

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE NO. 25 OF 99

UGANDA.....PROSECUTOR

VERSUS

PATRICK KAGABA.....ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE ELDAD MWANGUSYA.

JUDGMENT

The accused Patrick Kagaba is indicted on the first Count for the offence of Robbery Contrary to Sections 272 and 275(2) of the Penal Code Act and on the second Count for the offence of Murder Contrary to Sections 183 and 184 of the Penal Code Act. He was originally indicted with one, Francis Kyomuhendo who during the course of the trial was abducted by the ADF from Katojo prison and his whereabouts remain unknown. The trial of the case proceeded against Patrick Kagaba alone.

In count 1 of the indictment it is alleged that Patrick Kagaba and others still at large on the 5th day of October 1995 at Kamengo village in the Kabarole District robbed Mitala Charles of cash shs. 100,000/=, Lasonic Radio) yashica Camera seven jean trousers .one black jack and at or immediately before or immediately after used a deadly weapon to wit a gun and caused grievous harm to the said Mitala Charles and his wife.

In the second count it is alleged that Kagaba Patrick and others still at large on the 5th day of October, 1995' at Kamengo village in the Kabarole District Murdered Baguma s/O Mitala Charles.

In brief the case for the prosecution is that on the 5th day of October 1995 the complainant MITALA CHARLES (P.W.4) was at his home sleeping with his family when he was attacked by thugs who robbed him of the property already mentioned and during the process he and his wife got injured and his seven months old son, Baguma was killed.

According to the complainant, MITALA CHARLES (P.W.4) the thugs of whom he saw two banged one of the doors open and one of them entered the house. The other one remained outside. Both thugs were armed with guns . the thugs who entered the house ordered him to give him the money or else he would be killed together with his wife and child. He told the thugs that did not have money as he had used all the cash to purchase shop goods.

He then heard gunshots which according to him were fired by the accused who had entered the house. The accused told the complainant that he was going to kill him. He was holding a torch under his arm pit. The flashlight from the torch enabled him to identify the accused, The accused told him that if he did not give him money he would kill him. The accused then removed a curtain from the window which he used to tie the witness. The accused started

collecting property from his house that included a Laconic Radio Cassette, clothing and shop goods. The witness heard his wife yelling and one of the thugs standing in the doorway flashed torchlight at her. She was drenched in blood. The torchlight was turned on the thug inside whom the witness identified as Kagaba. He testified that Kagaba was putting on a cream Coat, green pair of trousers and shoes resembling army boots.

After the thugs had left the witness went to a neighbor who provided a vehicle for taking his wife and child who had been injured to hospital. One of his children, a seven month old baby boy had been killed.

He reported the incident to the Police where he recorded a statement.

He was asked to attend an identification parade at the Police but he declined because according to him he would be killed if the thugs knew that he had identified them.

He was asked about the property stolen and he told the Police that he would identify his Radio cassette and a jacket which had glue on one of the pockets. He subsequently identified a Radio Cassette which was shown to him at the Police Station. He had written his name inside the handle. On the same day he saw the accused being escorted to a room at the Police Station and he pointed him out as one of the thugs who attacked him. The accused was shown a list of things robbed from the complainant and he denied having any of them. Then the witness together with the police went to the home of the accused at Kanyambeho village. He remained in the Car and, according to him a jacket which he identified as his was recovered from the house of the accused.

Evalinie Kobusingye P.W.4 is the wife of the complainant. Her testimony as to what happened on the night of the incident was similar to that of her husband. She stated that after one of the doors to their house was broken one of the thugs who was armed with a run started firing and she was shot in the shoulder. Her seven months old baby, one Baguma was hit and he died instantly. Another child, Sheila got injured. She heard the assailants asking for money and one of them flashed a torch from outside.

She testified that during the Robbery she identified the accused as one of the assailants.

She enumerated the property robbed from their hone.

The evidence of D/SGT. Chandia a Police Officer previously stationed at Port portal Police Station and now stationed at Lugazi was to the effect that on 4.11.95 at about 8.00 a.m. he was on duty at Port Portal Police Station when on information received he went to the cells where he found the accused already in Police custody. He proceeded to Califonia Lodge where a Radio Cassette identified by the complainant as his was recovered. Later he proceeded to the home of the accused where with a Local Council Official of the area searched the home of the accused. The complainant saw the wife of the accused wearing a black jacket which

he identified as his. The jacket was recovered.

The evidence of DR. KEERI a Medical Officer, Fort Portal Hospital and that of No. 24833 D/C Nkojo, a Police Officer of Fort Portal Police Station was admitted at the commencement of the trial Under S. 64 of the Trial on Indictments Decree.

DR. KEERI'S evidence was to the effect that on the 5th October 1995 he proceeded to Kamengo village where he examined a body of a seven months old male child identified by Mitala Charles as that of his son Baguma. The body was lying on a bed in a pool of blood. It was dressed in a yellow T-shirt and a blue pair of trousers all stained with blood. He performed an autopsy and found the following injuries.

- (1) Fractures on the Zygomatic bones and on the right temporal region and right parietal bones.
- (2) On the viscera he found lacerated brain outside the skull.

The cause of death was brain crush injury associated with neurogenic shock. He found a cartridge on the bed.

The evidence of NO. 24833 D/C Nkojo a Police officer of Fort Portal Police Station was to the effect that he together with officers from the DISO office arrested the accused from Kiko. The accused led them to the home of one Happy of Kisenyi. Happy led them to the homes of Kyomuhendo and Nyakojo and later to California Lodge where Kyomuhendo was arrested.

Another witness one, Kaija a proprietor of California Lodge was called as witness but was declared hostile thus rendering his evidence useless.

The accused denied having robbed the home of the complainant and stated that he was at his home on the night of the alleged robbery. He gave a detailed account of the circumstances leading to his arrest. The substance of this lengthy account was that he had been working hand in hand with an intelligence officer, called Murungi to arrest Nyakojo a suspect in this case. He was abandoned by Murungi at Fort Portal Police Station from where he was taken to court and charged, with this offence.

Apart from the identity of the accused as one of the assailants who attacked the home of the complainant the other ingredients of the offences of Robbery and Murder are not in dispute. Both Mr. Komunda who represented the accused at the trial and Mr. Semalemba State Attorney addressed court on the ingredients and both agreed that there was no doubt that the offences of Robbery and Murder had been proved and the only issue for decision of this Court was whether or not the accused participated in the commission of the offences.

It will suffice to state that as far as the Robbery was concerned there was overwhelming evidence that a theft was committed at the home of the complainant and that a deadly weapon as defined by Section 273(2) of the penal code was used. Both Mitala and his

wife were injured in the incident and there was a scar on the shoulder of Mitala's wife that she said was caused by an injury caused by a bullet. A seven month old son of the complainant was shot and killed during the incident and there is no doubt that whoever killed him did so with the requisite malice aforethought.

As to whether or not the accused participated in the Robbery and Murder at Mi tala's home the prosecution relies on two pieces of evidence. The first piece of evidence is evidence of visual identification by Mitala and his wife and the second piece of evidence is that of a jacket which was allegedly found in the accused person's home and identified by the complainant as one of the items stolen from his home.

On the evidence of visual identification the principle laid down in the case of Nabulere and other Versus Uganda 1979 HCB 78 is that " where the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be convincing one and even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the the identification came to be made, particularly, the length of time the accused was under observation the distance, the light and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality the greater the danger."

In this case the most crucial factor is the light that enabled Mr. and Mrs. Mitala to identify the accused because if there was insufficient lighting the other factors become irrelevant. The complainant testified that he identified the accused by help of a flashlight which the accused had held under his armpit. He stated that he saw him clearly and identified his clothing. He further stated that the accused was wearing a cream coat, a green pair of trousers and his shoes looked like army boots. In the type of light described by the witness it is incomprehensible that he could identify anybody and describe in detail the clothes he was wearing.

The quality of the evidence of the identification by the wife of the complainant was not any better than that of the complainant. She testified that she identified the accused by help of a flashlight that was flashed. on the accused from outside and by help of moonlight. When the complainant

was asked as whether or not there⁶ was moonlight he first hesitated and then stated there was. Even if we were to believe the witnesses that there was moonlight there is no evidence as to how it assisted then in identifying the accused when all events described by both witnesses occurred inside the house.

The other important factor was that the accused was a stranger to both witnesses. None of the witnesses had known him before and according to Chandia(p.W.5) the report initially received at the Police Station was that the complainant was attacked by an identified person. The complainant was invited to attend an identification parade and he declined. His explanation for declining to attend the parade did not make any sense to me. He stated that he declined to attend the parade because if the assailants knew that he had identified them and they had not been arrested they would kill him. But the assailants would not be on the parade not if they were under arrest and the question of his being killed would not arise.

My conclusion on this evidence of visual identification is that in the circumstances analysed above neither the complainant nor his wife was able to identify any body. Their claim that they did was simply a lie and their evidence will be rejected as that.

On the issue of the jacket it was held in the case of Andrea Obonyo Vs. Republic 1962 EA 542 cited by Counsel for the prosecution that a person in possession of stolen GOODS soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. But one of the holdings in the same case was as follows:—

"Further, there was no evidence except the stolen property connecting them with the raid, and the nature of the property did not point so strongly to them being the thieves; having regard to the high degree of proof required on a charge of Murder, it would be unsafe to allow their convictions to stand."

The above passage is pertinent to the present case because given the seriousness of the offences charged the nature of evidence to be relied on should be received with caution.

I am hesitant to rely on the evidence of this jacket for a number of reasons especially the circumstances under which it was allegedly recovered from the home of the accused. D/SGT. Chandia who recovered the jacket testified that he went to the home of the complainant with the complainant himself and a Local Council Official among others. The complainant remained in the motor vehicle they had travelled in. If the purpose of going with the complainant was to assist in identifying whatever property belonging to him was in the house of the accused then there is no reason why he should have remained in the Car when a search was being carried out. Then Chandia testified that the complainant saw the wife of the accused putting on the jacket which he identified as his. This does not come out of the complainant's evidence who stated that the jacket was recovered from a search in the accused's house. Although D/SGT. Chandia testified that he carried out a search in presence of a Local Council official the Chairman of the area was called by the defence and he testified that none of the members of his executive attended a search in the accused's house. This point was raised early in the trial by the defence and the prosecution should have called the Local Council official who would have probably given a neutral picture of what happened during the search in the accused's house. I observed the demeanour of D/SGT. Chandia who carried out the search and the manner in which he handled other exhibits in the case and I would not place too much reliance on his evidence that he recovered the jacket from the home of the accused and base a conviction on it.

The accused raised a defence of alibi. He stated that he spent the night of the robbery at his home and never went to rob at the home of the complainant which he did not know. An accused who raises an alibi does not assume the burden of proving it (See SEKETOLEK0 Verses UGANDA[1967] E A 531

The burden remains on the prosecution to disprove the alibi which they could do by adducing evidence placing the accused at the scene. The nature of the prosecution evidence analysed above does not discharge this burden and there is absolutely no reason why the accused's alibi should not be believed. The gentlemen assessors gave differing opinions. Mr. Muzoora was of the view that the accused was properly identified at the scene as there was sufficient light and enough time for the witnesses to identify him. He was also of the view that a jacket belonging to the complainant was found at the home of the accused and a conviction could be based on it. The other assessor, Mr. Kadabada was of a different view. He advised acquittal of the accused because he was of the view that the accused had not been properly identified and that there was a major contradiction about the evidence of the recovery of the jacket. For the reasons already given in this judgment I agree with the opinion of Mr. Kadabada and disagree with the one of Mr. Muzoora.

I find the accused not guilty of the offences and I acquit him accordingly. He is to be released from custody unless he is being lawfully held on other charges.

ELDAD MWANGUSYA

JUDGE

20. 1. 2000.

20/1/2000; Accused present.

Mr. Kikomoko Holding a brief for Mr. Komunda for accused

Only Mr. Muzoora assessor present.

Mr. Gamukama Court Clerk

Court: Judgment delivered in open Court.