THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CRIMINAL SESSION CASE No.0029 OF 2005; HELD AT KYENJOJO

UGANDA ……
PROSECUTOR

VERSUS

1. KATONGOLE ADOLF }
2. ISINGOMA JOSEPH } :: ACCUSED
3. IRUMBA JOSEPH }

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

JUDGMENT

The accused herein, Katongole Adolf – A1, Isingoma Joseph – A2, and Irumba Joseph – A3; and all of whom are collectively herein after referred to as the accused, were indicted in this Court for the offence of aggravated robbery, in contravention of sections 285 and 286(2) of the Penal Code Act.

The allegations in the particulars of the indictment were that on the 11th day of April 2004, at Migongwe village, Kyenjojo District, the accused, with others still at large, robbed Mugisha John of his bicycle, mattress, two watches, a pair of shoes, cash in the sum of U. shs. 250,000/= (Two hundred and fifty thousand only - all valued at U. shs. 380,000/= (Three hundred and eighty thousand only); and that immediately before, or at the time of the robbery, or immediately after the said robbery, the accused used deadly weapons, to wit, pangas, on the said Mugisha John.

Each of the accused took plea, emphatically denied the charge which they had each said they had understood after I read out and explained to each of them. The Court then entered the plea of “Not Guilty” for each; and this trial was then conducted. The duty lay on the prosecution to prove the case against each of the accused beyond reasonable doubt, and establish the guilt of the accused on each of the four ingredients comprising the offence of aggravated robbery, if it was to secure a conviction of any of the accused. These ingredients are:

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

In pursuit of the discharge of this burden, the prosecution called and relied on the testimonies of three witnesses; namely:-

(i) Mugisha John – PW1; the victim of the robbery.
(ii) Bujune Getrude – PW2; wife to PW1.
(iii) Akugizibwe Mutabazi Edwins – PW3; a clinical officer who interpreted medical reports made by his colleague.

To prove that the theft alleged in the indictment did take place, the prosecution relied on the testimonies of PW1 and PW2. The two testified that their assailants took from them money they had kept under their mattress, which they later established totalled U. shs.

370,000/=, a bicycle – Hero make, a 4 inch thick mattress, PW1's shoes, trousers and shirts, and PW2's clothes too.

The crime of theft, as was explained in ***Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993,*** is established the moment there has been asportation of the property of the complainant without his or her consent. All that is required is that the property is removed and asported from one position to another, even within the owner's premises, however short that distance is. The evidence adduced by the prosecution satisfied this requirement and proved that theft occurred as charged; a position with which the defence agreed.

With regard to the alleged use of violence during the commission of the theft proved, PW1 and PW2 gave direct evidence of how their assailants broke their door with a bang in the middle of the night, assaulted both of them by cutting them with pangas, threatened them with a gun, forced PW1 to lie down, and generally threatened to harm them if they did not hand over the items demanded.

The assailants also tied both of them up with ropes before leaving with the items they had forcefully taken. The evidence adduced by PW3 in the medical reports made by his colleague - exhibited as PE1 and PE2 respectively - clearly corroborated the claim by both PW1 and PW2 that they sustained injuries from the violence meted out on them by the attackers. This ingredient of the offence too, the defence conceded had been proved.

Evidence intended to prove use of deadly weapon was discernible from the weapons which were mentioned as the instruments of violence; namely the panga and gun. Again it was the direct evidence of PW1 and PW2, and medical report aforesaid which presented that evidence.

PW1 stated that he was cut with a panga while lying on his bed; and that PW2 was cut when she made a failed attempt to escape from the assailants. The medical reports mentioned above classified the injuries inflicted on the two victims as maim and grievous harm. In 2004, when these harm were occasioned, the definition of 'deadly weapon' as contained in the Penal Code Act, 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.

At the time the law, which was only amended in 2007, was that for a gun used in a robbery to qualify as a deadly weapon, it had to either be fired in the course of the robbery, or upon recovery must be proved to be functional. This was not the case with regard to the gun the prosecution witnesses referred to herein; so the said gun was not a deadly weapon within the meaning of deadly weapon prescribed by law then.

However for the case of the panga which was not only an instrument made and adapted for cutting, but was actually used for offensive purposes and did inflict the injuries on PW1 and PW2, classified as grievous harm and maim, which could have caused death. Therefore, this satisfied the requirements of the law as it was then - and still is to date - regarding what amounted to a deadly weapon.

With regard to the identity of the assailants who committed the robbery established herein above, the prosecution contended that the accused were the ones who did so. It relied on the direct evidence of PW1 and PW2 to prove this assertion. As this case is based on evidence

of identification, the Court is guided by the authority in ***Badru Mwindu vs. Uganda; C.A. Crim. Appeal No. 1 of 1997,*** which is that the inculpatory evidence of identification adduced by the victim of the criminal act is the best evidence.

In the instant case before me, the two prosecution witnesses adduced evidence of visual identification. This being so I have to treat that evidence with care, conscious of the warning sounded and in compliance with the rule laid down first in ***Roria vs. Republic [1967] E.A. 583;*** namely that it is not safe, and there should be reluctance, to establish proof of offence charged, based entirely on evidence of identification.

The reason the Court advanced for this is that such evidence potentially poses greater risk of having those who are innocent convicted, than is the case with other forms of evidence. It handed down the warning that while the evidence of identification by a single witness can properly form the basis of conviction, it is less safe found a conviction on such evidence than would be the case with multiple identification witnesses; hence, the Court must first satisfy itself that in all the circumstances of the case, it is safe to act on such evidence of identification.

Two leading decisions of the Supreme Court of Uganda, namely ***Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77****,* and ***Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997***, cited the rule laid down in the ***Roria*** case above, with approval; and clarified that the need for the exercise of care is present both in situations regarding the testimony of a single or multiple identification witnesses.

The Court expressed wariness over such evidence, and advised that in either situation of evidence of a single, or multiple identification witnesses, the trial Court must warn itself and the assessors of the special need to exercise caution before it can arrive at a conviction based on such evidence. The Court explained, and because of its clarity I have to reproduce it in full, 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."*

The case of ***George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997*****,** upheld this position, citing ***Abdulla bin Wendo & Another v. R (1953) 20 E.A.C.A 166;*** and reiterating the need for testing, with the greatest care, evidence of identification; and particularly so where the identification being contested was made

under difficult and unfavourable conditions. In such circumstances, the Court advised that:

> *"... 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***, the Court pointed out that the other evidence required, to allay any doubt in the mind of the trial Court of any case of mistaken identity, where conditions favouring correct identification are poor, may be direct or circumstantial; and that such evidence may, for instance, be in the immediate naming of the assailants, by the witness, to those who answered the alarm; and that a fabricated alibi would also amount to such other evidence.

In ***Yowana Sserunkuma vs. Uganda, S.C. Crim. Appeal No. 8 of 1989,*** the Court warned that while the evidence of a single identifying witness at night may be accepted, it must be so accepted only after the most careful scrutiny; and that the Court should look for other evidence to ensure that the identification in issue is not mistaken. It went on to state further that:

> *"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."*

Although A1 and A2 were already known to the witnesses before the incident complained of took place, the assault which occurred at 1.00 o'clock in the night woke the witnesses from their sleep; and the light from the *tadhoba* lamp was only on for a brief period after the assailants entered the bedroom, and then it was put off, leaving only the light from the torches shone by the assailants lighting the bedroom.

The assailants forced PW1 to lie face down on his bed; and took about half an hour in the house, making demands, assaulting them, and searching for and collecting the items intended for their loot. On the whole, the conditions were fairly difficult and not quite favourable for identification; yet it would have afforded the opportunity for the witnesses to identify at least A1 from amongst the assailants, owing to the intimate familiarity they enjoyed with him.

Due to the conditions then obtaining not convincingly or altogether favouring correct identification, the possibility of error or mistaken identity would, in the circumstances, still have remained in place. This case therefore falls under the category of those situations envisaged in the ***Moses Kasana***, ***Bogere,*** and ***Yowana Sserunkuma*** cases (supra), as requiring other evidence in support before any conviction can be founded on the evidence of identification.

I therefore warned the assessors, and I also now proceed with care, that although I could in the circumstance of this case found a conviction on the evidence of identification adduced, alone, there is compelling need to look for other evidence to support that of identification adduced before me, and thereby persuasively establish that the evidence of identification was possibly not founded on some factual error or mistaken identity. The ***Bogere*** case (supra), qualified the phrase 'other evidence' 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 light of the authorities above, it is pertinent to examine the other evidence on record and determine whether any of them could possibly offer the requisite support, and give cogency, to the evidence of identification. While PW1 claimed to have mentioned to his father, and to the Chairman LC1, that it was the accused who had attacked them, there is no independent evidence to support this.

There was need for that independent evidence in view of the worrying failure by the witnesses to immediately reveal, to the police, the identity of their assailants. Both witnesses recorded statements with the police soon after the event, and then additional ones later. In cross examination it was elicited from PW1 who was confronted with his first statement to police, which he had made the day after the event, in which he had not mentioned the identities of his assailants. His explanation in his testimony was that at that time he was feeling bad and could not talk much.

When confronted further that in his additional statement to police made one year after the event, he had again not mentioned the names of the accused as his assailants, the witness claimed that he had in fact done so; and stated he was surprised that the police had not recorded

it. As for PW2 her case was also similar in that it was established, contrary to her denial, that she had mentioned the identity of the A3 only in her second statement to police.

The glaring inconsistencies between the witnesses' police statements and their testimonies in Court, regarding whether or not they had actually identified their attackers that night, is most relevant and has serious effect on the prosecution case. Several authorities have warned of the need to give serious attention to such inconsistencies; and that such discrepancies, if not satisfactorily explained, would damage the witness' credit and negatively affect the worthiness of evidence of identification.

In ***Rex vs. Shaban bin Donaldi (1940) 7 E.A.C.A. 60,*** in a passage which, due to its relevance and importance, was cited with approval in the of **Bogere** case (aforesaid), and which I reproduce hereunder in extenso, the Court of Appeal for Eastern Africa stated as follows:-

> *"We desire to add that 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 the ***Bogere case*** (supra), it was pointed out that the Tanganyika Evidence Act referred to in the ***Shaban bin Donaldi*** case (supra), had provisions similar to section 155 of the Uganda 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."*

In ***Kella vs Republic [1967] E. A. 809*** at p. 813, Court reiterated the need to uphold the practice recognised above; and 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 both the principal 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."*

The matter before me has to be resolved on the strength of the authorities cited above. There was nothing to bar the witnesses from naming the accused or anyone else as their assailants when they gave

their statements to police almost immediately after the event. The logical inference one would make here is that they had in fact not identified any of their assailants.

The accused, for their part, each denied the allegations labelled at them; and set up the defence of alibi, which they were under no obligation to prove. They might have lied in their contention that they had not known one another before their arrest. Indeed A3 even denied knowledge of his own paternal aunt – Tibaleka Victoria – to the chagrin of his father DW4. However, in the absence of cogent evidence by the prosecution pointing irresistibly to their guilt, the apparent deliberate falsehoods in their testimonies would be of no avail to the prosecution.

It’s noteworthy that, up to the time of their respective arrests, the accused continued to go about their daily business normally. This was conduct certainly not compatible with guilt at all. It would appear that it was when PW2 saw A3 in the trading centre with a finger wound, and concluded that this was the person she had bitten on the thumb on the night of the attack, that A3 and then the others came to be connected with the attack; but all this was subsequent to the first statements PW1 and PW2 had made to the police; and in which they had noticeably not given the identity of their assailants.

In the result, I find myself in total disagreement with the lady assessor, and only partially in agreement with the gentleman assessor; and have reached the conclusion and decision that the prosecution has failed to discharge the burden that lay on it to prove that any of the accused is guilty of the offence for which they have been indicted. I therefore acquit each of them of the offence charged.

Chigamoy Owiny – Dollo

JUDGE

12 – 06 – 2009