

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 138/94

UGANDA ..... PROSECUTION

VERSUS

ABDU WETYAKI ..... ACCUSED

BEFORE: THE HONOURABLE JUSTICE C. M. KATO

J U D G M E N T

The accused person Abdu Wetyaki is indicted for robbery contrary to the provisions of sections 272 and 273(2) of the Penal Code Act. The case for prosecution as contained in the indictment is that on 15/6/1993 at Naibiri Trading Centre in the district of Iganga the accused person together with other people not before court robbed Christopher Wejuli of a National Panasonic radio, wall-clock, handbag, 4 bars of soap and 300,000/= cash and that at that time the accused threatened to use a panga and a gun on the said Wejuli. The accused pleaded not guilty to the indictment.

It is trite law that the burden of proving the accused's guilt rests on prosecution throughout. The accused has no duty of proving his innocence: Woolington v. DPP (1935)AC 462. Where an accused person is being tried for an offence of aggravated robbery as is the position in the present case, prosecution is enjoined to prove beyond reasonable doubt that there was theft, that there was violence, that a deadly weapon, as defined in section 273(2) of the Penal Code Act, was used or there was a threat to use it and that the accused participated in the exercise.

Prosecution produced evidence of 3 witnesses to establish that there was theft. The 3 witnesses were: Christopher Wejuli (PW1), Hellen Naigaga (PW2) and Michael Mugeni (PW3). All these witnesses testified that on the night of 15/6/1993 the shop of Michael Mugeni in which Wejuli was selling was attacked by robbers and a number of shop articles were taken away by the attackers. I believe the evidence of these witnesses on this point as truthful and I hold that there was theft at the shop of Michael Mugeni on the night of 15/6/1993.



As for the question of violence, both PW1 and PW2 testified that the attackers ordered them to lie down and they obeyed, they (attackers) also threatened them that if they did not do as they were being told they would be shot. In my considered opinion the acts of the attackers amounted to violence.

On the question of deadly weapon being used it is the law that a gun and a panga are deadly weapons although in this particular case these weapons were not produced in court. I am of the view that the panga which was seen by PW1 and PW2 was capable of cutting a human being and as such it was a deadly weapon although I have some doubts as to whether what the witnesses saw which looked like a gun was a real gun or a mere toy as the alleged gun was never <sup>fired</sup> : Uganda v. Peter Buyamukama (1981) HCB 16. The attackers threatened the witnesses that they would harm them if they did not obey their orders which they were giving to them. In these circumstances it is my finding that there was a threat to use a deadly weapon namely: a panga. ~~It~~ follows that the offence of robbery with aggravation was in fact committed at the home of Michael Mugeni on the night in question.

The vital point to be determined now is whether or not the present accused Abdu Wetyaki was a party to that robbery. The accused who testified on oath denied ever having taken part in the robbery, but prosecution is adamant that he was one of the robbers who took part in the robbery. The 2 eye witnesses PW1 and PW2 truthfully told the court that they did not recognise any of the attackers whom they saw on that night, that being the position the evidence against the accused remains circumstantial. It is the law that the court should approach circumstantial evidence with caution: Simon Musoke v. R. (1958) EA 715.

In the present case the circumstantial evidence relied upon by prosecution is to be found in the testimony of PW4, PW5, PW6 and PW7 who testified that when the house of the accused was searched a radio cassette was recovered and the same radio was identified by PW3 as being one of the items which had been robbed from his house 3 months earlier. It is also the case for prosecution that when the accused person had been arrested he led a team of askaris to the house of Walusimbi where he had allegedly hidden a wall clock which was also later identified by PW3 as one of the items stolen from his shop.



On his part the accused says he did not steal the radio but he bought it from a neighbour called Walusimbi at the price of 30,000/= out of which he had paid 20,000/=. He explained that Walusimbi could not give him a receipt or agreement before he had paid the last instalment, which I think is a common practice in the country. As for the clock he says he never took anybody where the clock was found, when the askaris went to search Walusimbi's home he (accused) remained at the sub-county headquarters.

In my view the whole matter seems to centre on a question of which side is to be believed. Prosecution case has been riddled with a number of contradictions which have tended to weaken its case rather than strengthen it. Among the salient contradictions are the testimony of PW4 Paulo Wanume Chairman RCH who said that accused's house was searched by the 2 local administration policemen; but one of local administration policemen called Waiswa (PW7) says it was the RC officials who searched the house, the policeman remained outside. Another contradiction is that while Waiswa (PW7) says he went to accused's home with his boss Moses Nyanga (PW5), Nyanga says he went sent Waiswa to go and search accused's house he himself (Nyanga) did not go. In yet another contradiction Nyanga and Waiswa say they went to search Walusimbi's house where the wall clock was found in the presence of accused but Paulo Wanume (PW4) says when Walusimbi's house was being searched the accused was not present he had been left behind presumably at the sub-county headquarters where he was being detained. These contradictions are contained in the evidence of key witnesses as far as the recovery of the property is concerned. The law is clear as to the effect of contradictions, the law is simply that when such contradictions are grave or major and go to the root of the case and they cannot be satisfactorily explained away they should be resolved in favour of the accused person but if they are minor they should be ignored: Uganda v. Kassim Obura (1981) HCB 9 and Ndayakwa v. Uganda (1978) HCB 181. I consider the present contradictions to be major as they seriously affect the credibility of the star witnesses in this case.

It is an established principle of our law that when a person is found with property which has been stolen recently such person is either a thief or a guilty receiver unless he can offer an explanation as to how he came to be in possession of such property.



In the instant case prosecution case is that the accused was found in possession of a radio and wall clock which had been stolen from the owner 3 months previously. The accused does not deny the radio cassette having been found in his house; but it is his contention that he bought the radio from Walusimbi who is a neighbour. He paid Walusimbi 20,000/= and remained with a balance of 10,000/=. I accept the accused's account as to how he came to be in possession of the radio cassette to be truthful for the following reasons:

(a) When he returned home and he was told that his house had been searched and his radio together with his wife had been taken to the sub-county headquarters he immediately followed his property. According to the evidence of PW7 when the accused was asked how he got the radio cassette he explained that he had bought it from his brother Walusimbi and he has maintained that stand up to the end. Had the accused stolen the radio he would not have risked following it when it was in the hands of the authorities.

(b) The accused explained to the court as to why he had no agreement or receipt for the radio; the reason was because he still owed Walusimbi 10,000/= on the radio cassette and Walusimbi was not prepared to issue him with an agreement or receipt until the last payment, which I consider to be a reasonable explanation.

(c) The accused explained that when he bought the radio cassette he did not know that it was stolen and Walusimbi told him that he was selling it because he wanted to raise money for dowry.

(d) Prosecution witnesses in particular PW4, PW5 and PW7 have contradicted themselves so much as to how the radio was recovered that their evidence cannot be taken seriously.

(e) The accused has remained so consistent and firm when under the stiff cross-examination that it cannot be said that he was telling lies.

On the issue of the accused having taken the policemen to the home of Walusimbi where the wall clock was found, it has been the defence case that the wall clock was not found in possession of the accused and he never led anybody to Walusimbi's home where it was found. Prosecution witnesses (PW4, PW5 and PW7) are in full agreement that the wall clock was not found at the home of the accused but it was found at Walusimbi's house. The accused can only be held responsible on this issue if he actually led the police to where the wall clock was found. The accused's story that he did not lead anybody to where the



that

clock was is supported by PW4 who says the accused was not present when the wall-clock was being recovered at the home of Walusimbi. I accept his story that he did not lead anybody to where the wall clock was found and as such he cannot be said to have been in possession of the wall clock.

In these circumstances I would like to agree with Mr. Muziransa's contention that the circumstantial evidence as adduced by prosecution has not only been weakened but it has been totally destroyed: Serwada v. Uganda (1978)HCB 175 followed.

The accused put up a defence of alibi. As stated earlier in this judgment, all the 2 eye witnesses frankly said that they did not recognise any of the robbers, the only evidence which would have connected the accused with the alleged robbery would have been the goods which were found in his possession but the court having found that the accused has satisfactorily explained how he came to be in possession of the radio cassette and that he had nothing to do with the wall-clock, it follows that no evidence has been adduced to put the accused at the scene of crime at the time the crime was being committed, his defence of alibi must accordingly be sustained.

The position being what it is I find that prosecution has not proved its case against the accused beyond reasonable doubt. I find the accused not guilty and I do acquit him. He is accordingly acquitted. He is to be set free unless he is being held in prison for some other lawful purposes.

The gentlemen assessors had advised me to find accused guilty of being in possession of stolen property. I have not followed that advice because the two gentlemen assessors did not seem to have addressed their minds properly on the evidence before them and they seem to have been under a mistaken impression that the accused was under a duty of proving his innocence.

C.M. KATO

JUDGE

19/12/1994



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