THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0115 OF 2004; HELD AT KYENJOJO

UGANDA …….

PROSECUTOR

VERSUS

1. KIROKIMU RICHARD }

2. FRIDAY

ALEX } ::

ACCUSED

3. KUSEMERERWA JOHN }

4. BAKOKU JUBILEE RICHARD }

BEFORE THE HON. MR. JUSTICE CHIGAMOY OWINY – DOLLO

JUDGMENT

Kirokimu Richard, Friday Alex, Kusemererwa John, and Bakoku Jubilee Richard, (herein after respectively referred to as A1, A2, A3, and A4; otherwise, collectively referred to as the accused), stand indicted in this Court for the offence of aggravated robbery, in contravention of sections 285 and 286(2) of the Penal Code Act. The particulars of the offence as set out in the indictment are that: on the 5th day of July 2003, at Rwensenene village, Kyenjojo District, the accused together with others not available for trial, robbed Balitonganira John of Shs. 150,000/=, second hand clothes, a wall clock, a Panasonic radio, and other household properties; all valued at Shs. 300,000/=; and that at, or immediately before, or immediately after the said robbery, the accused used deadly weapons, to wit, pangas, on the said Balitonganira John.

Each of the accused informed Court, when the indictment was read out to them, that they had understood it; but each of them however denied the same. I then entered the plea of

"Not Guilty" for each; and consequently a trial followed, in which the prosecution adduced evidence from four witnesses, in order to discharge its burden of proving, beyond reasonable doubt, the guilt of the accused on each of the following four ingredients constituting the offence of aggravated robbery; namely:-

(i) Theft of property.
(ii) Actual use of, or threat to use, violence in the course of executing the theft.
(iii) Actual use or threatened use of a deadly weapon either immediately before, or at the time of, or immediately after perpetrating the theft.
(iv) The participation of the accused person in the perpetration of the said theft.

It was the testimonies of John Balitonganira - PW1, and his wife Yuditah Ahebwa - PW2, which the prosecution adduced to prove the offence charged. They gave direct evidence as the victims who witnessed the robbery that fateful night. It was PW1's evidence that the attack on them commenced at 1.00 a.m. when they were already in bed. The attackers gained forceful access by breaking the hind-door to their residence. They made a swift entry into his bedroom, found him still in bed, and immediately cut him with a panga the moment he jumped out of bed. PW2's testimony corroborated that of PW1 with regard to the assault aforesaid. She was also roughened up by the attackers, subjected to beatings, and compelled to hand over money and a number of their household items to them.

Theft, as clarified by the Supreme Court in ***Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993,*** occurs when asportation (the carrying away) of goods takes place without the consent of the owner. The asportation need not be to a long distance. Even where such removal of the item is from one position to another within the premises of the owner, it amounts to asportation in law. In the instant case, the taking was forceful; and no consent of the owners - PW1 and PW2 - was even sought. The defence did not see any need to contest the fact of the occurrence of robbery as presented by the prosecution witnesses; and accordingly conceded that indeed theft was proved by the prosecution

beyond reasonable doubt. I too do find that the occurrence of theft has been convincingly proved.

The evidence adduced in proof of the use of violence alleged in the execution of the theft proved above was first, the banging of the door to gain access; followed by the cutting of PW1 and ordering him to lie on the floor facing down as the assailant went about perpetrating their criminal enterprise; and then subjecting PW2 to threats, and actually meting out the beatings, which forced her to hand over to them the household items. The report of the medical examination on PW1, by Richard Kusemererwa – PW3, and exhibited as **PE1**, established that there were incised wounds and fracture on PW1; and corroborated the aforesaid two witnesses' assertion as to the violence they were subjected to that fateful night. Further corroboration of that evidence is in the testimony of DW2 who claims he took PW1 - his brother - to hospital with cut wounds sustained the previous night.

Evidence in proof of the ingredient of the threatened or actual use of a deadly weapon was adduced by PW1 and PW2. Both stated in Court that the assailants carried pangas with which they cut PW1. This assault took place in 2003 when the Penal Code Act, then, 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 actual use of a panga on PW1 was clear from the evidence adduced by PW1 and PW2. A panga is certainly an instrument made or adapted for cutting; and when used for offensive purposes may cause death. The fracture of the bone, classified in the medical report - **PE1** - as harm, was manifestation of what the panga could cause on the human body. It is evident that the use of the pangas by the assailants, on the victim - PW1, in the course of the theft, established the use of *'deadly weapon'* within the context of the definition, by the law pointed out above, of that phrase.

Since the defence had expressly conceded that the first three ingredients were not in contention; the prosecution having proved them as required by the law, it was only the last ingredient – that of the identity of the assailants – that engaged the parties hereto in serious dispute. Again, it was the evidence of PW1 and PW2 alone that the prosecution depended on for the establishment of that ingredient. From the testimonies of the two witnesses as summarised above, the attack was sudden and violent; and took place in the dark wee hours of the night. The only light that afforded visibility was torch lights flashed by the assailants. PW1 was cut the moment he jumped out of bed, and forced to lie face down as the assailants went about in the execution of their criminal enterprise.

PW2 who was in bed with her husband – PW1, at the time, was scared stiff by the deadliness of the attack; and took refuge in pleading with the Lord Jesus for divine intervention. It was she, rather than her husband, who had more time with the assailants as she had to pick the robbed items and hand them over; and also had to lead them to the front door where the trade goods were. Both witnesses asserted quite emphatically that they had both positively identified the accused as the assailants that night. In view of the circumstance of the assault brought out by the evidence, there is need to establish whether such identification as was asserted by the two witnesses could have been possible, and satisfactorily so.

It is now trite law that evidence of identification need to be approached with particular care. There are numerous authorities that have dealt with this and laid down the rules for application. In ***Roria vs. Republic [1967] E.A. 583;*** the Court dealt with the evidence of a single identifying witness and advised that where proof of the offence charged depends entirely on evidence of identification, there is need to treat that evidence with demur. The Court worried that there is greater likelihood of convicting an innocent person on such evidence than would be the case in other instances; and therefore sounded the warning, and established the rule that while the evidence of a single identifying witness can suffice to found a conviction, it is less safe to do so than is the case with multiple identification witnesses; and therefore, the Court is under duty to satisfy itself that in all the circumstances of the case, it is safe to act on such identification.

Since then, the Courts have, in numerous cases, built on and been guided by this rule. In ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77***, the Supreme Court echoed the need to exercise particular care both where the correctness of identification in dispute rests entirely or principally on the evidence of a single, or multiple identification witnesses. It emphasised that the Court must warn itself and the assessors of the special need for caution after which it may found a conviction on such evidence. The Court sounded their unease with regard to such evidence; and in what I have to produce here in extenso, it pointed out 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."*

Other cases have followed and enhanced the principle and rule laid down in the ***Nabulere*** case (supra); chief amongst which is ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***. In ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997,*** the Supreme Court of Uganda further upheld this position, citing with approval the ***Roria*** case (supra), and ***Abdulla bin Wendo & Another v. R (1953) 20 E.A.C.A 166.*** It reaffirmed the need for Court to test with the greatest care, evidence of identification; particularly so when such identification was made under difficult and unfavourable conditions. The Court then advised 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***, cited in the ***Bogere*** case (supra) with approval, the Court emphasised that where conditions favouring correct identification are poor, the 'other evidence' which a trial Court needs to look for, to allay any doubt subsisting in its mind of any case of mistaken identity, may be direct or circumstantial evidence. This evidence may, amongst others, consist of naming the assailants to those who answered the alarm; or of putting up a fabricated defence of alibi. In ***Yowana Sserunkuma vs. Uganda, S.C. Cr. Appeal No. 8 of 1989,*** the Court, while dealing with evidence of identification made by a single witness at night, pointed out that such evidence may be accepted, but only after the most careful scrutiny; and 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 EACA 166 at 168; Roria vs R.[1967] EA 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 case of ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** laid down the proposition in law that the inculpatory evidence of identification adduced by the victim of the crime charged is the best evidence on the matter. In the instant case before me, PW1 and PW2 were the victims of the robbery that night. The night was dark; with the only source of light available being the torches carried by the attackers, and shone on the victims. The attackers fell on them so suddenly and with such speed that the victims were not afforded the opportunity to get out of bed before the attackers stormed their bedroom. PW2 was in a state of apprehension; and PW1, after being severely injured with panga cuts at the very onset of this nocturnal ordeal, was compelled to lie down helpless; and

facing down. Such was the condition under which the attack occurred, and the identification of the attackers made by the witnesses.

In Court, PW1's testimony was that it was A2 and A3, both of whom he knew quite well, who entered his bedroom that night; and that it was A2 who had the torch which he flashed in PW1's face and, later, handed it over to PW2. He further testified that it was A3 to whom PW2 handed over the household items; and finally that A3 had remained behind and told PW2 that they had been sent by A1 to finish PW1 off; but had decided to spare him because of the children. In cross examination however, he varied his statement a little by adding that A4, too, had entered the bedroom; and that he had been cut by both A2 and A4.

For her part PW2 stated, contrary to what PW1 had said, that it was A3 and A4, each with a torch, who had entered the bedroom and cut PW1 with pangas; and she was emphatic that A2 never entered the bedroom, but was standing in the sitting room. In cross examination, she was firm that it was A3 who had entered the bedroom first then followed by A4. She further asserted that it was only A4 who had cut PW1; and that she had witnessed it. Both witnesses agree that the attack was sudden, vicious, and scared them; and that apart from the torch lights there was no other light. The discrepancies in their testimonies, regarding the identities of the assailants who entered their bed room that night, underscores the difficulty that must have obtained in effecting identification at the time.

Apart from the darkness, and the torch which was being flashed on the witnesses as victims of the attack, the assailants had camouflaged themselves by putting on dark overcoats and head gears. PW1 had been forced to lie on the floor, face down. PW2 was in such a state of fear, as a result of the attack, that she could only utter "Oh my Lord Jesus help us!" The discrepancy in their testimonies, regarding the identities of the persons who entered the bedroom that night is therefore not surprising. The warning on the need for caution, sounded in the authorities cited herein above, is precisely meant to guard against such situations as this one. The condition for correct identification in the instant case, I must say, was rather poor. The possibility of error or mistaken identity

would, in the circumstances, be high. I would not go as far as saying that the witnesses were lying with regard to the identities of their attackers; but their individual accounts are so at variance that it is a matter of grave concern.

This instance falls squarely under the category of cases envisaged in the ***Moses Kasana***, and ***Bogere*** cases (supra). In the light of this, a matter I warned the assessors about, and I am equally cautious about, there is need to look for such evidence, direct or circumstantial, as can support the evidence of identification adduced by the prosecution witnesses; as relying on their testimonies alone to found a conviction, while permissible, would be quite unsafe. In the ***Bogere*** case (supra), the Court clarified 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."*

It is therefore imperative to look at a number of things, from the circumstance of this case, to see if any of them offers supportive evidence. Since the properties stolen that night have not been found with the accused, it is important to establish what, regarding the identities of the attackers, PW1 and PW2 told those who first answered their alarm or call, or the authorities to whom they made their first report in the period following immediately after the attack. Further supportive evidence can be garnered from the conduct or testimony of the accused; if any. While PW1 and PW2 testified that they had informed the people who gathered at their home the following morning that it was the accused who had attacked them, no independent evidence was presented to support this; and owing to the misgivings I have regarding their evidence on notification to the police, which I discuss hereunder, I find it unsafe to depend only on their word on this.

It is in their statements to the police, that an answer to this ought to be found since it is documented. PW1 claims that he named the attackers to police. Confronted with the fact

that in his first information to police after the incident he is recorded to have stated that they had been attacked by unknown persons; and further that in his police statement of 30th July 2003 - almost a month after the event - he does not name his assailants, the witness blamed the police instead alleging that, from the manner the police officer who recorded the first information had handled him, he knew the policeman was a friend of A1. He however conceded in Court that the said first information to police and the police statement had been recorded on separate days by different police officers. This certainly serves to impugn the allegation of favouritism made against the police officer who recorded the first information.

After emphatically asserting that she had made only one statement to police; and that this was at Kyenjojo, PW2 was confronted with three statements: one made at Mukunyu police post, and two made at Kyenjojo police station. She identified, and confirmed having made them. When put to her that in her statement made at Mukunyu on the 2nd of August 2003, a month after the attack, she had only named A1 as the assailant, she maintained that she had named all the three accused. Confronted with her statement made to police at Kyenjojo on the 8th August 2003, in which she is recorded to have said that A1's co-assailants were strangers to her, she accused the police investigator of concocting lies! With regard to her statement of 12th August 2003, where she is recorded to have said she had not recognised the other two assailants, she was adamant that she had said no such thing; and blamed the police for leaving out the names she purports to have given!

PW2's denial spree does not end there. In her statement of 8th August 2003, she is recorded to have described A1 as then putting on a grey Kaunda suit; much different from the claim in Court that A1 was putting on a black coat. She however denied mentioning a Kaunda suit to the police. And yet in her recorded statement of 12th August 2003, she is recorded again as having described A1 as putting on a grey Kaunda suit; and when this was put to her she retorted that the police might have made a mistake while recording. Now, a Kaunda suit, leave alone whatever colour it is, is a far cry from a coat. It is rather strange and striking that different police officers, recording from two

witnesses at different places and time, would all suffer from the vice of falsifications, or make the numerous mistakes now attributed to them.

These inconsistencies and contradictions in the witnesses' statements and testimonies are not minor; and only strengthen the view that notwithstanding the claims by the witnesses that they knew the attackers quite well before the attack, and were thus able to identify them that night, conditions at the time of the attack were not favourable for correct identification. The importance of information given by a witness, either to those who he or she first meets, or to those in authority, in the immediate aftermath of an incident, is of great importance in determining the veracity and evidential value of such witness' testimony in Court; and this is especially so when such testimony comes, as is the instant case, long after the occurrence of the incident complained of. Numerous cases have dealt with and emphasised the importance of first information in the determination of dependability of evidence.

In ***Rex vs. Shaban bin Donaldi (1940) 7 E.A.C.A. 60,*** a decision followed 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 advised as follows:-

> *"… 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 ***Kella vs Republic [1967] E. A. 809*** at p. 813, the Court , in support of the need to uphold and apply this practice spelt out above, 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 … the … 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."*

In ***Uganda vs Bosco Okello alias Anyanya, (H.C. Crim. Sess. Case No. 143 of 1991), [1992 - 1993] H.C.B. 68,*** Court pointed out that failure by a witness to name his or her assailant at the first instance, negatively impacts on the credibility of that witness. In ***Frank Ndahebe vs Uganda, S. C. Crim Appeal No. 2 of 1993***, the eye witness neither named the attackers to the people who answered the alarm, nor to the authorities. The Court held that this weakened the evidence of identification; and without any other evidence connecting the appellant with the offence, the test put in place for proof of identification had not been satisfied. It is not difficult to appreciate the importance of the early naming of one's attacker. It is only by this that, barring mistake, the witness can persuade Court as being credible; and not having conjured up and borne false witness against an accused as an afterthought.

The Supreme Court of Uganda pointed out in the ***Bogere case (supra),*** that the Tanganyika Evidence Act cited in the ***Shaban bin Donaldi*** case (supra), was textually 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."

I find that this matter before me calls for the serious application of the rule on first information after the occurrence of the criminal deed, laid down in the authorities cited

above. If the police statements had been consistent with the testimony in Court, it would have had great and positive weight on the case regarding the identity of the persons who robbed PW1 and PW2. The evidence adduced by PW1 regarding the identity of his assailant is therefore, without more, unreliable and cannot suffice to prove the case against the accused. I then have to look for anything in the conduct of the accused, after the incident, and their testimonies in Court, if they can satisfy the test of that 'other evidence' which may serve in support of the evidence of identification in issue.

Both PW1 and PW2 testified that the relationship between A1 and PW1 – who are blood brothers - was cordial if not intimate; and that PW2 would always cook for A1 at her place. She testified that in the morning following the attack on them, A1 came over and was amongst the sympathisers who had turned up. A1 himself testified that indeed he was at his brother - PW1's home that morning and was involved in organising for the brother's transportation to hospital; and further that he was with his brother in hospital attending to him. PW1 claims that A1 came to the hospital; but on learning that the police wanted to arrest him, he fled from the place. PW1, PW2, and A1 all testified that there was no grudge between A1 and PW1.

Each of the accused, in their sworn testimonies, stated that they were ignorant of the happenings at PW1's place for which they are charged in Court. For their part, A2, A3, and A4, were each emphatic that while they knew one another even before their arrest and arraignment, they had not known PW1 and PW2 prior to the said witnesses' Court appearance in this trial; and that each of them had been arrested from their respective homes. PW4, the arresting police officer who however did not investigate the matter, testified that he arrested each of the accused from their homes after A1 had implicated them in the robbery for which they were now standing trial. A1 however stated in Court that he only came to know the accused from police custody.

Looked at in the light of the prosecution evidence of identification, I see nothing in the conduct of the accused or their individual testimonies that would offer that other evidence required to strengthen purported identification made under difficult and unfavourable conditions; as was the case here. The allegation made by PW2 that the accused had fled

their homes for a period of time collapsed when she admitted in cross examination that she had not gone to these people's village some distance away; and also by the fact that the police found these accused persons at their homes when effecting arrest. I am therefore left with no option but to make a finding that there is no such evidence on record that could amount to the requisite 'other evidence'.

I am alive to the guiding remark in the ***Abudalla Nabulere*** case (supra), where the Court cautioned against applying too strict a rule in cases of identification, 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."*

Even when I apply this rather generous and relaxed rule to the evidence in the instant case before me, I find that the prosecution has failed to allay the serious doubts that relentlessly hover in my mind with regard to the character and weight of the prosecution evidence on the identities of the perpetrators of the robbery in issue. Therefore, for the reasons given, and in disagreement with the lady and gentleman assessors, I acquit each of the accused, of the offence of aggravated robbery, as indicted. Unless they, or any of them, are being held for any other lawful cause, they must be released from remand forthwith.

Chigamoy Owiny – Dollo
RESIDENT JUDGE, FORT PORTAL
8/04/2009