THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 82/94

UGANDA ..... PROS

VERSUS

A1: MOHAMAD MUKASA)
A2: IDI KAGWA) ..... ACCUSED
A3: NO. 23131 P.C. ROBERT MUSIGA)

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

Each of the three accused persons Mohamadi Mukasa (A1), Idi Kagwa (A2) and Robert Musiga alias Mugisa (A3) whom I shall hereinafter refer to as A1, A2 and A3 respectively was initially indicted in 10 counts for robbery but at the close of the prosecution case, each of them was acquitted in respect of counts 2, 6,9 and 10, but the court found a case having been made out for each of them to answer in respect of counts 1, 3,4,5, 7 and 8. This judgment is therefore in respect of these last mentioned 6 counts. Each count is for robbery with aggravation c/ss 272 & 273(2) of the Penal Code Act. The three accused persons pleaded not guilty to the indictment.

Case for prosecution was essentially that on the morning of 23-2-93 at about 6.00a.m a coster bus Reg. no. UPB 762 was travelling from a village called Buyinge, towards Iganga but on reaching a place known as Iyirimbi village another car Reg. no. UVZ 671 was found parked on the road. The mini bus was stopped by one of the men who came from that other vehicle and was armed with a gun. About 5 or 4 men came from that vehicle. The occupants

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of the mini-bus were robbed of their money and some were beaten up by the attackers who came out of the small vehicle. Later on the three accused persons were arrested at different places and time on the same day. Later they (accused) were charged with the 10 offences of robbery.

On their part the three accused persons denied ever having taken part in the alleged robbery. A1 said that on that particular morning he was just arrested by 2 people at his home at Walukuba estate where he worked as a mechanic, when his house was searched some 600,000/= was found together with a microphone, radio cassette, camera, and a black bag. He denied having taken part in the alleged robbery. A2 who gave a sworn statement said he had been hired by A1 and he went with him together with A3 up to Iganga where he was joined by another group of two people who ordered him at gun point to drive them to a given place, but after they had reached that place they forced him to drive ahead although he resisted, when they reached a certain place he stopped and the other people went on the robbing exercise while he remained in the car at the scene of the crime but he was under compulsion. The case for A3 was a total denial of any involvement in commission of the alleged robberies. On 23-2-93 he was at his house no. 74B in the police barracks then he saw some policemen who came and searched his house then he was put under arrest. He found A2 at the police station when he was asked if he knew A2 he denied knowing him. He put up alibi as his defence.

It is trite law that where an accused person pleads not guilty to a charge all the ingredients of an offence are put in issue and the prosecution is duty bond to prove the case against the accused beyond reasonable doubt: Woolmington v. DPP (1935)AC 462 and Okethi Okale v. Republic (1965)EA 555 at page 559. The accused has no duty of proving his innocence and he should not be convicted on the weakness of his defence, but on the strength of the case as proved

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by prosecution: R. v. Israili Epuku s/o Achietu (1934)1 EACA 166. In the case of robbery with aggravation, like the present case, prosecution is duty bond to prove, inter alia, that there was theft, that there was violence, that there was actual use of or threat to use a deadly weapon and that the accused participated in the robbery.

I will deal with the above ingredients briefly a apart from the last one which I propose to deal with at length. It is not in dispute that on the fateful morning a number of passengers had their money together with other property taken away from them without their consent. It is my finding that there was theft. Regarding the 2nd ingredient there were witnesses who testified that at that particular moment they were roughed and beaten and gun shots were fired. This piece of evidence was not disputed. I therefore find that violence was involved in the exercise. Considering the issue of use of a deadly weapon all prosecution witnesses who were at the scene agreed that one of the men was armed with a gun which he fired in the air although the witnesses were not in agreement with the number of shots which were fired but there is no doubt that firing of a gun was involved. It was pointed out in the cases of: Wasaja v. Uganda (1975)EA 181 at page 183 and Uganda v. F. Kakooza (1984)HCB 1 at page 2; that where guns have been fired the court finds no difficulty in holding that there was a deadly weapon involved in the robbery. I find that gun shots which the witnesses heard were fired from a gun not from a toy gun therefore a deadly weapon was used. All in all I find that robbery was committed on that particular day to the prejudice of PWI (Mutwalibi Lubanga), PW2 (Chrisestom Kidubuke), PW7(Haji Amisi Lusala), PW8(Chritopher Mukubira), PW9(Ochieng Ogutu) and PW13(Moses Mayende). This finding was admitted by both sides in their submissions.

That leads me to the pertinent question which is: did the accused persons or any of them participate in that robbery?

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I intend to deal with the position of the 3 accused persons separately but before I proceed to do that there are 2 matters which require determination. The first of these matters concerns the issue of whether or not A2 whose evidence seems to be incriminating the other two accused persons is an accomplice. The other matter concerns his statement which he made to the police also incriminating the other accused persons.

I will deal with his statement first. In his statement which was tendered by prosecution as Exh.P19 A2 gave a detailed account of how he was hired by A1 and later on joined by A3 and how they went to Iganga and they were joined by 2 other people he was then put at gun point after which they proceeded to the place where the robbery took place. This statement although in itself does not ammount to a confession (in a strict sense of that word) was admitted under section 28 of the Evidence Act and it was admitted by consent. Since it was part of the prosecution case it can be taken to be a piece of evidence from an accomplice and as such it requires corroboration as a matter of practice by an independent witness before a safe conviction can be based upon it: Buteba s/o Mubyazhe and another v. R. (1953)20 EACA 178 and Anyuma s/o Omollo and another v. R. (1953)20 EACA218; as to whether or not this statement has been corroborated is a matter which I will deal with when dealing with each individual accused.

The second matter which I would like to address my mind to is the evidence which the accused gave when in the witness box. He appeared confused or doubtful as to what part was played by his co-accused but he eventually made up his mind and stated that they were the people who committed the offence not himself, in this case he was not testifying as a prosecution witness. The law as stated in the case of: Peter Burnes & James Richards v. R. (1940)27 Criminal Appeal Reports 154 at page 166; is that where an accused person appears in court and in the course of giving his defence he incriminates his co-accused in order to exonorate himself, his evidence is

not that of an accomplice and therefore requires no corroboration. Applying the decision in that case to the present case it is my view that while the statement which the prosecution tendered as Exh. P.19 requires corroboration, the evidence which the accused(A2) gave in court in his defence is not the prosecution case therefore it does not require corroboration because what that witness was stating was not part of the prosecution case. Technically it means A2's evidence in court is capable of corroborating what he told the police in his statement Exh. P.19.

I now turn to the case of A1, the only witness who testified as having identified A1 at the scene of crime is PWXI (Idi Mugoya). In his testimony Mugoya said that he had seen this accused person at the scene of the crime and that he had identified him as a person who was having a knife, he was wearing black jacket and was near him so he was able to recognise him. According to him these things happened at about 6.00a.m. the day was getting clear and there were lights from the two vehicles so he was able to recognise him properly. On his part this particular accused (A1) said that on that morning he was at his home at Walukuba housing estate and he was nowhere near the scene of crime. One of the two people must be telling the truth and one must be telling lies. In determining whether or not the accused was properly identified the court normally takes into account such matters as source of light, period taken when the witness was observing the accused and whether or not the accused was a stranger to the witness: Nabulere v. Uganda (1979) HCB 77. In the present case the accused was certainly a stranger to this particular witness as he says he had never seen him before but this same witness said that the weather was bright and the accused was near him and that the incident lasted for between 40 and 45 minutes. In my considered opinion these circumstances (apart from accused having been a stranger) created favourable conditions for correct identification of the accused (A1) by Idi Mugoya (PWXI) at the scene of crime on the morning of 23-2-93. I do not accept A1's statement that on that

morning he was at his home all the time. Considering the evidence of PWXI (Idi Mugoya) along with the statement of A2 which was tendered by consent of both sides I have found it unreasonable to believe the accused's defence of alibi which has been totally destroyed by prosecution evidence; the defence of alibi raised by A1 is accordingly rejected. The police statement made by A2 has been sufficiently corroborated by evidence of PWXI and A2's evidence on oath while in court.

That leads me to the position of A2. The case for prosecution against this particular accused is that he was involved in the commission of these offences and that he was identified at the scene of the crime by PW8. The accused in his statement to the police EX. 19 and in his defence which he gave on oath does not dispute having been involved in this matter. In this court he explained that through out this incident he was under compulsion, he explained that he was hired by A1 and later joined by A3 on a mission he thought was lawful until he was placed at gun point and ordered to do as his captors directed him to do. By provisions of section 16 of the Penal Code Act compulsion is a valid defence in our law in appropriate cases. All the witnesses who testified for prosecution apart from PW8 said that the driver of m/v UVZ 671 remained in his vehicle a story which supports A2's case that he remained in the car while being guarded. PW8 must have been mistaken as to the man he claims to have seen participating in the robbery.

The only issue here is whether or not A2 voluntarily remained in the vehicle just ready to facilitate the departure of the other robbers or he was there under duress. According to him a man had placed a knife on his neck and he could not take off. This evidence is not challenged by prosecution witnesses as none of them was sure as to the number of people who were in the car. Judging from what this particular accused (A2) told the court and what he said in his police statement and in view of his voluntary

reporting to the police to inform them of what had happened to him the previous night, I am prepared to accept his defence of compulsion as having been satisfactorily established. This accused must have been innocently made to be a party to a plan to which he had no knowledge. I believe his story as told in court and in his police statement Ex.P.19. This case must be distinguished from the case of: Ezera Kyabanamaizi v. R. (1962)EA 309 as far as the defence of compulsion is concerned because facts in the two cases are slightly different on that point.

Regarding the position of A3 Robert Musiga it was the case for prosecution that this particular accused was seen at the scene of crime on that dredful morning. On his part he said he did not go to that place on that morning as he was on duty. Prosecution relied on the evidence of PWI (Mutwalibi Lubanga), PWXI (Idi Mugoya), PWXII (Stephen Ojambo) and PW13 (Moses Mayende) to establish that the accused was one of the people who participated in the robbery. Each of these witnesses described how the accused was dressed and that he was the man who had the gun which he was firing. All these witnesses said they were able to recognise the accused because the day was bright and the incident took quite sometime. According to PWXI it took between 40 and 45 minutes, PW12 estimated it to have taken between 20 and 30 minutes and PW13 estimated it to have been between 40 and 45 minutes, although this accused was a stranger to these people, the circumstances were such that the witnesses could not have failed to recognise him, especially in view of the fact that the accused was so close to them. The incident took quite sometime and the day was bright. I believe these witnesses when they say that they identified the accused (A3) properly. I do not agree with him when he says that he was not there at that time. Each of these witnesses is supported by the evidence of Rwabyoma (PW3)

to the effect that although the accused was issued with a gun for night duty he did not return that gun to the counter in accordance with the established procedures he passed it behind and he did not sign for it's return as per Ex.P.1. This confirms the evidence by other prosecution witnesses that by about 6.00a.m A3 was not in Jinja but at the scene of crime some where in Iganga at Iyirimbi village with a gun. His defence of alibi cannot be sustained since prosecution has put the accused at the scene of crime at the time the crime was being committed through the evidence of PW1 (Mutwalibi Lubanga), PWXI (Idi Mugoya), PWXII(Stephen Ojambo) and PWXIII (Moses Mayende).

Another issue that comes up for consideration is whether or not these three accused persons had any common intention to commit the offences which they are alleged to have committed. It is the law that where two or more persons form a common intention to commit a crime each of them is liable for the acts or missions of his colleagues carried out in furtherance of their unlawful common purpose (see section 22 of the Penal Code Act and Adereya Obonyo v. R. (1962)EA 542 and R. v. Tabulayenka (1943)10 EACA 51). According to the evidence of the prosecution witnesses who were present at the scene these people were acting as if they were members of the same gang which was bent at robbing the passengers in the mini-bus, apart from A2 who, as pointed out by Mr. Okwanga appears to have been an innocent by stander. A1 had a knife, A3 had a gun and after the robbery they all left together. Both A1 and A3 did not disassociate themselves from what happened. Considering the evidence on record and the statement of A2 made to the police both A1 and A3 had common intention of unlawfully robbing passengers in the mini-bus, it is immaterial as to what weapon each was armed with and which of the several passengers was robbed by who among the two accused.

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There was a problem in the prosecution case concerning certain contradictions which appeard here and there. It is admittedly true that prosecution witnesses were contradictory in some aspects of what they saw and heard on that morning. These differences concerned the colour of shoes A3 was wearing, the number of people seen, the time taken by the robbers and the number of shots fired. The law is not doubtful as to the effect of such a contradictions. Where those contradictions are minor and were not deliberately meant to telling lies and can be satisfactorily explained away they should be ignored but where they are major and go to the root of the case they should be resolved in favour of the accused person: Uganda v. Dusman Sabuni (1981)HCB 1 and Tajar V. R. (EACA Criminal Appeal no. 167 of 1969). In the present case I would agree with the learned counsel for the state when he says that these were minor contradictions and they do not go to the root of the case. In coming to this conclusion I have taken into account the fact that these things happened a long time ago and that such a difference is expected in a case of this nature where witnesses were taken by surprise and because of the confusion that ensued at that time. In a situation like this it would be unreasonable to expect witnesses to remember the number of shots, the colour of shoes and such a minor details which can easily be forgotten by an ordinary person.

In all these circumstances and in full agreement with the unanimous opinion of the two gentlemen assessors who assisted me in this matter I am satisfied beyond reasonable doubt that prosecution has proved its case beyond reasonable doubt against Muhamadi Mukasa (A1) and Robert Musiga alias Mugisa (A3) in respect of all the 6 counts. I accordingly find each of them guilty of aggravation robbery c/ss 272 and 273(2) of the Penal code Act in respect of the 6 counts and I do convict each of them

for each of the 6 counts. I however find that prosecution has not proved its case against Idi Kagwa (A2) for any of the offences, I do accordingly acquit him in all the 6 counts. He is to be released from prison forthwith unless he is being held there for some other lawful purposes.

C. M. KATO
JUDGE
31-7-95