THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No. 0047 OF 2004

UGANDA …… PROSECUTOR

VERSUS

RA 157620 PTE KATURAMU THOMAS ……. ACCUSED

BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

RA 157620 Pte Katuramu Thomas, the accused in this case, has been indicted for the offence of aggravated robbery, contravening sections 285 and 286(2) of the Penal Code Act. The particulars of this offence are that in the month of July 2002, at Kasiisi village, Kabarole District, the accused robbed one Muhereza Edson of his motor cycle registration number 843 UAC; and that at, or immediately before or immediately after, the said robbery, the accused threatened to use a deadly weapon, to wit, a gun, on the said Muhereza Edson.

The accused denied the charge when it was read and explained to him; for which a plea of not guilty was entered. It thus became necessary to go through a trial, where it was incumbent on the prosecution to discharge the burden that lay on it under the law to prove, beyond reasonable doubt, the allegations contained in the indictment. The prosecution took up this responsibility and called four witnesses who adduced evidence in a bid to do so.

The offence of aggravated robbery has four ingredients, each of which it is incumbent on the prosecution to prove beyond reasonable duty; and only after this would Court find the accused guilty. These ingredients are, namely, that:-

(i) There was theft of property of, or under the charge of the complainant.

(ii) The thief used violence in furtherance of the theft.

(iii) The thief actually used, or threatened to use a deadly weapon either at, or immediately before, or immediately after the theft; or that death, was caused.

(iv) The accused perpetrated, or participated in, the theft in the manner set out in (ii) and (iii) herein above.

Concerning the ingredient of theft, the prosecution relied on the evidence of Muhereza Edson - PW1, and Bagonza George – PW2, both boda-boda riders; Samula Steven – PW3, the employer of PW1; and then Amon Rutenta – PW4, a security official who participated in the apprehension of the accused.

PW1, who admitted that he was illiterate, he having not attended school, testified that in the month of July 2002, at around 5 o'clock in the evening, the accused, whom he had earlier known as a soldier of Kabura military detach near Kyegobe S.S.S; and used to be part of the soldiers deployed at night to guard the area where PW1 resided, hired him from Harubaho boda boda stage to take him to Kasisi. The accused was carrying a fairly sizeable black bag.

At the junction of Kamwenge and Kasisi roads, the accused stopped PW1, pulled out a gun from the bag, cocked it, and gave PW1 the option to choose between his life and the motor cycle. He slapped PW1 who fell down and, out of fear, handed the motor cycle key over to the accused. The accused then rode off with the motor cycle whose registration number was UAC 843 – a Machara make, and green in colour.

PW2 testified that he saw the accused, who had a black bag, hire PW1 on that day; and that indeed PW1 later came back around 6.00 o'clock in the evening, and reported that the accused had robbed him of the motor cycle. PW3, the owner of the motor cycle, also testified that PW1 gave him the report of the robbery the following morning; and on receiving this, he and PW1 reported the matter promptly to PW4, a security official, to help arrest the soldier, and recover the motor cycle stolen.

To prove the ingredient of use of violence in the perpetration of the theft, PW1 - the sole witness to this violence - testified that his assailant cocked a gun at him, demanded for the key of the motor cycle, and threatened him with the option of choosing between his life and the motor cycle. The assailant served a hot slap which threw PW1 down, and compelled him to release the motor cycle key. These, if the witness comes through as a credible person, are clear instances of violent acts; which go to prove that violence was applied in the commission of the theft.

As for the ingredient of use of deadly weapon in the execution of the theft; this robbery was allegedly committed in 2003, prior to the enactment of The Penal Code (Amendment) Act; No. 8 of 2007, which amended the definition of deadly weapon.

The definition of the phrase 'deadly weapon' in the old law was as follows:-

S. 273 (3). *In sub section (2), "deadly weapon" includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death.*

The weapon allegedly used in the instant case was a gun. The legal position at the time was that for any such weapon or instrument in issue, which the victim or witness claims was a gun, to pass the test of a gun, it must either have been fired, or, upon recovery, it was tested professionally and proved to function as a gun. The gun in the instant case was only cocked, but not fired. It was not recovered so as to be subjected to professional examination. There was therefore no sufficient evidence that it was a functioning gun.

And for this reason the ingredient of use of deadly weapon was not proved. I accordingly advised the lady and gentleman assessors that in view of this, the charge of aggravated robbery as charged would not stand; and that therefore, Court would have to determine whether the evidence as it is, instead, discloses or proves the commission, by the accused, of any minor cognate offence, or not; and that if it be so, then it is lawful for this Court to find the accused herein guilty of such offence notwithstanding that he has not been charged with it.

The last ingredient for consideration is the participation of the accused in the crime he is indicted for. It is PW1 and PW2 who offer direct evidence of the hiring of PW1 by the accused that day. PW1, unlike PW2, testified that the accused was known to him. Both stated that the accused had a black bag with him when he hired PW1. In testing the veracity of the two witnesses there is need to establish, first, whether the conditions were favourable enough for the two to identify the person who they allege hired PW1 that day.

Second, whether generally PW1 is reliable, in his assertion that indeed the accused assaulted him and took off with the motor cycle in the manner he narrated in his testimony. PW1 testified that he had known the accused earlier as a soldier of Kabura military detach near Kyegobe S.S.S; and

that the accused used to be part of the soldiers deployed at night to guard the area where he (PW1) resided. PW1 further testified that the accused had hired him at around 5.00 o'clock in the evening; hence it was still day time.

PW2 testified that he witnessed the hiring of PW1 by the accused that day; and that indeed PW1 came back about 6.00 o'clock in the evening, and reported to him that the accused had robbed him of the motor cycle. PW3 also testified that PW1 reported the robbery of the motor cycle to him the following morning; and, together with him, reported the matter to PW4, a security official, who knew the accused, and assured them that he would have him arrested.

PW4 testified that upon the accused's arrest, he had confessed to him (PW4) that the motor cycle in issue was at a place called Rwimi. PW1, PW3, and PW4, were part of the search team which went to Rwimi the accused where the accused showed them the exact building in which parts of a dismantled motor cycle, which PW1 and PW3 identified as belonging to the motor cycle robbed from PW1, were recovered.

In his defence, the accused gave an unsworn testimony. He categorically denied the allegations of robbery made against him, and sought to be borne out by the evidence adduced by the prosecution witnesses. His case was instead that at the time of his arrest, he was a soldier based in Nakasongola; and that he had been arrested, together with his uncle, from his uncle's home at Kibito, by the L.C. Chairperson of the area, on the very day he had arrived at his uncle's place. The alleged ground for his arrest was that his uncle had not reported his arrival in the area; contrary to the rules of the area.

He further testified that he had refused to pay for his release as had been demanded by those who had arrested him. They then emptied his pocket of all its contents and, amongst other things, took the army discharge certificate which he had been issued in 2001. He was beaten on the orders of the said L.C. Chairperson, and later handed over to police. At the police some people he learnt were from Wembley (a violent crime crack force) demanded that he hand over to them a gun which they claimed he had.

When he denied being in possession of any gun, they subjected him to severe beating; and as they did so, boda-boda riders around started shouting:-

"These are the people we do not know. He might steal our motor cycle."

This account by the accused is in sharp contrast to, and wholly negatived by that of PW4 - the security official in charge of army veterans in the Rwenzori area. This official testified that, in fact, the accused had been a home guard, but had later joined the army, and after leaving the army, had joined a private security organisation called INTERID, which he had also left; and that at the time of his arrest the accused was unemployed. The accused testified that he was a Nakasongola - based soldier on leave when he was arrested; yet, in the same breath, he revealed that he had been discharged from the army way back in 2001.

The evidence adduced by PW1 on identification of the accused requires that it is tested with particular care so as to avoid the possibility of error or mistaken identity on his part, in naming the accused as the person who hired him and turned round to rob him of his motor cycle that day. In addition, there is need to look for such other evidence as would tend to connect the accused to the offence charged, and thereby strengthen the case that there was no mistake or error in the identification of the accused as the villain; but rather that the evidence of PW1 is cogent and reliable.

On evidence of identification, the law is that the inculpatory facts of identification as adduced by the victim of the criminal act complained of, provides the best evidence - see ***Badru Mwindu vs Uganda; C. A. Crim. Appeal No. 1 of 1997.*** The conditions under which PW1 was hired - during broad day light, his prior knowledge of the accused, and the time the two spent together at that junction where, face to face, the assailant confronted PW1 and snatched the motor cycle from him - were favourable for proper identification on the authority of ***Isaya Bikumu vs Uganda; S. C. Crim. Appeal No. 24 of 1989***.

In the instant case the circumstances under which the identification was made were such that the possibility of any mistake or error in identification would have almost been entirely eradicated. If it is established that PW1 is credible, then this is one of those circumstances where, on the authority of ***Abudalla Nabulere & Others vs. Uganda, C. A. Crim. Appeal No. 9 of 1978 [1979] H.C.B. 77,*** the Court would, after exercising the necessary warning, find it safe to convict the accused even though no other evidence is adduced to support the correctness of identification.

With regard to his account of the event of that day, PW1 has been consistent. He made the first report of the robbery to his fellow *boda-boda* riders at Harubaho stage, and named the accused as the one who had robbed him. He repeated this information to PW3 - the owner of the motor cycle, and later to PW4 - the security official who eventually arrested the accused. It is this consistent naming of the accused by PW1 which set in motion the chain of events that led to the arrest of the accused; and resulted in the recovery albeit only of parts of the motor cycle in issue, in circumstances that seriously incriminated the accused.

The case of ***Uganda vs. Bosco Okello alias Anyanya; H.C. Crim. Sess. Case No. 143 of 1991, [1992 - 1993] H.C.B. 68,*** is good authority for the proposition that failure by a witness to name his or her assailant at the first instance, seriously dents the credibility of that witness. In the case of ***Frank Ndahebe vs Uganda, S.C. Crim. Appeal No. 2 of 1993***, the eye witness had not named the attackers to the people who had answered the alarm, and to the authorities. The Court held that this weakened the evidence of identification; and in the absence of any other evidence connecting the appellant with the offence, the test required for proof of identification had not been met.

The rationale here is that it is natural and more logical to name one's attacker at the earliest opportunity; and therefore, such revelation is not considered as an after thought and rendered doubtful as possibly having been driven by some other factor or ulterior motive. In ***Rex vs. Shaban bin Donaldi (1940) 7 E.A.C.A. 60,*** which was cited with approval by the Supreme Court of Uganda in the case of ***Bogere Moses & Anor. Vs. Uganda; S.C. Crim. Appeal No 1 of 1997***, the Court of Appeal for Eastern Africa said:-

> *"We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made … by someone who is subsequently called as a witness, evidence of details of such report (save such portions of it as may be inadmissible as being hearsay or the like) should always be given at the trial.*
>
> *Such evidence usually proves most valuable, sometimes as corroboration of the evidence of the witness under section 157 of the Evidence Act, and sometimes as showing that what he now swears is an afterthought, or that he is now purporting to identify a person whom he really did not recognise at the time, or an article which is not really his."*

The ***Bogere*** case (supra), pointed out that the Tanganyika Evidence Act whose provision was referred to in the ***Shaban bin Donaldi*** case (supra), is similar to section 155 of our Evidence Act which is worded as follows:-

> *"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved."*

In ***Kella vs Republic [1967] E. A. 809*** at p. 813, Court reaffirmed the need for upholding the practice elucidated above; and observed that:-

> *"The desirability for this practice would apply with special force to a case of this nature … The police must in their investigation have taken statements from both the principal witnesses…… In her evidence* [the witness] *states that she gave the statement the following day naming the two appellants. If this statement had been produced and she had in fact identified both appellants by name the day after the incident, this would have considerably strengthened her testimony; but if this portion of her evidence was untrue, then it would have the opposite effect and have made her testimony of little value."*

When, in the instant case before Court, PW3 caused PW1 to report the robbery to PW4, a local security personnel with responsibility to investigate security related crimes such as this one; and which led to the eventual arrest of the accused, the evidence adduced by PW4 was of great evidential value and went to show that what PW1 had stated in Court was what he had stated immediately after the robbery six years before; hence naming the accused as the culprit was not an after thought.

And, as was decided in the case of ***Kasaija s/o Tibagwa vs R. (1952) 19 E.A.C.A. 268,*** and followed in the case of ***Kamudini Mukama vs. Uganda, S.C. Crim. Appeal No. 36 of 1995****;* in a case where the evidence of an arresting witness is relevant, the prosecution should call that witness; otherwise failure to do so may create doubt in the prosecution case.

The present case is one such situation. PW4, who arrested the accused, stated that the accused had revealed to him that the stolen item was carted away in Rwimi; to which he (the accused) led a search team, with the result that, there, parts of the stolen item were recovered, and thereby

providing incriminating evidence of immense value. It has been submitted for the accused that there is no evidence in the instant case from the police regarding the involvement of the accused.

The case of ***Alfred Bumbo & Ors vs Uganda, S.C. Crim. Appeal No. 28 of 1994,*** which emphasizes the need for calling evidence of the investigating police officer to prove the prosecution, provides that:-

> *"while it is desirable that the evidence of a police investigating officer, and of arrest and re-arrest of an accused person by the police, should always be given when necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of an accused person.*
>
> *All must depend on the circumstances of each case whether police evidence is essential, in addition, to prove the charge. In the instant case we are satisfied that the absence of police evidence did not weaken the prosecution' witnesses, and from the appellants' unsworn statements clearly indicating how and when they arrested. Other evidence also clearly proved the prosecution case. "*

Therefore, in the instant case, although no police evidence was called, the evidence provided by PW4, who executed the first arrest, and successfully helped locate part of the item stolen, adequately compensated for, and avoided any harm which the absence of police evidence would have had on the case.

And, in keeping with the now settled body of authorities on the need to tread carefully with regard to the evidence of identification such as was adduced by PW1, I warned the lady and gentleman assessors; and equally warn myself now that, while this Court can convict on the strength of evidence adduced by PW1 alone; yet it is prudent to ensure that such identification was made under favourable conditions, and that there is evidence which supports the correctness of the identification; and thus point to the guilt of the accused.

Defence counsel attacked prosecution evidence in several regards; suggesting that they were full of contradictions and inconsistencies, and that it would be unsafe to found a conviction based on their supposed strength. I have given due consideration to this contention. In the main, the

contradictions and inconsistencies are really minor; and neither do they go to the root of the case, nor are they deliberate falsehoods.

They are rather the type of contradictions or inconsistencies one can not avoid when evidence, as in the instant case, is adduced in Court six long years after the event. PW1 clearly states that his services were hired from Harubaho *boda-boda* stage; and true, this is contradicted by PW2 who instead states that he saw PW1 being hired from Kamwenge stage. This can surely be explained from the evidence on record that since PW2 operated from both Harubaho and Kamwenge stages, which in any case are not far from one another, and he has operated there for so many years, it was humanly possible that he could honestly mix up his facts.

Further, this was a statement that could not have been made as a deliberate falsehood in a bid to make the case of the prosecution stronger and thereby secure a conviction of the accused. The same argument goes for the contradiction in the time PW1 was allegedly hired by the accused. For ordinary folks, who have no watches to check on for determining time with precision, their mention of time must be regarded in the context of their appreciation of the concept of time. It would not be surprising if upon comparison with the time on the clock theirs is found to be way off the mark.

This would by no means suggest that they are stating deliberate falsehood; and further, the witnesses here were testifying in Court six years after the event. In all the instances against which counsel made his attacks, the witnesses are unanimous on the substance of the matter, and really only differ on the finer details which as I have pointed out can only be expected to happen, as they have, due to the lapse in time.

These are such issues as whether PW1 reported the theft to PW2 in the evening of the day of the theft, or the following morning; whether the bag which PW1 and PW2 saw the accused carry, was one metre or two feet wide; whether the search party moved to Rwimi together with the accused, or met him there; whether the structure the motor cycle parts were recovered from was a garage, or a structure behind a commercial building.

All the alleged contradictions cited therefore do not go to the root of the matter. The substance of the evidence attacked remains that PW1 immediately reported to the persons named in the evidence, the theft of the motor cycle, and the circumstance under which it happened; and that

both PW1 and PW2 agree that the accused was carrying a black bag and only differ in their estimation of its size, something which can be explained away by the difference in their appreciation of measurements; and that indeed the accused was at Rwimi, where he pointed out the specific building - whether it be called a garage or otherwise – at which the motor cycle parts were recovered.

On the whole, this Court finds that the prosecution evidence has been truthful and reliable. And in addition, in the light of the other evidence brought out above, including that which self incriminated the accused when he led the search party to the discovery of vital evidence; the evidence of PW1 is amply corroborated with regard to the identity of his assailant. This Court finds the defence of alibi raised by the accused, and the general circumstance of his arrest as narrated by him, an exceedingly lame, ridiculous, and absolutely unacceptable account of events; devoid of any truth, and must be treated with the contempt it deserves.

I have no doubt that the prosecution has proved the ingredients that constitute the offence of robbery. However because the evidence on record does not establish the vital ingredient of use of deadly weapon, I find that the accused is not guilty of the offence of aggravated robbery as charged. Instead, I follow the decision of Sir UDO UDOMA, C.J. *in* ***Funo & Ors. vs. Uganda; H.C. Crim. Appeals Nos. 62 – 69 of 1967; [1967] E.A. 632.*** In that case, the evidence adduced had not proved the offence as charged; and the learned C.J. had instead convicted the accused on the minor cognate offence of theft, for that of robbery.

At p. 636 of the judgment he cited, with approval, the observation made by ***Lord Pearce*** *in* ***Smith vs. Desmond (1) [1965] 1 All E.R.*** at p. 992, where the learned Lord Justice had said:

> *"The essence of the offence [of robbery] is that violence is done or threatened to the person of the custodian, who stands between the robber and the property, in order to prevent or overcome his resistance and to oblige him to part with the property and submit to the thief stealing it. Thus the offence against the person and the theft are combined".*

The learned C.J. further observed as follows, that:

> *"Under common law on a charge of burglary and stealing goods, if no burglary is proved; or of robbery, if the property is not taken from the person by violence or putting in fear, the*

prisoner may be convicted of a simple larcency. Indeed in indictment for robbery the prisoner may be convicted either of the robbery, or stealing from the person, or of simple larcency."

At the time the learned C.J. considered that case, section 180 of the Criminal Procedure Code, which was then the applicable law, provided as follows:

"*180: When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he may be convicted of a minor offence although he was not charged with it."*

On the strength of the provisions above, the learned C.J. instead convicted the accused of theft, rather than robbery; and accordingly passed a corresponding sentence. As for the instant case before me, section 87 of the Trial on Indictments Act (Cap 23), is couched in exactly the same language, word for word, as that of section 180 of the Criminal Procedure Code cited herein above; and endows this Court with powers to convict an accused on a minor cognate offence where the facts of the case so permit.

Hence due to the reasons given herein above for reaching my finding that use of deadly weapon had not been proved, and the subsequent advice given to the assessors on that; and contrary to the opinion of the gentleman assessor, but in full agreement with that of the lady assessor; I find that the prosecution has proved, beyond any reasonable doubt, the case against the accused for the commission of the minor cognate offence of simple robbery in contravention of sections 285, and 286 (1), of The Penal Code Act. I therefore, accordingly, convict him of that offence.

Chigamoy Owiny – Dollo
JUDGE
12 – 09 – 2008

Cosma Kateeba, holding brief for Mr. Rukanyangira for the accused.

Ann Kabajungu, for the State.
Accused in Court for Judgment.
Irumba Atwoki, Clerk of Court.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo
Judge.
12–09–2008

Ann Kabajungu: The convict has been on remand for 5 (five) years. He is a first offender; aged 31 years. He was discharged from the Army in 2001. Simple robbery, on conviction by the High Court, carries maximum sentence of life imprisonment. He was trained to protect the people of Uganda. Instead he turned out to terrorise them. Robbery cases high; we pray Court to pass a deterrent custodial sentence.

Cosma Kateeba: In mitigation, the convict is a married man with four children who are staying in Nakasongola. His father is dead, and the mother is disabled, and he was the one looking after her. he has five siblings whom her was looking after. He is still young and capable of reforming. He was arrested in 2002 and has been in detention since. He is a first offender, so should not get the maximum sentence but should be favoured with mercy in the punishment. So court should impose such sentence as would allow him to go out and look after his father's family.

Court: The convict was trained as a soldier, charged with the responsibility to protect the lives and properties of those within the jurisdiction of the country. He did the very converse of that duty and must be punished to send out a clear message that those who serve as members of the disciplined forces must nit turn the craft learnt in their training into terror instruments to make the lives of the ordinary citizen a nightmare. I do take cognisance of the fact that the convict has taken six years in detention in all. I shall not impose the maximum sentence of life; but in view of the gravity of the matter, the convict is hereby sentenced to 8 (years) in prison. It is hoped that he will come out a much reformed citizen thereafter. Right of appeal explained.

Chigamoy Owiny – Dollo

Judge.

12–09–2008