THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT FORT PORTAL

CRIMINAL SESSION CASE No. 0151 OF 2004; HELD AT KYENJOJO

UGANDA …… PROSECUTOR

VERSUS

1. MUGISA HENRY }
2. MUTEGEKI PETER } :: ACCUSED

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

JUDGMENT

Mugisa Henry alias Musinguzi - hereinafter referred to as A1; and Mutegeki Peter - herein after referred to A2; and both collectively referred to as the accused, have been indicted for the offence of aggravated robbery, in contravention of sections 285 and 286(2) of the Penal Code Act.

It is stated in the particulars of the indictment that on the 7th day of August 2003, at Rwabaganda village, Butiti sub County, Kyenjojo District, the accused, together with others still at large, robbed one Imelda Tibananuka of U. shs. 100,000/= (One hundred thousand only), a radio, clothes, and other household properties all valued at approximately U. shs. 500,000/= (Five hundred thousand only); and that at or immediately before or immediately after the said robbery, the accused threatened to use deadly weapons, to wit, pangas, on the said Imelda Tibananuka.

In their individual plea the accused, who each stated they had understood the charges read out and explained to them by Court, denied having committed the offence charged. A plea of "Not Guilty" was therefore entered for each; with the consequence that a trial ensued. The prosecution carried the burden to prove, beyond reasonable doubt, the guilt of each of the accused as charged; with regard to each of the four ingredients that constitute the offence of aggravated robbery; which are namely:-

(i) Theft of property.

(ii) Actual use of, or threat to use, violence during the theft.

(iii) Actual use of, or threat to use, a deadly weapon either at or immediately before or immediately after the theft.

(iv) The participation of the accused person in the commission of the theft.

The prosecution adduced evidence from three witnesses in its bid to discharge that burden. Prior to the calling of prosecution witnesses, however, I conducted a preliminary inquiry in accordance with the requirements of section 66 of the Trial on Indictments Act; at which certain agreed facts were admitted; namely that:

(i) Dr. Waisswa Kasadha, of Kyenjojo Health Centre, examined A2 on the 14th August 2003 and found that he was of the apparent age of 19 years; of a normal state of mind; and had laceration of irregular outline, on the right posterior thigh. The medical report was exhibited and marked **CE1**.

(ii) The same doctor examined A1 on the same date and found him to be of the apparent age of 18 years; had a punctured superficial wound on the right glyteal region, measuring 4cm long by 5cm wide; and he was of normal mental state. That report was exhibited and marked **CE2**.

The prosecution witnesses who adduced evidence in Court were:

(i) Tibananuka Imelda – PW1; the victim of the alleged robbery.

(ii) Itwara Francis – PW2; a neighbour of PW1, and a near victim of robbery.

(iii) Byaruhanga Yonasani – PW3; LC1 Defence Secretary of the village

To prove that theft did occur, the prosecution adduced evidence from 3 witnesses; and it was mainly the testimony of Tibananuka Imelda – PW1 that the prosecution relied on. Her testimony was that her assailants forced her to give them U. shs. 100,000/= (One hundred thousand only), and took away her suitcase containing her clothes, a radio cassette ('International'), that uses six dry cells, and a torch.

PW2 testified that about an hour form the time PW1 claims she was attacked, he had been attacked by persons he had identified; but he chased them away and they fled in the direction of

PW1's home. PW3 who together with the Chairman LC1 of the village arrested the accused and took them to police was told by the Chairman – a parent of A1 – that the two were thieves.

I find that PW1 was credible in her account regarding the assault, and her being dispossessed of her money and properties. This was theft as there was asportation of these items without her consent; and this meets the legal requirements in Uganda regarding what amounts to the crime of theft as was held by the Supreme Court in ***Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993***.

The account by PW2 of the attack on him, though futile, offered corroborative circumstantial evidence as the assailants are said to have fled in the direction of her home about an hour before she was attacked. I am satisfied that the ingredient of theft as a component of the offence charged has been established beyond reasonable doubt.

On the ingredient of threatened or actual use of violence, PW1 stated in her testimony that the assailants broke her door open with a bang; they then pulled her out of the house and threw her down, and raised their panga threatening to cut her while asking for money. After picking her properties named above, they tied her up and threatened to come back and kill her should she raise any alarm.

Each of the actions given in this account is a manifestation of either actual or threatened use of violence, by the assailants, on the victim – PW1 in the course of their perpetrating the theft. As with the case of theft above, I am satisfied that the prosecution has satisfactorily established that indeed the thieves actually used violence and as well threatened the use of it in the course of the thievery.

On the use or threatened use of a deadly weapon, PW1 gave direct evidence that both accused raised their pangas and threatened to cut her if she did hand over to them the money she had just been paid; and that it was for fear of being cut that she pleaded with them not to harm her, and took them to her bedroom wherefrom she gave them the money; and they themselves took the other items she named in her testimony.

In 2003 when this incident occurred, the provision in the Penal Code Act regarding the phrase 'deadly weapon' 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 pangas used to threaten PW1, and I believe her in this regard, were doubtless instruments made and adapted for cutting; and if applied on her, could possibly cause death. Her plea with them not to cut her with the pangas was due to her fear of what the pangas could do to her if applied as threatened. The threatened use of the pangas therefore satisfies the requirements of the law on the use of *'deadly weapon'*. I do find that here too, the prosecution has proved beyond reasonable doubt that, that in the perpetration of the theft, the use of pangas – deadly weapons – were threatened against PW1 the victim, by her assailants.

The evidence adduced by the prosecution to prove that it was the accused who attacked PW1 that night was the direct evidence of PW1 herself; and then other evidence in corroboration. PW1 was clear in her testimony, and this was corroborated by PW2 and PW3, that the accused were her village mates whom she had known for a long time prior to the attack. She even knew A1 by his real name of Musinguzi, as the name Mugisa he was known by was his father's name. She stated that it was the accused and a third person whose identity she did not establish, who had attacked her that night around 2.00 a.m. and took off with her money and the named properties.

The evidence linking the accused with the robbery complained of, and on which the prosecution case is founded, is that of identification. PW1 is a sole identifying witness whose identification was made during night. Because of this, there is serious need to approach her evidence with circumspection in accordance with the warning and compliance with the rules laid down, in ***Roria vs. Republic [1967] E.A. 583;*** which expressed unease at relying on evidence of identification for proof of participation of an accused in the offence charged.

This is because it is greatly open to the danger of convicting an innocent person on such evidence. The Court pointed out that although the evidence of a single identifying witness can result in a conviction, it is less safe to find guilt from it than would be with evidence from multiple identification witnesses; and for this reason, the Court must be clear in its mind that in all the circumstances of the case, it is in fact safe to act on such evidence of identification.

This position of the law above was followed by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***. It cited with approval, the case of ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77***, where the Court had made a clarification that the need for caution covers both situations whether the correctness of disputed identification depends either wholly or substantially on the testimony of a single or multiple identification witnesses; and that in either situation, the Court must warn itself and the assessors of the serious need for the exercise of caution before it can reach a decision to convict, based on such evidence. The Court expressed its unease over this type of evidence, and explained that:

> *"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. ……*
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> *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."*

In ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997,*** the Supreme Court of Uganda followed the decision in ***Roria*** case (supra), and ***Abdulla bin Wendo & Another v. R (1953) 20 E.A.C.A 166,*** and reiterated the need for the trial Court to test with the greatest care any evidence of identification, and especially so when such identification was made under difficult and unfavourable conditions. The Court's advice was that:

> *"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 ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47***, a decision which the ***Bogere*** case (supra) cited with approval, the Court re-emphasised that in situations where conditions do not favour correct identification, there is need to look for other evidence in support of the evidence of identification; so as to rid the Court's mind of any possibility of mistaken identity. The Court further clarified that this other evidence in support may, inter alia, be by naming the assailants to those who answered the alarm, or in a fabricated alibi set up by the accused. In ***Yowana Sserunkuma vs. Uganda, S.C. Cr. Appeal No. 8 of 1989,*** the Court further pointed out that it is now trite law that the evidence of a single identifying witness at night may be accepted, but only after the most careful scrutiny; and further that:

> *The court should also look for other evidence to confirm that the identification is not mistaken. (See **Abdullah bin Wendo vs R. (1953) 20 E.A.C.A. 166 at 168; Roria vs. R. [1967] E.A. 583**). A careful scrutiny is not the same thing as an elaborate justification accepting dubious evidence. A careful scrutiny means, for example, comparing a first report with evidence in court; really testing the effect of light – what type it was, where it was, and how illuminated the scene. Questioning the time, and why the witness did not see the clothing of the accused."*

In ***Isaya Bikumu vs. Uganda; S.C. Crim. Appeal No. 24 of 1989,*** and ***Remigious Kiwanuka vs. Uganda Crim Appeal No. 41 of 1995,*** the Supreme Court advised that where the crime was alleged to have been committed during broad day light, by a person fully known to the witness, then such a scenario offers favourable conditions for proper identification.

Because the matter before me is dependent on evidence of identification, I find guidance in the case of ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** which laid down the proposition that it is the inculpatory evidence of identification adduced by the victim of the criminal act complained of, which is the best evidence.

In the instant case before me, PW1 was the victim of a nocturnal attack. However, according to her testimony, she was able to recognise her assailants right from outside the house by the moonlight when they pulled her out and she fell at their feet; and from inside the house by the torchlight provided by them, and which shone throughout the one hour or so they spent with her

in her bedroom measuring only about 3 metres by 2.5 metres; packing her things, asking her questions, issuing threats at her, and tying her up.

This enhanced her opportunity to see them face to face at close quarters. They threatened her with death should she raise any alarm. Finally, for the period they were with her in the bedroom where they took the money and items from, they were speaking in Rutooro, the language which they always communicated to her in as village mates.
For the reasons laid out above then, after subjecting PW1's identification evidence to the careful scrutiny demanded in the ***Yowana Sserunkuma*** case (supra), I am persuaded that the possibility of correct identification, albeit the night attack, did exist.

The long period the attackers took with the witness compensated for any adversity the night time factor provided. From her account, the attackers acted with abandon; and did not bother to camouflage their identity. Barring deliberate falsehood on her part then, I do find that the scenario painted in her testimony afforded her sufficient opportunity for correct identification. The possibility of error or mistaken identity would, in the circumstances, only arise from the adversity of night time; but this is taken care of by the other factors that positively and favourably provided for proper identification.

This Court could in fact determine the matter of identification solely on the basis of the direct evidence of PW1, in view of the careful examination I have subjected that evidence to. However, I did warn the assessors that in compliance with the authority in ***Moses Kasana***, and ***Bogere*** cases (supra), advising on the wisdom in looking for supportive evidence in cases of night time identification such as the instant case, before Court can reach any decision to convict, it is safer to reach a conclusive decision on the matter by looking for such supportive evidence as would bolster up PW1's evidence of identification.

Such evidence is to be found in the testimony of PW2, a neighbour of PW1, who had himself been attacked an hour earlier by people whom he asserts he positively identified as the two accused; and whom he had chased into the direction of PW1's home. What is so striking in the testimony of PW2 is that he had in fact named the accused to the people who had that very night responded to the alarm he had sounded. In view of the threat that barred PW1 from raising an alarm, this is quite credible. PW2 only learnt of the attack on PW1 when he met her at the Chairman's home the following morning where she had gone to report the attack on her.

The evidence adduced by PW2 provides supportive circumstantial evidence that the attackers of PW1 were those whose attack PW2 had earlier foiled. It is in the chase by PW2 that the question which PW1's attackers posed at her can be understood. They queried whether there was someone else with her; and only gained the confidence to enter her house upon establishing that she was alone. Further evidence in support was from the Chairman LC1; the father of A1, who referred to the latter as a thief who had not slept home that previous night.

The evidence in support of that of identification by PW1 is all circumstantial. Had it not been for the direct evidence of PW1 the entire evidence of identification would have been exclusively circumstantial; and would have been governed by the principle that the inculpatory facts of that identification evidence had to be incompatible with the innocence of the accused, and be incapable of explanation upon any other reasonable hypothesis than that of guilt; and further, that there must be no co–existing circumstances that would negate the inference of guilt.

Several authorities have propounded this proposition of law; some of them are: ***Simon Musoke vs. R. [1975] E.A. 715; Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000;*** and ***Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12.*** But because of the direct evidence of identification by PW1, the matter falls squarely within the premise of the decision in ***Barland Singh v. Reginam (1954) 21 E.A.C.A. 209;*** and this is that where circumstantial evidence relied upon does not stand alone, then even if the circumstantial evidence is not entirely inconsistent with the innocence of an accused, it may corroborate the other evidence.

This is because it is only when the evidence is exclusively circumstantial that the rule of its inconsistency with any other reasonable hypothesis other than that of guilt applies. In the ***Bogere*** case (supra), the phrase 'other evidence' was qualified 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."*

The Court, in the ***Abudalla Nabulere*** case (supra), observed as follows:-

> *"If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered."*

In their individual defence, the accused gave sworn testimonies, and set up the defence of alibi. They were under no obligation to prove their alibi; this being perpetually the responsibility of the prosecution to disprove it. A1 testified that on the night of the alleged attack on PW1 he had slept at his home in Omuporoti village where he stayed with his grandmother; and which is far from Rwabuganda village, a place he had never been to at all, and where the robbery is alleged to have taken place. He claimed that he only knew PW1 casually and denied that she was a village mate of his. He stated further that at Mukunyu Police Post, the police left him and A2 alone with PW1; who then told him that:

> *"Henry, I have always wanted to frame you up; now I have got you. You will have to pay 900,000/= in order to be released."*

He testified further that when he asked her why he should pay that money, she replied that he had to do so since he had already been arrested. He conceded that there was no grudge between PW1 and him. A2 who stated that on the night of the alleged robbery he was at home sleeping; for his part also testified that he knew PW1 and A1 casually; and denied any involvement with the latter in the alleged robbery.

Considering the alibi of the accused in the light of the prosecution evidence, I find that the alibi and the denial by the accused are all baseless. The accused were, contrary to their assertion, village mates of PW1 and PW2. In fact PW1 pointed out that A1's true name is Musinguzi; and that the name Mugisa which he uses is his father's name. This, A1 himself confirmed. Further to this the attackers were people who knew that she had just received money in payment. This is evidence that PW1 and the accused knew each other a lot more than just casually.

As pointed out above, PW1 and PW2 both identified the accused in the two separate attacks on each of them; and were not aware of the attack on each other. There being no grudges between

them and the accused, as is admitted by the accused, it defies reason that PW1 and PW2 should, without any justification, single them as the villains of that night. In the same vein, it sounds unreasonable that the police would leave two armed-robbery suspects all alone with their victim where, as it is alleged by the accused, the victim would then reveal that she was the one who had schemed their arrest; and that they would only be released if A1 paid up the sum of shs 900,000/= to regain his freedom. Indeed the choice of the sum of 900,000/= and not the round figure of, say, 1,000,000/= sounds rather strange.

I am convinced that the denial by the accused, and the allegation of demand of ransom by PW1, are all concoctions by the accused intended to save them from the long arm of the law. The prosecution has certainly placed the accused at the scene of the crime that night; and I find that the alibi raised by the accused is a fabrication and cannot stand the test of scrutiny. These false alibis go to corroborate the direct evidence of identification by PW1.

I therefore find that the prosecution has proved beyond reasonable doubt, as against each of the accused, all the elements of the offence charged; and here I must register my disagreement with the lady and gentleman assessors, and convict each of the accused of the offence of aggravated robbery as indicted.

Chigamoy Owiny – Dollo
RESIDENT JUDGE, FORT PORTAL
05 – 06 – 2009