THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ADJUMANI

CRIMINAL SESSION NO. 0008 0F 2011

UGANDA :::::::::::::::::::: PROSECUTOR

=VERSUS=

AMAKU ABIKU FUNGARO :::::::::::::::::::: ACCUSED

JUDGMENT

BEFORE HON. JUSTICE NYANZI YASIN

The accused person AMAKU ABIBU FUNGARO is charged with the offence of aggravated robbery c/s sections 285 and 286 (2) of the Penal Code Act. It is alleged in the particulars of the offence that on 23rd day of January 2010 at Biyaya village in the District of Adjumani, the said ABIBI AMAKU FUNGARO robbed Lulu Fred of a motorcycle black in colour of BAJAJ model registration No. UDL 674 Z chasis No. MD2 DDDM22 RWL – 12280 and engine No. DUMBRL 94888 valued at shs. 2.480.000/= and at the time of the said robbery used a deadly weapon to wit a panga on the said Lulu Fred. Actually evidence reveals a threat to use and not use of the said panga. The accused person pleaded not guilty.

As I will reproduce the facts as I discuss the ingredients based on evidence. I found it not necessary to state them.

In our criminal justice system an accused person is presumed innocent till his guilt has been proved. Article 28 (3) (a) of the Uganda Constitution so provides. The burden to prove the guilt of an accused person remains and is always with the prosecution through out the trial.

In order to secure a conviction of the accused person, the prosecution must prove the guilt of that accused person beyond reasonable doubt. Any doubt as to whether the accused committed the offence or not must be resolved in

his favour resulting into his acquittal. See **WOOLINGTON –VS- D.P.P [1935] A.C 462.**

It is also trite that the accused is to be convicted on the strength of the prosecution case but never on the weakness of the defence as held in **ISREAL EPUKU s/o ACHUTU VR [1934] EACA 166**.

In ushering its duty of proving the guilt of an accused person, the prosecution must prove beyond reasonable doubt each and every essential ingredient of the offence with which the accused has been charged.

In the present case the ingredients in a charge of aggravated robbery are first spelt out by the sections of the Penal Code Act creating the offence that is section 285 and 286. However this has been re-affirmed in several court decisions see **OPOYA –VS- UGANDA [1967] EA 772 and UGANDA –VS- BUDEBO KASTO & 2 OTHERS CR. SS CASE NO. 0019 OF 2008.**

In the case before this court, namely they are:-

a) That a motor cycle was stolen.
b) That accused used or threatened to use a deadly weapon at or immediately before or after the said robbery.
c) That he possessed that deadly weapon.

d) That the accused person participated in the crime.

I will consider the ingredients in the same order except that ingredient number 2 and 3 are intertwined and will therefore be answered together.

WAS THERE THEFT OF MOTORCYCLE REG. NO. UDL 6742?

To prove theft of the motorcycle prosecution relied on evidence of PW4 Lule Fred which was direct evidence and the rest was matters inferred from the circumstances.

PW.4 testified that on the night 22nd which was a Friday, there was a disco function at SANAI disco hall. At about 4.00 pm when the disco closed some one called him for business. The passenger wanted to be taken to BIYAYA village. The two shortly talked and he PW.4 took him. They passed BIYAYA village by a kilometer and that when that person got off the cycle, threatened him with an object he did not see clearly and took the motorcycle as he ran away. He immediately told his employer MALISI. They looked for the motorcycle that night and failed to get it hence making a report of robbery at the police.

PW.4 described the motorcycle that was stolen from him as a black BAJAJ which had a scratch he had marked. He was able to show to court the

scratch he had marked. He was able to show to court the scratch on the motorcycle the motorcycle was tendered as prosecution Exh. PE 1 and its slip as PE1. This motor cycle was said to be the same involved in the accident described by PW.1 and left abandoned at the scene of the accident. On inquiry PW.5 HAJI ERICO the Chairman of Boda Boda stage in Adjumani found that it had initially been stolen.

The same motor cycle was proved to be the one which was numberless by exhibiting its number plate as Exh. PE2 which indicated that it was UAL 6742.

To remove any doubt prosecution further adduced evidence of documents through PW.5 INYANI STEVEN. The legal owner of the motor cycle. He tendered in this court the registration book for the motorcycle as Exh. PE3.

When this court adds the direct evidence of PW.4 that a motorcycle was stolen from him to the circumstantial evidence of a motor cycle that was abandoned after a road accident ready to positive identification by the owners, it is proved beyond reasonable doubt that a motorcycle was stolen from Lule Fred PW.4.

DID THE ACCUSED PERSON TREATEN TO USE A DEADLY WEAPON AND POSSESED ONE?

On this question the state relied on evidence of PW.4 Lule Fred and what he told PW.3 the investing officer. The defence disputed this evidence and also tendered in evidence Exh. DE1 and DE2. In resolving this question I will refer to all. Below is PW.4's evidence on the weapon. In examination in chief he said'

> **"The person removed something from his waist but since the light was off, I could not see what. He raised it and told me to surrender all I had."**

He a few lines after said

> **"I did not see the instrument he pulled but looked like a panga or long knife. I assume".**

The addition of the words "I assume" means that PW.4 was not sure of what he saw as he had earlier said that he did not see. His confusion on what he saw was made clearer in cross examination where on the same subject he said;-

> **"The accused person pulled out something I could not see well. I told police that I could not clearly identify the object the person pulled from his waist."**

That was in answering to the defence question as to what he told police that he saw. He eventually concluded that police misunderstood him. He said referring to Exh. DE2.

"In that statement I said that a panga was used to threaten me. Police misunderstood me"

That statement means that police misunderstood PW.4 to write it was a panga when he told who ever was recording the statement that he could not clearly identify the object.

To the above uncertainty one adds that in both Exh. DE1 and DE2 the makers of the statements were positive that a panga was used. PW.4 denies that he ever said that.

Another area to be looked at is the way PW.3 describes the use of the weapon compared to the description of PW.4. PW.2 said the person who threatened PW.4 "picked" something like a panga PW.4 says "pulled" from the waist the two description do not anger well.

"Puling from the waist" means all along the accused possessed a weapon. While "picking" may mean that the accused never possessed the weapon and just took advantage of that panga like object being where he was.

I have gone into air splitting because the difference touchs on ingredient to be proved.

The last defect on this point is that the questioned panga was never recovred according to PW.3 and therefore it was not tendered in evidence.

While PW.2 mentioned he saw a panga next to where the accused was sleeping police never told this court that they ever bothered to search the accused's home. All they did was to go with him to look for the panga from the scene of the crime.

With that land of evidence as above reviewed can it be safely said that this ingredient was proved to the required standard?

In **UGANDA VS KAWEKE MUSOKE [11976] HCB 12 ODOK J** (as he then was) held

> **"That in absence of evidence as to the weapon used or proper description of the weapon used or its being exhibited there would be doubt as to the nature of the weapon used which doubt should be resolved in the favour of the accused person."**

There well case where a deadly weapon is not exhibited and do not accept the evidence. And I admit those case are many but there would always be sufficient and clear evidence describing the weapon.

In **UGANDA –VS- OYIRWOTH CHARLES crim. Session case No. 0077 of 2006** (unreported) KANIA J accepted that a gun was used because

all the witnesses said they had gun shoots that contracted there to the scene. The investigating officer recovered two expended cartridges from the scene. With that land of evidence although no gun had been exhibited, my brother Judge could safely conclude that a gun was used as a deadly weapon in the commission of that offence.

Applying the test set in KAWEKE MUSOKE case (supra) which required proper description in absence of exhibition in the present case falls below that requirement.

PW.4 admitted he never properly saw the weapon even accused police to have misunderstood him to write a panga was used. That cannot be said to be proper description of the weapon. Yet it was not exhibited. I have a doubt in my mind whether the accused person actually had a panga or any other object or not.

Having entertained that doubt I decline to agree with the advice of both the honour assessors that the ingredient was proved beyond reasonable doubt and find that it was not as I have to resolve the doubt in the favour of the accused person.

DID THE ACCUSED PERSON PARTICIPATE IN THE THEFT OF THE MOTOR CYCLE.

To prove that the accused participated in offence now the act of stealing having found that a deadly weapon has not been proved, the prosecution has only PW.4 Lule Fred for direct evidence. However his evidence is weakened by problems relasing to proper identification.

He said there was little light from the disco hall. The two talked for a very short time and left Sinai.

Naturally the accused sat behind so PW.4 as the rider and the accused as his pillion could not see each other by any identification factors. The next moment he saw the accused was when the accused was when he said he was under attack. He said there was no light for him to see the panga or knife well, I would equally take it that the same light was not enough for identification of other features. I will therefore not discuss his evidence any further.

However the prosecution brought circumstantial evidence to support the contention that the accused participated in the commission of the crime. On his part the accused in his sworn evidence denied ever going to Town on the day of the alleged accident that led to his arrest. In affected he pleaded an

alibi as his defence. The issue now is whether the prosecutions circumstantial evidence suffices to place the accused person at the scene of the crime.

I will consider below the place of such evidence that the prosecution adduced before I decide on the issue.

a) There is evidence of PW.1 that on the 30th 0r 31st a day he could not recall he was involved in a motor cycle road accident with a person he saw. He knocked him, left him on the ground and abandoned his motorcycle. PW.1's piece of evidence above brings the accused to the scene of accident that resulted in the investigation of the motorcycle.

b) The motor cycle that was abandoned was numberless. This attracted concern. PW.1 informed PW.5 about the accident. PW5 said he was the chairman Boda Boda stage in Adjumani. When he got this information I believe he carried out his investigations in that official capacity and not for the sake of Beya nosy person. He inquired from the scene of accident. This is natural it is what even police does when a road accident occurs. From the scene he was told that the

person who ran away after the accident and was riding a motor cycle was the accused. I find that a natural result of an inquiry.

c) PW.5 was told that AMAKU was the person at the scene and he knew AMAKU as son of one ONZIMA a night watchman at Sinai. The accused also agreed that ONZIMA RAJAB was his father. PW.2 who also knew the accused very well and the accused knew him too as a person with whom he would pass time with, said that he found the accused at his father's home referring to the scene ONZIMA.

d) When PW.5 located the said ONZIMA the father of the accused and asked him about the motor cycle's owner that his son rides he said he does not know the owner. This means that the father had seen the son riding only that he did not know whose motorcycle it was.

e) PW.2 as a defence secretary of BIYAYI village participated in the arrest of the accused on the request of his Chairman. He said he went to the home of the accused and found him asleep with wounds on the head and hands. On inquiring what had happened the accused told

him that he fell on a motor cycle although he never told him where. This led to the accused's arrest.

f) On arrest PW.3 told court that the accused told him that he kept the number plate of the motor cycle Exh. PE2 at SUBE. PW2 also heard him say so. PW.3 in company and aid of the accused recovered the number at SUBE from a cassava plantation.

g) When he was arrested it is not true as argued by the defence that no single person identified him to police. The evidence of PW.1 AMIMU is to the contrary. He told court that he was on the frond but saw the accused, it was during day time at about 2.00 pm the accused was arrested the same day at about 5-6 pm. According to PW.3 who was the investing officer PW.1 helped them (police) to identify the accused. It is not true therefore to submit that there is no one who identified the accused for police.

The above are the relevant pieces of evidence as can be ascertained by court. KANIA J in **UGANDA –VS- OYIRWOTH** (supra) followed the decision

in **R VS TAYLOR WEAR AND DONOVAM [1928-9] 21 Crim. App. R. 20** and stated that;-

> **"The position of circumstantial evidence is that it is often the best form of evidence because it is evidence of surrounding circumstances which once put under intensified examination can prove a proposition with mathematical accuracy. To say that evidence is circumstantial therefore is not to say that it has less probative value."**

The circumstances I have listed almost in the sequence in which events occurred and infolded against the accused person irresistibly infer and lead to no other conclusion or hypothesis but that accused is guilty. From the start with accident to his arrest the story just followed one event after the one till he was arrested.

The must persushing place of evidence was the help the accused person rendered in the recovery of the number plate. PW.1, PW4 and Pw5 had all seen that the motor cycle that got involved in the accident was numberless.

With the accused help the number plate was recovered this number plate was confirmed to be the real plate for the questioned motor cycle by evidence of PW6 who produced Exh. PE3 the registration book for the motorcycle with

the reading of the same number plate. With that kind of evidence it becomes irritable to conclude that the person who stole the motor cycle.

The prosecution quite correctly in my view also pleaded that the doctrine of recent possession applies to this case. It has already been established that the motor cycle was stolen property. If found in possession of the accused person the strong inference to be drawn is that the accused stole it. In **BOGERE AND KAMBA ROBERT VS UGANDA S.C Appeal No. 11 of 1997** it was held that where a person is found in possession of recently stolen property, the is a strong presumption that he participated in the stealing of that property that authority was rightly cited by the learned state attorney and I agree with him it is applicable here. The strongest presumption with no doubt to be made here is that the person who was found with the motor cycle that was stolen is the one who stole it.

The last aspect implicating the accused in the theft is his conduct after the road accident. He ran away and abandoned property valued at shs. 2.480.000= in the hands of people he did not know. Police had not been involved. His reason for running away can be more connected to the theft

of the motorcycle other than the mere road accident. His conduct was not conduct of an innocent person.

I consequently agree with the honourable assessors that this ingredient was proved beyond reasonable doubt.

However in the present case the main ingredient of the offence of aggravated robbery is the use or to use a deadly weapon which was not proved. Under 87 of the trial on this indictment Act the prosecution evidence has proved a minor offence of theft of a motor vehicle.

I therefore find the accused guilty of theft of a motor cycle contrary to sections 254 (2) (a) and 265 of the Penal Code Act and convict him accordingly.

Signed

16/06/2011

16/06/2011

Mr. Omia P for state

Mr. Alule A for accused

Accused in Court

Baako court clerk

Mr. Omia P

We are ready to proceed for judgment

Mr. Omia P

We have no record of conviction, motorcycle are stolen and most cases they are taken to Congo and Sudan as boarder countries. Circumstances leading to this case show that was violence.

Accused is a young person of 19 years who has taken the path of a criminal life of style, his behaviour shows that the accused does not appreciate that one can get property lawfully. Seven (7) years the maximum penalty of this offence. Accused be sentenced to 7 years in prison.

Mr. Alule A

The accused person, I had interacted with him. He is first offender. He is only 19 years old. If he is given a long custodial sentence it would prejudice his future. He has been on remand for 16 months. Court should consider it. We pray for leniency.

Court:

I have heard both sides, the maximum sentence is 7 years. The state prayed for maximum period. The defence asked for leniency. The offence of

stealing motorcycle is becoming common. Sometimes it involves violence during its commission. The circumstances of the convict show him as a naïve thief starting the act of stealing that he could steal a motorcycle, strip it of its registration number and use it in the same town. He must be stopped from becoming an experienced thief.

He is sentenced to 4 years imprisonment the period of sentence will include the time of remand.

Signed

16/06/2011

Judgment read in open court in presence of accused, his advocate and state attorney. Right of appeal explained.

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NYANZI YASIN

16/06/2011