,000/= and a Nokia Cell phone 1202 model. He furnished a receipt for the cell phone (Exh P.1), indicating purchase of the phone 5 months earlier. PW3, who at the time of the incident was the police officer in charge of operations at Kasangati Police Post, testified that on the night in question he received a telephone call from his informants reporting a robbery at Kabanyolo.

PW1 and PW2 both testified that they had never recovered their property. The non-recovery of their property was confirmed by PW3, the Police Officer that searched Kirabira Ssalongo's

(A1's) home. In his sworn testimony A1 (Kirabira Ssalongo) also confirmed the search of his home and non-recovery of any items.

This case entails an assertion by PW1 and PW2 of theft of property under circumstances that allegedly constitute aggravated robbery. Both of the accused persons did not refer to the alleged theft in their testimonies. They merely raised alibis that placed them away from the scene of the alleged robbery. A1 also denied knowledge of PW1 and PW2. According to the testimonies of the Prosecution witnesses none of the allegedly stolen items was ever recovered. The question then is whether the incidence of theft has been proved beyond reasonable doubt.

It is pertinent to retrace the definition of theft. The legal definition of theft is set out in section 254(1) of the Penal Code Act. It entails the fraudulent dispossession of another of something that is capable of being stolen, and which item the dispossessor has no claim of right over.

PW1 and PW2 testified quite elaborately to the circumstances under which their property was stolen. They also outlined the circumstances under which they came to be in possession of the money that was stolen, with PW1 stating in cross-examination they were required to pay for the stones they transported so they often had money on them while on duty. He further stated, in that regard, that on the day in question he had paid for the stones on the truck but remained with a balance of money. PW2 furnished court with a receipt in respect of the stolen phone which he had purchased 5 months prior to its purported theft (Exh. P.1). PW1 did not provide court with any documents in proof of ownership or purchase of his stolen property.

I did observe PW1 and PW2 to be very truthful during their testimonies, and this observation is borne out by the fact that they did not contradict their testimonies under cross-examination, or at all. Their evidence was simple and straightforward, testifying to a robbery of property by 2 gun- and panga-wielding men known to them, who threatened to use and did on occasion use violence upon them in the course of the robbery.

I accept their testimony – that between the two of them they were robbed of two phones and Ushs. 344,000/=. I am satisfied that PW1 and PW2 were fraudulently dispossessed of the above items; the items are certainly capable of being stolen, and the thieves thereof had no claim of right to the same. Although the charge sheet is restricted to Ushs. 190,000/= and two phones, the ownership of which is attributed to PW1 – Mustafa Mugerwa, from the foregoing discourse, I am satisfied that the money and Nokia cell phone 2600 model did belong to PW1 and not the thieves thereof; neither did the thieves have any claim of right over PW2`s cell phone that he adeptly proved he had purchased.

The evidence of PW1 and PW2 in respect of the incidence of a robbery is corroborated by the testimony of PW3, who testified that on the night in question he received a call from one of his informants reporting a robbery at Kabanyolo that had taken place in the wee hours of 15th August 2009 at about 1.00 am. This corroborates the evidence of PW1 who testified that the robbery took place on 15th August 2009 at 1.00 am, as well as that of PW2 who stated that at midnight of

14th August 2009 they were warned of the presence of robbers at Kabanyolo and subsequently encountered the robbers.

Before I take leave of this issue, I shall briefly comment on the discrepancies in the prosecution evidence in respect of the ingredient of theft. The question as to whether PW1 and PW2 have adequately proved possession and/ or ownership of the stolen items, or indeed whether the non-recovery of the stolen items would adversely affect proof of the theft thereof.

The Prosecution is required to prove its case beyond reasonable doubt (emphasis mine). I have no reason to doubt the sworn testimony of PW1 with regard to how he came to be in possession of the money he was robbed of, given his trade. Similarly, absence of foolproof ownership of PW1's phone notwithstanding, I do not find it reasonable to expect purchasers of phones to keep the receipts thereof for unnecessarily lengthy periods of time. Certainly not beyond the period in respect of which a warranty in respect thereof may have been provided. It is indeed plausible that PW2 did possess the receipt in respect of his phone because it had been purchased only 5 months prior to its theft. I therefore find that non-possession of a receipt by PW1 is not reasonable ground to disbelieve his otherwise very truthful and credible evidence.

With regard to the issue of non-recovery of the stolen items, I am guided by the decision of the Supreme Court in the case of **Hilter Ojasi versus Uganda Crim Appeal No. 1 of 1986,** where their Lordships observed as follows:

> "**There are of course many examples of theft where no goods have been recovered ... but the lack of such evidence did not unsettle the verdict in (that) case**."

I therefore find that the ingredient of theft has been proved beyond reasonable doubt by the Prosecution.

Use or threat of violence:

PW1 testified that as he and his colleagues returned from a stone quarry, they encountered 2 men at Kabanyolo. One of the men whom he identified as A1 aimed a gun at the vehicle PW1 was driving so PW1 stopped the car. The second man whom PW1 identified as A2 had a panga. The witness said his assailants made him sleep on the ground, slapped and kicked him. PW2 testified that A1 told A2 to get money from PW1 or else he should cut him. He said A2 then slapped PW1 with a panga, and on discovering PW1's phone in the vehicle, kicked him (PW1).

Violence is defined in the Oxford dictionary as 'behaviour involving physical force intended to hurt, damage, or kill someone or something'. The use of violence in this case entailed kicking and hitting PW1 with a panga, while threat of use was displayed in the directive by A1 that his colleague (A2) gets money from PW1 or else cut him up. See PW2`s testimony. Accordingly, I find the behaviour of PW1`s and PW2`s accosters as described above commensurate with use

and threat of use of violence, and am satisfied that this ingredient has been proved beyond reasonable doubt.

Possession; use, or threat of use of a deadly weapon:

A deadly weapon is defined – in section 286 (3) of the Penal Code Act – as any instrument made or adapted for shooting, stabbing or cutting, or any imitation of such an instrument.

In the present case both PW1 and PW2 testified that their assailants in the wee hours of 15th August 2009 brandished a gun and a panga. The witnesses testified that while A1 had a gun, A2 had a panga. PW1 testified that A1 aimed the gun at his approaching vehicle, prompting him to stop. PW2 testified that A1 told A2 to cut PW1 if he declined to give him money.

I am satisfied that the behaviour of PW1`s and PW2`s accosters as described above is commensurate with possession and threat of use of a deadly weapon, and accordingly find that this ingredient has been proved beyond reasonable doubt.

Having established that all the ingredients of aggravated robbery have been proved beyond reasonable doubt by the Prosecution, I shall now revert to determination of the question as to whether or not the 2 accused persons were indeed the perpetuators of the offence as alleged by the Prosecution. Tied up with this, is the question as to whether or not the accused persons were properly identified by their victims.

The accused persons raised the defence of alibi. A1 gave sworn testimony and was cross examined on it, while A2 gave unsworn evidence. A1 testified that he does not know any of the people that testified against him. He stated that between 12th – 15th August 2009 he was sick and did not leave home, but on the night of 15th August he was arrested. He denied possession of a gun or panga. A2 testified that on the evening of 15th August 2009 he had gone to Gayaza to follow up on his children's uniform with a tailor and, upon his return, was arrested. I am cognisant of the fact that A2`s unsworn testimony deprived the Prosecution the opportunity to test the truthfulness thereof through cross-examination. Therefore, as I evaluate the value of his unsworn testimony I do bear this in mind.

On the other hand, 2 Prosecution witnesses purported to have identified the accused persons as the robbers that accosted them. In their testimonies, PW1 and PW2 squarely placed both accused persons at the scene of crime. They both testified that they knew the accused persons prior to the robbery incident.

PW1 stated that he knew A1 as a boda boda rider going by the nickname – Moodu (sic). He stated that he had known A1 for 2 years, and knew A2 very well. In cross examination, he stated that he is sure A1 was the person he saw at the scene of crime. He stated that he saw both accused persons clearly as he approached them with his headlamps on and only switched the lights off after the car had stopped.

PW2 also stated that as the victims' car approached the accused persons its headlamps were on, and he was able to clearly identify A1. He stated that after PW1 switched off the headlamps A2 emerged at PW1's side of the car and asked for money and phones. He further stated that A2 thereafter went to his (the passenger) side of the car and ordered the passengers to get out. He stated that he gave A2 Ushs. 4,000/= worth of coins. He furthermore states that A2 then started searching the inside of the car with the inner car light switched on, and he was able to stealthily see what he was doing. He asserted that he knew A2 because the latter usually hired cars from the stage at which he and his colleagues operated from. Furthermore, that A2 was the one that asked the victims questions and kicked them from close range so he was able to recognise him.

The test of correct identification was outlined in **Abdala Nabulere & Another vs Uganda Crim. Appeal No. 9 of 1978** as follows:

> "**The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced. The poorer the quality, the greater the danger.**"

From the testimonies of PW1 and PW2, which testimonies I am inclined to believe, the accused persons were properly identified and the question of mistaken identity does not arise. A1 and A2 were known to them prior to the robbery incident; A1 as a boda boda rider who passed by the nick name of Moodu, and A2 as someone that often hired cars from the car `stage` from which they operated. PW1 and PW2 stated that they had known the accused persons for 2 and 4 years respectively. They further testified that they identified the accused persons initially using their car head lamps, and later at close range as they posed questions to them, kicked and hit them, and threatened them violence.

I find that the circumstances under which the accused persons were identified were favourable to credible and authentic identification, and am satisfied that the identification was of such good quality as to place the accused persons squarely at the scene of crime and defeat their defence of alibi.

I therefore find that the prosecution has proved the offence of aggravated robbery against the accused persons – Kirabira Ssalongo and Nsubuga Bosco – beyond reasonable doubt.

In complete agreement with the Lady and Gentleman Assessors, to whom I am grateful**,** I find both the accused persons guilty of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act, and do convict them of the offence as charged.

MONICA K. MUGENYI

JUDGE

10th January, 2011