THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0029 OF 2004

UGANDA ……

PROSECUTOR

VERSUS

1. MUHUMUZA GILBERT alias KADOGO }

2. MUZEYI EMMANUEL }

3. ARINAITWE SIMON RONALD } ::

ACCUSED

4. BYARUHANGA ROGERS }

5. MUWANIKA ASUMAN }

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

JUDGMENT

The accused, Muhumuza Gilbert (*alias* Kadogo), together with Muzeyi Emmanuel, Arinaitwe Simon Ronald, Byaruhanga Rogers, and Muwanika Asuman, were jointly and individually indicted for the offence of aggravated robbery c/s 285 and 286(2) of the Penal Code Act. The particulars of the indictment was that the five Accused and others not before Court had, on the 19th day of February 2004, at UWESO offices in the Municipality of Fort Portal, robbed one Betty Rwankwenge of her hand bag containing money and several personal effects; and that at the time of the robbery, the accused threatened to use a deadly weapon, to wit, a knife on the said Betty Rwankwenge.

When the case came up for taking plea, the indictment was read out to each of the Accused and explained. Each of the accused responded that they had understood the charge but each denied the offence. The Court therefore entered the plea of "Not Guilty" for each of them. This then necessitated the trial at which the prosecution called evidence in a bid to discharge the burden which lay on it to prove the guilt of each of the Accused as charged.

The offence of aggravated robbery comprises four ingredients, each of which the prosecution is duty bound to prove beyond reasonable doubt before an Accused can be found guilty and convicted accordingly. Where the State fails to adduce evidence to prove any one of the ingredients listed below, the offence as charged would fail. These ingredients are, namely, that:-

(i) There was theft.

(ii) There was use of violence or threat to use violence during the commission of the theft.

(iii) There was either actual use or threat to use a deadly weapon, either at the time of executing the theft, or immediately before, or immediately after executing the theft.

(iv) The accused participated in the said theft.

In the instant case, the prosecution called four witnesses in a bid to discharge the burden of proof of guilt of each of the Accused. On the ingredient of occurrence of theft, the prosecution relied on the testimony of the victim of the theft, Betty Rwankwenge – (PW2). She gave an account of how she was assaulted from her office on the fateful day of 19th February 2004, around 8.30 to 9.00 o'clock in the morning by an intruder. Her assailant had camouflaged his face with a cap pulled low over his face, so she was unable to identify him. He held a knife at her and threatened to stab her if she uttered a word.

He ordered her to leave her bag which she obliged. The assailant then grabbed and made off with the bag containing money and several other personal effects. She went after him in pursuit but lost him. Prosecution witness Edward Nsubuga, PW5, the *boda-boda* (motor cycle) operator who gave a ride to a peculiar passenger about the same time that day corroborates this. He states that on that day in the morning, a passenger flagged him down around the bus park and he carried him first to the Kasese stage then to the Bundibugyo stage.

Both in the statement he gave police a couple of days later, which was admitted in evidence, and his testimony at the trial, that passenger had a black lady's bag. This fits in with the description of the person who PW2 asserts made off with her black bag; and satisfactorily corroborates the evidence of PW2 with regard to the theft. Both Counsels agreed that the prosecution had proved the ingredient of theft beyond reasonable doubt. Both gentlemen assessors also concurred; and I

do find, in agreement with the assessors, that the ingredient on occurrence of theft has been proved beyond reasonable doubt.

On use of violence in the execution of the theft, from the account of events as recounted by PW2, as set out above, it is clear that indeed violence was used to accomplish the theft. Again on this ingredient, as on the first, both counsels were in agreement that the prosecution had discharged the burden of proof; a position with which the gentlemen assessors were in full agreement. Without much ado, I do find that indeed use of violence in furtherance of the theft has been proved. The consensus reached by the learned Counsels with regard to the first two ingredients discussed above was to be the furthest they could go in convergence in this matter.

Mr. Kateeba for the accused vehemently attacked the prosecution evidence adduced in support of the two remaining ingredients; namely, the use or threatened use of a deadly weapon, and the identity of the assailant (thief). On the use of a deadly weapon, counsel's attack was premised on the view that since the knife allegedly used in the theft was not produced in Court, the prosecution witness – PW2 – was under duty to describe it sufficiently and accurately to enable Court appreciate and make a finding whether or not that knife was a deadly weapon. He contended that the description by PW2 that it was a kitchen knife was not sufficient to qualify the knife as a deadly weapon.

It is important to bring out the testimony of PW2 on the weapon used against her during the course of the theft. During cross examination by counsel Kateeba himself, on the issue of the knife used during the theft, PW2 the victim stated as follows: –

> *"I saw the knife he was holding. It was a knife with a black handle. A kitchen knife."*

In the course of re–examination by the State counsel, the witness stated that: –

> *"The person entered with a knife … He told me: 'don't talk'. I released the bag trembling as he had a knife. He held the knife at the handle, his hand raised up and the blade pointing at me."* [Here, the witness gestures the manner the assailant held the knife].

In her police statement which she made just two hours after the said theft – a statement which became part of evidence on record in this trial as it was tendered in by the defence, and exhibited by Court – PW2 stated as follows regarding the knife: –

> *"…he was holding a knife and threatened me that I should not talk anything or else he injures me … Due to too much fear I could not do anything until immediately when the man left that's when I followed him making an alarm for help but there was no help at all. "*

In 2003, when this offence is alleged to have been committed, the phrase *'deadly weapon'* was defined in the Penal Code Act 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.

In the light of the definition assigned to the phrase *'deadly weapon'* at the time, it is a little difficult to appreciate defence counsel's contention that the weapon allegedly used in the robbery, and which PW2 classified as a kitchen knife, could not pass the test for '*deadly weapon'*. The witness clearly identified the weapon as a kitchen knife the sight and threatened use of which made her tremble and release her bag to the thief, and left her in such state of fear that she could not do anything until after the assailant had fled. A knife is an instrument adapted for cutting; and a kitchen knife is certainly adapted for cutting substance much more resistant and stronger than the human flesh.

Once the witness identified the instrument as a knife, and a kitchen knife at that, there was no need for her to indulge in describing its size, shape, or colour. If it had been a razor blade, it would still have passed the test for *"deadly weapon"* as assigned to that phrase by the statute as it was then. The best proof of the instrument used being a deadly weapon is found in the testimony of PW2, when she states that the sight of the knife induced fear in her. This could only have been so, because she knew that the knife could cut or stab; and if her assailant were to use that knife on her, it could have caused her death.

No wonder then that the witness was cowed, trembled at its threatened use, and submitted herself to the will of the assailant. Indeed, Counsel having conceded proof of the use of violence in this vile transaction, and that this violence involved the use or threat to use a knife on the victim, it was rather inexplicable that he could question the use or threatened use of a deadly weapon. On this issue, I am in disagreement with the gentlemen assessors, and do find that the prosecution has proved beyond reasonable doubt that, in the commission of the theft, the assailant threatened to use a deadly weapon – a knife – on the victim (PW2).

With regard to the ingredient pertaining to the identity of the assailant, Court had at the close of the prosecution case found that, save for Muhumuza Gilbert alias Kadogo who was put on his defence, the Accused persons had no case to answer as no evidence linked them with the crime charged whatever; and therefore no prima facie case had been made out against each of them to require them to be put on their defence. Consequently, the other four Accused persons were each acquitted and discharged.

In order to establish that the remaining Accused was the assailant of PW2, the prosecution sought to link the evidence of the victim – PW2, to that of Nsubuga Edward – PW5. In view of the fact that PW2 did not identify her attacker, the evidence adduced by PW5, which the prosecution depended on as proof that the particular passenger PW5 carried that morning was the assailant of PW2, was entirely circumstantial evidence; and, further, was evidence of a single identifying witness.

In a case grounded exclusively on circumstantial evidence, such as this one with regard to the identity of the assailant of PW2, for conviction to be justified, the Court must establish that the inculpatory facts are incompatible with the innocence of the Accused, and incapable of explanation upon any other hypothesis than that of guilt; and further, that there are no co–existing circumstances that would negative the inference of guilt. There is a near inexhaustible line of authorities affirming this legal position; see for instance, the leading case of ***Simon Musoke vs. R. [1975] E.A. 715;*** *and* ***Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000.*** In ***Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** at p. 14, the Supreme Court of Uganda spelt out that: –

> *"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are*

incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The Court must be sure that there are no other co–existing circumstances, which weaken or destroy the inference of guilt. (See ***S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480****)."*

In addition to this, in the case of ***Tindigwihura Mbahe vs. Uganda S.C. Crim. Appeal No. 9 of 1987***, the Court pointed out that circumstantial evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. Therefore, before drawing an inference of the guilt from such evidence, there is compelling need to ensure that there are no other co–existing circumstances which would weaken or altogether destroy that inference.

Since the determination of this instant case rests on evidence of identification, this Court must proceed with caution in accordance with the warning in ***Roria vs. Republic [1967] E.A. 583,*** at p. 584, in a passage reproduced by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***, where that Court had stated as follows: –

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as ***Lord Gardner L.C.*** *said recently in the House of Lords in the course of a debate…..*

'There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of the ten – if they are as many as ten – it is on a question of identity' …..

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

In the ***Bogere*** case (supra), the Court cited with approval, the case of ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77****;* and reproduced a passage from the latter judgment, in which the Court had stressed that the need to exercise care applies to both situations of single or multiple identification witnesses as follows: –

"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger…..

When the quality is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

The Supreme Court of Uganda further affirmed this position in the case of ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997*****,** it stated as follows that: –

"The law with regard to identification has been stated on numerous occasions. The Courts have been guided by ***Abdulla bin Wendo & Another v. R (1953) 20 E.A.C.A 166*** *and* ***Roria v. Republic [1967] E.A. 583*** *to the effect that although a fact can be proved by the testimony of a single witness this does not lessen the need of testing with greatest care the evidence of such a witness respecting identification especially when the conditions favouring a correct identification were difficult.*

In such circumstances what is needed is other evidence pointing to guilt from which it can reasonably be concluded that the evidence of identification can safely be accepted as free from the possibility of error."

In a situation where the conditions for correct identification are difficult, the Court, in the case of ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47***, and in a passage which was cited with approval in the ***Bogere*** case (supra), stated at p. 48 as follows: –

> *"Where the conditions favouring correct identifications are difficult, there is need to look for other evidence, whether direct or circumstantial, which goes to support the correctness of identification and to make the trial court sure that there is no mistaken identification. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm, and of fabricated alibi."*

In the ***Bogere*** case (supra), the Court stated as follows: –

> *"We have to point out that the supportive evidence required need not be that type of independent corroboration such as is required for accomplice evidence or for proving sexual offences (See* ***George William Kalyesubula vs. Uganda*** *(supra)). Subject to the circumstances of each case, any admissible evidence which tends to confirm or show that the identification by an eye witness is credible, even if it emanates from the witness himself, will suffice as supportive evidence for the purpose."*

Defence counsel put up a spirited and relentless attack on the prosecution evidence; submitting that they were all littered with grave inconsistencies, contradictions, and general discrepancies; and that they generally lacked veracity. Counsel therefore urged Court to find it unsafe to convict the accused basing on such discredited evidence. There are indeed several instances of inconsistencies and discrepancies in the testimonies of the prosecution witnesses. A number of these can be explained away by the long period of time it took for this matter to come to trial – four years.

Such inconsistencies include the issue whether PW5 picked his passenger from the *boda-boda* stage or from the bus park; or whether the passenger had a jacket on, or not; or whether it was PW2, or someone else who took the accused to the bus park police post for questioning; and a few others which are really not grave as they do not go to the root of the case. However, there are serious inconsistencies and contradictions in the prosecution evidence which are rather difficult to explain away. By her own admission, PW2, the victim of the robbery stated in Court that she did not identify her assailant. He had camouflaged his face.

She could only describe his attire, the salient ones being that he had a cap on his head, and was putting on, a brown jacket. And yet, later in her testimony, she asserted that when she got the accused at the main police station, she positively identified him as her assailant; and had told the police: *"yes he is the one."* PW2 had made a statement to police just two hours after the robbery – a statement which she admitted having made; and was tendered in evidence by the defence. In the Editorial note to the case of ***Thairu s/o Muhoro & Others (1954) 21 E.A.C.A. 187***; where the trial Judge had declined to make an order to the prosecution to avail defence counsel copies of statements made to the police by prosecution witnesses, it was stated at p. 187, thus: –

"(1) The passage from the judgment of the Court of appeal (Whitley, P., Gray, C.J., and Thacker, J.) in Criminal Appeals 124 and 125 of 1945 to which reference is made in the judgment, reads as follows:-

> *'since there would seem to be some uncertainty as to the proper procedure to follow when it is sought to cross examine a Crown witness on a previous statement with a view to discrediting him, we state our views shortly as follows: When the witness gives his evidence, the defence should call for the earlier statement recorded by the police. The defence are entitled to see this statement and to cross-examine the witness on any apparent discrepancies. The person who recorded the earlier statement should then be called to prove and put in as an exhibit the statement.*
>
> *But that does not make what is said in the statement, substantive evidence in the trial. Its only purpose and value is to show that on a previous occasion, the witness has said something different from what he has said in evidence at the trial, which fact may lead the Court to feel that his evidence at the trial is unworthy of belief.'*

This passage presumably deals only with the situation where the witness denies having made the alleged earlier statement. It is submitted that, if he admits having made it, the statement is thereby proved and the statement can be put in if desired. If it is so put in, it may be a matter for argument whether or not there is an inconsistency which damages the witness's credit. If there is no such inconsistency, the document may still be of importance

under section 157 of the Indian Evidence Act, and, and if the witness affirms that the contents of the earlier statement are true, it may be 'substantive evidence at the trial'."

I hold the view that where a witness has, on oath, owned a statement he or she had earlier made to the police, it should not be treated merely as a statement the departure wherefrom by the witness may weaken the weight of his or her testimony. Unlike the earlier making of the statement to the police, the admission in Court on oath, albeit in cross examination, that the statement was indeed made to the police, is not any different from the evidence adduced in examination in chief.

With regard to the instant case, PW2 had stated to the police immediately after the robbery that she had sounded the alarm but no one had responded. Four years later, she now testified that when she sounded the alarm, people responded; and named one Mr. Mugyenyi of National Water Department as having helped to pursue the fleeing assailant. There is no way the witness could have forgotten the participation of the said Mugyenyi only a couple of hours from the incident and yet vividly remembered it four years later.

The witness, whose evidence is meant to corroborate that of PW2, is Edward Nsubuga – PW5, the *boda-boda* rider. He is best placed to plug in the hole in the circumstantial evidence of PW2 regarding the identity of the robber. His evidence however suffers from serious inconsistencies and contradictions. In his police statement, made a couple of days after the event, he had stated positively that the passenger he had carried was a familiar face, someone whom he usually saw at the bus park, and was called Kadogo; and that he would be able to identify him. Yet, in Court, four years later, PW5 was adamant that the passenger he had carried on the day in issue was someone he had not known before; and he had never seen him in town before; that the passenger was just like any other customer.

And furthermore, PW5 who allegedly only met the accused as a passenger told police in his statement that the accused had not acted alone, and that other people who were with him had fled on foot. He admitted his police statement nevertheless. There is no way any one could reconcile these outstanding discrepancies. In ***Rex vs. Shaban bin Donaldi (1940) 7 E.A.C.A. 60,*** in a passage which was cited with approval in the of **Bogere** case (aforesaid), the Court of Appeal for Eastern Africa 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."

In the ***Bogere case*** (supra), the Supreme Court noted that the provision of the Tanganyika Evidence Act referred to in the ***Shaban bin Donaldi*** case (supra), was similar to section 155 of the Uganda 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 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 position of the law elucidated in the authorities cited above, in my considered view, applies with unqualified force to the matter now before me; and puts to rest the issue of credibility of

PW2 and PW5 with regard to the identification of the villain who assailed PW2 in that vile crime of robbery that unfortunate morning.

It is noteworthy that PW5 was put under arrest by police, but he fled and abandoned his motor cycle at the police. He was apparently only granted police bond upon undertaking to help police apprehend the passenger he had carried. It is therefore not far fetched to suggest that PW5 could have been merely concerned with, and bent on, selfishly saving his neck at the expense of the Accused. On the other hand, there could be a lot more up his sleeve than he was prepared to reveal to the police and to Court. Either way it is difficult to treat him as a witness of truth regarding the identity of the passenger he carried that day.

The other disturbing piece of evidence adduced by the prosecution came from the testimony of the police officer, detective constable Rwakabale – PW4; who identified the Accused persons at the dock, stating that they had been familiar faces at his police station, as they used to be brought there frequently, even before their arrests over this case. It would seem that the Accused were already in the bad book of the police. Therefore, the inference is well founded, that the police, in their zeal to net the villain of the day, and on account of the prompting by PW5, found the temptation great, and was easily convenient to implicate the five Accused persons and round them up.

Otherwise one fails to identify any clear or credible and therefore reliable evidence that would pin any of the Accused persons down, beyond reasonable doubt, as the assailant of PW2. With the evidence of (PW5), the only person who claims to have identified the thief, discredited so much and thus unreliable, the other evidence adduced by the prosecution that the Accused had fled from police on two occasions, and that brand new items had been recovered from his house do not offer substantial corroborative circumstantial evidence, upon which this Court could draw the necessary inference to found a conviction. In any case it is trite law that evidence, such as that of PW5, lacking credibility, cannot be corroborated.

The police witness (PW4), as pointed out above, revealed that the Accused were always being brought to the police station; meaning they always found themselves on the wrong side of the law. The flight of this Accused, from police, could therefore be explained away as arising from his fear of, and aversion to police molestation. Similarly, the brand new items found with the

accused seven days after the event, while creating suspicion, were not sufficient to pin the accused down as having acquired them from the proceeds of the robbery in issue.

In any case the Accused put forward a reasonable hypothesis, and co – existing circumstance regarding how he had acquired these products, when he stated that these were acquired by the proceeds earned from his egg business. There was no prosecution evidence to negative this hypothesis to enable Court reject the defence case. In the circumstance then, the inculpatory facts of the case do not point exclusively to the guilt of the accused; and I am therefore compelled to resolve the doubts manifest in the case in favour of the accused.

In the sum, I am in agreement with the gentlemen assessors that the prosecution has failed to prove beyond reasonable doubt that the person, who assaulted and robbed Betty Rwankwenge (PW2) of her properties on that fateful day of the 19th of February 2004, was Muhumuza Gilbert the Accused. I therefore accordingly also acquit him, like his co–Accused before him, of the offence of aggravated robbery c/ss 285 and 286(2) of the Penal Code Act, as charged; and discharge him. Unless he is being held for any lawful cause, he must be set free forthwith.

Alfonse Chigamoy Owiny – Dollo
JUDGE
20 – 08 – 2008