

IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL SESSION CASE NO. 89 OF 2011

UGANDA V ORWEI SIMON AND ENANGU DAVID

JUDGMENT BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

The accused persons are charged with robbery c/s 285 and 286 (2) of the penal code. It is alleged that the two accused persons on the night of 6th June 2010 at Abola Central village in Kaberamaido district robbed Edongu Alfred of various items, namely, metro lite stone, weighing scale, plastic chairs, utensils, a suitcase of clothes, and cash 2,000,000/..That immediately before or after the said robbery, threatened to use a deadly weapon, to wit, a gun on the said Alfred Edongu.

Prosecution was led by Mr. Jonathan Okello and later by Mr. Kunya, Resident State Attorneys. Accused persons were represented on private brief by Mr. Levi Etimu.

Assessors were Mr. Ochole Joshua and Amaso Christine.

Prosecution had a duty to prove beyond reasonable doubt the following In order for a charge of aggravated robbery to be sustained, the prosecution must prove that the accused persons stole property and immediately before or at the time of the stealing, or immediately after, threatened the complainant or used a deadly weapon on the complainant.

Whether a robbery took place

The case for the prosecution is that PW1 Edongu Alfred, the complainant, was at home with his wife Anatalio Asamo PW2 in the night of 6.6.2010. Soon after their dinner, PW2 Asamo took utensils to the kitchen. At this point, PW1 heard Asamo raise an alarm and on responding to the alarm, and as he moved to rescue her, he met Orwei A1 at the verandah who grabbed him, demanding for a metro lite stone. The witness responded he did not have it, whereupon Orwei pushed him to the ground, called on his partner in crime and the two poured some glue like substance in the mouth of the witness. An alarm was raised by Oyulu and Okim and the two assailants fled. That the two assailants pierced him on the head with a barrel of a gun and he sustained injuries.

According to the witness, no property was taken during this incident but the assailants returned the next day on 7.6.2010, and stole property although he was not at home that night.

PW1 Edongu was able to identify Orwei, his in law and village mate. However, the witness did not name the second assailant and also said Enangu David A1 was not in the dock, instead referring to him as Elochu.

In cross examination, PW1 said that in his police statement, he named five people as the assailants including Orwei Simon, Elochu, Enangu and Erimu.

The incident of 6.6.2010 is confirmed by Asamo Anatalia except that she mentions 7 p.m as the time when Orwei and others came to their compound demanding for a metro lite stone. According to the witness, she was assaulted and lost a tooth.

She recognized assailants as Orwei and Elochu. In cross examination, the witness said the assailants were brought by her son.

After the attack, she fled to the bush and on her return, from hiding; she found that property had been stolen. The witness came to court with the items that had been stolen. She showed court two plastic chairs, a small black suitcase, weighing scale and utensils which she said were handed to her by police.

With regard to use of deadly weapon, only PW1 Edongu mentioned he was assaulted on the head with a barrel of a gun while Asamo did not mention it in her testimony although she mentions it in her police statement, DExh. 5. PW4 although Det. Omache mentioned the toy gun but it was not produced in evidence.

From the foregoing analysis, I make a finding that the assault and attempt to steal a metrolite stone on 6.6.2010 took place accompanied by use of a deadly weapon. The fact that the property stolen in the night of 6.6.10 was recovered the next day 7.6.2010 is circumstantial evidence of burglary since it happened in the night . Hence, while there was attempted aggravated robbery of a metrolite stone, there was evidence of burglary of household property of Edongu.

Participation of accused persons

The defense attacked the credibility of the witnesses through their police statements.

In particular, the defense attacked PW2 Asamo's statement made on 7.6.2010 , Dexh. 4 that she did not recognize the clothes the assailants were wearing as it

was dark. In the same statement, Asamo suspects her son Erimu as the person who brought assailants. In her statement of 13.6.2010 Dxh. 5, it was at Bululu police post she learnt it was Orwei and others.

PW1 Edongu in his police statements reveals the identity of his attackers only at the third statement recorded on 14.6.2010, Dexh. 3. In the first and second statements recorded on 7th.6.2010 and 12.6.2010 respectively and marked Dexh. 1 and 2, Edongu refers to his attackers as unknown thugs.

From an evaluation of the evidence, the two witnesses PW1 Edongu and PW2 Asamo confirm an incident took place at their residence on 6.6.2010 at about 7 p.m in which A1 assaulted both witnesses demanding for a metro lite stone.

However, the defense case has raised grave doubts on the question of identification of the assailants. The stark contradiction between the police initial police statements of the two witnesses and their testimony in court is not to be glossed over as minor contradictions. In their initial statements, the two refer to the assailants as unknown thugs/people then days later, in additional statements, they identify the assailants to include Orwei. Obviously their credibility is brought into question by the different versions of statements to police .

In light of the changes in police statements from non-recognition of the assailants on 6.6.2010 in statements made on 7th June 2010 to identification on 13th and 14th June 2010 in additional statements renders the witnesses unreliable and likely to have been simply told the identity of the assailants rather than eye witness evidence. Indeed in her police statement of 13th June 2010, PW2 Asamo states

that at Bululu police post, she was told that their household properties were brought in by Orwei, Erimu, Eroku James and Ewechu Julious.

While in court, PW1 and PW2 assert they do not know A2 Enangu and instead refer to him as Elochu. Neither is there any mention of A2 Enangu David in their police statements.

The defense also raised issues of a grudge by PW4 Det. Sgt. Omache against A2.

With regard to PW3, Anyeto Mary, her testimony has no bearing to the charges against the accused persons in so as she states she was robbed yet the indictment is silent on her complaint. Briefly, she states that on 6.6.2010, the two accused persons whom she knew as Orwei a village mate and the second accused Elochu companion to A1, forced their way into her house, dragged her out while flashing torches. She was assaulted and tied with a piece of cloth. The evidence of PW3 has no bearing to the charges against the two accused persons and it will be disregarded.

With regard to the evidence of PW4, Det.sgt. Omache, he testified that he came to know the two accused persons on 7.6.2010 at Bululu police post. He received information that Edongu had been robbed and he also received information of stolen property . He rushed to Owido landing site where he arrested A2 Enangu , Elochu and Edworu Simon. He arrested the three and another police officer arrested Orwei.

The witness conducted a search of Orwei's house where he found a toy gun.

The gun was not exhibited in evidence.

The credibility of PW1 and PW2 having been brought into question coupled with the fact that the no stolen property was recovered with A1, casts reasonable doubt on the prosecution case.

In his defense, the accused person raised the defense of alibi except that he named Elochu, Enangu and Ebworu as persons who visited him the night of 6.6.2010.

In light of the weak prosecution case, the court will not make an adverse inference on the defense case especially when it attempts to shift culpability to co-accused persons.

From the foregoing evaluation of evidence, the prosecution has failed to prove beyond reasonable doubt that A1 participated in the attempted robbery of Edongu of 6.6.2010 and the subsequent burglary in the same night.

With regard to A2 Enangu, PW1 Edongu and PW2 Asamo did not know him and their evidence against him was based on what they were told at the police station, mainly, that he was one of those arrested at Owiny landing site with stolen property.

Although PW5 Det. Obache testified that Enangu A2 and others were arrested at the landing site with stolen property, the stolen property was never exhibited either at police or in court. Indeed, the witnesses carried the property they showed to court from their homes, and the prosecution did not apply to tender the property as exhibits.

This being the case, it is not possible for the court to make a finding that Enangu was found with stolen property as the said property was not preserved by police and neither was it tendered as exhibits.

I am in agreement with the two assessors that the two accused persons are not guilty of the offence charges. They are accordingly acquitted and released from custody unless lawfully held in connection with some other offence.

DATED AT SOROTI THIS 04th DAY OF APRIL 2014.

HON. LADY JUSTICE H. WOLAYO