THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No. 0002 OF 2005

UGANDA

……PROSECUTOR

VERSUS

1. KABERUKA BRITCH EPHRAIM }

2. LYALYEME PAUL } :: ACCUSED

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

JUDGMENT

The two accused persons herein; Kaberuka Britch Ephraim, herein after referred to as A1; and Lyalyeme Paul alias Kwetolora, herein after referred to as A2; and both referred together herein as the accused, are jointly indicted for the offence of aggravated robbery, in contravention of sections 285 and 286 (2) of the Penal Code Act.

The particulars of the said offence is that on the 23rd day of April 2004, at Rwenjaza Trading Centre, Nyabbani Sub County, Kamwenge District, the accused together with others not before Court, robbed one Twijukye Provia of U shs 4,700,000/= (Four million, seven hundred thousand only), and a mobile phone Nokia valued at U shs 280,000/= (Two hundred eighty thousand only); 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 Twijukye Provia.

The two accused each pleaded not guilty, when the charge was read out and explained to each of them; and upon responding that each had understood

the charge. This, then, led to a full blown trial. There are four ingredients that comprise the offence of aggravated robbery. Each of these ingredients, prosecution was under duty to prove beyond reasonable doubt, in order to establish the guilt of the accused. The Penal Code Act, as it was in 2004, when this offence was alleged to have been committed, provided for these ingredients as follows, that:-

(i) Theft of the property, complained of did take place.
(ii) Violence was used in the execution 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 aforesaid theft, and in the manner set out in (ii) and (iii) herein above.

The prosecution, pursuant to its obligation under the law, to prove the guilt of the accused as charged, called three witnesses. On the allegation that theft had taken place, the prosecution relied on the evidence adduced by Twijukye Provia – PW1, the complainant herein. The defence also provided strong circumstantial evidence, to wit that adduced by DW2, which corroborated the testimony of PW1 that indeed a phone recovered and answering to the description given, and identified, by the complainant – PW1, had been stolen.

The evidence adduced by PW1 was that around 9.00 o'clock of the evening of 23rd day of April 2004, while she was resting in her bedroom, one of her children rushed in with an alarm indicating that something was wrong. There was light provided by a candle in her bed – room, and a hurricane lamp in the sitting room. She saw an intruder pass by and head for the shop. This intruder was immediately followed by three others. The intruders put her at gun point, tied her hands at her back, and forced her to divulge where she had kept her money. One of the assailants went to the shop following her revelation as to where the money was.

In addition to the phone which one of the assailants took from a stool next to her bed while she was seeing, PW1 discovered after the assailants had left, that U. Shs. 4,300,000/= (Four Million Three Hundred Thousand Only), which she had kept in the drawer in the shop was, together with some shop items, missing; and she believed they had been taken by the thieves. A couple of months later, a phone which she was able to identify as the stolen one, was recovered by police from some one else; and for which an arrest of a suspect was made.

DW2 – Kasisi David, to whom the phone stolen from PW1 was traced after recovery, gave a strong circumstantial evidence corroborating that of PW1, by stating that in deed on the fateful day, he had been in the company of some two persons, not in Court, with whom he had travelled to Rwenjaza Trading Centre; and that after sometime, these two people had come back to the place they had left him waiting for them; and that on their return, they had certain items including the phone which they gave him as payment for having assisted them with transportation to that place.

Regarding the ingredient pertaining to use of violence in the execution of the theft, the direct evidence adduced in Court was that of PW1. She testified that her assailants, whose intrusion into her house had scared and caused one of her daughters to rush to her sounding an alarm, put her at gun point, tied her up with strong ropes in the infamous ‘kandoya’ (hands tied behind the back) style, ordered her to face upwards, and demanded from her to choose between her life and her money; and further threatened her with the dire consequence of death, should she divulge the identities of the assailants. The rope had been strong and was tied so securely that it took the use of a razor to cut it and free her.

The evidence of John Baptist Mbonye, the medical officer – PW2 corroborates that of PW1 with regard to the nature of the injuries she sustained due to being tied up. He testified that upon examination of PW1, he found she had fresh traumatic bruises on her arms, which were irregular; and she was

suffering from pains on both arms and wrist joints. He stated that the wounds were consistent with something having been tied on the wrists, and classified the bruises as harm. The combined testimonies of PW1 and PW2 provide satisfactory proof that indeed violence was applied on PW1 in the execution of the theft.

As for the ingredient of threat to use, or actual use of a deadly weapon in the perpetration of the robbery, again it is the direct evidence of PW1 the prosecution has relied on; coupled with the evidence offered by DW2 regarding the gun he saw with his colleagues when they were at the Rwenjaza Trading Centre. This of course is circumstantial evidence, but helps to support the testimony of PW1 that her assailants had a gun at the time of the theft. This robbery was committed, in 2004. The Penal Code Act, then, had 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.*

Here, the weapon alleged to have been used was a gun. The law at the time of the commission of the said robbery, and had been decided by Court in a number of cases, was that any weapon or instrument used in a robbery, which the victim or witness claimed or alleged was a gun, had to first pass the test of being a gun, before it could be declared by the Court to be so. This test could be satisfied by either the gun having been fired at the time of the criminal act; or, upon recovery, being tested and established to be a functioning gun. In the case before this Court, the weapon PW1 alleged to have been a gun was not fired. No recovery was made of that weapon so as to be subjected to professional examination.

There was thus no proof by evidence, as required, that what PW1 saw was truly a gun at all, as defined by law. Consequently then, the ingredient on use of deadly weapon was not proved. I accordingly advised the lady and

gentleman assessors, that this lack of proof rendered the charge of aggravated robbery, with which the accused stood indicted, untenable; but that it is however open to this Court to determine, from the other evidence on record, and for the assessors to advise me so, whether any minor cognate offence was disclosed or not; and that if this was so, then it would be lawful for this Court to find the accused herein guilty of such offence; notwithstanding that they have not been charged with it.

The final ingredient in the charge is the participation of the accused in the robbery alleged by PW1. It is, here, the testimony of PW1 alone which offers direct evidence as to the participation of the accused in the crime charged. Establishing the participation of the accused will, in the circumstance of this case, depend first on the credibility of PW1 generally; and then whether at the time of the robbery complained of, the conditions for positive identification of the robbers was favourable or not.

The evidence of PW1, being that of a single identifying witness, will therefore have to be subjected to very careful evaluation before this Court can come to any decision based on it. PW1 testified that at the time of attack, there was light provided by a candle in her bedroom, and another source of light being a hurricane lamp situated in the sitting room. She and both accused, in their separate testimonies in Court, agree that they all know one another quite well as fellow residents in the trading centre; and had related closely and quite frequently due to both accused having been regular customers in her shop which she operated in the trading centre.

Further, PW1 testified that on the fateful day, both accused had at separate times called on her at her said shop; and had each placed calls using her phone. Her case was that at the time her assailants attacked her, A1 was putting on the very vest he had worn earlier in the day when he visited her. Added to this, and for quite a while, the attackers stood very close to her, asking her certain questions.

In matters of evidence of identification, as stated in ***Badru Mwindu vs Uganda; C. A. Crim. Appeal No. 1 of 1997,*** the inculpatory facts of identification stated by the victim of the criminal act, offers the best evidence. In the instant case PW1 was the victim of the attack, and gave direct evidence about that attack. She knew both A1 and A2 quite well; there was sufficient light from the candle and the hurricane; and the attackers stood very close to her, and were with her for quite a while.

These were favourable factors for proper identification as laid out in cases such as ***Uganda vs. Tomasi Omukono & Others, 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,*** and ***Isaya Bikumu vs Uganda; S.C. Crim. Appeal No. 24 of 1989.*** The combined effects of these favourable factors herein stated would have had the effect of minimising the possibility of any mistake or error on the part of PW1 in the identification of both A1 and A2 that night.

The accused, on the other hand, and in sworn testimonies, each denied the allegation that either of them was with the other accused that day, or that they were at the scene of the crime as alleged; thereby raising an alibi. In law, the accused are under no obligation whatever to prove their alibi. The burden remained on the prosecution to negative that defence of alibi. A1 testified that on the fateful day, and during the time the robbery was allegedly carried out, he was in fact at his house with a friend; and that he never moved out of his home; and that when his friend left, he went to bed and slept till morning.

He testified further that he had indeed gone to the shop of PW1 earlier in the afternoon of the day of the event, to pick a phone charger; and had used her phone to send a message to ‘Radio Endigito’. He stated that he was arrested from the trading centre where he had joined other residents at PW1’s place, following the reported robbery on her. He believed that his arrest was prompted by the vindictiveness of PW1 whom he had earlier had a love affair

with, but which he had then discontinued, to her chagrin. Robert Neshakanabo -DW1, testified that indeed he had been with A1, his friend, at the latter's home during the time the robbery is alleged to have occurred.

For his part, A2 testified that on the said date, he had been busy ferrying cement on a motor cycle from Kamwenge Town, to Rwenjaza Trading Centre; and had, in the course of doing so, seen PW1 in the late afternoon and chatted with her. He had, after a tiresome day settled at his house where he remained till morning. He was arrested from the trading centre together with A1. His house was searched, and his jacket was taken by the police. He thought that possibly his refusal, earlier, to sell a piece of land to PW1, was the real reason for her implicating him in the robbery, and thereby causing his arrest.

David Kasisi – DW2, testified to having gone with some two persons, who are not in Court, to Rwenjaza Trading Centre in the evening of the alleged robbery. The aforesaid two persons had gone to a certain home, leaving him to wait for them at a spot before the shops of the trading centre. When the two returned, they had with them a bag, a gun, some money and a mobile phone. They gave him some money and the phone as his due for having carried one of them on his bicycle.

This phone, which he had sold to some one, was however traced back to him when the buyer was arrested. He was also arrested, and PW1, whom he identified, seated in Court, had from Ibanda Police Station, pointed him out as the person who had robbed her. He testified that he did not know the two accused in the dock; and further that he came to testify in Court because a journalist relative of one of the accused had traced him, after having learnt of his ordeal over this incident and the issue of the gun.

This case turns almost entirely on the credibility of PW1 with regard to the incident of that evening generally; and in particular to the identity of her assailants. Her evidence being that of a single identifying witness must be

tested with the greatest care to avoid any possibility of error or mistaken identity on her part, in naming the accused as the persons who robbed her that evening. As was stated in ***James Richard Kawenke Musoke vs. Uganda, C.A. Crim. Appeal No. 2 of 1981 – [1983] H.C.B. 1***, where the evidence meant to implicate an accused person is entirely that of identification, it must be absolutely water - tight to justify a conviction.

In the case before this Court, the favourable conditions for identification in the instant case, as pointed out above, are however, not by themselves safe to base a conviction thereon. There is still the need to determine first whether, on the evidence, PW1 is a credible witness with regard to the identification; and second, whether there is such other evidence as would point to the guilt of the accused. However, in law, if her testimony is found to be reliable, then this would be an instance where, upon exercising the necessary caution, it would be safe for Court to convict, notwithstanding the absence of any other evidence that would corroborate or support the evidence of identification adduced herein.

As for her credibility, with regard to her account of the event of that evening, there is the evidence she adduced in Court; and as well statements she made to police in the course of their investigation of this robbery, and which the defence caused to be exhibited in Court. In her police statement which she made at 10.00 o'clock in the morning after the robbery, PW1 had stated as follows about the person who had first intruded into her shop:-

> *"I immediately saw a person running to the shop through the behind door of the house. He was putting on a red shirt and had covered his head. The shirt had no collar.....I identified the one who ran to the shop as Kaberuka. "*

In Court she said as follows:-

"I saw A1 passing by. He was coming from the side of the bed room going towards the shop.....I had seen him earlier in the day. "

In cross examination she had said that A1 was the only person in the trading centre with a red collarless shirt. Yet, in an additional statement she made at Kamwenge Police Station, two months after the robbery, and following the arrest of DW2 – David Kasisi, PW1 had stated as follows about the person who entered the shop, and about the person who had tied her up:-

"When I went to Kamwenge Police station, the suspect was brought and I identified him as the real person who came into my house and went direct into the shop and picked the phone before he tied me.....I am the only person who saw him (Kasisi) pick the phone even his friends never realised that Kasisi took the phone."

In cross examination, PW1 conceded that her memory in 2004 when the incident was fresh in her mind was better than when she was now testifying in Court five years later. She was also shaken when confronted by what she had told police in her additional statement regarding the role of DW2 in the robbery. She asserted during cross examination that she did not know how Kasisi got the phone, and that she has never seen Kasisi; thereby denying even seeing him at Kamwenge Police Station. In fact she was even hesitant to admit that she ever made an additional statement with regard to the recovery of the phone. This is what she stated:-

"The things about Kasisi I do not recall how I said them in the statement (additional statement of PW1 made on 22nd of June 2003 tendered and marked exhibit DE2). I do not know who took the phone that night, but I saw someone amongst the robbers take it."

The first thing PW1 had done in the morning after the robbery was to report to her neighbour one Paul Imanairiho; but she did not name her assailants to

him, and yet this would have been the one irresistible, and most logical, thing to do in the circumstance. This is what she told Court:-

> *"I did not tell him the identity of the people who had robbed me. I did not tell anybody else because when I came back from Paulo, people had started gathering at my place. I did not tell Paulo the properties stolen from me. I was crying and went back to my house.....At the police I reported being robbed by gunmen. I did not say anything else, but later made a statement at my home."*

In cross examination, PW1 stated that:-

> *"At police I was asked if I knew the people who had robbed me. I told them I knew some of them. I told this to the police when we reached the scene. This was before arrest of the culprits."*

What emerges from all this is that PW1 did not seize the very first opportunity to name the accused persons as part of her assailants, either when she reported to her neighbour, or when she made the first report to police. She only named A1 after the police had inquired, from the scene of the incident, following her reporting the robbery to them. Nowhere, however, does she name A2 in her police statement as one of the assailants. It would appear she just picked on him from amongst the crowd that had gathered at the trading centre in response to the reported event of the previous night.

The other aspect of this matter that also comes out is the very strong inference that can be drawn, that the accused became suspects on account of their having behaved in a manner which PW1 might have considered suspicious when, during the day of the robbery, they had both come to her, though separately, and used her phone to place calls or send out messages. It is thus reasonable to conclude that PW1, as a matter of fact, never identified the persons who assailed her that night; and consequently, she

could not have named the accused to her neighbour, or to the police upon making the first report.

The importance of naming one's assailants at the very first opportunity has been stated in many cases. In ***Uganda vs Bosco Okello alias Anyanya, (H.C. Crim. Sess. Case No. 143 of 1991), [1992 - 1993] H.C.B. 68,*** Court held that failure by a witness to name his or her assailant at the first instance, seriously affects the credibility of that witness. In the case of ***Frank Ndahebe vs Uganda, S. C. Crim Appeal No. 2 of 1993***, the eye witness did not name the attackers to those who had answered the alarm, or 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 stringent test requisite for proof of identification had not been met.

It is indeed only logical to name one's attacker at the earliest opportunity; so that it is not taken that it was done as an after thought, after some reflection; possibly driven by some 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 Eastern Africa Court of Appeal stated that:-

> *"We desire to add that in cases like this, and indeed in almost every case in which an immediate report has been made to the police 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 re-stated the need for sticking to the practice reiterated above; and observed that:-

> *"The desirability for this practice would apply with special force to a case of this nature where the decision depends upon the identification of the accused person some two and a half years after the incident happened. 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."*

The string of authorities above, on the importance of first statements made to police, is relevant to this matter under consideration by this Court. The inconsistencies in the statements the accused made to police, and her testimony in Court, point to the fact that, in all probability, she did not recognise or identify her assailants; hence her jumping between A1 and DW2 as the person who first went to the shop. This doubt therefore would require that there is some other evidence that would augment that of PW1 with

regard to the identity of her assailants. Her evidence of identification stands out alone. There is no other evidence direct or circumstantial that goes to support her that the accused are guilty of the offence charged.

The search carried out in the homes or the two accused yielded nothing of value. The conduct of the accused subsequent to the alleged robbery weakened the prosecution case. Both were at the scene of the robbery the following morning with the other residents of the trading centre. It is not easy to find this conduct compatible with that of a guilty neighbour who has, only the previous night, perpetrated an armed robbery on a neighbour who knows him so well.

This exculpatory conduct of the accused leads to the irresistible conclusion away from any inference of guilt on their part, with regard to the deed of the previous night. Instead it gives credence to the allegation raised by the accused of victimisation by PW1; among this is that her mention of the two accused, as we have observed, was probably due to their having suspiciously visited her shop only a few hours before the unfortunate incident; hence her remembering the shirt A1 had put on during the day.

The prosecution adduced evidence that proved theft, and the use of violence, in perpetrating the theft. The prosecution has however not been able to clear the very serious doubts manifest in its case regarding the identity of the assailants of PW1 that evening. I am under duty to resolve those doubts, left hovering in my mind, in favour of the accused; and I hereby do so.

In the result, and in full agreement with one assessor, but in disagreement with the other assessor, and for the reasons fully set out herein above, I acquit both accused of the offence charged and set them free. Unless, of course, either of them is being held for any other lawful purpose, each of them must be released forthwith.

Chigamoy Owiny – Dollo

JUDGE

24 – 09 – 2008

Ms. **Ann Kabajungu** for the State.

Ms. **Angela Bahenzire** for the accused.

Both accused in Court for judgment.

Clerk - **Irumba Atwoki**.

Judgment delivered in open Court.

Chigamoy Owiny – Dollo

Judge.

24 – 09 – 2008