

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0059 OF 2015

UGANDA **PROSECUTOR**

VERSUS

PIWUN ALEX alias MUZEE **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is indicted with two counts of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that accused on the 5th day of February 2013 at Nyangeze River, Vur Parish in Nebbi District, in Count 1; robbed Obonyo Musa of a Senke motorcycle, and in Count 2; Munguriek James of shs. 10,000/= and at or immediately before the said robberies threatened to use a deadly weapon, to wit, a gun on the said Obonyo Musa and Munguriek James respectively.

The prosecution case briefly is that on the 5th day of February 2013, P.W.4 Opio Swaldo sent the two complainants to Nebbi Town aboard his Senke motorcycle, to tow back from a mechanic, another motorcycle of his which had broken down. On their way back, Obonyo Musa was riding the Senke motorcycle which by a sisal rope towed the broken one while Munguriek James sat atop the latter. At around 8.00 pm when they reached Nyangeze River valley, as they began their ascent out of the valley, they were suddenly stopped by two men who emerged from the bush ahead of them. One of the men was in army full camouflaged uniform and armed with a gun which he pointed at them and ordered them to stop. Obonyo Musa stopped but left the motorcycle engine running and the headlamp on. The armed robber approached the motorcycle, turned off the lights and the ignition and removed his cap. He ordered his colleague to tie the two complainants up. The second assailant used a rope which he had to tie their legs and their hands with the one they had used to tow the broken down motorcycle. He dipped his hands into their pockets and took shs. 10,500/= and a handkerchief from Munguriek James, while the armed assailant kept them at gun point throughout that ordeal. The two assailants then boarded the

Senke motorcycle and rode away into the night. The two complaints soon thereafter managed to untie themselves and using his mobile phone which he had stealthily thrown onto the ground as soon as the robbers stopped them; Munguriek James called Opio Swaldo to notify him of the robbery. Opio Swaldo together with two other people immediately boarded a motorcycle and rode in the direction the robbers were said to have taken in an attempt to intercept them but crashed along the way, thereby giving up the chase.

When the incident was reported to Nebbi Police Station the following morning, P.W.5 AIP Chorom Kennedy suspected the accused to have been involved in the robbery. He arranged for his arrest at Zeu Health Centre III in Zombo District where he had gone for treatment. The accused was brought to Nebbi Police Station, where an identification parade was organised on 8th February 2013 by P.W.3 D/IP Okee Billy Boss. At that parade, the two complainants identified the accused as one of the robbers and he was charged accordingly. In his defence at the trial, he stated that on the night of 5th February 2013, he was at Songoli Village in Zombo District at the funeral vigil for his deceased relative John Onen. The first time he came to know of the offence was when he was arrested on the morning of 6th February 2013 as he came out of Zeu Health Centre III where he had gone for treatment. His alibi was supported by his mother D.W.1 Oling Terezina. At the close of the trial, the learned State Attorney Mr. Emmanuel Pirimba submitted that all the ingredients of the offence had been proved beyond reasonable doubt and therefore the accused should be convicted as charged. In response, defence counsel on state brief Ms. Winfred Adukule argued that the prosecution had failed to disprove the alibi set up by the accused since the evidence of identification was not free from error and mistake and hence the accused should be acquitted. In their joint opinion the assessors advised the court to acquit the accused stating that although the first three ingredients of the offence had been proved, the evidence of identification was unreliable.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution

bears the onus to prove the ingredients of the offence beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of Aggravated Robbery, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Theft of property belonging to another.
2. Use or use threat of use of violence against the victim.
3. Possession of a deadly weapon during the commission of the theft.
4. The accused participated in commission of the theft.

That theft of property belonging to another occurred in this case requires proof of what amounts in law, to asportation (that is carrying away) of the property of another without his or her consent. The property stolen in this case is alleged to be a Senke motorcycle, and shs. 10,000/= In this the prosecution relies on the evidence of P.W.2 Obonyo Musa one of the victims and P.W.3 Munguriek James the other victim. They explained how these items were taken from them when they were stopped at a deserted place in a valley by two assailants. This is corroborated by P.W.4 Opio Swaldo the owner of the stolen motorcycle who had sent them to pick another that had broken down. He received a call from P.W.3 immediately after the robbery and he attempted to pursue the robbers but was involved in an accident along the way. Failure to recover the items allegedly stolen does not, in itself, negate the fact of theft. Both witnesses provided sufficient description of the items and I am not in doubt that they were stolen from them. Counsel for the accused did not contest this ingredient during her final submissions. Considering the evidence as a whole relating to this element and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that on the night of 5th February 2013 at Nyangeze River, Vur Parish in Nebbi District, a Senke motorcycle was robbed from Obonyo Musa and shs. 10,000/= from Munguriek James.

The prosecution further had to prove that during the said theft, the assailants used or threatened to use violence against the victims in order to effect the theft or to escape arrest. In this regard, the prosecution relies on the oral testimony of the two victims P.W.2 Obonyo Musa and P.W.3

Munguriek James. They explained an ordeal that took about ten minutes during which they were tied up, threatened with being shot, and the brandishing of a gun at them by the assailants. Counsel for the accused did not contest this during her final submissions. Considering the evidence as a whole relating to this element and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that the assailants used or threatened to use force to effect the theft.

It also had to be proved that at the time of the robbery, the assailants had a deadly weapon in their possession. A deadly weapon is defined by section 286 (3) of *The Penal Code Act* as one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. A gun or an imitation of a gun is a deadly weapon within the meaning of that provision. To prove this element, the prosecution still relies on the evidence of the two victims P.W.2 and P.W.3. They described the weapon they saw by the aid of the motorcycle head lamp as a rifle. It does not matter whether or not it was an actual gun or a mere imitation. Counsel for the accused did not contest this during her final submissions. Considering the evidence as a whole relating to this element and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that that the assailants had a deadly weapon in their possession during the robbery.

Lastly, the prosecution had to prove that the accused participated in commission of the offence. The prosecution achieves this by adducing evidence placing the accused at the scene of crime not merely as a spectator but an active participant in its commission. The accused put up the defence of alibi. He was at Songoli Vilage in Zombo District that night at the funeral vigil for his deceased relative John Onen. This alibi was corroborated by the testimony of his mother, D.W.1. He has no duty of proving this alibi. It is the duty of the prosecution to disprove it. Any weaknesses in his defense cannot be relied upon to fill gaps in the prosecution case but may only be used to corroborate an otherwise strong prosecution case against him.

To disprove his defence, the prosecution relies on the evidence of two identifying witnesses; P.W.2 and P.W.3. However, eyewitness evidence is not always perfect. Even the most well-intentioned witnesses can identify the wrong person or fail to identify the perpetrator of a crime.

To sustain a conviction, a court may rely on identification evidence given by an eye witness to the commission of an offence. That notwithstanding, it is necessary, especially where the identification is made under difficult conditions, to test such evidence with the greatest care, and be sure that it is free from the 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.

In the instant case, there was light from a motorcycle headlamp going uphill and the light must have had considerable elevation aided by the gradient of the slope. However, none of the witnesses had seen the assailants before. Both assailants suddenly emerged from the bush and the identification was done at night at around 8.00 pm, with the aid of light from a motorcycle headlamp that was switched off soon after the witnesses were stopped. It was a dark night without any mention of moonlight by either witness. The scene was dark surrounded by bush and a banana plantation. The circumstances were stressful involving threats of death and brandishing of a gun. The assailant was wearing a cape which he removed only shortly before the lights were switched off when he came to within two metres of the witnesses. The duration of that time was estimated at only four minutes. He kept at a distance of about three metres from them as the other assailant tied them with ropes. The presence of a weapon during an incident could have drawn the witnesses' visual attention away from other things, such as the perpetrator's face, and thus affected their ability to identify the holder of the weapon. Some of the features they remember about the assailant such as an oval face and a protruding Adam's apple do not match the appearance of the accused in the dock. In the circumstances, I find that the factors unfavourable to correct identification far outweigh those in favour to the extent that I am unable to conclude that this purported identification of the accused at the scene by the two witnesses was free from the possibility of error or mistake.

This was followed by an identification parade conducted three days later on 8th February 2013 at Nebbi Police Station. The testimony of both P.W.2 and P.W.3 and that of the accused in his defence revealed that some of the guidelines were flouted such as; all participants were suspects brought out of the police cells to participate in the parade. The voluntary participation of persons drawn from police cells is doubtful. The accused was not advised of his right to choose attire for

the parade. He was instead required to appear bare chest at the parade along other bare chest suspects drawn from the police cells acting as volunteers. The accused stood out as the tallest in the parade, a number of participants were of lighter complexion than him and a number were much shorter and bigger than him. He was required to change positions after each identifying witness rather than advised that it was his choice. Although P.W.3 D/IP Okee Billy Boss stated that he followed the guidelines in organising the parade, I consider his statement to be based on defensive self interest. I am inclined to believe the witnesses he brought to identify the accused who in court pointed out all these flaws. Being lay people, they had nothing to defend about the propriety of the parade and narrated what they saw as they saw it. The guidelines exist to guarantee conduct of a fair and reliable identification procedure. They outline how a neutral, fair and reliable identification parade should be conducted. In light of these flaws, the credibility of the result of this parade is highly doubtful.

Similarities of persons lined up in the parade should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics. P.W.3 was under a duty to eliminate any extreme variations in height, which he does not appear to have done. Volunteers should not be known to the witness, yet there is no assurance on the evidence before me that this was the case. The suspect should be allowed to pick his own position in the line-up yet this was not assured of him. To protect the integrity of the identification procedure, the administrator must remain neutral throughout the procedure so as not to, even inadvertently, suggest a particular line-up member to the witness. Measures should be taken to diminish the opportunities that the witnesses have of talking to each other before or immediately after the identification procedure. They can be kept in separate rooms before and after the identification, or an officer can sit with the witnesses to ensure they do not speak about the process or the case, or the witnesses can be allowed to leave immediately after participating in the procedure, or the witnesses can be taken to separate areas after the identification procedure for further interviews with detectives. The procedure should create a neutral environment, free of inadvertent cues from the administrator of the parade.

The veracity and reliability of the entire outcome of the identification evidence is further cast in doubt considering the prosecution evidence regarding the circumstances in which the accused

was arrested. According to P.W.5 AIP Chorrom Kennedy, when he received the report of the robbery, the accused immediately came to his mind as the prime suspect. This was because the family of the accused had before moving to Zeu in Zombo District lived close to Nebbi Police Station. During their stay in Nebbi, this family was notorious for criminal activity. The previous day, the accused had been cited in Nebbi Town by an unnamed person and he came to this conclusion not on the basis of positive identification by that person but rather on basis of the description of the appearance of the person who had been sighted. It is on that account that he communicated with the O/c of Zeu Police Post to arrest the accused. He later went to Zeu Police post to re-arrest the accused, brought him to Nebbi Police Station and instructed P.W.3 D/IP Okee Billy Boss to arrange an identification parade.

Article 23 (1) (c) of *The Constitution of the Republic of Uganda, 1995* provides the guarantee that no person should be deprived of personal liberty except, *inter alia*, upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda. Arrests should be based on reasonable suspicion. Reasonable suspicion is a standard, which requires the existence of more than a hunch, something more than an inchoate and un-particularised suspicion, but considerably below preponderance of the evidence. There should be a particularized and objective basis for suspecting a person of criminal activity. The circumstances that led to the arrest of the accused ought first to have met that standard as a justification for subjecting him to an identification parade. However in this case, the arrest was based on a mere hunch and an apparent prejudice harboured fairly or unfairly, against the family of the accused by P.W.5 who in his own admission had in 2012 caused the arrest of the accused in similar circumstances following which the accused was prosecuted and acquitted for lack of proper identification. There was absolutely no particularized and objective basis for suspecting the accused of criminal activity in the instant case as well.

The criminal justice system has separated the four functions of investigations, prosecution, adjudication and corrections for exactly this reason; to prevent a perversion of criminal justice by the personal prejudices, subjective decision making and the pursuit of private interests of persons to whom the different roles are conferred. The investigative function is entrusted to the Police Criminal Investigations Department, the prosecutorial function to the Directorate of Public Prosecutions, the adjudicative to the Judiciary and corrections to the Prisons Service. The first

three organs provide checks and balances against each other as the case leaves one level to proceed to the next. At each level, there is a clear and defined standard designed to aid objective decision making. The standards are designed to ensure that criminal justice is administered in the public interest. Such a distinction is meant to enhance the necessary vigilance required to maintain objectivity throughout the entire proceedings. At each level, there is need to develop and encourage best practices, consistency, transparency and accountability. Decisions at each level are guided by established standards directed at ensuring more transparency and avoidance of abuses caused by idiosyncratic decision-making where discretion is exercised on the basis of stereotypes and prejudice. Decisions made on the basis of clear and fair standards promote equality within the criminal justice system.

At the level of investigations, the standard on basis of which arrests are justified is that of “reasonable suspicion.” The principal components of a determination of reasonable suspicion will be the events which occurred leading up to the decision to arrest. The question is whether these historical facts, viewed from the standpoint of an objectively reasonable police officer amount to reasonable suspicion.

This standard has preoccupied many a judicial mind. For example in *R v Smith (Joe)* [2001] 2 Cr App R 1; [2001] 1 WLR 1031, Otton LJ, delivering the judgment of the Court of Appeal, stated at page 5; “To establish a reasonable suspicion it is not necessary for a police officer to possess evidence which amounts to a prima facie case: see *Dunbell v. Roberts* [1944] 1 ALL ER 326). In *Hussein v. Chong Fook Kam* [1970] AC 942, PC, Lord Devlin in the Privy Council stated as follows at p. 948: “Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.” In *O'Hara v. Chief Constable of Royal Ulster Constabulary* [1997] AC 286, Lord Steyn at 293C stated: “... information from an informer or a tip-off from a member of the public may be enough.”

Therefore, there is only a limited amount that has to be proved in order to establish a reasonable suspicion. This is an objective test and not a subjective test. Lord Hope in *O'Hara* adopted with approval the dicta of Sir Frederick Lawton in *Castorina v. Chief Constable of Surrey* (*The Times*,

June 15, 1988): “suspicion by itself, however, will not justify an arrest. There must be a factual basis for it of a kind which a court would adjudge to be reasonable.” While suspicion can take into account matters which could not be adduced at all, for example, hearsay, reasonable suspicion has come to mean more than bare suspicion. The fact that this standard deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime. However, it is no justification for acting on mere conjecture, guesswork, hunch, idea, impression, notion, supposition, and surmise or idiosyncratic decision-making where the discretion to arrest was exercised on the basis of stereotypic thinking and prejudice as appears to have driven P.W.5 in the instant case.

This standard is supervised by the Directorate of Public Prosecutions under the powers conferred by Article 120 (3) (a) of *The Constitution of the Republic of Uganda, 1995*. This subsequent prosecutorial oversight applies the “probable cause” standard in sanctioning charges preferred by the police. A charge is not sanctioned except where the State Attorneys are satisfied that; (1) there was a reasonable suspicion of a criminal offence having been committed on basis of which the arrest or investigation has occurred, (2) there is credible evidence that has been assembled at the preliminary stage of the investigation implicating the suspect in committing that offence; and (3) on basis of the objective, ascertainable facts assembled so far, there are reasonable prospects that further evidence implicating the suspect will be discovered. This “probable cause” standard which guides the supervisory role prevents indiscriminate and discriminatory breaches of privacy and liberty interests by ensuring that the police have an objective and reasonable basis for interfering with an individual’s reasonable expectation of privacy and liberty.

Commenting on this role in *R. v. Regan (2001)*, 161 C.C.C. (3d) 97, Mr. Justice Binnie wrote as follows at para. 137;

I agree with the trial judge as a matter of law that the Crown prosecutors must retain objectivity in their review of charges laid by the police, or their pre-charge involvement, and retain both the substance and appearance of even-handed independence from the police investigative role.

Justice Binnie described three related but distinct components to the concept of “Minister of Justice”: The first is objectivity, that is to say, the duty to deal dispassionately with the facts as

they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including police and the defence. The third, related to the first, is lack of animus, either negative or positive, towards the suspect or accused. The state is expected to act in an even-handed way. The advisory role is focused on assessing credibility, the strength of the evidence, and explaining this to the investigator, as opposed to being investigative in nature.

To a State Attorney, probable cause exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that further evidence of a crime will be found. State Attorneys are the local Ministers of Justice, serving the public interest independently from police, victims and accused, charged with dealing objectively and even-handedly with facts to obtain justice for all. To sanction a charge, the State Attorney should be guided by the probable cause standard. On the facts of this case, there was a failure in the application of this standard. A charge based only on mere conjecture, guesswork, hunch, idea, impression, notion, supposition, or surmise such as that P.W.5 expressed in his testimony should not have been sanctioned.

The next safeguard is provided by the “reasonable prospects of securing a conviction” standard which guides the Directorate of Public Prosecutions in the decision whether or not to commit an accused person to the High Court for trial. The decision to prosecute should take into account the sufficiency of evidence and an assessment of public interest. The screening process also requires State Attorneys to determine whether the investigation is complete. The decision to prosecute / commit for trial must be based on an assessment of whether there is a reasonable prospect of conviction. The state is required to have sufficient evidence to believe guilt could properly be proved beyond a reasonable doubt. This objective standard is higher than a “prima facie” case which merely requires that there is evidence upon which a reasonable tribunal, properly instructed, could convict, but it does not require ‘a probability of conviction’, that is, a conclusion that a conviction is more likely than not.

Although a State Attorney does not have to be personally convinced beyond a reasonable doubt of an accused person’s guilt in order to proceed with a prosecution, no prosecution is justified unless the State Attorney is personally satisfied on the available evidence, that the accused is

guilty. Many State Attorneys would feel uncomfortable proceeding where they had a genuine doubt as to guilt. In such cases the prosecuting State Attorney should meet with the more experienced colleagues to determine whether the prosecution should proceed. State Attorneys are expected to vigorously pursue provable charges while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction. If during the trial new information comes to light which impacts on the reasonable prospect of conviction (for example, a recantation by a witness, other witnesses emerging, new expert evidence or alibi evidence) the case must be reassessed and an appropriate decision taken.

This constant re-assessment is important in light of the provisions of Article 120 (6) of *The Constitution of the Republic of Uganda, 1995* which renders the exercise of prosecutorial discretion non-reviewable by the courts. The basis for this protection has several justifications: the independence required by State Attorneys which fosters and protects the neutrality they require to perform their role as ministers of justice; review of the charging decision would consume a great deal of judicial time and cost; judicial officers may be ill equipped to address the variety of considerations involved in the decisions to charge or prosecute; and excessively close scrutiny by the courts would create a chill in the exercise of discretion in controversial cases. In the instant case though, even after the testimony of P.W.5, when it became apparent that the entire case was founded on mere conjecture, guesswork, hunch, idea, impression, notion, supposition, surmise and stereotypic thinking that resulted in idiosyncratic decision-making on the part of P.W.5, the prosecution was unable to re-assess the case and take the appropriate action, such as was expected of them in a case like this. The series of safeguards failed the accused in this case.

As matters stand, the court was obliged to evaluate the evidence of identification generated at the identification parade with that background in mind. There is no evidence that the identifying witnesses were cautioned before being ushered before the suspects, that the person who committed the crime may or may not be in the line-up. This caution addresses the possibility of a witness feeling any self-imposed or undue pressure to make an identification. For that reason, inadvertent cues from P.W.3 D/IP Okee Billy Boss before and during the parade or inadvertent suggestions towards a particular lineup member to the witnesses or the possibility of the witness having felt self-imposed or undue pressure to make an identification cannot be ruled out. The

possibility that the witnesses could have felt compelled to identify a person with the closest similarities to the assailant they had seen rather than on basis of positive recognition too cannot be ruled out. In the circumstances, I consider it unsafe to convict on basis of a substantially flawed process that was unfairly skewed against the accused from the very beginning, right at the time of arrest.

Defence counsel vehemently contested this element in her final submissions. Having considered all the available evidence, I find that the prosecution evidence has failed to disprove the alibi set up by the accused person. The prosecution has as a result failed to prove that the accused participated in the commission of the offence. In agreement with the assessors, I find that the prosecution has failed to prove the case against the accused person beyond reasonable doubt and I accordingly find him not guilty and hereby acquit him of the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. He should be set free forthwith unless held for other lawful reason

Dated at Arua this 8th day of February, 2017.

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Stephen Mubiru
Judge.