

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
CRIMINAL SESSION NO. 79/03

UGANDARESPONDENT

V versus

A'l Lutaya Tonny)

\2 Kasimu Wagana).....ACCUSED

A3 Sseimvanga Hussein)

BEFORE: HON. MR. JUSTICE V. A. R. RWAMISAZI KAGABA JUDGMENT

Lutaya Tonny, Kassim Wagana and Ssemwanga Hussein who I shall refer to accused A'l , A2 and A3 respectively in the rest of judgment are indicted for robbery contrary to sections 285 and 286 (2) of the Penal Code Act. It was stated in the particulars of the charge that Lutaya Tonny Kassim Wagana and Semwanga Hussein on the 10th day of May 2001 at Kakonde village in Mubende District, robbed Nsubuga Joseph of Shs.13,426,231, and one mobile phone, and during the said robbery used a deadly weapon, to wit a pistol to the said. Nsubuga Joseph.

All the accused denied the charge and were represented by Edward Mugulumu while the prosecution was conducted by Vincent Niyonzima, a resident State- Attorney based at Mubende.

The prosecution case rested on seven witnesses. In summary, the prosecution stated that PW3, Joseph Nsubuga, a cashier for the Uganda Tea Growers Corporation (UTGC) collected cheques amounting to Shs. 13,426,231/= from the Corporation's Headquarters at Fort Portal on the 9/5/2001. On the 10/5/2001 Nsubuga went to Mityana Town and cashed all the cheques at the UCB (Mityana Branch). With his wife Masitula Nsubuga (Mrs.) (PW7) as a passenger, Nsubuga set off his journey on a motorcycle heading for Kakonde Tea estate where he was based. His wife was carrying Shs.13,426,231/= in her bag. Before reaching Kakonde, a motorcycle carrying three people overtook them and parked in front of them. Nsubuga and his wife fell off their motor - cycle.

One of the three men who intercepted them had a pistol which he fired three times as he struggled with Nsubuga. The other two men struggled with Masitula, got the bag containing the money and ran away into the swamp. They were followed by the pistol-man. Nsubuga said he identified the robbers as it was day light. After an alarm was raised, Tonny Lutaya was arrested, taken to Kibuto Police Post and later to Mityana Police Station. The other two suspects were arrested by ISO (GISO) personnel taken to Kibuto Police Post and then escorted to Mityana Police Station..

According to Nsubuga he identified A1 and A3 who took money from his wife while A2 was the one who had a pistol. Nsubuga reported the robbery to his employer, Muima Abubaker (PW6). At Mityana Police Station, A2 and A3 were handed to D/CPL Isiko (PW5)_ after the same officer had received A1 from Kibuto Police Post. D/CPL Isiko requested AIP Wephukulu to conduct an identification parade which Isikio also attended. Mrs. Masitula Nsubuga attended the Parade. She identified Kassim Wagana as the tall brown suspect and Semwanga Hussein as the slender man in the middle.

In their defence, Lutaya (A1) said he was hired by two people from Natete in Kampala who told him they were going to bury a relative in Mityana. As he rode, a motor-cycle approached him from behind. He stopped to give it way but fell as he tried to stop. Then he heard gunshot. He ran into the swamp where a mob of people arrested him and brought him to the scene.

Accused No.2 Wagana Kassim denied the offence but admitted he knew Nsubuga and had been doing some work for Nsubuga's company. He was arrested from his home at Naama village, taken to Busimbi Sub-County headquarters then to Kibuto Police Post then to Mityana Police Station. He said Masitula identified him at the parade by pointing her nose at him and she alleged Nsubuga and his wife had seen A2 and 3 at Busimbi Sub-(County Headquarters.

Accused No.3 Semwanga Hussein, denied the charge and said he was arrested from his house by DISO Officials on allegations that he was cohabiting with a school girl in his

house. He alleged, like A2, that Masitula saw him at Busimbi Sub-County Headquarters. He attended the parade at Mityana Police Station at which he said Masitula pointed at her with her mouth.

This being a criminal case, the prosecution has the legal burden to prove the guilt of the accused and all the ingredients of the offence with which the accused are charged, beyond reasonable doubt. That burden never shifts to the accused. The prosecution must succeed on the strength of its evidence.

Any weakness in the defence or lies told by the accused shall not be a basis for convicting the accused or be relied on to bolster the prosecution case. Any reasonable doubt created by the evidence must be resolved in favour of the accused who should then be acquitted. I explained to the assessors and also now warn myself what the burden of proof, the test to be applied in assessing the prosecution evidence the reasonable doubt, mean in law.

See: (1) Woolmington versus D.P.P. (1935) A. C. 462

(2) Sekitoleko versus Uganda (1967) E.A. 631

(3) Uganda versus Bitwire (1977) HCB 103

This offence was committed by more than one person, I directed the assessors as I now warn myself on the application of the doctrine of Common Intention. I explained to the assessors how sections 19 and 20 of the Penal Code Act: are applicable to the case, not forgetting that the role played by each offender must be established in the first place.

See: (1) Solomon Mungai & others versus Republic (1965) E.A. 782.

(2) Dracaku s/o Alia versus R. (1963) E.A. 363.

The accused are jointly tried for robbery with aggravation and the prosecution must prove beyond reasonable doubt the following ingredients:

- a) that there was a theft of something capable of being stolen
- b) that there was the use or threats to use a deadly weapon, at, or immediately before or immediately or before the said robbery.
- c) that it was the accused who participated in this robbery, individually or collectively.

See- 1) Opoya versus Uganda (1967) E.A. 752

2) Uganda versus Mawa alias Matua (1992-3) HCB 65

It was not seriously contested that Nsubuga went to the bank and cashed cheques to the tune of Shs. 13,426,231/= and the same was stolen from him as he approached Kakoge Tea Factory. Nsubuga was with Masitula when he withdrew the money from the Bank and reported its theft to PW6, Muima Abubaker, his employer. The same reports were made to Kibuto Police Post and Mityana Police Station. Nsubuga and Masitula said the money was

snatched from Masitula, who had been carrying it in her bag as Nsubuga was driving the motor-cycle, by two of the three robbers. This money has never been recovered and it was taken without the consent of Nsubuga or Masitula, his wife.

'The money that was stolen from Nsubuga was in his possession as its special owner, though its real owner was UTGC. Section 254 (1) of the Penal Code Act States:

A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof anything capable of being stolen, is said to steal the thing. In the provision to that section — “Special Owner” is defined to include any person who has any charge or lieu upon the thing in question or anything arising from or dependent upon holding possession of the thing in question.

Thus, I find that Nsubuga while transporting the money from Mityana was its “special Owner”, from whom, if taken without his consent, such taking amounted to theft.

See:- (1) *R. versus Gomez (1993) A. C. 442 H. L.*

2) *Lawrence versus Metropolitan Police Commissioner (1972) A. C. 626 U. C*

(2) *Archbold - 1997 —par. 21-22 page 17S2.*

A deadly weapon is described in section 286 (3) of the Penal Code Act. The gun/pistol in this case was fired three times according to Nsubuga and Masitula. The firing of the firearm was corroborated by Al Tonny Lutaya who stated he heard the gunshot after he fell from his motor-cycle. In ***P.C Ben Mulwani and Another vs. Uganda — Criminal Appeal No.3/1993 the Supreme***

Court held that once a gun is fired during the robbery, it is deemed to be a “deadly weapon”

See also (1) *Burumba vs Uganda - Criminal Appeal 32/89 (S.C)*

(2) *Robert Sabiti vs. Uganda - Criminal Appeal No 4/1989 (S.C)*

(3) *Wasajja vs Uganda (1975) E. A. 18.*

The prosecution has therefore proved that a deadly weapon was used during the robbery.

The last ingredient the prosecution had to prove is the participation of the accused individually and or collectively. In order to identify the offender, the court must investigate the factors enabling proper identification of the attacker. Such factors include the light and its intensity available at the time, the past knowledge of or association with the attacker, the proximity of the witness to the attacker during the attack and the duration of the commission of the offence. Added to these, the suspect may be identified by his voice, tribal scars, physical features and particular type of dress.

See--(1) Abdulla Nabulere and others versus Uganda — Criminal Appeal 9/1978 (C.A.)

(2) Uganda vs. George Wilson Ssimbwa — Criminal Appeal No. 37/1995 (S.C.)

This offence was committed at about noon in broad daylight and there were no obscuring objects between Nsubuga, Masitula and the attackers. Although Nsubuga and Masitula said they had never seen the attackers, Wagana, A2 said had been dealing with Nsubuga in transporting their staff and tea leaf.

The accused were lined up in court (dock) in the order Lutaya A1 Wagana A2 and Semwanga A3. Nsubuga while testifying had difficulties to identify any of the accused. Nsubuga testified “The two people who took money from my wife are Tonny Lutaya A1 and A3 Kassim Wagana” “The person who had a pistol was this middle one — who I know as Hassan Semwanga A2. Later he says “The other two never attacked me. They concentrated on my wife” “The other two were with my wife who identified them” Nsubuga did not attend the identification parade at Mityana Police Station.

From the description, by mixing up the name of Semwanga as the person with whom he was struggling for a pistol while pointing at A2 Wagana who was described as being short with a long nose, Nsubuga was not sure who Semwanga was or who of the three suspects was armed with a pistol. Nsubuga’s evidence was therefore unsatisfactory as far the identification of the attackers is concerned. Added to that, how could he fail to identify Wagana (A2) properly and by name when A2 admitted dealing with Nsubuga in matters of transporting their sick workers and tea?

The other evidence which the prosecution relies on to identify the robbers is that of Masitula (PW7). She said, “The two men removed the bag where there was money, from me. I was half-facing the ground.” her description of the robbers at the scene of the robbery’ was “the gunman” was struggling with her husband ten metres away, “the two men removed the bag containing money.”

She did not point out in court who took the money from her. She did not point out who had a pistol and or who took the money from her (in court).

This same Masitula attended an identification parade at Mityana Police Station which was conducted by DIP Yahaya Wepukhulu (PW4) and attended by D/CPL Isiko (PW5). Evidence of identification parades is another type of circumstantial evidence intended to confirm the identification of a suspect by the witness. It is a type of corroborative evidence which may corroborate the witness’s testimony and show his/her consistency or inconsistency.

Isiko received the three suspects from Kibuto Police Post who he identified in court as A1 — Lutaya, A2 Semwanga the small slender man, and A3 Kassim Wagana the brown man. Isiko attended the parade at which, he said, Masitula identified and touched Kassim Wagana A3 the tall brown man and Semwanga Hussein (A2) the slender man in the middle.

In fact, according to the line-up in court the slender man in the middle was Kassim Wagana (A2) while A3, the brown man was Semwanga Hussein (A3). D/IP Wepukhulu. (PW4) who conducted the parade in the presence of Isiko said Masitula identified A2 as Wagana and A3 as Semwanga. She did not: describe what each of those A2 and 3 did during the robbery. Masitula said she identified A3 by his skin colour and A2 by his size and nose. Again she did not state, either in court or the parade what each of the three robbers did, individually, either to her or husband during the robbery. I find her evidence of identification of the suspects is not conclusive as to the identity of the accused and as the persons who robbed them.

Each of the accused put up the defence of alibi. Where an accused person puts up the

defence of alibi, the prosecution has the legal burden to disprove that alibi. This must be done with credible evidence (prosecution). If the prosecution fails to negative that alibi, the accused must be acquitted.

Sec: (1) Constantino Okwel Alias Magendo versus Uganda — Criminal Appeal 12/1990

(S.C.)

(2) Abdu Ngobi versus Uganda — Criminal Appeal No. 10/1991 (S.C.)

Beside the unsatisfactory identification by Nsubuga and his wife, I find very serious contradictions between the evidence of Nsubuga and Masitula as to the events at the scene of the robbery. I also noted serious contradictions in the evidence of Masitula, Isiko and D/IP Wepukhulu as to what transpired at the identification parade. Why should the three attendants at the parade give different versions as to the identity and description of the suspects? All the suspects were either given different names or different descriptions which did not tally with their names.

In considering the inconsistency in the testimony of a witness or witnesses, the test to apply is whether those contradictions are minor or substantial. If minor, they may have no effect on the witness's testimony. But if serious, they may have a serious effect on that testimony or even render it valueless. The deciding factor is whether the contradictions are such as to indicate that the witness is deliberately telling lies to the court.

See: (1) Shokatali Adbulla Dhall vs. Sadrudin Meralli - Civil Appeal No.32/1994 (S.C.) (2)

Tindigwihura Mbahe vs. Uganda — Criminal Appeal 9/87 (S.C.)

Applying the above principles to the present case the prosecution testimony has not proved the third ingredient which concerns the participation of the accused person in the commission of the robbery. The alibi of the accused has not been negated. The identification of the accused has been left wanting and left me with a reasonable doubt which must be resolved in favour of the accused.

Since one of the vital ingredients has not been proved, the prosecution has thus failed to prove the offence of robbery against the accused. I therefore find, all the accused not

guilty. Consequently, and in agreement with unanimous opinion of the assessors, I acquit all the accused of the offence for which they were indicted. Pursuant to section 82(6) of the Trial on Indictments Act. They are all set free forthwith unless they are liable to be held further for some other lawful excuse.

V. A. R. Rwamisazi-Kagaba

J u d g e

21/7/2004