

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE**

CRIMINAL SESSION CASE NO. 0092 OF 2010

UGANDA..... PROSECUTOR

VERSUS

A1: DENIS MONGIN

A2: WOKADALA BONIFACE}..... ACCUSED

BEFORE THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

The two Accused persons were charged with Robbery c/s 285 and 286 of the Penal Code Act. The robbery is alleged to have been committed on the night of 16/01/09 at Kapkobor village, Bukwa District. The Accused persons are Denis Mongin and Wokadala Boniface.

The particulars of the offence are that the two Accused persons on the 16th day of January 2009, armed with a knife robbed Yeko Christopher of Shs. 63,500/= and immediately after the said robbery used a deadly weapon, to wit a knife on the said Yeko Christopher, the complainant.

When the charge was read and explained to the two Accused persons, they both denied committing the offence.

The prosecution case rested on the evidence of 5 witnesses. PW1 Dr. Mwonga Michael, the Medical Officer of Bukwa Health Centre IV. He examined the complainant. PW2 Yeko Christopher the complainant; PW3 Cheleko Jackson a mechanic who stays at the home of the

complainant; PW4 AIP Chesang Fred Mark attached to Bukwa Police Station at the time of the robbery and who received the Exhibits; and PW5 D/AIP Kisoro Rogers Samuel who received the Exhibits from PW4.

PW1's evidence was that he is a Medical Doctor and on 27/01/09, he received a request from Bukwo Police Station on Police Form 3 (a) to examine PW2, who was a complainant in a robbery case. He examined PW2 and found the following:

- A cut wound above the right eye measuring 1cm long and 1cm deep.
- A cut wound on the right infra orbital area extending through the right area of nose 3cm long and 0.4cm deep.
- An abrasion on the right infra scapula area measuring 8cm long and 0.1cms deep.

The injuries were classified as grievous harm considering that they would lead to a permanent disfigurement.

His remarks were that a sharp object, probably a knife was used to inflict the injuries.

The Form was tendered in as Exhibit P₁ without any objection by Counsel for the Accused.

PW2 the complainant told Court that he is a businessman and a farmer. He owns 2 vehicles for business and 1 for personal use.

He identified A1 Denis Mongin as someone who had washed his cars at home or at the river for 2 years. And A2 Wokadala Boniface who used to be his house boy for 1 year and also sometimes washed his cars. He had known the two Accused since they were young.

On 16/01/09 at about 11am while at Bukwa Trading Centre, PW2 told the driver of his lorry to take it to the river for washing. When he (PW1) returned home at Swamu at 4pm, the lorry had been brought home and A2 was also there.

A2 asked PW2 for money for washing the lorry. He told PW2 that one Musasa had washed the lorry. Musasa informed PW2 that he had washed the lorry for Shs. 4,000/= . PW2 gave him Shs. 5,000/= and A2 gave him back Shs. 1,000/= and the two left.

In the evening PW2 went to the Hotel to have dinner after which he went back home at about 8.30pm. He used the smaller of the 2 gates to enter and looked for the keys for the gate and locked it.

As he was opening the door to his house, he saw A1 walking hurriedly towards him. PW2 stopped opening the door and A1 stabbed him with a knife on the right side of the nose and above the right eye.

A2 also came in with a knife went behind PW2 and stabbed him. At the same time A2 shoved his hand in PW2's pocket and took the Shs. 63,500/= PW2 grabbed him by the shirt and it got torn. A1 kept on stabbing PW2's face, a struggle ensued and A1 ran away dropping the knife. His shoe also remained behind.

PW2 made an alarm that was answered by a number of people. They took him to Hospital and on the way passed via the Police to report. He named the people who had attacked him and the Police went to arrest them.

At the Police he gave them the piece torn off A2's shirt, the shoe and the knife. The shirt was maroon with blue stripes. PW2 recognised it as A2's shirt as A2 had worked and stayed with him for a long time.

The shoe (open) (sandal) was identified as that of A1 who also worked for PW2 and at times sat with him. PW2 made a statement to Police. He asserted that he was able to recognise the two Accused with the help of the flashlight on his Nokia phone. That the neighbour who packs his car at PW2's home also saw A1 standing by the gate that night.

In cross-examination he said that he stays with 3 other people at home. Two of them were not at home that night while the third one had gone out to drink.

The two Accused persons were not staying with PW2. They would come to work and go away. PW2 has no electricity at the house. The two gates face each other. The big one for vehicles and the small one for pedestrians. At the time of the attack the big gate was closed by not locked as the padlock had been stolen earlier in the day.

A1 emerged from the back of the house and PW2 noticed him when he was about 3 footsteps away from him. PW2 flashed the phone light and noticed it was A1 who was wearing a white short sleeved shirt, black trousers and sandals. When A1 stabbed him he struggled with him and that when A2 also appeared PW2 flashed his light at A2. The torch fell down when A2 put his hand in PW2's pocket. PW2 grabbed his shirt and A2 stabbed him on the right side below the arm (ribs). Because PW2 was wearing a jacket, the knife did not sink deeply. It scratched him.

PW3 stays in one of the rooms at PW2's home. He confirmed that the two Accused used to work for the complainant and identified them to Court.

On the night in question he had gone out. When he got home he found many people gathered there. They told him that PW2 had been assaulted. Together with the neighbours and with the light of a torch they found a slipper with blood stains, a knife and a torn shirt. The items were taken to Bukwa Police Station and left at the Counter and then went to Hospital to see PW2. However, they were not allowed to see him that night but the next day. Pw3 noted PW2 had wounds on the right eye and nose and on the side.

He identified the shirt and slipper retrieved from the compound as belonging to A2 and A1 respectively as he had seen them wearing them before. The knife that is double edged he had never seen before. The handle of the knife is covered with a goat skin.

In cross-examination he said he had known both Accused for 2 years as they worked for PW2. They had also grown up in the village.

PW4 AIP Chesang was a Sergeant at the time of the incident. He recalls that at about 9.30pm of the night in question, he was on duty. PW3 came with a double edged knife which has a handle with a goat skin, an old blue sandal and a piece of cloth torn from a shirt maroon with green and blue stripes. He identified all the items in Court. He was told the items were recovered at the scene were PW2 was attacked and robbed of Shs. 63,500/=.

PW4 received and kept the Exhibits until the next day when he handed them over to PW5 the Investigating Officer. That night PW4 went to the Health Centre but could not talk to PW2.

In cross-examination: the shirt from which the piece was torn was never recovered. There were blood stains on the knife.

PW5 D/AIP Kisoro was by then attached to Bukwa Police Station and was at the rank of Detective Corporal.

He confirmed that the double edged knife with a rubber handle, a blue slipper (Bona bagagawale) and a piece of cloth torn from a shirt (maroon, with green, blue and white stripes) were handed over to him on 17/01/09 at about 10am.

PW5 received the Exhibits vide CRB 019/2009 and marked them KRS.

The witness presented the Exhibits to Court, described each one and they were tendered into evidence as P₂ (Knife), P₃ (piece of torn shirt) and P₄ (Blue slipper).

In cross-examination, he was told the Exhibits belonged to the Accused persons. He did not notice blood on the knife but he is sure it was double edged with a rubber handle. The rest of the shirt was never recovered and the homes of the Accused were never searched.

After the testimony of PW5, the prosecution closed its case and Court ruled that a prima facie case had been made out against the Accused to require them to be put on their defence.

Both Accused opted to give unsworn statements. A1 said he wished to call 2 witnesses while A1 had one witness.

Court directed Witness Summons to issue and adjourned the matter to enable the witnesses appear.

But at the next hearing, Court was informed that the witnesses could not be found and that therefore the Accused had decided to do without them.

DW1 (A1) told Court that he washes vehicles for a living. On 16/01/09 at about 8pm he was in the bar of one John Masiki, with one Lutaya Francis and a lady called Idah. He stayed with them up to 9.30pm and went home where he reached at 10pm. After dinner he went to bed and slept for 2 hours, whereupon his wife woke him up saying there was someone at the door.

He got up, the person at the door introduced himself as the LC of the area and asked him to open the door.

Upon opening the door the Vice Chairperson of the village came in accompanied by two Police Officers. One Officer in uniform was carrying a gun, the other one was in plain clothes (PW3).

The house was searched and they asked for a shirt he had been wearing in the day time. His wife showed them one hanging on a line.

The Police took A1 with them to Police and put him in cells. In the morning they informed him of the complaint of PW2.

This Accused denied participating in the theft saying he has never seen the complainant and does not know him. That all the prosecution witnesses told lies to Court, as he did not carry any knife and the slipper exhibited was not his. As a car washer, he always wears gum boots.

DW2 (A2) denied knowing A1 or that they were friends and or neighbours. That though he was working for PW2 its not true that they robbed him.

On that date in question at 8pm, he said he was at home with his wife and did not go out anywhere. He had dinner, bathed and went to sleep at 8.30pm.

At about 12.30pm someone knocked on his door and identified himself as the O/C Swamu Police Station. A2 opened the door and 4 people entered the house. They looked around the house, asked him if he had a panga and Accused told them he had lent it to an old woman.

The Police took him with them to Bukwa Police Station. The next day he was asked to make a statement. He told the Police that he had been with one Gizanga Moses the day before, washed PW2's Fuso at the river, went to his home (PW2) for payment and he gave them Shs. 6,000/=. The money was shared equally, A2 bought lunch and went home.

He denied ever seeing A1 that day or stabbing the complainant. They have known each other since 2005 and PW2 was paying A2 very well and therefore he had no grudge against him.

A2 believed that PW2 framed him because A2 had testified against him in a case of adultery.

To prove a charge of Aggravated Robbery **c/s 285 and 286 (2)** of the Penal Code Act, the prosecution has to prove the following elements beyond all reasonable doubt:

- (i) That there was a theft.
- (ii) That there was use of violence.
- (iii) That there was threat to use a deadly weapon or actual use of a deadly weapon as defined under section **286 (3) (a) (i)** of the Penal Code Act or that the Accused caused grievous harm to the complainant.
- (iv) Direct or indirect participation of the Accused in the commission of the offence.
- (v) Where there was more than 1 Accused person, common intention has to be proved.

As has been stated overtime the burden of proof is on the prosecution to prove all those elements beyond all reasonable doubt. The burden never shifts to the defence even where the Accused set up a defence, except in a few cases provided for by law – see the case of **Uganda vs. RO 973 Lt. Samuel Kasujja & 2 Others; Criminal case No. 08/92.**

Taking into account the evidence as a whole, Court will deal with each element separately to determine whether the prosecution discharged its burden.

Proof of theft: To prove this element, the prosecution relied upon the evidence of PW2, the sole eye witness to the offence. He stated that on the date in question at about 8.30pm and as he was opening the door to his house, he was attacked by 2 assailants who were armed with knives. During the attack and the ensuing struggle, one of the assailants took Shs. 63,500/= from his pocket. PW2 was very consistent in his evidence.

The defence did not dispute the fact that PW2 was attacked and robbed and that a deadly weapon was used.

Court finds therefore that the first element of theft was proved beyond all reasonable doubt.

Turning to the question of violence and use of a deadly weapon, the evidence of PW2 shows that the assailants stabbed him on the right side of the eye, of the nose and under the arm. The injuries sustained were confirmed by PW1 the Doctor who examined PW2 – See Exhibit P₁.

It is on record and it is not disputed by the defence that the assailants of PW2 used knives to stab him.

Under section 286 (3) of the Penal Code Act **“deadly weapon includes – (a) (i) any instrument made or adapted for shooting, or cutting, and any imitation of such instrument.”**

Indeed a knife is a deadly weapon as its made for cutting and can be adapted for stabbing. The defence conceded in this case that a deadly weapon was used on the complainant PW2.

There is therefore sufficient evidence for Court to find that there was violence and use of a deadly weapon at the time of commission of the offence.

PW1's report shows that a knife was probably used for stabbing the complainant and PW3 together with the neighbours recovered a knife from the compound of PW2 after the incident and took it to Police – Exhibit P₂.

What is left to determine is whether all the accused persons or anyone of them participated in the attack of the complainant. This depends on whether there was proper identification of the assailants.

On this issue the prosecution relied upon the evidence of PW2 the complainant who told Court that he returned home at about 8.30pm and as he was opening the door to his house, he was attacked by A1 who stabbed him on the right eye brow and the right side of the nose. That in the ensuing struggle A2 who joined by A1 who also stabbed PW2 under the arm (ribs) and also took his Shs.63,500/=. He was able to recognise the two Accused persons with the help of the flash light on his Nokia phone. He knew the two well since they worked for him and he had known them since they were young. Immediately after the attack he named the 2 Accused as his assailants and a knife, a blue sandal and piece of torn shirt belonging to them were left behind. Both Accused raised alibis.

The established principle applied in considering evidence of identification is that **“before a conviction can be based on the evidence of sole or more identifying witnesses, such evidence must be tested as truthful and any possibility of 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 person with the offence.”** Reference is made to the case of **Uganda vs. RO. 973 Lt. Samuel Kasujja & 2 Others; Criminal case No. 8/92** where the case of **Tomasi Omukono vs. Uganda; Criminal Appeal No. 04/97** and **Roria vs. R [1967] E.A. 583** were relied upon.

And in the case of **Kalume vs. Republic [1998] LLR 693 (CAK)**, it was emphasised that, **“the Court should warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrators of an offence fleetingly and under stressful circumstances.”**

Counsel for the Accused argued that the circumstances of this case were not favourable for proper identification. It was at night. The only available light was a phone flash light. There was a struggle during which the complainant was injured.

Further that there would be circumstantial evidence the exhibits of the knife, slipper, piece of torn cloth were never proved to belong to either of the two Accused persons. And that their alibis had not been disproved.

But looking at the evidence as a whole, it is clear that both Accused were well known to PW2 the complainant, and he recognised both of them. They had each worked for him for at least 2 years and he had known them since they were young. Although the circumstances of the attack were stressful, PW2 had a flash light on his phone which he used as the Accused came towards him.

It has been laid down in decided cases that **“recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant”** - case of **Wamalwa & Anor. Vs. Republic [1999]2 E.A 358 (CAK)** where the case of **Anjononi & Others vs. Republic** was applied.

It is also on record that the complainant immediately named his attackers to the neighbours and to the police as the two Accused persons.

According to the case of **Njiru & Others vs. Republic [2022]1 E.A. 218 (CAK)**, **“.....evidence relating to identification if scrutinized carefully could be acted upon if Court is satisfied that it was positive and free from the possibility of error. The factors to be considered in making this determination included the surrounding circumstances and whether the eye witness(es) gave a description of the suspects to the Police at the earliest**

opportunity (Republic vs. Turnball [1976]63; Criminal Appeal No. 132 and Hibuya vs. Republic [1996] LLR 425 (CAK) applied.)”

In the circumstances of the present case, I am satisfied that the Accused were properly recognised by PW2 and his recognition was free from the possibility of error because of the following reasons.

There is evidence that A1 left one of his sandals/slippers at the scene of the crime. While A2's piece of cloth that was torn off his shirt was left at the scene together with a knife. All the items were exhibited without any objection from Counsel for the Accused.

Counsel's argument that the items were never proved to belong to either of the Accused persons is belied by the fact that both PW2 and PW3 described the items as they had seen the two Accused wearing them over a period of time.

While the prosecution witnesses disagreed as to whether there was blood or not, the fact remains that a knife was retrieved at the scene and PW2 was attacked by people wielding knives identified as A1 and A2. The Doctor confirmed that injuries were caused by a sharp object like a knife.

Am satisfied therefore that there was sufficient evidence against A1 and A2 and that their alibis were disproved as lies. Contrary to the arguments of Counsel for the Accused, the two were placed squarely at the scene of the crime.

Having found that it was the Accused who attacked the complainant that night, injured him with knives, and took his Shs. 63,500/=, I find that they had a common intention to prosecute an unlawful purpose as defined under section 20 of the Penal Code Act. For those reasons, each of them is deemed to have committed the offence – see **Andrea Obonyo & Others vs. R [1962]1 E.A 542 (CAN)**. The finding is further supported by the case of **Dafasi Magayi & Others vs. Uganda [1965]1 E.A 667 (CA)** where the Court held that “since it was abundantly proved

that the deceased was mercilessly beaten with sticks by the Appellants until he died, there was enough evidence of “common intention” to kill or cause grievous harm.”

In the present case the common intention of the Accused was to cause grievous harm and to rob the complainant of his money.

For all the reasons given in this Judgment, am satisfied that the Accused attacked the complainant and robbed him of his money. And in conformity/agreement with the opinion of both Assessors, I find the Accused persons guilty of the offence of Aggravated Robbery c/s 285 and 286 of the Penal Code Act and they are convicted accordingly.

Dated the 27th day of February 2012

Flavia Senoga Anglin
JUDGE