

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA; FORT PORTAL CIRCUIT
CRIMINAL SESSION CASE No.0009 OF 2004; HELD AT KASESE**

UGANDA
PROSECUTOR

VERSUS

**1. KIBAYA JACKSON }
2. BWAMBALE LAZARO }
3. MASEREKA KWIRINO } :.....
ACCUSED
4. MUKWE APURUNARI }
5. KIBAYA AUGUSTINE }**

BEFORE: THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY – DOLLO

The accused, Kibaya Jackson – A1, Bwambale Lazaro – A2, Masereka Kwirino – A3, Mukwe Apurunari – A4, and Kibaya Augustine – A5; otherwise hereinafter collectively referred to as the accused, were indicted on 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 or about the 12th day of November 2002, at Kabirizi village, in Kasese District, the accused robbed one Katanizi Janet of cash Shs. 80,000/= (Eighty thousand only); and that immediately before, or immediately after the said robbery, they threatened to use deadly weapons, to wit a spear and panga, on the said Katanizi Janet.

The particulars of the second count were that on or about the 12th day of November 2002, at Kabirizi village, in Kasese District, the accused robbed one Ntungwa Samuel of cash Shs. 1,000,000/= (One million only); and that immediately before, or immediately after the said robbery, they threatened to use deadly weapons, to wit a spear and panga, on the said Ntungwa Samuel.

Each of the accused pleaded not guilty when each of the counts were read out and duly explained to them. The Court accordingly entered the plea of “Not Guilty” for each of them; and proceeded to try them. The case was heard by the Hon Mr. Justice V.R. Kagaba, now retired; but he was not able to conclude the trial before his retirement. Upon taking over, I had to determine whether to proceed with the case from where he had left it, or commence the trial de novo. After a perusal of the record, I made a decision to proceed with the trial from where my said predecessor trial judge had left it.

I came to this decision out of the persuasion that the record was quite clear; and given that the accused had unfortunately been on remand for the last seven years, any further delay by having to begin the process all over again would indeed occasion grave injustice to them. Furthermore, the cause of justice might not be served by the real possibility that the prosecution witnesses who had been readily available then, may not be now available; and even if they were, their recollection of the events would certainly not be as good as when they appeared and testified at the time.

The burden lay on the prosecution to prove by evidence beyond reasonable doubt, the charge against the accused severally and or collectively, on each count, by establishing each of the four ingredients that constitute the offence of aggravated robbery; namely:

- (i) Theft of property.
- (ii) The actual use of, or threat to use, violence in the course of committing the theft.
- (iii) The threat to use, a deadly weapon either immediately before, or immediately after the theft.
- (iv) The participation of each of the accused in the theft.

After the close of evidence on both sides, the defence conceded in their final submissions, and rightly so, that in deed the prosecution had adduced sufficient evidence that had proved the first two ingredients listed above to the satisfaction of the requirement of the law; and thereby leaving it to the Court only to determine whether in fact a deadly weapon was used or threatened to be used in either of the counts, so as to place them in the realm of aggravated robbery; and further, whether any of the accused herein participated in the robbery for which they have been indicted.

Regarding the allegation of threatened use of deadly weapons as set out in the two counts, PW6 testified with regard to the first count that she was hit badly with small pieces of timber and ordered to lie down; and that when the robbers were leaving, they took with them her spear and panga. Both

the spear and panga are certainly deadly weapons within the meaning attached to that phrase in the Penal Code. However, nowhere in her testimony does she mention the use or threatened use of the panga or spear against her. I find that there was no proof of use or threatened use of any deadly weapon in support of the first count.

The testimony of PW4 in support of the allegation of threatened use of deadly weapon in the second count is that he saw A1 with a spear, and A2 had a panga. Before the robbers left, they showed him the panga and advised him against the folly of divulging their identities and the incident of that night to anyone; otherwise if he did so and they were apprehended, then he had to migrate from that village. This was a direct threat issued immediately after the robbery, with the singular purpose of affording the robbers the luxury of retaining the money they had stolen from PW4. I therefore find that proof of threatened use of deadly weapon was established with regard to the second count.

As for the allegations of participation of the accused, the evidence adduced in support of this in the first count was the testimony of PW6 – Katamizi Janet, that of PW5 – His Worship Rwatooro Baker who took the admitted extrajudicial statement (confession) of A1, and the corroboration by A1 in his sworn testimony. PW6 testified that the robbers who attacked her at around 11.00 p.m. included A1 who had been her casual worker for a year, A2, A3 and A5 whom she knew very well and by their names; and as well A4 whom she knew by face. She had been familiar with the accused for a period of one year as she lived within the same locality with them.

Her further testimony was that she was able to identify the assailants by the three torches which they lit; and that A2 entered her bedroom, while the rest remained at the corridor at a distance of only a metre away from her bed. The robbers later lit a *tadhoba* (local lamp) at the corridor and this enabled her to identify them quite well from the position she had been forced to lie down at as she was facing them. Further to this, the assailants took about an hour at her place, and A1 even took time to drink milk which was in the house. She also testified that she had earlier sold her cow in the presence of A1; and that she told the robbers that she had deposited some of her money with PW6; and that when they left her place they took one of her servants as captive and went with him.

On the second count, PW4 – Ntungwa Samuel testified that five robbers, who were in the company of a servant of PW4, had attacked him on the fateful night at around 12.30 a.m.; and that they had three torches which they shone around and brightly lit his bedroom which was only some three metres in diameter. The assailants who made no attempt at camouflage took up to 20 minutes in his

bedroom, and he was able to identify all of them as he had known all them from their childhood, and they lived within a 2 mile radius from his home. They used to play football from a place near his home, and he was the patron of their team.

He knew A1 and A2 by name; while the rest he knew by their face. A1 had earlier been his porter for 6 years, and so he was able to identify him by his voice as well. The witness further testified that A1 had a spear, and A2 had a panga. When the assailants took him out after taking his money, he was able to further identify them by the bright moonlight that shone. From outside his house A4 showed him the panga and revealed to him that their purpose had been to sever his head off, but that they had spared him owing to his cooperation; but that should he ever divulge their identities to anyone and they are apprehended, then he would have to migrate from the place.

The following morning, he named A1 to the Chairman L.C.1 and people who had gathered in response to the robbery; and this resulted in their arresting A1 who then divulged the identities of his fellow perpetrators, leading to the arrest of the accused by the police. PW3 – No 20390 D/Cpl Birungi Viani recovered a panga and spear from the house of A2 which PW6 identified as the ones the robbers had taken from her house. PW5 testified that A1 had confessed to him in an extrajudicial statement, which was admitted in evidence, to having earlier witnessed PW6 sell her cow; and to having led the other four accused to rob her from her home.

Each of the accused, in their sworn testimonies, denied participation in the robbery. A1 admitted that he had worked for PW4 and PW6; thereby corroborating their testimonies in that regard. For their part, the other accused admitted knowing PW4, thereby corroborating his testimony about his knowledge of them. They however all denied any knowledge of PW6. Each set up an alibi for that night of the robbery; and except for A5, whose alibi was that he had been attending a church convention, the rest contended that they had been at their respective homes. They all stated that there was no grudge between each of them and the two complainants – PW4 and PW6.

In defence of A1 was his wife Biira Loyce – DW3 who adduced evidence in support of his defence of alibi that he was at home all night that fateful night of the robbery. A3 summoned his wife DW3 – Grace Muhindo to his aid; and she was not content with a general statement as evidence in support of his defence of alibi, but went as far and as explicit as to testify that she had spent the whole of that night with her husband – A3 in bed at their home; and that part of the night they had put to good use playing an ‘exhausting’ game (a clear euphemism for the enjoyment of conjugal rights)!

In view of the evidence of identification in each count being that of a single witness, and at night, I am duty bound to treat the evidence of PW4 and PW6 with care, and subject each of them to serious scrutiny and test, in keeping with the rule laid down in the authorities of ***Abdulla bin Wendo & Another v. R (1953) 20 E.A.C.A 166***; and ***Roria vs. Republic [1967] E.A. 583***; and the host of other subsequent authorities on the matter. I accordingly warned the assessor that while he could advise me to convict the accused on each of the evidence of the single witnesses alone, it was not safe to do so.

I warned him of the need to tread with caution, and treat each of their evidence with utmost care; and to first be satisfied that, having regard to all the circumstances of the case, it is safe to act on such evidence of identification. I pointed out to him that factors that help in the exercise of the caution I had advised, include the availability of light at the time of the robbery, familiarity of the assailants to the identifying witness, the length of time the robbers took with the witness, and the proximity from which the witness was able to identify the robbers. I sought to rule out the possibility of mistaken identity by the witness as was warned in ***Abudalla 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***,

In the instant case before me the factors that obtained, and the circumstances under which PW4 and PW6 had observed the assailants, as set out above, very much reduced the possibility of mistake in identification, and thus favoured correct identification. In addition, there is sufficient other evidence pointing to the correctness of identification. This is in the fact of both PW4 and PW6 specifically and immediately naming A1, to the chairman L.C.1 and those who had gathered the following morning, as having been one of the perpetrators of the robberies of the previous night; a revelation which corroborated A1's confession statement.

The testimony by PW6 that the robbers had taken a spear and panga from her, and also taken her servant captive, upon her having told them that she had deposited her money with PW4; and by PW4 that the same robbers had subsequently attacked him while in possession of a spear and panga, and were in the company of a servant of PW6, and as well the recovery of a panga and a spear from the home of A2 was circumstantial evidence which was 'other evidence' pointing to the correctness of the evidence of identification by PW4 and PW6 on the authority of ***Moses Kasana vs. Uganda – C.A. Crim. Appeal No. 12 of 1981; [1992-93] H.C.B. 47***.

Evidence in support of correctness of identification may emanate from an accused himself as was stated in *George William Kalyesubula vs. Uganda – S.C. Crim. Appeal No. 16 of 1997* and *Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997*. In the instant case, such evidence is found in the confession A1 made in his statement to PW5. His repudiation in Court of the naming of the other accused as co –perpetrators, purporting that he had done so while crying out for their intervention, to save him from soldiers who were allegedly torturing him, was ridiculous and laughable, knowing that civilians are known to avoid confrontation with armed soldiers. He had no reason to implicate them before PW5 too; as neither was there a single soldier, nor was he being subjected to any form of torture then.

PW2 – Dr Mainuka who examined A1 seven days after the robbery (and alleged torture), and whose evidence was admitted at the trial as an agreed fact, found no trace of injury on him. A1’s confession of guilt was from his own volition; and this is yet ‘other evidence’ from which I find it reasonable to conclude that it is safe to accept the evidence of identification by PW4 and PW6 as free from any possibility of error. I have carefully considered the evidence of identification against the defence put up by each of the accused. I am convinced that each of the defence of alibi put up by the accused is cannot stand in the face of the prosecution evidence. They are worthless and I therefore reject them.

Accordingly then, with regard to count one of the indictment, I find that the offence of aggravated robbery as charged is not proved. I therefore, in agreement with the gentleman assessor, acquit each of the accused of that offence. However owing to the establishment of the rest of the ingredients of robbery, I find that the prosecution has instead proved beyond reasonable doubt, the commission by the accused, of the offence of simple robbery in contravention of sections 285 and 286(1) of The Penal Code Act; notwithstanding that they were not charged with it. I therefore, accordingly, convict each of them of that minor cognate offence.

As for count two of the indictment, I am satisfied that the prosecution evidence has established all the ingredients of the offence of aggravated robbery as charged; and accordingly, and unfortunately in disagreement with the opinion of the gentleman assessor, I convict each of them.

Chigamoy Owiny – Dollo

JUDGE

25-11-2009