

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT SOROTI
CRIMINALS SESSION CASE 26 OF 2012.

UGANDA V TUMWINE STEPHEN AND ELASU RASHID

JUDGMENT BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

The two accused persons are jointly charged with aggravated robbery c/s 285 and 286 (2) of the penal code in nine counts. I will reproduce the particulars of counts 1,2 &3 only because no evidence was led in respect of counts 4,5,6,7,8, & 9.

In count one, It is alleged that the two accused persons and others still at large on 12th June 2011 at Atigo forest, Alwa in Kaberamaido district robbed Opalakiro David three head of cattle valued at 2,400,000/ and at or immediately before or after, threatened to use a deadly weapon to wit a gun, on the said Opalakiro.

In count two, it is alleged that the two and others still at large, on 12th June 2011 at Atigo forest, Alwa in Kaberamaido district robbed Econyu Emmanuel one cow valued at 1,000,000/ and at or immediately before or after, threatened to use a deadly weapon to wit a gun on the said Econyu Emmanuel.

In count three, It is alleged that the two accused persons and others still at large on 12th June 2011 at Atigo forest, Alwa in Kaberamaido district robbed Emoru Francis two cows valued at 1,600,000/ and at or immediately before or after, threatened to use a deadly weapon to wit a gun on the said Emoru Francis.

Prosecution was led by Mr. Noah Kunya SSA, while the accused persons were represented jointly by Mr. Twarebireho on private brief and Mr. Ogire on state brief.

Assessors were Mr. Ocole Joshua and Ms Amoding Florence.

The prosecution had a duty to prove the following ingredients contained in sections 285 and 286 of the penal code. For purpose so of this case, the following definition will suffice.

1. The stealing or attempt to steal anything from any person and the use of violence or threat of violence immediately before or after the stealing in order to retain or obtain the thing, or to overcome resistance or prevent resistance to the stealing.
2. Possession of a deadly weapon whether or not it is used. It is immaterial if the weapon is an imitation provided it causes fear in the victim.

Prosecution relied on the evidence of three witnesses. PW1 Econyu Emmanuel together with PW2 Emoru Francis , PW3 Opalakira David and others maintained a communal kraal located at the home of late Enyau, where each of them owned cattle. PW1 Econyu owned one cow, PW2 Emoru owned two cows while PW3 Opalakiro owned three cows. All three prosecution witnesses attest to this fact. They all attest to the fact that the cattle in the kraal was herded by A1 Tumwine.

On terms of payment for the communal kraal, PW3 Opalakiro testified in cross examination that the owner of the kraal was his late brother Enyau who was the employer of A1 Tumwine and the three witnesses would surrender the milk from their cows and add an additional 70,000/ each which went to A1.

What seems to be in dispute is whether Enyau was alive during the theft of the cattle. While PW3 Opalakaliro said he died before the theft, PW1 Aconyu testified that Enyau was still alive by the time of the theft. The defence in cross examination of witnesses suggested that these witnesses were not credible because of such inconsistency but I find that it is a minor inconsistency that does not go to the root of the prosecution case as it has no bearing to the offence charged.

What is material is that A1 was in control of the kraal that contained cattle belonging to the three witnesses.

According to all witnesses whose testimony is similar in all material respects, on 212.6.2011 , they converged at the kraal in the morning to check on their cattle. On arrival, they were informed by A1's wife called Jane that he had taken the cattle to graze in the forest very early in the morning. The trio decided to follow A1 to the forest.

While in the forest, they all heard the sounds of cattle being beaten and some were mowing. They moved closer to an opening only to see Fuso lorry brown in color according to PW2 Emoru and red according to PW1 Econyu. It was described by the witnesses as bearing registration number plate UAN 221T.

On approaching the lorry, the trio observed that A1 and A2 , dressed only in trousers, were busy herding the cattle onto the lorry which was parked in such a way that an anthill was close to the back of the lorry to facilitate the herding of the cattle onto the lorry. Others assisting them were Ocan, and Elechu. The trio shouted to A1 'where are you taking our cows?'

As the trio started to move towards the lorry, at a distance of about 20 metres, two armed men in military uniform emerged. One of the men cocked his gun and ordered them to disappear, in Swahili. The trio then fled the scene and reported to the LC1 chairman and Alwa police post.

According to PW1 Econyu, the trio and a police officer went to the scene in Atigo forest but the lorry had left with cattle leaving behind only 12 head of cattle. Some of the cattle taken included one for PW1 Econyu, three cattle for PW2 Emoru and two cattle for PW3 Opalakiro.

According to PW1 Econyu, A2 Elasu gave a movement permit for the movement of the cattle in his capacity as vice Chairman of the area, a piece of evidence he got from A1 on the latter's arrest. However, I disregard this evidence on the grounds that it is hearsay.

I accept the rest of the evidence adduced by the prosecution on the grounds that the witnesses were forthright and their testimonies were on all fours.

In cross examination of PW1, the defence suggested that he did not own any cattle in the kraal as he was not certain whether he bought it from a businessman at an auction or from Enyau's kraal, or from Enyau's widow. PW1 did testify in cross examination as indicated. The fact remains that PW1 complained that his cow was among those stolen and in the absence of contrary evidence, I am satisfied that he lost a cow.

A1 was arrested from Kyankwanzi in the presence of PW1 who was in the company of a police officer in November 2011 and returned to Kaberamaido ..

In defence, the two accused persons made sworn statements in which they denied the theft. In particular A2 raised the defense of alibi that on the day of the theft of the cattle, he was at a crusade in Agama village, Kamuda sub-county having left for the crusade on 9.6.2011. He called DW3 Thomas Odero to confirm that they were at the crusade together. A1's alibi was that he left Enyau's place in 2011 for his home in Kyankwanzi from where he was arrested.

However in light of the solid prosecution case, I find that the two accused persons were placed at the scene of crime on 12.6.2011. I also find that they participated actively in the loading of cattle and therefore theft of cattle. I also find that the prosecution has proved beyond reasonable doubt that an armed man, who was part of the scheme to steal cattle with the two accused persons was in possession of a gun which he used to instill fear in the witnesses, the owners of the cattle being stolen. I find that although the two accused persons were not in

possession of a gun, which is a deadly weapon, the armed man was posted to stand guard for the two accused persons.

The theft occurred during daylight in the morning hours and in a clearing in the forest according to the prosecution witnesses hence there was no question of mistaken identity. In any case, A1 was responsible for herding the cattle and that he had taken them to the forest was confirmed by the three witnesses.

I am in agreement with the two assessors that the state has proved beyond reasonable doubt that the two accused persons on 12.6.2011 at Atigo forest, in Kaberamaido district, robbed the three complainants, Opalakiro, Econyu, and Emoru and during the said robbery threatened the three complainants with a deadly weapon. I accordingly convict both accused persons on counts 1, 2, and 3 respectively. They are acquitted of counts, 4,5,6,7,8, and 9.

DATED AT SOROTI 19TH DAY OF JUNE 2014.

HON. LADY JUSTICE H. WOLAYO