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. MUGISA MOSES } ::

ACCUSED

3. WETAASE JOHN }

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

JUDGMENT

Mugisa Henry, Mugisa Moses, and Wetaase John - hereinafter referred to as A1, A2, and A3 respectively; and collectively referred to as the accused, are jointly indicted, in two counts, for the offence of aggravated robbery, in contravention of sections 285 and 286 (2) of the Penal Code Act.

The particulars of the first count stated that on the 7th day of August 2003, at Butara – Haruhanda Trading Centre, Bugaki Sub – County, Kyenjojo District, the accused robbed one Tibakunirwa Margret of cash shs. 100,000/= (One hundred thousand only), a radio cassette of eight cells, a small radio of two cells Sonny, empty crate of beer – Citizen, 15 kgs of sugar, 10 kgs of rice, 1 box of soap, exercise books, dry cells, radio cassette compacts, 20 packets of salt, packets of white floor valued at shs. 500,000/=; 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 Tibakunirwa Margret.

In the second count the particulars of the offence were that the accused had, on the same day and place named above, robbed one Kabataremwa Stella of cash 31,000/=; 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 Kabataremwa Stella. It emerged that A3 had escaped from remand and was therefore not committed to the High Court. His name was accordingly struck off the indictment, leaving only A1 and A2 to take plea.

The accused stated that they had each understood the charges read out and explained to them by Court; but each denied having committed the offence charged. A plea of "Not Guilty" was therefore entered for each; and this trial followed. The duty lay on the prosecution to prove, beyond reasonable doubt, that each of the accused was guilty as charged; and this it could only do so by establishing 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.

Before calling prosecution witnesses, I conducted a preliminary inquiry in compliance 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 A1 on the 10th November 2003 and found that he was of the apparent age of 18 years; of a normal state of mind; and had a punctured wound on his right elbow; approximately 5cm by 0.7cm The medical report was exhibited and marked **CE1**.
(ii) The same doctor examined A2 on the same date and found him to be of the apparent age of 19 years; was of normal mental state, and had no wound on him. The medical report was exhibited and marked **CE2**.

The prosecution adduced evidence from five witnesses in its bid to discharge that burden. These witnesses were:

(1). Dr. Waiswa Musa Kasadha – PW1; the Medical Officer who examined A1 and A2; and whose reports are exhibits CE1, and CE2 respectively.

(2). Kabatalemwa Stella – PW2; the victim in Count No. 2.

(3). Katuramu Johnson – PW3; was a fellow resident with A1.

(4). Tindisingura Jane – PW4; mother to A2 and village mate of A1.

(5). No. 20246 Cpl. Bebwa Denis – PW5; a police officer who investigated the crime and took the statement of the late Margaret Tibakunirwa.

To prove that theft did occur, the prosecution relied on the evidence of PW2, PW5, and the statement of the victim in the first Count. PW2 testified on how the attackers had captured her neighbour and landlady, and compelled her to lead them to her (PW2's) residence next door where, upon entry, while wielding pangas they had robbed her of her money in the sum she could not establish, as she had not yet counted the day's earnings.

They took various items from her; including 30 kgs of sugar, 20 kgs of maize flour, a dozen exercise books of size 32 pages, sweets, a small black radio whose make she had forgotten, pepsi sweet mint, 5 bars of soap, biscuits, a small jerry can of cooking oil, dry cells; and other items the witness had forgotten. The items robbed were never recovered.

In her police statement exhibited under section 30 of the Evidence Act, as PE4, she having died before this trial took place, the late Margaret Tibakunirwa stated that the thieves had taken from her shop, that night, the following items: 15 kgs of sugar, 10 kgs of rice, 1 box of soap, 1 carton of dry cells, exercise books, a black radio cassette, 8 packets of white flour, 120 compacts, 20 packets of salt, 1 small radio using two cells, and shs. 81,000/=.

I have accepted the evidence of PW2 and that of her late neighbour as truthful with regard to the assault on them that night, and the theft committed in their respective premises. There was asportation of these shop items without their consent; hence in accordance with the legal requirements in ***Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993***, theft was committed; and this the defence is in agreement with; therefore the ingredient of theft as a component of the offence charged has been established beyond reasonable doubt in both counts of the indictment.

On the ingredient of threatened or actual use of violence, PW2 heard at a bang on her neighbour – landlady's door; followed by the threat to kill or cut the landlady if she made an alarm, and her

being compelled to lead them to PW2. Her neighbour corroborated this in her statement above. Furthermore, upon their entry into PW2's room they ordered her out of the bed, forced her to sit down, and threatened her while wielding their pangas at her.

All these were incidents of both actual and threatened use of violence against the two victims in the course of perpetrating the theft. As with the case of theft above, and also with the gracious concession by defence, 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, PW2 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. The statement by the late landlady is in agreement with that of PW2 that pangas were used by the assailants in the course of the robbery. 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 PW2, were clearly instruments made and adapted for cutting; and if applied on her, could possibly have caused 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.

PW2 was categorical that she had not identified her attackers that night. Her neighbour also stated that the assailants were total strangers to her although she added that if they were arrested, she would have been able to identify them. No identification parade was conducted however

despite the arrest of the accused as the suspects. PW3 testified that A1 had sold him a crate of beer only half full with empties; and some baking powder; claiming that he had temporarily closed his business.

PW4, mother to A2, had to be declared a hostile witness and was accordingly subjected to cross examination by the prosecution. She admitted having made a statement to police; and recognised her signature on the statement when she was confronted with it. She conceded having stated to police that on the 2nd November 2003, A2 had come home with a big radio cassette and other shop items; and that she had feared to say a word to her son out of fear of being killed. She however refuted the part of the statement which stated that A2 had earlier threatened to kill her for revealing his deeds.

She could not remember whether or not she had stated that the police had recovered stolen properties from her house in a cupboard. Then she remembered having stated in her statement that the police had recovered some things from her house in her presence; and that all the items named in her statement as having been recovered from her house, except the radio, were as she had told the police. It turned out from the cross examination that this witness, despite having turned hostile in an attempt to protect her son A2, highly incriminated him in the theft.

PW5 who investigated the crime testified that he recovered some of the items, named by the complainants, from the homes of A1 and A2's mother – PW4, following the lead thereto by the accused respectively. In fact A1 led the witness and his team to the bush where some of the items were hidden; and to the home of Katuramu to whom he had sold the crate of beers. He testified further that the complainants identified whatever belonged to them and he handed back to them some of these items, whose inventory he kept. He had also recovered a toy gun from the bush behind the home of A1; and added that following the arrest of the accused, the complaint of robbery with a gun and pangas had ceased. He therefore tacitly and subtly inferred that the accused were the notorious robbers.

The evidence adduced by the prosecution to prove that it was the accused who had robbed PW2 and her late neighbour that night was exclusively circumstantial; and because of this, the evidence was governed by the principle that the inculpatory facts of identification therein 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 had to 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.*** at p. 14 :-

> *"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****)."*

Further, as is well stated in the case of ***Tindigwihura Mbahe vs Uganda S.C. Crim Appeal No. 9 of 1987***, circumstantial evidence must be treated with caution, and narrowly examined, due to its susceptibility to fabrication. Hence, before drawing an inference of the accused's guilt from circumstantial evidence, there is need to ensure the absence of other co-existing circumstances which would weaken that inference.

In the instant case, the major pointer to the participation of the accused were the recoveries of the stolen items from either the parents of the accused, or from the close proximity of their dwelling houses, or from those who claimed they had purchased the same from them. These items had just been stolen when they were recovered in a manner that linked them to the accused. The test of the doctrine of recent possession as set out in ***Yowana Sserunkuma vs Uganda, S. C. Crim. Appeal No. 8 of 1989,*** is that:-

> *"When a person is found in recent possession of stolen property, and cannot give a reasonable explanation as to how he came into such possession, the inference is that either that person is the thief or receiver of that property…*
>
> *Being found in recent possession of stolen property is a species of circumstantial proof; and as is well known in cases of circumstantial evidence, if an innocent hypothesis is as*

possible as a guilty hypothesis, then the prosecution has failed to prove its case beyond reasonable doubt.

A reasonable explanation leaves open the possibility of an innocent explanation, even if the court is not convinced of its truth. To reject an explanation as false, there must be specific evidence that on some point or points it is actually proved false."

The Supreme Court of Uganda, in ***Mbazira & Anor vs Uganda; S.C. Crim. Appeal No. 7 of 2004,*** stated that on the doctrine of recent possession as follows:-

"The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a presumption of fact that that person was the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession.

It follows that the doctrine is applicable only where the inculpatory facts, namely the possession of the stolen goods, is incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances that weaken or destroy the inference of guilt."

This was in keeping with the decision earlier made in other Court decisions such as: ***Uganda vs Stephen Mawa alias Matua, H.C. Crim. Sess. Case No. 34 of 1990; [1992 - 1993] H.C.B. 65; Andrea Obonyo vs R. [1962] E. A. 542;*** and ***Bakari s/o Abdulla vs R. (1949) 16 E.A.CA. 84.***

In their respective defences, the accused gave sworn testimonies, and set up the defence of alibi, which they were under no obligation to prove. A1's testimony was that he had not known A2 before his arrest; and that he neither knew the late Tibakunirwa nor PW2 either. He denied knowledge of Butara Haruhanda trading Centre, and of Katuramu Johnson – PW3, and sold nothing to him as he was not a businessman.

He testified that on the night of the alleged robberies he had slept at his home in Isunga Mirambi village which neighbours Isunga village; where he stayed alone as his siblings were in boarding

school. He claimed that he was arrested by the Local Council Defence Secretary and taken to police over demands that he should show the new people in the village. A2 testifying as DW2 stated that he was of Isunga village, but did not know A1 before his arrest; and that he did not know the persons allegedly robbed on the material day in the indictment. He claimed that on the fateful day of the robbery, he was at his home sleeping. He claimed that he was arrested by the Chairman L.C.1 and Defence Secretary of his village on allegation of having an affair with someone's daughter, and taken to police.

He denied all the llegations made out against him by the prosecution witnesses. He claimed that although he spent two days with the police in Rugombe, and fifteen days with the police at Kyenjojo, he never talked to the police at all. I find that the denial by the accused of knowledge of one another ridiculous. The accused were, by their own admission, village mates. They were arrested by the same Local Council officials. The alibi set up by each of them was baseless, in the light of the prosecution evidence pointing to their having been either in direct or indirect possession of the stolen items.

I am convinced that the circumstantial evidence irresistibly points to the participation of the accused in the robberies charged. The discoveries of the stolen items in the manner pointed out above could not be explained by any other reasonable hypothesis than that of guilt. I find that the alibi raised by the accused were concoctions. I am therefore in agreement with the lady and gentleman assessors that the prosecution has proved beyond reasonable doubt, as against each of the accused, all the elements of the offence charged; hence I convict each of them of the offence of aggravated robbery in each of the two counts of the indictment.

Chigamoy Owiny – Dollo
RESIDENT JUDGE, FORT PORTAL
12 – 06 – 2009