

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
HCT-06-CR-SC-0072 OF 2013

UGANDA..... PROSECUTOR

VERSUS

SSEMAGANDA MUHAMAD ERIAS.....ACCUSED

JUDGMENT

BEFORE: Hon. Lady Justice Margaret Tibulya.

The accused stands charged with aggravated robbery contrary to section 285 and 286 (2) of the Penal Code Act.

The brief facts are that in the night of 5th September 2012 the complainant **NAKABIRI WALIYA** was sleeping and at 3:00am she heard a voice of one saying that he had gone to kill her. She saw a man standing in the doorway to her bed room. He was wearing a mask. He flashed a torch at her and she went and pushed him. In the process the panga he had cut her finger. She ran out and the intruder followed her and hit her with the panga on the cheeks. When she told him that she was sick, he told her to keep quiet. She recognised his voice. The accused used to work at the hill on the road to Kalungu. She used to greet him whenever she would pass-by, and therefore knew his voice. She tried to enter a pile of bricks but he pulled her legs, held her neck and strangled her. He opened her legs and raped her. Pw3 (**Kayondo James**) who responded to an alarm saw the man who was wearing a white mask and had a panga.

The intruder later went away with Pw1's maroon suit case (**in which there 3 dresses, a pair of socks, a hand bag, a clock, a blanket and a pink towel**). She had known the accused for two years because they were at times praying in the same mosque.

The Pw1 reported the attack to the area chairman (Pw2 **Bukenya Vincent**) who in turn made a report to the police. On the basis that the accused had been seen putting on a mask and stealing people's things he was a suspect in this case.

According to Pw4 (**Akiror Florence**) the police searched and recovered a black blood-stained jacket, a panga, a stick, a torch with cells, a DVD player, bed sheets, a generator, table cloths and a mask which was under the bed, from the accused's house. They searched the area around the house and recovered a big blanket and a brownish suit case in which there were other properties

all identified as the complainants, about 30 metres from the accused's house. All recovered properties were taken to the police station and some of the other properties were claimed and taken by the people from whom they had been stolen. The exhibit slips and the various items that were recovered were allowed in court as exhibits P1 and P2-P6 respectively.

Further evidence was that the accused was living alone in the home from where the properties were recovered.

In his defense the accused denied the allegations. He said that nothing was recovered from his house. He said that Pw2 is the one who took the police to a forest **one kilometre** from his home and they came back for him later and told him to carry a blanket and a suit case which were in the forest. Journalists took pictures of the place from which they got the items. Those things were brought to his home, and together with a mattress, a generator, plates, cups, saucepans and jerricans got from his house, pictures of all those things were taken. All those properties were his.

His further evidence was that Pw2 (**Bukenya**) tore a rug and put it on his head and a picture of him putting on the rug was taken and put in the News Papers (**Exhibit D 1**).

Dw2 (**SanyuEneriko**) the accused's father said that he found when the accused had been arrested. By the time he arrived at the accused's home nothing had been recovered. Some properties were later recovered from the bush. The chairman (**Pw2**) is the one who led the police to where the properties were got, about 1 Km from the home.

Dw3 (**Naggayi Mariam**) wife of the accused testified that Pw2 (**Bukenya**) had grudge with the accused over the fact that while their shop which is opposite that of Pw2's mothers was doing well, the chairman's mothers shop was not.

BURDEN AND STANDARD OF PROOF

The prosecution bears the burden of proving the guilt of the accused person, and this, beyond reasonable doubt. The burden does not shift except in a few exceptions. This case does not fall in the exceptions, see **Woolmington vs. DPP (1935) AC 462, 481 & 482** which has been quoted with approval in **Tuwamoi vs. Uganda EACA 1967 P.84 at Page 97 and in Uganda vs. Joseph Tole 1978 HMB P 269.**

THE INGREDIENTS FOR AGGRAVATED ROBBERY.

1. Theft of property,

2. use or threat to use a deadly weapon during immediately before or immediately after the theft or robbery or causing death or grievous harm,
3. Participation of the accused.

THEFT

For theft to be proved there must be asportation (**carrying away**) of a person's goods without their consent, see **Sula Kasiira Vs Uganda Criminal APPEAL No.20 of 1993**. The complainant's evidence was that her properties were taken away by her assailant. Pw4 (**Akiror Florence**) said that the police searched the area around the accused's house and recovered a big blanket and a brownish suit case in which there were other properties all identified as the complainants. The fact that the recovered properties were the ones that had been taken from the complainant's home was not disputed. The fact that they were recovered a distance away from her house means they were moved to that place (**asportation**), under circumstances amounting to theft. The key ingredient of the offence of theft was proven.

THE USE OR THREAT TO USE A DEADLY WEAPON DURING IMMEDIATELY BEFORE OR IMMEDIATELY AFTER ROBBERY.

NAKABIRI WALIYA (Pw1) said that the intruder told her that he had gone to kill her and that he had a panga which cut her finger when she pushed him. He hit her with it on the cheeks and told her to keep quiet. He pulled her legs, held her neck and strangled her, then opened her legs and raped her. He went away with her maroon suit case (**in which there 3 dresses, a pair of socks, a hand bag, a clock, a blanket and a pink towel**). Pw3 (**Kayondo James**) also said that the man had a panga.

The above evidence was not disputed. The accused only denied having participated in those events. A panga does have to be proved beyond common knowledge that it is dangerous. The threat to use it was in the fact that he had it at the time and as such the complainant must have felt threatened. Moreover, he said he had gone to kill her, and in fact used it to hit her. There is evidence that the assailant took away properties after the attack. Those pieces of evidence sufficiently prove the ingredient.

PARTICIPATION OF THE ACCUSED.

The prosecution sought to rely on three main pieces of evidence in this regard. The first was voice and height identification by the complainant. The second was the fact that the recently

stolen properties were recovered near the accused's home, and lastly that he was a known thief who was wearing a mask in his escapades during that period.

The voice and height identification.

Voice identification evidence is relevant so long as it is shown that the witness had some close connection, (though not necessarily direct), with the accused person reasonable enough to be able to identify him by voice, only that there seems to be the need for other evidence to support the voice identification evidence.

In Sabwe Abdu Vs. Uganda ((Crim. Appeal No. 19 Of 2007)) [2010] UGSC 15, where the victims were familiar with the appellant because he lived about a quarter of a mile from their home and they always passed by his home as they went to school and used to hear him speak to other people, and further the appellant also used to go to their home where they would hear him speak to their father, the girls were found able to identify the appellant by voice even if they had never directly talked to him. The court also noted that to identify a person's voice, one does not necessarily have to have talked with that person.

In **Moses Kasana Vs. Uganda Criminal Appeal No. 12 of 1981** it was held that

“Where the conditions favouring correct identification are difficult, there is need to look for other evidence whether direct or circumstantial which goes to support the correctness of identification and to make the trial Court sure that there is no mistaken identification...”

In this instant case the complainant said that she at times used to pray with accused in the same mosque. Further that she used to by-pass and greet him while he was digging by Kalungu road. This evidence was also not challenged. Her claim that she knew his voice was therefore well founded. On the basis of the above authority this was sufficient interaction as to enable the complainant to identify the accused by voice, the only injunction being that the court has to look for other evidence to support the voice identification evidence before convicting the accused.

As regards the accused's height, nothing peculiar was pointed out about it that would set him apart from any other person, as to form a basis for an adverse finding.

THE ACCUSED WAS THE ONLY KNOWN HABITUAL THIEF WHOSE METHODS INVOLVED THE USE OF MASKS.

The fact that following the lead, a mask was recovered from the accused's house is relevant to the issue of participation by the accused in the robbery. I did not believe that it was a coincidence.

PROPERTIES RECENTLY STOLEN FROM THE COMPLAINANT WERE RECOVERED FROM NEAR THE ACCUSED'S RESIDENCE.

In Bogere Moses & Anor vs Uganda Cr. Appeal No. 1 of 1997 (SC) it was held:

“It ought to be realised that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of possession, the evidence is even stronger and more dependable than the eye witness's evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the latter solely depends on the credibility of the eye witness.”

In the later case of Siragi & Another vs. Uganda (supra) the doctrine of recent possession was further clarified:

“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 starting point for the application of the doctrine of recent possession, therefore, is proof of two basic facts beyond reasonable doubt; namely, that the goods in question were found in possession of the accused and that they had been recently stolen.” (emphasis mine).

It should be remembered that in this case the stolen properties were found in a bush near the house in which the accused lives with one Mzee Karamagi. According to the prosecution they were found about 30 meters from the accused's house, while according to the defence, they were 1 kilometre from his house. I believed the prosecution account that the properties were recovered about 30 meters from the accused's house. This evidence was given by police officers who had no reason to incriminate the accused beyond ensuring that the ends of justice are met.

Even if I proceeded on the understanding that the properties were found in a distance of 1Kilometer from the accused's house, I would still, in the circumstances of this case, make an adverse finding against the accused.

Such finding is based on the fact that the reason the accused was a suspect in the first place, that he had been seen wearing a mask yet the assailant was putting on a mask, was proved to have been with basis, given that a mask was indeed found under his bed. This evidence was not challenged.

To put it clearly, I did not find the following facts to have been mere coincidences;

- a. The intruder was putting on a mask, yet a mask was recovered from under the accused's bed.
- b. The victim identified the intruder by his voice to have been the accused, and then her stolen properties were found in the vicinity of his house.
- c. On the one hand the intruder had been putting on a long black jacket, and during the attack there was a struggle in which the victim was cut and she bled. On the other hand, the long black jacket recovered from the accused's house bore blood stains.

The link between those pieces of evidence is clear, and it persuades me to believe that the voice identification evidence was accurate, and to conclude that the accused before me was the intruder.

On the evidence that the complainant identified the accused by his voice, that a mask was found under his bed yet the assailant had been putting on a mask, and that the recently stolen properties were found in the vicinity of his home,I find that the accused's participation in the commission of the offence was sufficiently proved.

I don't agree with the gentleman assessor who advised me to acquit the accused. Some of the reasons he gave for his opinion were not backed by the evidence on the record. The assertion, for instance, that the chairman (**Pw2**) is the one who led the police to where the properties were got, about 1 Km from the accused's home is not backed by evidence. It was advanced by the accused and his witnesses and not put to Pw2. He was not given a chance to accept or deny it. The only conclusion is that it was an afterthought only meant to assist the accused.

The fact that the complainant did not mention that she had identified her attacker does not, for example, water down the evidence that her properties were recovered from near the accused's home, or that a mask was found under the accused's bed.

Moreover, considering the circumstances the complainant went through it is understandable if she failed to name her attacker to the people she first interacted with. I saw how distressed she was even in court, crying during her testimony. It should be remembered that she was raped and disgraced during the attack. I can't base on the fact that she did not name her attacker at the earliest opportunity to make an adverse finding.

In agreement with the gentlemen assessor who advised me to convict, I find the accused guilty and convict him of the offence of aggravated robbery contrary to section 285(2) of the Penal Code Act.

Margaret Tibulya

Judge

19thMay 2016.