

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT AT MASAKA**  
**CRIMINAL SESSION CASE NO. 0107/2002**

**UGANDA ::::::::::::::: PROSECUTION**

**VERSUS**

**ASIIMWE MOSES :::::::::::::::ACCUSED**

**BEFORE: THE HON JUSTICE V.F. MUSOKE-KIBUUKA**

**JUDGMENT:**

The accused person in this case, Asiimwe Moses, was indicted for robbery with aggravation contrary to section 272 and 273 (2) of the Penal Code Act.

It was alleged, in the particulars of the offence that on the 25<sup>th</sup> day of February, 2002. At Lwempwanyi village, in Masaka District, the accused robbed Namanya Selapio, a Motor cycle, Yamaha engine No.F5B and chassis No.F5b-86234. It was also alleged that during or immediately before or after the robbery, the accused used a deadly weapon, to wit a knife, on Namanya Selapio.

The law in Uganda imposes the burden of proving the case against an accused person beyond any reasonable doubt, **Leonard Aniseth vs Republic [1963] E.A. and Okale and others vs Uganda [1965] E.A. 555**. An accused person bears no obligation to prove his or her innocence. He or she cannot be convicted upon the strength of the case presented by the prosecution through evidence led during the trial of the accused person.

In the instant case, the prosecution led evidence from some six witnesses. The defence consisted of evidence given upon oath by the accused in his own defence. This Court also invoked its powers under section 39 of the Trial on indictment Act, Cap.23 and called one witness to verify exhibit D1 that witness, Elias Kizito, appears on the record as CW1.

The case for the prosecution is that PW5, Namanya Selapio, was a Boda boda operator based at Kyazanga trading centre in Masaka District. On 25<sup>th</sup> February 2002, at about 6.00 p.m. hired by the accused to take him to a place called Keikolongo. The accused had a collection of some empty sacks which he said he intended to use to purchase milk from Keikolongo.

PW5 took the accused to Keikolongo and waited for him. On the way back when the two reached some forested area at Lwempwanyi, the accused suddenly stabbed PW5 in the head and on the right side of the neck with a knife with a shining blade and black handle. Both the accused and PW5 fell off the motor cycle but the accused quickly got up and grabbed the motor cycle. As PW5 struggled to follow up the accused to prevent him from riding away, the accused got out a second knife and shouted at PW5 "Come and die if u want to do so"

PW5 reported the incident to Kyazanga Police Post. He was examined, on 10<sup>th</sup> May by one Bukenya, a medical Assistant at Kyazanga Health Centre. Mr. Bukenya found PW5 with a cut wound on the right side of the face measuring 120 mm in length and 2mm in width. A second cut wound was on the sulahugual region. It measured same 40 mm by 2mm. the third stab wound was on supra slaricular region. It measured 30mm by 3mm PW2 was hospitalized at Kitovu Hospital for over one week.

The evidence of Mr. Bukenya who appears on the record as PW1 and exhibit P1, the report made by him against Police Form 3 were agreed upon by both sides of the case under section 64 of the TID (Now section 66). Also admitted under the same section of the TID was the evidence of PW2, Doctor Ssekitoleko of Masaka Hospital who examined the accused against Police Form 24 on 7<sup>th</sup> March 2002 and found him to be aged about 30 years with a cut wound measuring 30mx and mentally sound. PW3 and PW4 D/Cpl. Muhozi Christopher and AIP, Muteso Colueri, both attached to Masaka Police Station, on 5<sup>th</sup> March, 2002, went to Kakuto trading centre upon being tipped off that a stolen motor cycle was available for sale by the accused. They arrested the accused who led them to where the motor cycle was kept at Kakuto County headquarters where the accused worked as a builder. The accused was arrested and charged with this offence.

In his defence, the accused denied ever hiring PW5 on 25<sup>th</sup> February 2002 from Kyazanga to Keikolongo. He put up an alibi stating that on 25<sup>th</sup> February 2002 he was at his home and never went to Kyazanga.

The accused stated that motor cycle bearing engine number F5B-862034 was recovered from his possession on 5<sup>th</sup> March 2003, by PW3 and PW4. He led them to where he kept it. But he had not robbed the motor cycle. He had purchased it from one Kayondo Twaha at a PURCHASE PRICE OF 1,500,000/= million of which he had paid Kayondo Twaha Shs. 1,100,000/= million against an agreement of sale, exhibit D1 executed between the accused and Kayondo Twaha and witnesses and approved by the LC officials of Kakuto trading Centre.

The offence of robbery, with aggravation, contrary to section 272 and 273 (2) of the Penal Code Act has four essential ingredients which the prosecution must prove beyond any reasonable doubt.

- (a) Theft of same property;
- (b) Violence accompanying the theft;
- (c) Use or threat to use a deadly weapon during immediately before or after the theft; and
- (d) Participation of the accused person.

Learned Counsel for the defence, Mr. Kamugundu, has placed emphasis, in his final submissions upon the denial by the accused that there was never any theft of the Motor cycle, Yamaha, engine Number F5B, chassis number F5B-862034. It was Learned Counsel's submission that once the issue of the theft of the motor cycle failed then the entire case would crumble. The defence was somehow contradictory on this issue. On one hand they argued that there was no theft because the prosecution failed to produce the motor cycle as an exhibit during the trial and therefore was never owned by PW5, the motor cycle, a Yamaha, black in colour was not stolen by the accused but bought by him from one Kayondo Twaha.

The prosecution nevertheless, led evidence from PW5, PW6, PW3 and PW4 on this particular issue. PW5 stated that he had purchased the motor cycle. Both PW3 and PW4 saw the receipt upon which PW5 had purchased the motor cycle in question. There is therefore no doubt that motor cycle Yamaha bearing engine number F5B and chassis number F5B-862034, through unregistered at the time, belonged to PW5. PW5 testified that he agreed with the accused to take the accused to Keikolongo for a fee of shs. 3,000/=. PW5 took the accused together with his load of sacks. On the way back the accused stabbed PW5 three

times and took away the motor cycle. The motor cycle was found with the accused by PW3 and PW4 who recovered it from him.

The accused claimed a right of ownership of the motor cycle through exhibit D1. It is indeed, the law that a claim of right would negate theft:-

However it is also clear to this Court that exhibit D1 is a forgery. The evidence given to this Court by CW1 Kizito Eliasi, the LC1 Chairperson of Kakuto trading Centre who is supposed to have examined it on behalf of the seller, Kayondo Twaha, and also stamped it with the LC1 stamp of Kakuto trading Centre, expresses disowned it and denied its authenticity before this Court. Even a mere glance at exhibit D1 is enough to show that it is not a genuine agreement. Apart from the LC1 stamp being a forgery, it is purported to have been affixed upon exhibit D1 on 3<sup>rd</sup> March 2002 while exhibit D1 is said and indicated to have been written on 5<sup>th</sup> March 2002. There are no signatures on the agreement.

The same writer appears to have written all the five names of the persons purporting to have executed or witnesses the agreement. The failure by the prosecution to produce the motor cycle as an exhibit the trial, in my view was satisfactorily explained through the evidence of PW4 and PW3 as well as well as that of PW5. The position appears to me that failure to produce an exhibit is itself not fatal to the prosecution's case if witnesses who saw the exhibit adequately describe it in Court. *Kalist Ssebuggwawo vs Uganda SCCA No. 7 of 1987 (Unreported)*. What would have happened if the item unreported to have been stolen was of the nature of perishable good that in existence at the time of the Trial.

In the circumstances, therefore, I find that the prosecution has proved that on 25<sup>th</sup> February 2002, at Lwompanyi, near Kyazanga there was theft of motor cycle Yamaha, black in colour, engine no.F5B and chassis No. F5B-862034, the property of PW5.

The circumstances described by PW5 in his testimony clearly shows that there was violence accompanying the theft of the motor cycle.

On whether a deadly weapon was used or threatened to be used, the prosecution produced the evidence of PW1, Mr. Bukenya was agreed upon under section 66 of the TID. The evidence shows that PW5 was cut or stabbed with a knife. This Court saw all the three long and large

sears on PW5, which resulted from such stale. Mr. Bukenya classified the injuries as grievous harm. A knife is a deadly weapon under subsection (4) of section 273 of the Penal Code Act.

The defence does not deny that PW5 was stabbed with a knife. It simply denied that the accused was not at the scene of crime. It simply denies that the accused was not at the scene of crime. It is the finding of this Court that the prosecution has in this case, proved, beyond any reasonable doubt, that during or immediately before or immediately after, the theft of motor cycle Yamaha, engine No. F5B, chassis F5B-862034.

I will now resolve the issue of whether or not the accused person was the one who committed the theft of the motor cycle belonging to PW5 on 25<sup>th</sup> February 2002 at Lwempwanyi near Kyazanga. The prosecution has adduced evidence from PW5, PW6, PW3 and PW4. PW6 Mwesigwa Frank whom I regard as a very truthful witness, was a restaurant operator at Kyazanga near the boda boda stage. He saw the accused on 25<sup>th</sup> February 2002. The accused went to PW6's restaurant at about midday. He ordered food and kept around for some hours waiting with PW6 whom he asked whether he knew of some boda boda operator with a good motor cycle for hiring. The following day again at about the same time, the accused came back to the same restaurant again he ordered lunch and later sat conversing with PW4 for hours until later in the evening when he hired a boda boda taking PW6 that he was going to Keikolongo to purchase millet. Later that evening PW6 learnt that PW5 had been stabbed and his motor cycle stolen. PW6 positively identified the accused in Court.

PW5, evidence was emphatic that he took the accused to Keikolongo and that the accused stabbed him during the long journey and took off with his motor cycle. PW5 had a reasonably long time to get to know the accused lived the boda boda was 6.00 p.m. which is day time. The two took time to report the deal. They eventually agreed upon a fee of Shs. 3,000/=. The journey was not very short and PW5 had to wait for the accused to take him back to Kyazanga. In those circumstances, PW5 had ample opportunity to identify the accused. He also easily identified him in Court.

The accused put up an alibi as part of his defence. It was to the effect that he was never at Kyazanga on 25<sup>th</sup> February 2002 but at his home at Kakuto. The accused was under no

obligation to prove that alibi. The prosecution had the duty to destroy the alibi by adducing evidence that places the accused at scene of crime. See **Abasi Ssali and another vs Uganda SCCA No.1 of 1997 (unreported)**

It is the finding of this Court that the evidence of PW5, PW6, PW4 and PW3, which is accepted by this Court as truthful, destroys the alibi of the accused in this case. It renders false and untruthful. It also places the accused at the scene of crime. The alibi put forward by the accused as part of his defence in this case, therefore, is not sustainable. It has been destroyed by the cogent evidence produced by the prosecution against the accused person.

It is clear to me that the accused person had told lies to this court when he concocted and tendered into Court a false agreement Exhibit D1 purporting to have bought the motor cycle in question. The accused appears to me to be a very smart and acclimatized thief, indeed, **It is a principle enunciated by the Supreme Court of Uganda in Moses Ksana vs Uganda SCCA No.12 of 1991**, that where lies are proved on the part of an accused person such lies make the inference of guilt even stronger and may amount to corroboration.

In the circumstances, I find that the prosecution also proved the participation of the accused person in the commission of the offence under this trial, beyond any reasonable doubt.

The two gentlemen assessors gave me unanimous opinions in this case. Both Mr. Kateregga and Mr. Ntambazi were of the opinions that the prosecution proved its case beyond any reasonable doubt and that I find the accused person guilty of the offence charged. From what I have stated throughout this judgment, I cannot find any reason to differ with those opinions of the gentlemen assessors. I so convict Asiimwe Moses of the offence of robbery, with aggravation contrary to sections 272 and 273 (2) of the Penal Code Act.

**V.F. MUSOKE-KIBUUKA**

**JUDGE**

**13/1/2004**

**13.1.2004**

Court as before

Court: Judgment is read and signed

Court: only one sentence is provided under the law of Uganda for any one convicted of the offence of robbery contrary 272 and 273 (2) of the Penal Code Act. That is the sentence of death. I accordingly sentence you to suffer death in a manner provided by law.

**V.F. MUSOKE-KIBUUKA**

**JUDGE**

**13/1/2004**

Court: Right of Appeal to Court of Appeal within 14 days from today explained to the convict.

**V.F. MUSOKE-KIBUUKA**

**JUDGE**

**13/1/2004**