

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBALE**  
**HCCS NO. 0020 OF 2002**

**UGANDA.....PROSECUTOR**

**VERSUS**

**1. KAMU MASAWI**

**2. WANZALA STEPHEN.....ACCUSED**

**BEFORE: THE HON.MR. JUSTICE RUGADYA ATWOKI**

**JUDGMENT**

The two accused persons in this case Kamu Masawi A1, and Wanzala Stephen A2, were indicted of Robbery contrary to sections 272 and 273(2) of the Penal Code Act. The particulars of the offence were that the two accused persons and others not in court on the 18<sup>th</sup> November 1998, at Bukalata village Kato sub County, in Mbale district, robbed one, Namasa Bulakisita of money shs. 40,000/=, and at or immediately before or immediately after the said robbery, used a deadly weapon, to wit a panga on the said Namasa Bulakisita. The two accused persons each denied the offence.

The prosecution produced five witnesses in the attempt to prove their case while the two accused each gave sworn testimony. One witness was called for the defence.

The facts giving rise to this offence according to the prosecution were as follows. On the fateful night, the victim Namasa Bulakisita (PW4), a woman of very advanced age, which she not even know, was sleeping in her house. At about 1.00 a.m., she was awakened by assailants who gained access into her house through her bedroom window. They used a stone with which they banged the window open. A1 was the first to enter. They were at least threes, and were flashing torches around.

A1 hit her head against the wall, as his colleague gagged her mouth. Namasa was assaulted severely. There was a panga in the bedroom which Namasa used to keep for her day to day chores. The assailants used this panga to assault her. She told court that A1 was the one who used the panga. Her hand was cut and severed from the body when she tried to defend herself from being cut on the neck. She showed court the hand, which is now a mere stump. She was also cut on the left shoulder, on the arm, and on the back. She showed court a long big scar running across her back.

They left her believing that she was unconscious or even dead, and after ransacking her suitcase from which they took her money amounting to shs. 40,000/=. They also took with them her panga, the assault weapon. This was a new panga which she had recently acquired and sharpened on a machine in Bududa.

During this attack, with the aid of the attackers torches, and from a lantern lamp, which was lit inside her bedroom, Namasa managed to identify two of the attackers whom she named immediately to those who came to her rescue.

These were the two accused persons herein. The lamp was nailed high on the wall, and as they went away, A1 smashed it. She knew these two very well prior to this event. A1 was a village mate and a neighbor. A2 was from the immediately neighbouring village. She often prepared food for them at her home. The two were close friends. A1 had animals which often entered her gardens and destroyed her crops. She had sued him in this respect before, and he was ordered to pay her compensation, which payments he had not yet completed.

Under cross-examination, she insisted that the lantern lamp was still alight at the time of the attack, although she had reduced the intensity before going to bed. When she heard the bang on her window, she rushed and increased the brightness. She raised the alarm well after the assailants had left, after she was sure of their departure. People answered the alarm including one Steven Kutosi. At a certain point, A1 came back and joined the people who answered her alarm, but this time, he had changed clothes. During the attack he was wearing dark clothes, but when he came later, he was wearing white clothes.

Kutosi Steven (PW5) is the nephew of Namasa. He heard the alarm and rushed to the rescue of his Aunt. The time was about 4.00 a.m. He found her inside her house with the hand cut and

severed off completely. She was also cut on the shoulder. He was the first person to arrive at the scene soon after the attack. Namasa told him that A1 and A2 were the people who attacked her. He knew these two very well, as they are cousins. He also made a further alarm, and as soon as other people arrived, he rushed off to summon Namasa's daughter. He participated to Bududa hospital., but did not see A1 or A2 anywhere then afterwards.

In cross-examination, he stated that he lit a candle (Tadoba), when he arrived at the scene. Upon his return from summoning the daughter, Namasa informed him that the assailants had stolen from her shs. 70,000/=.

The rest of the prosecution witnesses were formal. Their testimony was admitted under section 64 of the Trial on Indictments Decree.

PW1 Dr. Twinomuhangi's testimony was to the effect that on 22/1/2002, he examined A2, and found him to be of the apparent age of 26 years. He had no injuries on the body, and appeared to be of sound mental state. On the same day, he also examined A1 whom he found to be of the apparent age of 37. He had no injuries on his body, and was of apparently sound mental state. The two medical examination reports of the accused persons on PF 21 were admitted in evidence as prosecution exhibits PE1 and PE2 for A1 and A2 respectively.

PW2 D/C Okello's evidence was that on 19/11/1998, he arrested A2 and took him to Bududa police station.

PW3 P/C Kalamya's testimony was that he re arrested A1 when he (A1) came with the LC1 Vice Chairperson Wanambwa Stephen at Mayenze police post, to report the assault upon Namasa. That was the prosecution case.

The defence consisted of the sworn testimony of the two accused persons and also one witness.

A1 Kamu Masawi testified on oath. He told court that Namasa is his grandmother. Her husband is a brother of his grandfather. He denied all the allegations of Namasa. He told court that on that fateful night, he was in his house asleep when he heard an alarm. He went to investigate and realized they were emanating from the home of his neighbor, Namasa. He immediately rushed to the scene. There were very many people already at the scene, including the LC1 Chairperson, Wanyenze Steven.

He saw Namasa but she was in a bad state although she was talking. She said that she heard the voice of A1 outside the house during the attack. She mentioned the names of many other people totaling to nine as being in the group of her attackers. He mentioned seven of them as;

- Steven Wanzala,
- Micheal Wangaya,
- Ekisoferi Kuletsia,
- Rogers Washimbi,
- Partick Kutosi,
- Wandulu Wabyanda, and
- George Wabyanga.

This was in the presence of both the chairperson and Vice Chairperson. It was suggested that in view of the fact that he had been named, they should go to the police and that is what happened, and he was there detained.

He admitted that he had disputes with Namasa over his chicken and animals, which used to damage her crops. He said that he was once fined shs. 105,000/=, and had thus far paid shs. 80,000/=. He was remaining with only just a small bit to complete the payments. He said he could not have attacked her over such a small sum when he had paid the bigger part. He also told court that six other people were arrested in connection with this attack, but they were later released because they had money. He however said he was not aware why the names of these people were not in his police statement. He was not sure whether or not he mentioned them to the police. The statement of A1 at the police station was admitted in evidence as DE 1.

In answer to court, he said that the fine of shs. 105,000/= was imposed on him for the destruction of Namasa's crops by just his one hen and its three chicks.

A2 Wanzala Stephen also gave sworn testimony. He told court that he called Namasa his grandmother. He denied the offence completely. He set up an alibi as a defence. He told court on 18/11/1998, there was a circumcision ceremony in which Fariki Werikhe and Bumayo Salim were being circumcised. He was at his home operating the music. He learnt of the attack on Namasa when the askaris from the Local Defence Unit came to arrest him.

Under cross-examination, he told court that he did not have any grudge with Namasa. He had never gone to her house. Which was about one kilometer away from his home. He said that at the police station, he found six other people also under arrest for the same attack on Namasa. He named them as;

- Micheal Wanfaya,
- George Wabyanga,
- Robert Wabyanga,
- Partick Kutosi,
- Rogers Washiebye,
- Ekisoferi Buletsa.

This was at Bududa police station while A1 was at Buyenze police post, where they all were later taken and the six were bonded out, leaving himself and A1.

DW3 was Wanyenze Steven, the Chairperson. He testified that he was woken up by Kutosi Patrick who reported to him the attack on Namasa. He proceeded to the scene with other people, including A1. He met the victim Namasa inside her house. There were already many people. He observed that her hand was cut off; she was also cut on the shoulder and at the back. She reported to him that she did not recognize any of her assailants. But that she only heard the voices of A1 and A2, and Wanambwa. Since A1 was mentioned by Namasa, he immediately told him he was under arrest, and he handed him over to his Vice Chairperson who escorted him to police. Namasa did not name any other person as her attacker. He assisted in taking Namasa to hospital.

DW 3 was asked about people who were named by A2, and he confirmed that these were arrested soon after the attack on Namasa, as they had at one time quarreled with her. He told court that she had even quarreled with A1 and A2, plus Wanambwa. In cross-examination, he recalled that he recorded a statement at the police on 18/11/98, and that was the very morning after the attack. In that statement, he told the police that Namasa informed him that the people who attacked her included A1 and Wanambwa, and that A1 ordered Wanambwa to cut her.

In court, he denied those remarks, but that he was only told of voices. His statement to the police was admitted in evidence as PE3. DW3 admitted that he is related to the two accused persons.

He also admitted that there was a long-standing grudge between A1 and Namasa, which he at one time attempted to settle, but Namasa objected doubting his impartiality on account of his relationship A1. She instead took the dispute for resolution before a Magistrate. That was the defence case.

The burden to prove a charge against an accused person lays on the prosecution. The Supreme Court held in Ojepan Ignatius vs. Uganda Cr. App. No. 25 of 1995 (unreported), that the onus was on the prosecution, as it is always on the prosecution in all criminal cases except a few statutory offences, to prove the guilt of the accused beyond any reasonable doubt. See also Adbul Ngobi vs. Uganda Cr. App. No 10 of 1991, (SC), (unreported).

The offence of robbery as charged has three essential ingredients, which must be proven beyond reasonable doubt.

- a) That there was a theft,
- b) That there was a threat to use a deadly weapon during, immediately before or after the theft, or causing death of grievous harm, and
- c) That the accused persons participated in the theft.

See Wassajja vs. Uganda [1975] HCB 181.

With regard to the ingredient of theft, there was the evidence of PW4 Namasa herself, the victim and complainant in this case. She testified that when the assailants were leaving her house through the window as they had come in, they ransacked her suitcase and stole her money to the tune of shs. 40, 000/=.

PW5 Kutosi Steven told court that Namasa was his grandmother. He was the first person to arrive at the scene in answer to her alarm. He found her in bad shape having been cut and her hand severed. He made further alarm and later rushed to call Namasa's daughter. Upon his return, Namasa informed him that the assailants took with them shs. 70,000/=. That was all the evidence concerning the theft.

Theft as an offence is complete when goods which are capable of being stolen are taken by anyone who has no claim of right, without the consent of the owner thereof and with intention to permanently deprive the owner thereof of the same. There must be asportation that is the goods

must be moved. See Etobu Moses & Others vs. Uganda HCCS No. 88 of 1996. (unreported). The evidence of theft was contradictory. PW4 mentioned a sum of shs. 40,000/= having been stolen. But PW5 mentioned a figure of shs. 70,000/=. The difference is so varied that it is difficult to believe that the victim of the offence could have made such a mistake. She stated that the assailants ransacked her suitcase from which they removed the money. No witness and certainly not PW5 who arrived at the scene first mentioned seeing any ransacked suitcase.

The story of the theft of money was simply unbelievable. I noted that Namusa exhibited tendencies to exaggerate the sad event which befell her that night. But that is not to say that she was not entirely credible. Far from it. The desire to attract sympathy for the great pain and suffering she went through that night led to her to overstate certain events of the night. I will say a little more on this later.

I am satisfied that the claim that money was stolen from her that night was one such exaggeration. The evidence of theft was too contradictory to be believed. I accordingly find that this ingredient of the offence was not proved by the prosecution beyond reasonable doubt.

The next ingredient of the offence of robbery was that there was use or threat to use a deadly weapon, or causing death or grievous harm. The complainant stated that the assailants entered her bedroom and assaulted her using her own panga. Her hand was cut and completely severed off. She was cut in the back. She showed court the severed hand and the deep long scars on her back. There was no dispute whatever that Namasa was assaulted with a panga and that she sustained very serious injuries.

The law in section 273 (2) of the Penal Code Act defines a deadly weapon as one which is made or adapted for stabbing, cutting or wounding, or if used for offensive purposes is capable of causing death. Without doubt, a panga fits the above definition with perfection. It is a deadly weapon. The defence did not contest this ingredient of the offence. I therefore find that the prosecution proved beyond reasonable doubt that there was use of a deadly weapon, and there was grievous harm occasioned on Namasa when she was assaulted in the night of 18/11/1998.

The last ingredient for consideration in the offence of capital robbery, and by far the most contentious in this case was the participation of the accused. This was a case of a single identifying witness.

During the summing up, I warned the assessors as I also warned myself of the need to take great caution when dealing with the evidence of a single identifying witness. This was even more so when the conditions under which the identification came to be made were not favourable for a correct identification.

The court of appeal in the case of Abdalla Nabulere V. Uganda [1979] HCB 77, held that,

“a conviction based solely on visual identification invariably causes a degree of uneasiness because such evidence can give rise to a miscarriage of justice. There is always the possibility that a witness though honest may be mistaken. For this reason courts have over the years evolved rules of practice to minimize the danger that innocent people may be wrongly convicted.”

These rules were set out in the case of Abdalla Bin Wendo and Another V. R. (1953) 20 EACA 166, which was cited with approval in Roria V. R. [1967] EA. 583. They are that;

“1. The testimony of a single witness regarding identification must be tested with the greatest care.

2. The need for caution is even greatest when it is known that conditions favouring correct identification were difficult.

3. Where the conditions were difficult, what is needed before convicting is ‘other evidence’ pointing to guilt.

4. Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence.”

The above principles and rules have been approved and followed by the superior courts in this country. See Bogere Moses & Another vs. Uganda Cr. App. No.1 of 1997, (SC). (unreported). In the case of Uganda vs. George Wilson Simbwa (SC) Cr. App No. 37 of 1995, (also unreported), the court reiterated the above principles and held that while the identification of an accused person can be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest caution the evidence of such witness regarding identification, especially when conditions favoring correct identification are difficult. Circumstances to be taken into



account include the presence and nature of light, whether the accused person is known to the witness before the incident or not, the length of time and opportunity the witness had to see the accused and the distance between them.

The attack on Namasa was made in the middle of the night. She was found inside her room. She was awakened when a stone was banged on the window forcing it to open. She had left the lantern lamp on, but only at reduced brightness. On hearing the bang, she increased the brightness. The assailants entered through the window flashing torches. They assaulted her. A1 used a panga to do so, as A2 gagged her mouth to stop her from making any noise. With the aid of the light from the lantern lamp, and also from the torches which the assailants were flashing around, she was able to identify her assailants as A1. And A2, both of whom she knew very well.

The two accused were her neighbours; in fact A1 was her immediate neighbor. The two used to come to her house and would even eat her food. She had a confrontation with A1 prior to this event. There was a lantern lamp in the room, which was nailed up on the wall. When the assailants banged the window, she got out of bed and increased the intensity of the light from the lantern lamp. That is when the assailants got her, A1 banged her head on the wall, and as A2 gagged her, A1 got the panga and aimed it at her head. She put up her hand in reflective protection of her head, and that is when her hand was cut and severed off.

This activity must have taken some time. The assailants must have been close enough for body contact, as they must have touched her as she struggled while she was gagged, and assaulted. That was the time and opportunity she had to observe her assailants. When they were leaving, they smashed the lantern lamp.

Those were the conditions under which the identification was made. As stated earlier, this was identification by a single witness. She knew her assailants very well prior to this event. They were neighbours. There was light inside the room from the lantern lamp. There was further light from the torches which the assailants were flashing around as they entered the room. There was a struggle as the assailants gagged her and cut with her own panga. The intensity and sufficiency of the light inside the room enabled the assailants to locate her panga, which they used to assault her. It cannot be said that those were unfavourable conditions for making a correct and positive identification.

It was contended for the defence that there was a contradiction in the prosecution evidence regarding the identification of the accused in the assault. While Namasa stated in court that she clearly identified her attackers, evidence from other witnesses was to the effect that she did not identify them, but only heard the voices of the two accused person outside her house during the attack.

With respect, that is not entirely correct. While it is true that the complainant told court that she identified her attackers, it was the defence witness DW3, who insisted that Namasa told him only of hearing the voices of the two accused outside her house during the attack. However, during cross-examination, this witness recalled that he told the police that the complainant Namasa indeed mentioned the name of A1 as one of the people who attacked her inside her house, and that A1 directed one Wanambwa to cut her. The statement was recorded the very morning after the attack. That statement to the police was admitted in evidence as PE3.

The defence consisted of a denial of the charge by each accused. Each set up an alibi as defence. A1 told court that he was at home during that night when he feared the alarms coming from his neighbor, Namasa. He proceeded to that in answer to the alarm. He arrived at the scene when many other people had already arrived, including DW3 Wanyenze Steven. When DW3 was interrogating Namasa, she mentioned his name as one of the people whose voice she heard outside her house during the attack. She mentioned the names of her attackers who were seven in number including A2. The Chairperson thereafter arrested him and directed the Vice Chairperson to take him to the police post which was done, and he was detained. He told court of the grudge between himself and Namasa.

A2 also set up an alibi. He told court that he was at his house the whole night, as he was the music operator in celebrations after the circumcision of Farili Werikhe and Bumayo Salim. He only learnt of the assault on Namasa when the police went to arrest him.

The accused, when he sets up an alibi as a defence, he or she does not thereby assume any responsibility of proving the alibi. The prosecution is under a duty to negative the alibi by evidence. Kibale Ishma vs. Uganda (supra). The prosecution must produce evidence which places the accused squarely at the scene of crime.

In *Bogere Moses & another vs. Uganda Cr. App. No.1 of 1997, (SC)* (unreported), the court gave what amounts to putting the accused at the scene of crime. It held that this, “must mean proof to the required standard that the accused was at the scene of crime at the material time. To hold that such proof has been achieved, the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself upon the evaluation of the evidence as a whole.

Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defence not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable.”

The complainant Namasa was emphatic that she identified the two accused as her assailants. There was a lantern lamp in the room. She knew both of them very well prior to this event. They struggled as they gagged and assaulted her. They left after smashing the lantern lamp.

PW5 Kutosi Steven was the first person to arrive at the scene in answer to her alarm. She informed him that A1 and A2 were the people who attacked her. When the LC officials arrived, she told them, including the defence witness DW3, that A1 was one of the attackers. She was consistent on that score

The defence contended that there were many arrests in connection with this case, as whoever had ever had a grudge with the old lady was arrested. This meant that she was not sure of the identity of the attackers. It is true that many other people were indeed arrested in connection with this case and they were later released. It also is true that many of these had at one time or another quarreled with the old woman Namasa.

It came out from the evidence of A1 that only his name and that of A2 were mentioned by Namasa that night of the attack. The names of the other people came out later, almost as an afterthought. In any event, even if these other people were also mentioned by Namasa, I do not see any contradiction with the rest of her testimony. She told court that the attackers were many, but she mentioned only those whom she saw, who entered her house. If these others were also

mentioned then it was as well, but after investigations, the police decided to charge only these two accused as the evidence pointed to them.

I said earlier that the complainant was wont to exaggerate the sad events, which she went through that night. She told court that she lay pretending to be dead after her hand was hacked off in order to let the attackers believe she was dead, least they might have finished her off. She stated that she even peeped outside to ensure that they had gone before she raised the alarm. I agree that she went through a very difficult time with the attackers. Her severed hand and the very deep, long and ugly scars on her hand and her back were vivid testimony to this. But I found this part of her testimony to be an exaggeration of her bravery and courage. But that does not mean that she was not truthful. A witness who has gone through the kind of traumatizing experience as did the victim in this case, was bound to make some exaggeration, not because she intended to deceive, but rather to drive home the suffering she endured.

I was able to observe Namasa as she gave her testimony in court. Apart from the obvious and understandable exaggerations, she was a very straight forward witness. She narrated the events which occurred nearly 4 years earlier with clarity and vividly. She recalled even the minor details in spite of the intense pain she must have been going through. She recalled that the assailants smashed her lantern lamp when they were going away. Kutosi Steven who first arrived at the scene found her in darkness, and had to light a candle instead. When the attack took place, he was wearing dark clothes, but when he returned, he had changed into white clothes.

It was submitted for the accused that there was an undisputed grudge between the complainant, and A1. The chicken of A1 at the time destroyed Namasa's crops, and A1 was ordered to pay compensation of shs. 105,000/=. A1 told court that he had so far shs. 80,000/=. and the unpaid balance was due for payment the day of the attack. This was given by the difference as the reason why Namasa mentioned the names of A1 as one of the assailants.

The grudge was not disputed. While it existed if that was the only reason why A1 was mentioned, this did not explain why A2 who stated that he had no grudge with the old woman was mentioned at all. The only reason was that the two were identified as being part of the group which attacked Namasa.

The defence sought to rely on the testimony of DW3, Wanyenze Steven, the LC1 Chairperson. He told court that he came to the scene with A1. But A1 testified on oath that he arrived at the scene where he found many people already including DW3. That was a grave contradiction in the defence evidence. The same witness stated that the victim did not identify any of her attackers, yet in his statement to the police, he stated that she revealed to him, that A1 with Wanambwa were some of her assailants. This was a very unreliable witness. He told court lies in the attempt to save the skin of his relative A1.

A2 told court that the complainant is his grandmother. She is also a neighbour, and their houses are less than 1 kilometre apart. But he testified on oath that he had never gone to her house. That was an obvious lie. These were lies in the defence case, and such proven lies go to corroborate the prosecution case.

From the evidence on record, I found that the accused were properly identified by the complainant. They were squarely placed at the scene of crime. Their alibis were improbable. I had the opportunity of observing them as they gave their testimony. They were not impressive as witnesses. I did not accept their testimony. I accordingly rejected their defence and their alibi.

The ladies assessors advised me to convict the two accused as charged. They believed that all the ingredients of the offence of robbery with aggravation were made out. From what I found earlier, the ingredient of theft was not proved by the prosecution beyond reasonable doubt. For that reason, I do not accept their opinion.

I do find the accused not guilty of the offence of robbery contrary to sections 272 and 273(2) of the Penal Code Act, and I acquit them of those charges. I do however find them guilty of the offence of burglary contrary to section 281(2) and 284 A of the Penal Code Act, and I convict them accordingly.

**RUGADYA ATWOKI**

**JUDGE**

**5/11/2002**