THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No. 0078 OF 2003

UGANDA …… PROSECUTOR

VERSUS

ZORO ERINEST …..…….. ACCUSED

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

JUDGMENT

The accused herein, Zoro Erinest, was indicted in this Court for the offence of aggravated robbery, in contravention of sections 285 and 286(2) of the Penal Code Act. The particulars of this offence were that on the 29th day of July 2002, at Kitumba Trading Centre, Fort Portal Municipality, Kabarole District, the accused, and others still at large, robbed one Basaliza Francis of cash U. shs. 280,000/=, two loud speakers 'magnum' by make, three big bottles of wine, three big bottles of Uganda Waragi, and two coats. Further particulars were 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 Basaliza Francis. The indictment was read out and explained to the accused whose response was that he had understood the charge; but he however denied the entire allegations made out in the indictment; which therefore necessitated a trial for proof of those allegations.

The prosecution, in a bid to discharge the obligation incumbent on it under the law, to prove the guilt of the accused as charged, adduced evidence from four witnesses; namely:-

1. Dr. Edwin Kataaha Musinguzi - PW1; the medical officer who carried out medical examinations on the victim, and on the accused.
2. Francis Basaliza - PW2; the victim of the offence charged.

3. D/ASP Mathew Otuu - PW3; a police officer who oversaw the investigation of the crime charged.
4. No. 27054 D/Cpl Valerian Katehangwa - PW4; a police officer who investigated the crime.

Aggravated robbery, the offence with which the accused has been charged, comprises four ingredients; each of which the prosecution must establish, by proof beyond reasonable doubt, before Court can find the accused guilty as charged. These ingredients, as pointed out in the case of ***Uganda vs. Stephen Mawa*** alias ***Matua, H.C. Crim. Sess. Case No. 34 of 1990; [1992 - 1993] H.C.B. 65***, are as follows, that:-

(i) There was theft of the property of the complainant.
(ii) Violence was used in furtherance of the theft
(iii) There was actual use, or threat to use a deadly weapon either at, or immediately before, or immediately after the theft; or that death, was caused.
(iv) The accused participated in the theft in the manner set out in (ii) and (iii) herein above.

To establish the first ingredient, the prosecution relied principally on the evidence adduced by the victim of the alleged robbery, PW2; and, as well, that of PW4, who was involved in the recovery of some of the items allegedly robbed from PW2. PW2 testified that at around 3.00 a.m. of the night of the 29th of July 2002, at his pub popularly known as 'Basaliza Pub' some persons, strangers to him, attacked him. He further testified that the assailants forced him to give them U. shs. 280,000/= (Two hundred thousand only); and later when they had gone, he made an inspection in his premises and discovered that the following items were missing; namely: two coats, three bottles of V&A, three bottles of Uganda Waragi, and a pair of radio speakers – 'MAGNUM' make. Two months later, at Kyenjojo Police Station, he saw and identified the said radio speakers which had been recovered.

PW4 testified that he, together with some other police officers, had recovered the aforesaid radio speakers, in the month of September 2002, from a house in Kasamba village in Bugaki Sub County, Kyenjojo District. The recovered items were identified by PW2 as part of the items he had lost on the date of the robbery. The speakers were exhibited in Court as ***PE4(a)*** and ***PE4(b)***. The testimonies of the two witnesses, put together, establish beyond reasonable doubt that indeed

a theft of the items named in the indictment did occur; and since the counsel for the defence conceded so, the first ingredient has been satisfactorily disposed of.

On the allegation of use of violence in the course of the theft, PW2's evidence is that his assailants broke the back door to his shop, to gain entry into it. Upon their forceful entry the thieves, whom he tried to fight back, overwhelmed him when they fired a gun which shattered his TV screen. They also used very intimidating, and vulgar language at him; such as the Kiswahili expression *'koma nyoko'* (which, in the circumstance of the case, was an obscene reference to the private parts of the victim's mother). They inflicted injuries on him by subjecting several parts of his body, such as the back, feet, and shoulder to severe beatings.

The medical report made by PW1, upon examination of PW2, corroborated the fact that indeed violence was meted out on PW2. The examination revealed that PW2 had sustained injuries on his shoulder, back, buttocks, ankle, and foot; and that his right ankle was puffed up, and leading PW1 to suspect that there was a fracture at that spot. He classified the injuries as 'bodily harm'. Proof of violence is clear from the evidence of the two witnesses. Counsel for the defence was persuaded that indeed this ingredient too, had been proved beyond reasonable doubt. I am in agreement.

Regarding the ingredient of threat to use, or actual use of a deadly weapon in the commission of the robbery, the evidence of PW2 was direct. His testimony was that his assailants possessed a gun whose barrel he saw at the time of his futile attempt to stave the lead assailant off, with a panga. This gun, he testified, was fired and the bullet shattered the screen of his T.V. set. When this robbery was allegedly committed in 2003, the Penal Code, then, defined the phrase 'deadly weapon' 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.*

Once the weapon used in the attack was, as in this case, established to have been a gun due to its having been fired, then, it was conclusively proved that a deadly weapon, within the meaning assigned to it by the law as stated above, was used in the robbery. PW2 was a credible witness with regard to his account of the event of that fateful night. Counsel for the defence, once again,

gracefully conceded that this ingredient had been proved by the prosecution as required by the law; and so I find that the third ingredient – that of use of deadly weapon – was proved beyond reasonable doubt.

The last ingredient in the offence was proof of participation of the accused in the robbery alleged by PW2. What would amount to direct evidence on this aspect of the prosecution case is that adduced by PW2. He testified that the incident took place at around 3.00 a.m.; and he was woken up from his sleep. He, twice, had a glimpse of the lead attacker when the fellow tried to enter the room; but each time PW2 swung his panga and the assailant ducked off. From this brief encounter PW2 was only able to see that this assailant was a tall brown stranger with a cap on his head, and dressed in a rain coat.

When he saw the barrel of the gun only two metres away from him, and then it was fired into his room, PW2 switched off the lights; and in fear and resigned to his fate, went and lay on his bed facing down, waiting for the worst to happen. All that happened when the robbers entered his room therefore took place in darkness. The testimony of PW2 with regard to the identity of his assailants that night is the evidence of a single identification witness. The law is that the weight to attach to such evidence depends on whether or not the conditions were favourable enough for PW2 to identify the person who he alleges assaulted him and made away with his properties that night. That evidence must therefore be tested with great care to avoid any possibility of error or mistaken identity on the part of PW2 in naming the accused as the person who attacked him that night.

In cases resting on identification, such as this, the law is that it is the inculpatory facts of identification adduced by the victim of the act complained of, which is the best evidence – see ***Badru Mwindu vs Uganda; C.A. Crim. Appeal No. 1 of 1997.*** The conditions under which PW2 saw his attacker were such that he only had glimpses of the latter, and only twice, during the vain attempt he made to prevent the attacker from intruding into the room. The attacker was a total stranger who had camouflaged himself with a cap on his head; and was dressed in a raincoat. Worse, the rest of the encounter subsequent to the fleeting observation took place in utter darkness that night.

It is now well settled, and there is a long list of decided cases laying down the principles Courts should adhere to when faced with evidence of identification, as in this case. Some of the leading

authorities on this are ***Tomasi Omukono & Others vs. Uganda, H.C. Crim Sess. Case No. 9 of 1977, [1977] H.C.B. 61; Abudalla Nabulere & Others vs. Uganda, C.A. Crim. Appeal No. 9 of 1978 [1979] H.C.B. 77; Isaya Bikumu vs Uganda; S.C. Crim. Appeal No. 24 of 1989; Uganda vs. George William Simbwa, S.C. Crim. Appeal No. 37 of 1995***, and that of ***Bogere Moses & Anor. vs. Uganda, S.C. Crim. Appeal No. 1 of 1997***. They all emphasise the need for Court to scrutinise and test such evidence with great care; and ensure that the possibility of any error or mistaken identity, by the witness, is excluded before making any finding of guilt basing thereon.

The principle here is not about credibility of the witness, as the most credible witness may suffer entirely from mistaken identity, or error in identification. The authorities advise that the Court confronted with such a situation must look for such evidence as would rid the case of any possibility of such mistake or error. On the strength of these authorities cited, the conditions established as then obtaining in the instant case were certainly poor; hence not favourable for proper or correct identification. Such conditions could therefore only have enhanced rather than minimised the possibility of mistake or error by PW2 in the identification.

I accordingly warned the assessors of the need to look for such other evidence as would support the evidence of identification adduced by PW2 and thereby exclude that strong possibility, evident in this case, of error in identification, before this Court could find it safe to convict the Accused as charged. The evidence worthy of attention herein, as possibly supportive of the evidence of identification, was that adduced by PW4 who recovered the radio speakers; and then the evidence of identification parade. PW4 testified that the accused, and others, fled when police officers arrived at the homestead of the accused. In a house in that homestead, which he learnt belonged to one Kadoma Ismael, a brother of the accused, the police recovered certain items including radio speakers – exhibit ***PE4(a)*** and ***PE4(b)*** – which PW2 identified as belonging to him.

He testified further that he saw Kadoma later and conceded that Kadoma and the accused do resemble one another. It is clear that this evidence by PW4 is not of any value as it does not help to eliminate the possibility of error in the evidence of PW2 in his purported identification, that night, of the accused as the person who had robbed him. The recovery of the radio speakers from the house of Kadoma Ismael, was circumstantial evidence pointing, instead, at Kadoma Ismael as being either the thief; or that he had received them with the knowledge, or ought to have known, that they were stolen property. It would, without more, extend the principle governing

circumstantial evidence too far to suggest that the Accused, who dwelt in a different house from that of Kadoma albeit admittedly in the same homestead, could be held culpable for that possession.

The other evidence intended to help exclude the possibility of error, and thereby support the evidence of identification, was that arrived at by the conduct of an identification parade; which was meant to test and confirm the victim's memory as to the identity of the person he claimed to have seen on the night of the robbery. The rules and principles governing the conduct of an identification parade were set out in the case of ***Mwango s/o Manaa (1936) 3 EACA 29,*** and reaffirmed in ***Ssentale vs. Uganda, Crim Appeal No. 53 of 1968 – [1968] E.A. 365***; and the rules are elaborate, and include the following salient points; namely that:

(i) In introducing the identifying witness, the police must tell him or her that he or she will see a group of people among who may or may not be the suspected person; but not to say "pick out somebody"; and never to influence the witness in any way whatsoever;

(ii) The accused must be told of his right to have a lawyer or friend around when the identification parade is taking place;

(iii) The witness must not see, and thereby know the identity of the accused person in police custody, before the parade;

(iii) The accused must be placed amongst at least eight persons; and as far as possible persons of similar age, height, general appearance and class of life as the accused himself or herself;

(iv) The officer(s) conducting the identification parade must always bear in mind, the imperative need and duty to act with scrupulous fairness; otherwise the value of identification as evidence will depreciate considerably.

In Uganda, the rules of practice for carrying out identification parade are spelt out in Police Form 69, which has the sub heading: (POLICE STANDING ORDER 14/59), on which the report of the parade is entered. This document provides rules of conduct which if adhered to would satisfy the requirements in the rules set out herein above. In the instant case the report of the identification parade carried out was tendered in Court as ***exhibit PE2***; not by the officer who had carried out the identification parade, D/AIP Sam Mugabi, as he was reported to have left the services of the Uganda Police Force, and was believed to be somewhere in one of the Arab countries.

PW3 who had given the instructions for the identification parade, and was familiar with the handwriting of the said D/AIP Sam Mugabi, gave evidence about the parade. His was therefore restricted to an interpretation of the content of ***exhibit PE2***, aforesaid. Where, in the said Identification Parade Report, the questionnaire was whether the suspect was satisfied that the parade was conducted in a satisfactory manner, or whether any statement was made by the suspect, there is the handwritten endorsement, in capital letters, stating as follows:-

"I am satisfied with the way the identification parade has been conducted."

Notably, it was not the suspect who signed that part of the report; contrary to the express rules governing the conduct of identification parade. Furthermore, there was no endorsement as to whether or not the suspect had been asked to sign, but had declined to do so. In effect then, it is not the suspect, but rather the police officer who conducted the parade asserting, again contrary to the rules, that the parade had been conducted in a satisfactory manner. In the said Identification Parade Report, PW2 was asked in what connection he was able to identify a member of the parade; and his response was the following endorsement that:–

"I recognise the suspect from his face and height plus his structure/appearance."

In his testimony, PW2 stated that at Fort Portal Police Station, what the police had asked him was whether he would be able to identify, from an identification parade, the person who had robbed him; and he had said he would. He testified further that from the room where he found about ten men paraded, the police asked him to identify those who had robbed him. This testimony clearly reveals that the identification parade conducted was so done in non compliance with, and further offended against, the rules set out for attaining reliable identification. Here the witness was not, as required by the rules, told that in the parade there may, or may not, be the person who he alleged had robbed him. He is in effect led to beware that the person suspected to have robbed him is amongst the people paraded for identification.

The other matter of concern is the choice of attire of the members who constituted the parade. In his evidence on what he had on the identity of his attacker, PW1 had stated as follows: –

"I saw the attacker when he was trying to open the door of the room where I was, and I tried to use the panga on him. He was putting on a cap, and a rain coat; and he was brown."

It is clear that the assailant who PW2 had seen had camouflaged himself; and further to this, PW2 did not have the opportunity to see him in full length, or for any sufficient amount of time, as the door separating the two antagonists was opening out ward and shielding the assailant each time PW2 used a panga to bar the assailant from gaining access to his room. Therefore, to parade persons who were shirtless, hence half naked, and with their heads not camouflaged in any way at all, hence far removed from the description given by PW2, was, for purposes of facilitating identification, most improper in the circumstances. What the police needed to have done in the present circumstance was to, as much as possible, have put each of the members of the parade as close as they could, to match the description PW2 had given of his attacker.

Accordingly, the police should have availed each of the paraded members with a cap as a bare minimum. This was the most noticeable camouflage the attacker had used that night. Secondly, due to the fact that the complainant had stated that the defining feature of the assailant was that he was brown and tall, the volunteers chosen for the parade needed to have reflected that information. The choice of the people paraded, from the testimony of PW1, and again contrary to the identification parade rules set out above, however, did not reflect this situation; because as he stated: **–**

"They were not the same size, nor age. There were brown and complexioned people. I moved around twice before picking the accused because the person I saw at night while I was afraid I had to take time to recognise. I wouldn't jump up and say he is the one. The accused was in the middle. He was dressed in a trouser without shirt. "

One other matter on this aspect of the evidence of identification is what came out in the unsworn testimony of the accused. He stated that he was arrested from the trading centre when someone had singled him out saying: *"His brother is here."* He was arrested and detained at Kyenjojo Police Station, wherefrom a police officer called Katehanga [PW4] took him from the cells to some men he did not know; and that one of the two persons who were brought to identify him from the identification parade, turned out to be one of those men he had seen at Kyenjojo Police Station. In view of the endorsement made by the police officer in the identification report shown

above, purporting to state on behalf of the suspect that the parade had been carried out satisfactorily, this is of serious concern.

It leads to the strong and reasonable inference that the suspect, now accused, was deliberately denied the right to give his response to the questionnaire in the report as to whether or not the parade was conducted satisfactorily, and to endorse it as required by the rules; and that, probably, the suspect would have indicated his dissatisfaction with the manner the parade had been conducted. The revelation came out, when it was elicited from PW2 in cross examination, that he had in fact earlier gone to Kyenjojo where the accused was detained as a suspect. His explanation was that he had gone to Kyenjojo for the purpose of identifying the speakers that had been recovered; and that while there, he had requested to be allowed to see the suspect, but that the police had refused to grant him that request.

The fact that PW2 had gone to Kyenjojo Police Station where the accused was detained as a suspect was important. Looked at together with the aforesaid revelation regarding his knowledge of the accused before the parade, only extracted during cross examination, gives the impression and leads to the reasonable inference that PW2 had, in his testimony during examination in chief, deliberately skipped this important information in view of the bearing it would have on the fact of his having picked out the accused during the identification parade. Therefore, in the light of the defects, deficiencies, and irregularities pointed out in the manner the identification parade was conducted, it can only further weaken the prosecution case with regard to the identification of the perpetrators of the robbery in issue.

Finally, and added to all this, is the evidence adduced by PW4; the relevant part of which is that Kadoma, the brother of the Accused, whom he saw when he was later arrested by the police, over other matters, resembles the Accused. Since it was in the house of Kadoma that the speakers robbed from PW2 were recovered, there is thus compelling ground for reasonable inference that the person who PW2 saw that night and who, evidence has shown, resembles the accused, was more probably Kadoma; and not the accused. The net sum of all this is that the conditions then obtaining for identification at the time of the robbery were not favourable at all for correct identification.

Further to this, neither did the recovery of the speakers from the house of Kadoma, situated next to the one of the accused, nor the result of the identification parade, incurably flawed as it was, help to eliminate those factors that militated against correct identification. The identification parade herein serves as an example of how an identification parade should not be conducted. It was unscrupulous and offended against the rule for fairness as elaborately provided for in the rules of procedure aforesaid. Instead, the evidence on record has only served to ingrain more in the mind of this Court, the real possibility of mistaken identity or error on the part of PW2 in naming the Accused as the person who assaulted him and robbed him of his properties that night.

In the case of ***James Richard Kawenke Musoke vs. Uganda, C.A. Crim. Appeal No. 2 of 1981 – [1983] H.C.B. 1***, the Court held that where the evidence alleged to implicate an accused person is entirely of identification, that evidence must be absolutely water–tight to justify conviction. Applying this authority to the present case, I am unable to find any evidence incriminating, leave alone pinning down, the accused for the crime alleged; unless his resemblance to his brother in whose house the stolen properties were recovered is taken to amount to such incriminating evidence; which of course in law would be quite ridiculous.

I find that the prosecution has not adduced evidence that passes the stringent test of evidence requisite for proof of identification, to warrant conviction of the Accused. There are serious doubts in the prosecution case which I am under duty to resolve in favour of the accused. In the result, and in full agreement with the gentlemen assessors, I acquit the accused of the offence charged; and unless he is being held for any other lawful purpose, he must be released forthwith.

Chigamoy Owiny – Dollo
JUDGE
01 – 09 – 2008

Ms. Ann Kabajungu – State Attorney; for the State.
Accused in Court for judgment; counsel for the accused absent.
Irumba Atwoki – Clerk of Court.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo

JUDGE

01/09/2008