THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT FORT PORTAL

CRIMINAL SESSION CASE No. 0020 OF 2005; HELD AT KYENJOJO

UGANDA …… PROSECUTOR

VERSUS

MALEMESA VICENT …….. ACCUSED

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

JUDGMENT

Malemesa Vicent – herein after referred to as the accused – has been indicted for the offence of aggravated robbery, in contravention of sections 285 and 286(2) of the Penal Code Act.

It is alleged in the particulars of the indictment that on the 27th day of February 2004, at Kyegegwa Trading Centre, Kyenjojo District, the accused robbed one Imelda Kasukali Betty of cash Shs. 267,000/=; and that at or immediately before or immediately after the said robbery, the accused used a deadly weapon, to wit a panga, on the said Kasukali Betty in which she lost a hand and three fingers.

The accused's answer to the indictment which was read out and explained to him, and which he stated he had understood, was a total denial. Court therefore entered a plea of "Not Guilty"; after which this trial ensued. The burden lay on the prosecution to establish the guilt of the accused; by proving, beyond reasonable doubt, each of the four ingredients that constitute the offence of aggravated robbery; 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.

In a bid to discharge the above stated burden, the prosecution adduced evidence from the following witnesses:

(i) Bachurana Methodius – PW1; a police officer who investigated the crime and recorded a statement from the victim of the robbery.
(ii) Kahunde Rose – PW2; a daughter of the victim of the robbery.
(iii) Irumba Idi – PW3; a trader of Kyegegwa Trading Centre.
(iv) Dr. William Mucunguzi – PW4; who examined accused to establish his mental status.

For proof of theft, it was the police statement of Kasukari Betty, the victim, admitted in evidence in accordance with the provisions of section 30 of the Evidence Act (Cap 6 Laws of Uganda Revised Edition 2000) – she having died subsequent to making the statement – which the prosecution relied on. The said provision reads as follows:

"***30. Cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant.***

Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be produced without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases-

(a) when the statement is made by a person as to the cause of his or her death, or as to any of the circumstances of the transaction which resulted in his or her death, in cases in which the cause of that person's death comes into question and the statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his or her death comes into question; …"

The victim had stated in her said statement that when her assailant had cut her several times, she told him – apparently in a bid to stave off the attack – to open her suit case and pick money from it; and that this, the assailant did and then left her place. I find that statement convincing. If the

victim had wanted to conjure up some lies, she could for instance have mentioned a huge sum of money which one could believe as the reason she was subjected to such cruel assault. The sum of Shs. 267,000/= is more difficult to fabricate than a round figure of say Shs. 1,000,000/=. I believe that she was dispossessed of her money in the manner described by her.

Although the assailant had not demanded for money, and the idea of his taking money had come from victim, this was nonetheless theft as he was not entitled to that money; and her offer of the money did not amount to consent, as she was constrained to do so to divert him from his murderous criminal enterprise. Theft, as was held by the Supreme Court in ***Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993***, occurs when there has been asportation of property, as in the instant case, without the owner's consent.

The deadly injuries the victim was subjected to, evidenced by the grisly and awful photos admitted in evidence, showing a severed limb and fingers; and the medical report showing that the victim had suffered numerous body injuries ranging from harm to maim, were clear proof that actual violence was used on her. The statement by the victim was that the assailant had persistently cut her until she offered the money.

The taking of the money by the assailant of course betrayed the fact that subjecting the victim to that brutal treatment was in furtherance of the theft. As was the case with the ingredient of theft above, the defence rightly conceded that it was proved that violence had been used on the victim in furtherance of the theft.

The evidence before Court is that the assailant used a panga to inflict those gruesome injuries on the victim. The wounds were, clearly, cut wounds; and the medical evidence corroborated this. A panga is certainly a deadly weapon. The Penal Code Act had, in 2004 when this crime was committed, 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.

The use and effect of the panga on the victim in the instant case, fitted quite well with the provision of the law above on deadly weapon. The panga here proved that it was not only adapted

for cutting; but that used for offensive purposes, as it was done, it was likely to cause death, as it caused grievous harm and maimed the victim. I do find that here too, and in agreement with the defence who conceded so, that the prosecution has proved beyond reasonable doubt that, in perpetrating the theft, the assailant used a deadly weapon, to wit, a panga on the victim.

The evidence adduced by the prosecution to prove that it was the accused who had fatally attacked the deceased that night, was the statement of the deceased and circumstantial evidence in corroboration. The statement by the victim was not made in a situation of extremity or in expectation of death; and it was not shown that it was these injuries, albeit their severity, which eventually culminated into her death. Hence her said statement did not amount to a dying declaration. It was therefore not safe to found a conviction based on it, without some supportive evidence.

I accordingly warned the assessors of the need to look for other evidence in support of her statement; notwithstanding that a conviction can be founded on her statement alone without such supportive evidence, as long as that caution has been exercised. In ***Kabateleine s/o Nchwamba (1946) 13 E.A.C.A. 164***, where the deceased had reported a threat to burn her, and indeed she was later burnt, the Court held at p.165, that this earlier report was admissible; and cited the Privy Council case of ***Pakala Narayana Swami v. Emperor (1939) A.I.R. 47,*** quoting a passage therein at p.50, which stated that:

> *'The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction'.*

In ***Okethi Okale and Others v. Republic [1965] E.A. 555,*** at p. 558 (E) to p. 559 (A): the Court followed the decision in ***Jasunga Akumu v. R. (1954) 21 E.A.C.A***. and held that because the statement was not made in the circumstance of immediate expectation of death, the Court had to approach that statement:

> *"…with that circumspection that the law enjoins with regard to dying declarations."*

In ***Uganda vs. George Wilson Simbwa, S.C. Crim. Appeal No. 37 of 1995,*** Supreme Court made it very clear that when a statement by the person who later dies, regarding the cause of that death,

is made in a condition of extremity, when all hope of life is gone and the maker is in expectation of imminent death, then corroboration of such evidence is not a requirement. Otherwise any other statement made by a person who later dies, regarding the transaction that eventually ends up in that death, is admissible; except that it is not safe to act upon it without corroboration of such evidence.

The direct evidence, identifying the accused as the perpetrator of the vile deed that accompanied the theft above, was contained in the aforesaid police statement of the victim who later died. She was a sole identifying witness; and the incident took place during the night. Owing to this I have to treat that evidence with circumspection as was warned in ***Roria vs. Republic [1967] E.A. 583;*** in which Court expressed its reservation about reliance on evidence of identification to prove that the accused person participated in the offence charged.

Court pointed out that this type of evidence seriously poses greater danger of having an innocent person convicted, than is the case with other forms of evidence. The Court therein acknowledged that the evidence of a single identifying witness can form the basis of a conviction; but that it is less safe to do so with regard to such evidence, than would be the case with multiple identification witnesses. And for this reason, the trial Court must first be satisfied that in all the circumstances of the case, it is really safe to act on such evidence of identification.

This principle of law was followed by the Supreme Court of Uganda in ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***. In that case, the Court followed its decision in the case of ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77***, in which it had pointed out that the need for caution applies both to situations where the correctness of disputed identification depends 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 need to exercise caution before reaching a decision to convict, on the basis of such evidence.

Expressing its reservation with regard to this type of evidence, the Court stated 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. …… …

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) approved, the Court emphasised that in circumstances which do not favour correct identification, the Court needs to look for evidence that would support that of identification; and satisfies it that there is no possibility of mistaken identity. The Court explained further that the said 'other evidence' may, for instance be the naming of the assailants to those who answer the alarm, or an alibi concocted by the accused.

In ***Yowana Sserunkuma vs. Uganda, S.C. Cr. Appeal No. 8 of 1989,*** the Court re-stated the law which is now trite; namely that the evidence of a single identifying witness at night may be accepted, but only after the most careful scrutiny; and stated 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."*

The proposition of law laid down in the case of ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** that it is the inculpatory evidence of identification adduced by the victim of the criminal act complained of, which is the best evidence, applies with equal force here. The attack, in the instant case before me, took place around 10.00 o'clock in the night when the victim was in the process of closing her retail shop premises. She was packing her trade goods in a container to keep them away from rats, when the assailant struck.

There was light provided by a lamp; and this was the light she had been using for her sales. He had visited her shortly before to pick some trade goods from her; and they had held a conversation. She claimed that she identified him properly, having known him for a long time as a casual labourer in the trading centre, and a frequent visitor to her neighbour. She gave a description to PW1 that fit the accused. I have carefully examined this evidence with the seriousness advised in the ***Yowana Sserunkuma*** case (supra).

While the attack took place at night, the victim was still wide awake and busy at her shop. She did not only know the accused; but had served him only a few minutes earlier that same night, holding a friendly conversation with him. The attacker that night made no attempt at camouflage. In the circumstances then, the conditions favouring correct identification were in place; and the possibility of error in identification was minimal.

I find that she had adequate opportunity for correct identification of her assailant. Her evidence alone could have formed the basis of resolving the issue of identity of the perpetrator. However, this being night time identification, and by a single witness, I accordingly warned the assessors in keeping with the decisions cited above of the need to exercise caution; and in accordance with the ***Moses Kasana***, and ***Bogere*** cases (supra), of the need to ascertain the existence of other evidence

pointing to the correctness of the evidence of identification before acting on that evidence; more so since this evidence was not a dying declaration.

While at first it may not appear so, the deceased had in fact taken an early opportunity to name her assailant as the accused. Her reason for not immediately divulging the identity of her assailant is well explained. She told the police that because she was not stable. She then told PW1 – the investigating officer, later from Mubende hospital that it was the accused who had assaulted her. According to PW1, she explained that she had declined to reveal this the first time she was asked because the police had asked her in the presence of many people.

She equally explained in her additional statement to police that she had not felt it safe to name the accused to her daughter - PW2, who had inquired from her for the identity of the assailant, because there were many people at the time; and her fear was that someone could tip the accused off, and thus lead to his escape. It is important to take serious note of the fact that she does not, anywhere, state or even merely suggest that she did not know her assailant; she only deferred revelation of the identity of the assailant to the police and daughter for the reason given above.

This was of course not a wise decision. The situation was compounded by the fact that she fell unconscious soon after the police, her daughter, and others had come to her rescue. She could have died of the injuries and lost the opportunity to name her assailant. However on the other hand I find her reason for not instantly naming her assailant plausible. It is quite possible that had she done so, and the accused had learnt of it, he might have disappeared for good; and might have entirely evaded arrest.

Be as it may, it is important to take note that she however named her assailant to police the following day, from Mubende hospital, when she felt it safe to do so. In the circumstance, she revealed the identity of her assailant at the earliest opportune moment. Further evidence in support of the correctness of identification was in the disappearance of the accused from the trading centre immediately following the incident for over a month before coming back; and was arrested by the police after a tip off that he was at the trading centre moving stealthily.

His attempt to set up an alibi did not fall through. His claim that he was in his village for the whole of February is controverted by the evidence of PW3 who testified that he had hired the accused from Kyegegwa township, and the accused had worked for him up to about 7.30 p.m. of

the day the victim had been assaulted; and that after this, the accused had disappeared he never saw him again until in this Court when he came to testify in this case.

In the ***Bogere*** case (supra), the Court, in clarifying on the nature of the 'other evidence' 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."*

In the ***Abudalla Nabulere*** case (supra), the Court laid down a more relaxed rule regarding the need for corroboration of evidence of identification; stating that:-

> *"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 the unsworn statement he made in his defence, the accused denied that he was responsible for the incident complained of. He attempted to put up an alibi which however could not stand; as it instead covered the period after the event. He claimed that the deceased was unknown to him. Finally he claimed that he was summoned by police from his village and when he reported, he was arrested, tortured, and then charged in Court; leading to this trial.

The evidence adduced by the prosecution controverts that of the accused. It is clear that the accused and the victim were both residents of the same trading centre where the victim was a trader and the accused a casual labourer; and the two had knowledge of each other. Owing to this, the evidence which I believe is that on the fateful day the accused had been present at the trading centre, having been hired up to evening hours by a resident; and only disappeared after the event.

The defence put up by the accused is all a fabrication. It has only served as that other evidence required to support the correctness of evidence of identification by the victim. I nurse no doubt

about the participation of the accused as the villain in this grisly assault. The prosecution has proved, beyond reasonable doubt, each of the elements constituting the offence of aggravated robbery.

Therefore, and in agreement with the opinion of the lady and gentleman assessors I hereby convict the accused of the offence of aggravated robbery as indicted.

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