THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No. 0021 OF 2005; HELD AT KYENJOJO

UGANDA …… PROSECUTOR

VERSUS

KALYEIZA BENARD …..……. ACCUSED

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

JUDGMENT

The accused Kalyeiza Benard was indicted in this Court for the offence of aggravated robbery, contravening sections 285 and 286(2) of the Penal Code Act. The particulars of this offence alleged that on the 3rd day of February 2004, at Miranga village, Kyenjojo District, the accused, together with others still at large, robbed one Ruharuza George, of cash shs. 70,000/= and two mobile phones; all valued at shs. 500,000/=.

It was further alleged that, at or before or immediately after the said robbery, the accused used a deadly weapon, to wit, a gun, on the said Ruharuza George. The indictment was read out and explained to the accused. His response was that he had understood the charge; however he denied the entire allegations contained in the indictment; and for which reason a trial then ensued.

The prosecution endeavoured to discharge the obligation incumbent on it under the law, to prove the guilt of the accused as charged, called five witnesses; namely:-

1. Keziah Ruharuza – PW1; victim of the robbery charged; and wife to PW4.
2. Mudda Robert – PW2; Secretary for Defence for the parish where the robbery took place.
3. Isingoma Peter – PW3; employer of the accused at the time the robbery took place.
4. George Tinka Ruharuza – PW4; victim of the robbery charged, and husband of PW1.
5. Andrea Mutabazi – PW5; a local leader who first effected the arrest of the accused.

The offence herein being aggravated robbery, it comprises four ingredients; and each of these the prosecution must establish, by proof beyond reasonable doubt, before the accused can be found guilty as charged. These ingredients, as pointed out in the case of ***Uganda vs. Stephen Mawa*** alias ***Matua, H.C. Crim. Sess. Case No. 34 of 1990; [1992 - 1993] H.C.B. 65***, are as follows, that:-

(i) There was theft of the property of the complainant.

(ii) Violence was used in furtherance of the theft

(iii) There was actual use, or threat to use a deadly weapon either at, or immediately before, or immediately after the theft; or that death, was caused.

(iv) The accused participated in the theft in the manner set out in (ii) and (iii) herein above.

For proof of the first ingredient, the prosecution led evidence from the victims of the alleged robbery – PW2 and PW4 both of whom were very credible witnesses; who gave a persuasive account of how their attackers had force them to part with the money named in the indictment; and had taken mobile phones from them on the fateful night of the robbery; and that three days later their daughter's phone which had also been taken in the robbery was recovered from a bush where the robbers were suspected to have passed after the attack on the family. The prosecution did not contest proof of theft, so this ingredient was settled.

On the use of violence, both the two witnesses above gave direct evidence of how the thieves, had pushed them and forced them on the floor; and one of them who carried a gun which he cocked, had threatened to kill them, and had marched them at gun point to the servants' quarters and threatened to harm members of their family if they did not cooperate, and comply with their demands for money.

The gun man asked PW1 if they had 10,000,000/=; and told PW4 that he had come for his life and if he valued his life he should part with 15,000,000/=. There were also beatings of children in the servants' quarters. All this was a clear account of use of violence in furtherance of the theft. Again the prosecution conceded the prosecution had established this ingredient.

Regarding the use of a deadly weapon in the commission of the robbery, the two witnesses believed what one of the assailants was carrying was a gun. PW4 testified that this was a big gun; the type he usually saw the police with. Evidence was given that this gun was cocked. Beyond this however there was no evidence as to what other use, the gun was put to. It was not fired. When this robbery was allegedly committed in 2003, the Penal Code, 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.*

PW1 testified that she had attended the mchaka–mchaka course (a sort of military training for civilians), and was therefore familiar with guns. She was positive that what one of the attackers had which he even cocked was a gun. The law as laid down by the authorities was then that for whatever weapon used in a robbery, which witnesses attested to as having been a gun, to qualify to have been so, the weapon had to either have been fired in the course of the robbery, or was recovered, tested, and confirmed that it was capable of discharging ammunition.

This was not the case in the instant robbery. Therefore the testimony that what one of the assailants possessed was a gun, was not proved by sufficient evidence that it was indeed so; and accordingly, there was no proof that a deadly weapon was used in the robbery. This ingredient was therefore not established.

The last ingredient of the offence – the participation of the accused – was hotly contested by the defence. Both witnesses – victims of the attack –agreed that the attack took place about 10.00 p.m., as they prepared to settle in bed for the night. The lights had gone off and they had lit a candle. The attackers were total strangers to both of them. The gun man was wearing a black long over-coat with a hat or hood on. PW1 feared to see him in the face; and PW4 said the gun man could not allow the witnesses identify him. What the witnesses testified to was to the effect that the conditions for identification were rather poor.

Ordinarily, in cases resting on identification such as this, the law is that it is the inculpatory facts of identification adduced by the victim of the act complained of, which is the best evidence – see ***Badru Mwindu vs Uganda; C.A. Crim. Appeal No. 1 of 1997.*** By their own admission, the witnesses did not identify their assailants who, in any case were total strangers and did not afford

them the opportunity to do so; as he subjected them to fear and anxiety, and had camouflaged himself with an overcoat and hood.

In effect then I do not even have to address my mind to the rule laid down and followed in leading authorities such as ***Tomasi Omukono & Others vs. Uganda, H.C. Crim Sess. Case No. 9 of 1977, [1977] H.C.B. 61; Abudalla Nabulere & Others vs. Uganda, C.A. Crim. Appeal No. 9 of 1978 [1979] H.C.B. 77; Isaya Bikumu vs Uganda; S.C. Crim. Appeal No. 24 of 1989; Uganda vs. George William Simbwa, S.C. Crim. Appeal No. 37 of 1995***, and that of ***Bogere Moses & Anor. vs. Uganda, S.C. Crim. Appeal No. 1 of 1997****;* which is that evidence of identification, more so regarding night identification, needs to be examined and tested with the greatest care.

The issue of identification would have been put to rest; and however only arose when PW4 testified that he had seen and related the accused with the previous night's attack, when he found him under arrest with the police; and the police had told him this was one of the suspects who might have robbed him the previous night. PW1 had testified that she had known the accused as her attacker of the previous night when the accused was brought to her home by the police, and the Secretary of defence had stated that they had arrested one of the thieves who had attacked the witness at night.

The evidence that would link the accused to the robbery is here wholly circumstantial evidence: PW1 testified that the robber spoke broken Rutooro and Swahili but fluent Rukiiga. For one hour the accused who had been brought by the police while being beaten, and had injuries on the leg, led them through the swamp tracing where they had passed. After three days the phone of the PW1's daughter which had been taken during the robbery was found around the place where the accused had shown the police and the other people where they had passed.

PW5 was the first person to arrest the accused at the church. He testified that the accused was suspicious – looking, was scared, shabby, with mud on his body, and came to the church place around 6.00 a.m. saying that he had slept in the bush and was apparently lost. PW2 to whom the arrest was first reported testified that the accused whom he found wet told him he had slept in the bush; but said he did not know why he had slept in the bush. The accused, he further testified, attempted to flee from his employer's (PW3's) place to which he had been taken.

He corroborated PW1's evidence that the police took the accused to show them where they had passed; that the accused was moving ahead, but would hesitate. Soldiers shot on the ground around the foot of the accused. Nothing was found in the search. PW3 the employer of the accused testified that the accused had not eaten his supper, and had not slept at home that previous night. The accused was brought to him in bad shape: with scratches on his body, looked dirty, and was injured.

The accused could not answer his question as to where he had been and what had happened to him. He corroborated PW2's testimony that the accused attempted to flee when a decision was taken to take him to the authorities; and had to be arrested. The accused, he said, was otherwise well behaved and hardworking; and the witness had been surprised to see him in that condition that morning.

The evidence against the accused herein is therefore entirely circumstantial. That being so, it has to be approached in accordance with the rules laid down in ***S. Musoke vs. R. [1958] E.A. 715;*** and which has been followed by numerous other cases since. The Supreme Court restated this rule in ***Byaruhanga Fodori vs. Uganda, S. C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12*** at p. 14 as follows:-

> *"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 was 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, owing to the fact that evidence of this kind is susceptible to fabrication. It is therefore important that before drawing an inference of the accused's guilt from circumstantial evidence, Court must ensure that the inculpatory facts are not open to any reasonable hypothesis save the guilt of the accused, and that there are no other co–existing circumstances which would weaken that inference.

In his defence the accused set up an alibi that he had slept at home the night of the robbery and was therefore nowhere near the place of robbery; and that he had been arrested from his employer's tea estate where he was carrying out his work. He testified that he had had a quarrel with PW3 – his employer – over money which the latter was not willing to pay him unless he had finished the work assigned to him; and that he had been arrested from the tea estate when he was nearing completion of that work. He further testified that the people who arrested him and took him to police had shouted and expressed anti Bakiiga sentiments at him.

I have given this defence considerable thought in the light of the prosecution evidence regarding the circumstances under which the accused was arrested. I do find the defence unacceptable with regard to his allegation that he had slept at home the night previous to his arrest. I believe that indeed he was arrested under the circumstances brought out in the prosecution evidence. Nonetheless, that still leaves the prosecution evidence entirely circumstantial with regard to the involvement of the accused in the robbery.

The most unfortunate thing in this case is that the police and soldiers fatally bungled up the investigation into the robbery. From the account given by PW4, he was called by the police and shown the accused in the custody of the police as a suspect in the robbery. He then related the accused with the robbery. Furthermore the attempt to have the suspect show where they had passed the previous night was equally bungled up when as was stated by PW1 soldiers kept firing guns at the foot of the suspect.

It cannot be said that the accused was freely following a path he had taken before. He might well have been following a path well beaten by some other persons, including the robbers of the previous night, altogether not connected with him. It is also not lost on Court that the prosecution evidence is that the accused led the way following the path, but was hesitating, and that nothing was found in the search, although a couple of days later one of the phones robbed was discovered around the same place.

What the police needed to have done in the circumstances was to conduct an identification parade in which the victims of the robbery – PW1 and PW4 – would have tried to pick out their assailant of the previous night. This was a good case for such an exercise. It would have lent considerable weight to the circumstantial evidence regarding his arrest of the accused at the church yard. I

therefore find it difficult to find that albeit being arrested in such suspicious circumstances the evidence has clear nexus with the robbery.

The accused might have indeed been one of the robbers that night; but equally he could have, that night, gone on a frolic of his own which had nothing to do with the robbery. He could have had some paramour in the area – say, somebody's wife; he could have been a night dancer and lost his way back to his place, being a new person in the area. There are a host of other possibilities to explain why he appeared in the church yard in the condition he did that morning. It is such co – existing circumstances that weaken circumstantial evidence.

And it is for this reason that I find that the prosecution case has serious doubts which I am under duty to resolve in favour of the accused. I am here, in full agreement with the lady assessors that the prosecution has not proved the case against the accused beyond reasonable doubt as required by law. I therefore acquit the accused of the offence charged; and unless he is being held for any other lawful purpose, he must be released forthwith.

Chigamoy Owiny – Dollo
JUDGE
12 – 06 – 2009