**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**CRIMINAL SESSION CASE No. 0115 OF 2005; HELD AT KYENJOJO**

**UGANDA ……**

**PROSECUTOR**

*VERSUS*

**1. BYAMUKAMA ROBERT }**

**2. BAGUMA AHEEBWA }::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::**

**ACCUSED**

**3. MONDAY SELEVESTA }**

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

**JUDGMENT**

The accused herein, Byamukama Robert – A1, Baguma Aheebwa – A2, and Monday Selevesta – A3; collectively hereafter 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.

It was alleged in the particulars of the indictment that on the 14th day of September 2004, at Rwenkuba village, Kasina Parish, Kyenjojo Town Council, Kyenjojo District, the accused, and others still at large, robbed Kenganzi Violet Kahunde of cash Shs. 340,000/= (Three hundred and forty thousand only), 9 suits of children, 6trousers, 6 shirts, bitenge clothes, 5 children dresses, 30 kilos of sugar, one dozen of half petty, 20 kilograms of rice, 4 women dresses, 2 hand bags, and other shop commodities, all valued at Shs. 1,000,000/= (One million only); and that immediately before, or at the time of the robbery, or immediately after the said robbery, the accused used a deadly weapon, to wit, a gun, on the said Kenganzi Violet Kahunde.

After stating that they had understood the indictment which had been read and explained to them, each of the accused denied the charge; and accordingly the Court entered the plea of "Not Guilty" for each of them; and followed by this trial. The burden lay on the prosecution to prove, beyond reasonable doubt, the allegations made against each of the accused. To achieve this, the

prosecution had to establish by evidence that the accused were each culpable with regard to all the four ingredients that comprise the offence of aggravated robbery. Short of that it would have failed to prove the case against the accused. These ingredients of the said offence are:

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

With a view to discharge the aforesaid burden of proof, the prosecution summoned and relied on six witnesses; namely:-

(i) Kanganzi Violet – PW1; the victim of the armed robbery.
(ii) Deo Matsiko – PW2; former employee of PW1.
(iii) Kajumbukire Joyce – PW3; mother in law of PW1, and co - resident.
(iv) No. 23058 D/Sgt. Bwambale Jasmine – PW4; police officer who co-investigated the crime; and presented the statement of a dead colleague.
(v) Akugizibwe Mutabazi Edwins – PW5; a clinical officer who interpreted the report of colleagues.
(vi) Basaliza Yuda – PW6; neighbour of PW1

The prosecution relied on the direct evidence of PW1, PW2, and PW3, and then other circumstantial evidence to prove its case. Regarding the ingredient of theft, PW1, PW2 and PW3 gave their accounts of how the assailants who struck in the night, robbed them of various items from the residence and shop, some of which were recovered by the police and identified by PW1 from the police station. This satisfied the proposition of law as stated in ***Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993****;* namely that once asportation of the property takes place without the consent of the owner, then theft has occurred. Removing the property from one position to another, however short the distance may be, is asportation; and constitutes theft. The defence conceded quite rightly that this ingredient had indeed been established, by the prosecution, beyond any reasonable doubt.

The said three prosecution witnesses in their testimonies narrated how the attackers broke the door to their residence with a stone, hit the bedroom door, held PW1 at gun point and fired several shots in and outside the house whose cartridges were recovered from the scene, wielded a panga, injured PW1and tied her up, and beat up members of her family. The medical report on PW1 attested to the injuries she had sustained, which was classified as harm, and thus corroborated he evidence on the use of violence on the night of the attack.

The law at this time was that a weapon used at a robbery could only be accepted as having been a gun, if it was either fired or was recovered and established to have been functional. The defence conceded, and it was the proper thing to do in the circumstance, that the prosecution had proved that violence was applied, and deadly weapons – guns and a panga – were used against the victims in furtherance of the theft.

As for the participation of the accused in the robbery, the three prosecution witnesses were unanimous that none of them had identified any of the assailants. PW1 was clear that the only light available was from the torches the assailants had in their possession; and that this was too bright as the assailants shone it directly at the victims. Even the evidence by PW1, that later when she was told that A1 was one of her assailants she had then realised that the voice she had heard was indeed his, was not helpful; it being an afterthought. Owing to this, the evidence relied on by the prosecution in proof of the participation of the accused was therefore entirely circumstantial.

For a case grounded exclusively on circumstantial evidence, such as this for conviction to be justified, the Court must satisfy itself that the inculpatory facts of participation are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt; and as well, that there are no co-existing circumstances that would negative the inference of guilt. This is the proposition of law stated in numerous leading cases such as ***Simon Musoke vs. R. [1975] E.A. 715, Sharma & Kumar vs. Uganda; S.C. Crim. Appeal No. 44 of 2000,*** *and* ***Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12,*** where at p. 14, the Supreme Court of Uganda pointed out that:-

> *"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****)."*

The Court pointed out in ***Tindigwihura Mbahe vs. Uganda S.C. Crim. Appeal No. 9 of 1987***, that owing to the fact that circumstantial evidence is quite susceptible to fabrication, evidence of this kind must be treated with caution; and subjected to narrow scrutiny. There is therefore compelling need, before drawing an inference of guilt from such evidence, to establish that there are no other co-existing circumstances which would weaken or altogether destroy that inference**.** The strongest circumstantial evidence that linked the accused with the robbery was the evidence of recovery, from the accused, of some of the items that were reported stolen in the said robbery.

The direct evidence of PW4, and the secondary evidence adduced by him in accordance with the provisions of section 30 of the Evidence Act, was that some of the stolen items identified by PW1 as belonging to her were recovered from the home of A1 at the time of his arrest; and that A1 named one Mwangusya as his accomplice. Mwangusya was arrested and found with cut wound on his face; and several stolen items identified by the complainant PW1 was recovered from him. It was Mwangusya who named Monday and Baguma as accomplices. A search at Monday's place yielded some of the stolen items hidden in a bush behind his house. Here a gun containing a live bullet in the chamber was also recovered; and the bullets therein matched the cartridges that were recovered from the scene of the crime.

Even where reliance cannot be placed on the evidence of identification, conviction can nevertheless still be founded on the evidence of the accused being found in possession of that property. The test of the doctrine of recent possession has been laid down, and applied in numerous cases; some of which are: ***Bakari s/o Abdulla vs R. (1949) 16 E.A.CA. 84; Andrea Obonyo vs R. [1962] E. A. 542;*** and ***Uganda vs Stephen Mawa alias Matua, H.C. Crim. Sess. Case No. 34 of 1990; [1992 - 1993] H.C.B. 65.*** In ***Yowana Sserunkuma vs Uganda, S.C. Crim. Appeal No. 8 of 1989,*** the Court explained that:-

*"When a person is found in recent possession of stolen property, and cannot give a <u>reasonable</u> explanation as to how he came into such possession, the inference is that either that person is the thief or receiver of that property…*

*Being found in recent possession of stolen property is a species of circumstantial proof; and as is well known in cases of circumstantial evidence, if an innocent hypothesis is as possible as a guilty hypothesis, then the prosecution has failed to prove its case beyond reasonable doubt.*

*A reasonable explanation leaves open the possibility of an innocent explanation, even if the court is not convinced of its truth. To reject an explanation as false, there must be specific evidence that on some point or points it is actually proved false."*

The Court, in ***Mbazira & Anor. vs. Uganda; S.C. Crim. Appeal No. 7 of 2004,*** gave further explanation on the doctrine of recent possession as follows:-

*"The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a presumption of fact that that person was the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession.*

*It follows that the doctrine is applicable only where the inculpatory facts, namely the possession of the stolen goods, is incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances that weaken or destroy the inference of guilt."*

The other circumstantial evidence, which was corroborated by the medical findings adduced by PW5, was the fact that the police upon the arrest of Mwangusya found that he had a cut wound on his face, matching the description of the injury PW2 testified he had inflicted on one of the assailants. the police testified that A3 disappeared from his usual place of abode after this incident; and was arrested much, much later.

The bullet found in the chamber of the gun was quite telling. As explained by PW4, either the gun had been cocked and the bullet had entered the chamber ready for firing; or it had been fired and a fresh bullet had entered the chamber automatically to replace the one fired. In the

circumstances of the case, it is more reasonable to infer that the bullet went into the chamber after firing of the gun.

For their part, the accused each set up the defence of alibi, stating that on the material night of the incident, each was at their respective homes; and also denied that they knew each other before their arrest and detention at Katojo prison. A1, who testified as DW1, denied that he had ever made a statement to police at all; hence the claim that he had named the other people as his accomplices was false. He also vehemently denied that any item was recovered from his house. A2 testified as DW2, stating that he had been arrested a year after the alleged robbery, and denied making any statement to the police; and further maintained that he was not aware of the reason his co-accused A3 had been arrested, or where A3 hailed from; and that because it was not his business, he was not bothered to know.

A3, who testified as DW3, for his part stated that he was arrested two years after the event. A critical examination of the defence case, alongside the prosecution evidence, does not present any alternative hypothesis, leave alone a reasonable one, or co-existing circumstance from which I could make the inference of possible exculpatory circumstance; and thereby throw doubt in my mind of the efficacy of the circumstantial evidence on record. The accused chose to make a blanket denial. I do not believe them one bit in any of their assertions. The recovery of the stolen items from them, the wound found on one of them answering to the description given by one of the victims, all satisfy me that the circumstantial evidence on record pin down the accused as the perpetrators of the robbery to which PW1 and her family were subjected on the material date.

For this reason then, I hereby make the finding, and in agreement with the lady assessors that the prosecution has, by proof beyond reasonable doubt, fully discharged the burden that lay on it to prove that each of the accused is guilty of the offence for which they have jointly and severally been indicted. I therefore accordingly convict each of them.

**Chigamoy Owiny – Dollo**
**JUDGE**