

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KASESE
HCT – 01 – CR – CS – 0086 OF 2016

UGANDA.....PROSECUTOR

VERSUS

SSENFUKA IBRAHIM
ISIMA SSENKONGA
KALANZI ADAM

.....ACCUSED

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

Judgment

The accused were indicted with two counts, Count I of Aggravated Robbery Contrary to **Sections 285 & 285 (2)** of the Penal Code Act, and Count II of Conspiracy to commit a Felony Contrary to **Section 390** of the Penal Code Act.

It was alleged that the accused persons and others still at large on 10th April at Bwera, Kasese District robbed Bwambale Enos of 14605 Kgs of unprocessed coffee valued at UGX 50,230,000/=, mobile phone worth UGX 70,000/= and cash UGX 160,000/= and during the robbery caused grievous harm on the said Bwambale Enos.

Secondly, the accused persons conspired to commit a felony to wit aggravated Robbery.

The accused persons all denied the charge on both two counts.

The prosecution produced 9 witnesses to prove their case, three Police Form 24s in respect of the medical examination of the accused persons were admitted in evidence under **Section 66** of the Trial on Indictment Act as Exhibit PE₁, PE₁₍₂₎, PE₂ and one Police Form 3 as Exhibit PE₄.

A1 produced one witness, A2 produced no witnesses other than himself and A3 also produced one witness. In total the defence produced 5 witnesses.

Kiiza Anna Resident Senior State Attorney appeared for the State and Counsel Edgar Tukahabwa for the accused on State Brief.

Summary of evidence

The prosecution case:

PW1 was the Doctor that examined A1 and A2 and found them of sound mind.

PW2 was the medical personnel that examined A3 and told Court that he too was of sound mind.

PW3 Bwambale Enos told Court that he first saw the accused persons when they came asking for jobs at his work place which was to transport coffee to Kampala. That on the fateful day they loaded the coffee and he went along with them to Kampala on the instructions of his manager. During the voyage the vehicle was stopped whereof A1 and A3 pulled him out of the vehicle, slapped him and carried him to the bush and chloroformed him. PW3 however, confirmed that only A2 was present when they were loading the vehicle with coffee and only heard about A3 in Court which contradicted his earlier statement.

PW4 Gera Bosco, told Court that only A1 was known to him because he is the one that came with a driver and a tata lorry, they loaded the same and were paid money for hiring the lorry. That on the fateful day he was called by PW3 informing him that they had gotten a puncture but then never got any other communication until 14/4/2014 when he saw PW3 staggering in Bwera town. PW3 was then taken to Hospital and a complainant lodged at Police. PW4 further told Court that he was given A2's number by a Police Officer from Kampala who told him that he was linked to the theft of his coffee. A2 was known to PW4 as a broker of trucks and Lorries. PW4 then reported to Police and A2 was arrested together with A3 at his hotel. PW4 confirmed to Court that A2 pleaded with him that he had been given UGX 2M but he did not know how A3 was arrested.

PW5 Timothy Muke, the medical personnel that examined PW3 confirmed to Court that the time he examined the victim, he was not mentally stable at the time he came to him.

PW6 D/CP Alex Arinaitwe, told Court that only A2 was known to him. That he found out as per his assignment that A2 was linked to the theft but during arrest he was found with A1 and since A2's physical appearance was not known to the arresting officers both persons were arrested. However, during the identification A2 was singled out as the broker that took the lorry to the factory to load coffee.

PW7 Kibuka Mbaaga, told Court that it was A3 that sold to him Coffee on 14/4/2014 at Kyazanga Trading Centre through Mzee Kasaija that he always bought coffee from and A3 was paid through Centenary bank and also by cash.

PW8 Hakim Adam, the Investigating Officer told Court that on 22/4/2014 the Police flying squad arrested A1 who led Police to the whereabouts of the lorry. A1 was arrested in Kawempe and was later transferred to Kasese Police Station and confessed to the theft and the involvement of A2 and A3 in the same.

PW9 Kabanyoro Dianah, a banker confirmed to Court that A3's bank account received large sums of money on various dates and had a balance of UGX 40m.

The defence case:

A1, A2, and A3 all denied committing the offence and raised a defence of alibi.

A1 brought one witness **DW4 Kabugho Yamula** who told Court that on the fateful day she was with A1 who is her husband.

DW5 Kalanzi Musa testified on behalf of A3, his father confirming that the accused was with him in the store on that fateful day and they do sell produce among which is coffee.

Burden of proof:

In determining this case this Court is mindful of the fact that the burden of proof is on the prosecution to prove all the elements of the offence beyond all reasonable doubt. The burden never shifts save in a few cases provided for by the law. Even where the accused sets up a defence, it is still upon the prosecution to prove that nonetheless, the offence was committed. (See: **Uganda versus R.O 973 Lt. Samuel Kasujja & 2 Others Criminal case 08/92**).

To prove Aggravated Robbery the prosecution has to prove the following elements of the offences:

1. There was theft of property.
2. Use of actual violence at, before or after the theft or that the accused caused grievous harm to the complainant.
3. The assailants were armed with a deadly weapon before, during or after the theft.
4. The accused participated in the robbery.

It is trite law that all the above ingredients ought to be proved beyond reasonable doubt since all the ingredients go hand and glove. Therefore failure to prove one is failure to prove all: (See: **Walakira Abas & Others versus Uganda: Supreme Court; Criminal Appeal No. 25 of 2002 (Unreported)**).

Ingredients:

Whether there was theft of property:

Section 254 (1) of the Penal Code Act provides that:

Theft occurs when a person fraudulently and with intent to deprive the owner of a thing capable of being stolen, takes that thing from the owner without a claim of right.

In the instant case coffee was stolen and sold off that belonged to PW4 and the commission of this offence was witnessed by PW3 who fell victim. There is no doubt that there was theft of property.

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

PW3 told Court that he was slapped and chloroformed. This was corroborated by the evidence of PW4 who took him to hospital and PW5 who examined him and found that his mental state at the time was not normal and that PW3 had been beaten and had injuries. In the

circumstances I find that there was violence used in the commission of the offence of aggravated Robbery.

Use or threatened use of deadly weapons:

Section 286 (2) of the Penal Code Act, provides that a deadly weapon includes;

”an instrument made or adapted for shooting or cutting, and any imitation of such instrument”.

In the instant case there was no proof that there were any deadly weapons used thus; this ingredient was not proved beyond reasonable doubt.

Whether the accused participated in the theft:

In the instant case it was the testimony of PW3 as the only eye witness that A1 participated in the commission of the offence. PW4 told Court that it was A2 that brought the hired lorry since he was a broker and A1 did participate in the loading of the vehicle and went with the coffee to Kampala. PW7 told Court that it was A3 that sold to him the coffee in Kyazanga.

It is my considered opinion that the accused persons were properly identified as the culprits in the commission of the offence of Aggravated Robbery.

In the case of **Walakira Abas & Others versus Uganda, Supreme Court Criminal Appeal No. 25 of 2002 (Unreported)** it was held that;

“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.”

In this case the commission of the offence was during the day, A1 was seen at the factory at the time he came to pick the coffee, helped in loading the same and when pulling PW3 out of the lorry which created close proximity and these were people who were travelling together, thus, there was no issue of mistaken identity. A1 was also identified by PW4 when he came to pick the coffee and loaded the same at the factory and this was in the morning hours.

In regard to A2, this is the person that approached PW4 to hire to him a lorry to transport his coffee and was also know to PW3 as a broker.

A3 was identified by PW7 who directly dealt with him in the sale of the coffee.

Although there were other people involved in the robbery who were never arrested, each of the accused persons is deemed to have committed the offence under the doctrine of common intention as per **Section 20** of the Penal Code Act, **Andrea Abonyo & Others versus Republic [1962]1 EA 542 (CAN); Opoya versus Uganda [1967]1 EA 752 (CAK)** and

Isingoma versus Uganda [1986-89]1 EA 155 (SCU). The intention of the accused persons can be inferred from their actions. (See: **Birikadde versus Uganda [1986] HCB 6.**

The accused persons in the instant case all raised a defence of alibi. The accused has the duty of raising the defence but has no duty of proving it. Prosecution bears the duty of destroying the defence by putting the accused at the scene of crime at the time the offence was being committed.

The accused persons gave their evidence, A1 and A3 even brought witnesses to aid them in their defence however I observed the demeanour of DW4 and she did not seem truthful by her conduct. She was laughing about like, it was a joke and not a serious matter. I did not find her credible and nor her evidence reliable.

The evidence of DW5 was also full of contradictions and false hoods.

In the circumstance I find that all the accused persons were sufficiently proved to have participated in the offence of aggravated Robbery by the Prosecution.

COUNT II CONSPIRACY: contrary to **section 390** of the Penal Code.

The offence is committed when there is an agreement between two or more persons to prosecute an unlawful purpose. In this case theft is the offence.

In the instant case from the testimony of PW4 I find that there was a conspiracy between the accused persons who paid A2 to hatch the plan. It was also the testimony of PW8 that A2 and A3 joined in along the way after A1 had left with the driver heading to Kampala. PW8 also told Court that A2 while at Police confessed to having committed the offence and that was in conjunction with A1 and A3.

In agreement with the opinion of both assessors, I find that the prosecution proved the guilt of the 3 accused persons beyond all reasonable doubt. I therefore find each and every one of them guilty of the offence of Aggravated Robbery Contrary to **Sections 285 and 286 (2)** of the Penal Code Act as Count I and Conspiracy to commit a felony Contrary to **Section 390** of the Penal Code Act as Count II and I convict them as indicted.

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OYUKO. ANTHONY OJOK

JUDGE

03/04/2017

State: Michael Kwesiga State Attorney holding brief for Resident Senior State Attorney – Kiiza Anna.

Count I:

No previous record. However, A3 is facing trial in other Courts in Uganda. The offence of Aggravated Robbery is rampant within this jurisdiction. The manner in which this particular offence was committed was very brutal, leaving the victim Bwambale Enos with permanent mental damage as testified by the Doctor, there is need to protect the business community from the acts of the convicts. The offence carries a maximum of a death sentence in Count I and Count II carries maximum of 7 years. A custodial sentence is available on Count I. The convict needs to pay the cost of the stolen coffee because it has not been recovered. The convicts in Count I should be sentenced to the highest custodial sentence and on Count II sentenced as indicted and an order of compensation of the stolen coffee be made, as having sold the coffee and obtained proceeds the convicts should pay the money on top of custodial sentence prayed for.

Edgar T:

No medical proof that Enos Bwambale is suffering from permanent mental damage and for charges in other Courts there is no proof. All the convicts are of advanced age, A1 is 53 years, A2 is 54 years, and A3 is 64 years. A1 and A2 have been on remand for over 2 years and 11 months, A3 has been on remand for 1 year and 11 days. A1 has a family of two children and 2 wives, suffers from ulcers and back complications, A2 is a family man, has a diabetic wife and 7 children. A3 has a family of 19 children and 3 wives; he is diabetic, has a paralyzed leg and suffers from ulcers. This should be taken into consideration. Pray for a lenient custodial sentence of 10 years.

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OYUKO. ANTHONY OJOK

JUDGE

03/04/2017

Court:

This is a serious offence which attracts a maximum sentence of death and should be discouraged. However, I have taken into account the time the convicts have been on remand, their advanced age, their sicknesses, and families. I therefore sentence each of them to 10 years imprisonment on Count I and on Count II I sentence each of them to 5 years

imprisonment and also to refund the money worth UGX 50,460,000/= upon completion of their sentence. Both sentences will run concurrently.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

03/04/2017