THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CR – SC – 148 OF 2014

UGANDA.....PROSECUTOR

VERSUS

TUMUKUNDE SULA.....ACCUSED

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

The accused is indicted for aggravated robbery **C/S 285** and **286(2)** of the Penal Code Act. That on 5th March 2015 at Kizungu, Nyamwamba Division, Kasese District, he robbed Muhindo Anna of a mobile phone valued at Shs. 40,000/= and immediately before the said robbery, used a deadly weapon to wit a stone, and caused grievous harm on the said victim. The accused denied the offence and raised a defence of alibi. He gave sworn evidence. Prosecution brought 4 witnesses and the defence brought only the accused person.

The state is represented by Ojok Alex Michael, Regional Principal State Attorney – Fort Portal and Counsel Kizito Deo on state brief for the accused.

Burden of proof

It is a requirement by the law that the prosecution must prove its case beyond reasonable doubt because the accused has no duty to prove, his innocence (**Article 28** of the Constitution). (See: **Woolmington v D.P.P. [1935] AC 462. Uganda v Joseph Lote [1978] HCB 269**).

It is our principle of the law that an accused person should be convicted on the strength of the case as proved by prosecution but not on the weakness of his defence. (See: **Insrail Epuku s/o Achietu v R [1934] I 166 at page 167**).

Standard of proof

Prosecution must prove its case beyond reasonable doubt. Any doubt in the evidence shall be resolved in favour of the accused.

Section 286 (2) of the Penal Code Act provides that;

"Notwithstanding subsection (1) (b), where at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death."

Ingredients of the offence

The essential ingredients of the offence of aggravated robbery are the following:

1. That there was theft of property.
2. That there was use of violence or threat to use violence.
3. That the assailants used or threatened to use a deadly weapon.
4. That the accused participated in the offence.

Whether there was theft of property:

In the instant case the prosecution witnesses told Court that the accused is the one that stole a phone that belonged to PW4 and the said phone had been given to PW3 who was watching a movie off it with other children. The state in his submission stated that the phone was grabbed by the accused from PW3 and he ran away with it.

Counsel on state brief on the other hand submitted that the evidence of PW3 who is the person that had the phone and the only eye witness was tainted with lies and grave inconsistencies as his testimony did not rhyme with any of the other prosecution witnesses' statements. PW3 told Court that the accused had run after him and snatched the phone from him however; all the other prosecution witnesses told Court that the phone had been left on the slab after the accused had started throwing stones at the children while they watched a movie. The said phone was left behind as the children ran away to save their dear lives.

The accused in his defence did tell Court that he was at his home at the time of the incident and therefore did not steal any phone. The accused had also told the persons who came to his

home to arrest him that he had no knowledge of the stolen phone whereof he was beaten and later on taken to Police.

The prosecution witnesses also maintained that when the accused was asked about the phone, he denied having stolen it or knowing its where about.

It is my opinion that the prosecution did not prove this ingredient beyond reasonable doubt as the only eye witness had a different story from the rest of the prosecution witnesses and the said witnesses being PW1, PW2, and PW4 who got the narration of the incident from PW3 the eye witness. I am mindful of the fact that eyewitness' testimony was different from those of all the other prosecution witnesses, therefore uncorroborated in anyway. All the other prosecution witnesses gave evidence that was only hearsay and this is not credible or reliable evidence in the circumstances, therefore, I will not put it into consideration.

Whether there was use of violence or threat to use violence:

The accused was said to have hit the victim with stones before he stole the phone. The medical evidence as tendered in Court indicated that the victim had tenderness on the scalp where as PW5 told Court that the victim had an open wound the time they came to report the incident to Police. The two pieces of evidence are inconsistent.

The said report was issued on 7/3/2016, and the medical examination carried out on 9/3/2016. The medical report therefore bears two different dates and one wonders which the correct date is, since the father of the victim PW1 confirmed to Court that the medical examination was carried out on 9/3/2016. The inconsistency as to dates on the medical form creates doubt in one's mind as to whether the assault actually did take place. I find that the prosecution did not prove this ingredient either.

Use or threatened use of deadly weapons:

As for the use of a deadly weapon, under **Section 286 (3) (a) (i)** of the Penal Code (Amendment) Act 2007 a deadly weapon includes any instrument made or adopted for shooting, stabbing or cutting or any imitation of such instrument.

In the instant case it was alleged that the accused used stones however, none were exhibited in Court to sustain this allegation.

Whether the accused participated in the theft:

Evidence of visual identification:

The Supreme Court of Uganda and its predecessors have in a number of leading cases elaborated on the principles to apply in cases where the guilt of the accused person depends on evidence of visual identification. A few of those leading cases are: **Abdalla bin Wendo & Another versus R (1953) 20 EACA 116; Rovia versus Republic (1967) EA 583; Tomasi Omukono & Another versus Uganda, Criminal Appeal Case No. 4 of 1977; Abudala Nabulere & Others versus Uganda, Criminal Appeal No. 10 of 1977; Moses Kasa versus Uganda, Criminal Appeal No. 12 of 1981.**

The above principles are laid down in the case **Walakira Abas & Others versus Uganda, Supreme Court Criminal Appeal No. 25 of 2002 (Unreported).**

"The Court may rely on identification evidence given by an eye witness to the commission of an offence, to sustain a conviction. However, it is necessary, especially where the identification be made under difficult conditions, to test such evidence with greatest care, and be sure that it is free from possibility of a mistake. To do so the Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification. Before convicting solely on strength of identification evidence, the Court ought to warn itself of the need for caution, because a mistaken eye witness can be convincing, and so can several such eye witnesses."

Generally, the following factors have been said to affect the quality of identification:

1. Length of time the accused was under observation by the witness.
2. Distance during observation.
3. A type of light aiding visualization.
4. Familiarity of the witness with the accused person: (See: **Abdulla Nabulere versus Uganda [1977] HCB.)**

Conditions which may not favour correct identification include;

1. Where assailant covered the whole of his or her face with a hat or camouflage.
2. Where the assailant was said to have threatened the victims with death so much so that in fear or panic, they could not recognize their assailant.

3. Where the assailants were too brief at the scene to be recognized by any one. (See: **Kasibante Yahaya versus Uganda; Court of Appeal Criminal Appeal No. 65 of 1998. Nyanzi Stephen versus Uganda; Court of Appeal.**

The accused also raised a defence of Alibi and the law regarding an alibi is that where an accused person sets it up, he does not assume the burden of proving it. The burden of disproving the alibi remains on the prosecution; and the prosecution discharges that burden by leading cogent evidence that places the accused at the scene of crime at the time of the offence. (See: **Sekitoleko Versus Uganda (1967) E.A 531**).

From the evidence on record, and the grave inconsistencies I am inclined to believe that the evidence of the prosecution witnesses is a concoction and a pack of lies. The prosecution witnesses must have taken advantage of the fact that the accused was known to them to frame him of the said offence since no credible evidence has been led to prove that he actually did commit the offence. The prosecution totally failed to place the accused at the scene of crime.

Doctrine of recent possession:

The doctrine of recent possession is cardinal evidence especially in proof of offence against property like theft and robbery. The doctrine was well stated in the case of **Kasaija versus Uganda; Supreme Court Criminal Appeal No. 12 of 1991** as follows:-

"The doctrine of recent possession, a species of circumstantial evidence, is that if an accused is in recent possession of stolen property, for which he has been unable to give reasonable explanation, the presumption arises that he is either the thief or the receiver of the stolen goods, according to the circumstances. Hence once the appellant has been proved to have been found in recent possession of stolen property, it is for the accused to give reasonable explanation. He will discharge this onus on the balance of probabilities, whether the explanation could reasonably be fine, if he does so then an innocent possibility exists which negatives the presumption to be drawn from the other circumstantial evidence."

In **Mbaziira siragi & Another versus Uganda [2007] HCB Vol. 1 HCB 9** the Supreme Court held inter alia that:

"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 the 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. The starting point for the application of the doctrine of recent possession is proof of two basic facts beyond reasonable doubt, namely that the goods in question were found in possession of the accused and they had been recently stolen. In re-evaluating the evidence adduced against each appellant (accused) Court must consider it from two perspectives; namely whether the evidence proves that the found items (or any of the items) were stolen during the robbery in question, and whether any of the appellants was in possession of any of the found items."

In relying on the doctrine of recent possession the prosecution adduced the evidence from PW3 that the phone was grabbed from him by the accused who had been seen loitering around earlier that evening. The victim told Court that he reported the theft to his father, and the owner of the phone and they proceeded to go and arrest the accused. However, PW4 the owner of the phone confirmed to Court that the PW3 was not present when they went to arrest the accused not to mention the different narrations of what the accused was found doing at the time he was going to be arrest. All the prosecution witnesses told Court that the accused was not found with the phone even after a Police search. The Police even then never tracked the said phone to concretely prove that the accused is the one that stole it or was found with it or traced to him. The prosecution was therefore unable to prove that the accused was found with the stolen phone nor was the stolen phone ever recovered.

Grudges

The accused in his defence told Court that Michael had approached him, in a bid to have the accused sell his land which apparently was a good site, to a Congolese who was Michael's friend of which the accused refused. In the circumstances I find that the prosecution witnesses had a grudge with the accused.

It is my considered opinion that the prosecution did not prove the offence of aggravated robbery beyond reasonable doubt against the accused. The evidence on record is insufficient to have the accused convicted of the same. There were a number of inconsistencies in the evidence of the prosecution witnesses. I am also in agreement with the assessors that the accused should be acquitted for lack of evidence on the charge of aggravated robbery against him. He is acquitted and set free.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

10/11/2016

Delivered in open Court in the presence of;

1. Counsel on State Brief – Kizito Deo
2. Prosecutor – Ojok Alex Michael – Regional Principal State Attorney
3. Court Clerk – James
4. Assessors

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OYUKO. ANTHONY OJOK

JUDGE

10/11/2016