

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

CRIMINAL SESSION CASE NO. 256/91

UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTION
VERSUS

A1: 2ND LT. VINCENT KATEROGA)
A2: AWALI WALIWA KADUNGA) :::::::::::::::::::::::::::::: ACCUSED

BEFORE: THE HONOURABLE JUSTICE C. M. KATO

J U D G E M E N T

The accused persons: 2nd Lt. V. Kateroga and Awali Wasiwa Kadung herein after referred to A1 and A2 respectively, were each indicted of robbery contrary to the provisions of sections 272 and 273(2) of the Penal Code Act. The Indictment alleges that the 2 accused persons on or about 30/10/1989 at the village of Nabirere in the district of Iganga robbed one Abdu Elobyewa of a number of house hold property together with 1.6m/= and at that time he was threatened with guns. Both accused pleaded not guilty to the indictment.

Before proceeding to deal with the merits and demerits of this matter I would like to point out that this case proceeded on a duplicate file because the original file went missing in circumstances which have never been clear. The accused persons had been committed for trial as far back as 1991 but the trial could not be conducted because the file seems to have been misplaced either at Jinja Criminal Registry or High Court Criminal Registry in Kampala. I consider this to be an unfortunate state of affairs which has led to the accused persons to remain on remand for unreasonably too long without knowing their fate; it is hoped that the administrators will bring a stop to such an unhappy situation.

Going back to the issues in this case I would like to start by stating as to what case for each side has been. The case for prosecution as contained in the evidence of the complainant Abdu Elobyewa and his 2 wives is that on the night of 30/10/1989 as they were sleeping at their home some strangers came and demanded for them to open the door, on sensing that there was a problem the complainant jumped out of the window but before he could run far he

was caught up by one of the attackers. He was eventually tied up and made to lie down. The complainant was able to recognise the 2 accused persons but his 2 wives were only able to recognise A2 whom they had known for a long time. During the alleged attack several things were taken out of the house, they included 1.6m/=-, 1½ bags of rice, 20 shirts of uniform, 5 gomases, 2 rolls of Nytil Jinja, one small radio, one big radio, 3 blankets, one jerrican of paraffin, 2 dozens of plates, 2 bowels, 100 gunny bags and other small items that were found in the house. The attackers were armed with guns. After the robbery the complainant was taken to the Chairman RCI who was not found at home, the complainant was then taken to Busembatia police station from where he was finally handed to Iganga police where he was detained for 1½ weeks.

On the other hand the essence of the case for A1 is that on that particular night he had gone to the home of the complainant while on official duty to search for the guns which the complainant was allegedly keeping illegally. He got his instructions from Magamaga barracks where he was stationed. On receipt of the order he proceeded to Iganga where he reported to the District Security Officer Mr. Bwire John who was in charge of the operation at the home of the complainant. He (A1) proceeded in a Santana and on reaching the complainant's home he found when the search was over and he asked those who had gone ahead in a pick up and carried out the search if they had told the RC of the area about the search. He was told that they had not done so, he advised them to take the complainant to the chairman RCI, they proceeded there but the RC chairman was not there. The complainant in this case was taken to Busembatia and then Iganga Police. His (A1's) role in the matter ended there. Later on however on the 19th December the same year, he was surprised when he was sent to Iganga to be told that during the operation they had carried out at the home of the complainant some money had been stolen and he was finally charged with the present offence.

The substance of the story as told by A2 is that on that particular night he was at his home, 2 men dressed in military uniform knocked at his door, he opened for them expecting them to be one of his nocturnal visitors as he (A2) is a confessed witchdoctor. They asked him whether he knew Abdu's

home, he said he knew because he was his relative then they asked him to show them the guns which he and Abdu used to rob people. He denied knowledge of such guns, he was then arrested and tied "kandoya", he was put on a pick up, but on the way to Abdu's home the pick up stopped he was untied and was given a military uniform to wear which he did, he was finally driven to Abdu's home where he remained tied and under guard, finally he was taken to Iganga police where he was detained together with the complainant and eventually charged with the present offence.

It is trite law that the burden of proving the guilt of an accused person rests upon the prosecution through out, the accused has no duty of proving his innocence: Woolington Vs. DPP (1935)AC 462 and Okali Okethi Vs. Republic (1965) EA 555 at page 559. In a case of aggravated robbery like the one under consideration now prosecution is enjoined to prove, among other things, that there was theft; that the theft was accompanied with violence, that there was use of or threat to use a deadly weapon as defined under section 273(2) of the Penal Code Act and that the accused in the dock participated in that theft.

I propose to deal with the above ingredients one after the other starting with the issue of theft. It is not in dispute that a number of house hold property were taken away from the home of the complainant Abdu Elobyewa without his consent on the fateful night. The evidence also does indicate that at the time the property was being taken away the complainant was beaten up and tied up ~~which~~ is an indication that a certain degree of violence was involved in the exercise.

On the issue of using or threat to use a deadly weapon, it has been the case for prosecution that the people who attacked the home of the complainant were armed with guns, this fact not disputed by both accused persons. Here it should be pointed out that the presence of the guns at the home of the complainant was clearly explained by A1 who told the court that the purpose of going to the complainant's home was to search for guns which were being illegally kept. It is a matter of common sense in modern Uganda that when going to search a man who is suspected to be in possession of guns one must be armed with another gun. The guns which were seen at the home of the complainant being carried by

those who had gone to search that home were therefore for lawful purpose and they were never intended to be used for robbery. If they were meant for use to rob the complainant they would have been fired or some threats would have been made to those present that if they did not comply with the orders they would be shot but there were no such threats. The reasons why such threats were never made to the members of the family was because the guns were not intended to cause any harm to anybody except in self defence. According to the evidence available one may reasonably state that during the search for the guns some of the members of the team might have broken loose and decided to help themselves on the property of the complainant which in my view was wrong but did not necessarily mean that there was robbery. It is my finding that what happened at the home of the complainant on that night did not amount to an aggravated robbery but ordinary theft of the complainant's property.

The next matter to be dealt with is whether or not the 2 accused persons or one of them was a party to the theft of the complainant's property.

The case for the 1st accused person Vincent Katerega, as earlier pointed out in this Judgement, is basically that he went to Abdu's home in his official capacity to effect a search illegal guns and on his arrival he found when the search had already been completed by his colleagues who had gone ahead of him. This story appears to be true and believable for 2 reasons: The 1st reason is that all the prosecution witnesses do not describe what role this particular accused played in the alleged robbery although PWII says she saw him giving orders quietly, she did not elaborate on how these orders were being quietly issued. A1's story is supported by PWI who says that the pick up arrived 30 minutes before the santana came, since this accused came in a santana it is possible that by the time he arrived the search had already been carried out by those people who came in the pick up. The 2nd reason why I feel that A1's story is true is that the way things were done after the arrival of A1 is indicative of some innocent part being played by the accused eg. the complainant was taken to the RC chairman at the suggestion of A1, although he (RC chairman) was not at his home, later the complainant was taken to

Busembatia and Iganga police stations. The movement of the complainant is consistent with the story that an official search had been carried out at the complainant's home and A1 was part of that team which was supposed to carry out that search although he arrived a little bit too late. I am not aware of any common practice in this country whereby ordinary robbers take their victims to the authorities after the robbery.

It is trite law that a person cannot be criminally liable for an offence committed by another person unless such person had common intention with the other person or has expressly or indirectly authorised that other person to commit the crime. In the present case the 1st accused cannot be said to have authorised those who stole the complainant's property in the process of the search because he was not in charge of the operation and he was not present when the search was being carried out. He did not have common intention of unlawfully committing any offence at the home of the complainant. The provisions of section 22 of the Penal Code Act cannot be applied to A1 in the present case.

I find that there is no evidence to conclusively prove that A1 was one of the thieves who carried away some property from the complainant's house.

I now turn to the 2nd accused Awali Waiswa Kadunga. In his evidence which has already been summarized above, this accused denied ever having taken part in the commission of the crime, his story that he was taken to the scene when in captivity is strongly supported by all the prosecution witnesses apart from PW2, whose evidence did not appear to be reliable, that this man was all the time tied with ropes and was made to lie down, he also remained guarded by an armed man and at no time did he take part in the removal of the complainant's property. In my view this is a case where compulsion has been successfully pleaded under section 16 of the Penal Code Act. The presence of the 2nd accused at the home of the complainant was not a voluntary act and force which was used from his (A2's) house upto the complainant's house continued to be exerted upon him until he was finally handed over to Iganga police. In the case of: R. Vs. Sydney Joseph Bourne (1952) CAR Vol. 36 125 at

page 128 it was held that a person who does some thing wrong when under duress cannot be held criminally liable. The present case must be distinguished from the case of: Ezera Kyabanemaizi & others V. R. (1962)EA 309 at page 316 in that in the latter case the accused in fact participated in the murder of the deceased and they were not under duress all the time as has been the case in the present case. I find that A2 did not commit the offence he is alleged to have committed and he had no common intention with those present to commit any crime at the home of the complainant, a mere presence by him at the scene of the crime is not enough, his presence there was against his will and he did not take part in what was going on: R. V. Komen Arap Chelal & others (1938)5 EACA 150 at page 152 and R. V. Ramji Sirji & others (1946)13 EACA 127 at page 131.

I find that the 2 accused persons did not participate in the theft of the complainant's property on that night. None of them therefore can be held criminally liable. In agreement with the opinions of the 2 gentlemen assessors I find the 2 accused persons not guilty and I do acquit each of them of the offence of aggravated robbery. Each of them is to be set free from prison unless he is being held there for some other lawful purposes.

C.M. KATO

JUDGE

15/11/1994