

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT RUKUNGIRI
CRIMINAL CASE NO.01 OF 2014

UGANDA

PROSECUTOR

VERSUS

MUTUNGI IVAN alias TUMUKUNDE IVAN

ACCUSED

BEFORE HON.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

The accused was charged with murder contrary to sections 188 and 189 of the Penal Code Act. He was in the same charge sheet charged with Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act.

The Prosecution alleges that on the 4th June 2011 at Nyamiyaga Village in Rukungiri District, the accused murdered Namanya Andrew and on the same date robbed shillings 200,000/-, exercise books, three bars of soap, salt and other items from Taremwa Anthony.

The Prosecution called Taremwa Anthony(PW1), Natukunda Abias(PW2) and Namanya Hillary(PW3) as witnesses. The accused did not call any witness.

PW1 Taremwa Anthony narrated to Court that on the 4th June 2011 at about 7.30 pm he was walking home with Natukunda Abias and Namanya Hillary when they met the accused and another person sitting on the road side. Each of them carried different items they had received from their grandfather. The accused stood in the middle of the road and ordered them to surrender what they carried. PW1 resisted and the accused drew a long knife from his jacket which he used to cut PW1's left arm. PW2 and PW3 dropped the items they had and ran away.

They reunited at a home in the neighborhood from where PW1's bleeding hand was tied with a piece of cloth and they were escorted to the nearby trading center from where their parents were contacted. A report of the robbery was made to Rukungiri Police which referred PW1 to Nyakibale hospital where he was admitted for four days. PW1 further told Court that while they were still at the trading centre they heard of a murder committed at the spot they had earlier been robbed from. PW1 told Court that the deceased, Namanya Andrew had been following them on the road but they did not know that he was the person who had been murdered.

PW1 told Court and the Police that he had recognized the attacker as the accused who had grown up on the same village with them before selling his land to migrate to an unknown place. His evidence was that the whole incident took about 10 or 15 minutes and there was bright moon light which enabled him to positively identify the accused whom he had known for a long time.

PW2 and PW3 restated what PW1 had told Court the only variation being that PW2 added that she also recognized the accused by his voice since she used to talk to him before he sold his land to migrate from their village. PW2 however denied identifying the accused in her Plain statement to Police but later qualified it saying that she feared to disclose it because she feared to be arrested by Police when she identified the knife used to murder Namanya Andrew as the one the accused used to injure PW1. She thought she would be called as a witness in the murder case yet she did not witness it.

PW2 clarified to Court that the accused had come back to the village and was staying with his grandmother at the time the robbery took place. All the witnesses told Court that their home was near the paths the accused used to go to his garden and they had known him for a long time.

PW4 Detective Assistant Inspector Turamy Frank was on the 5th June 2011 assigned to investigate the murder of Namanya Andrew. He proceeded to the crime scene where he saw the body with a knife stuck in the left ribs. PW4 was told by people at the scene that they heard a person calling for help at about 8.00pm on the 4th June 2011 but nobody had responded. He further learnt that other people had been robbed at the same spot earlier on and one of them had been admitted at Nyakibale hospital.

The witness interviewed PW1 from hospital and was told it was the accused who had carried out the robbery. PW2 led PW4 to the spot where the robbery took place and also identified the knife used to kill Namanya Andrew as the one used to injure PW1 in the robbery.

The witness narrated to Court that the accused disappeared from the village until he was arrested after a few days from Buyanja trading centre. The accused claimed to be sick and was admitted at a local health centre from where he disappeared from a Police guard until he was re-arrested in another robbery in 2013. At the time this case was heard, the accused was a convict serving a sentence in the later robbery case.

The accused denied participating in the robbery and murdering Namanya Andrew. He however conceded that the victims of the robbery knew him well since they used to live on the same village before he relocated to Mitooma District after selling his land in November 2011. The accused denied escaping from Police custody but claimed he had been given Police bond by PW4 in 2012. The accused confirmed to Court that he was a convict in another robbery case committed in 2013.

Counsel opted not to make submissions and invited Court to rely on the evidence by both sides to reach a decision.

In all criminal trials the Prosecution bears the burden to prove all ingredients of any offence beyond reasonable doubt and this does not shift to the accused save in instances provided for by the Law. It is also trite that Court cannot convict an accused on the weakness of the defense evidence but on the strength of the Prosecution case.

In order to secure a conviction on the murder charge, Prosecution is required to prove that Namanya Andrew was unlawfully killed by the accused and with malice aforethought. The

ingredients for the offence of Aggravated robbery to be proved by the Prosecution are theft of property by use of violence or the threat to use violence by the accused. It must also be proved that the accused carried a deadly weapon during the commission of the robbery.

It is worth noting that no witness testified to the murder of Namanya Andrew. The only nexus between his death and the accused was the knife allegedly used to injure PW1. All the witnesses claim to have seen the accused with a long knife which PW2 identified as the one found stuck in the deceased's ribs. The knife was not exhibited in Court which omission I do not find fatal to the Prosecution case since Court can convict even in the absence of a murder weapon.

See: S. Mungai Vs R (1965) EA 782 at 787.

The witnesses told Court that the deceased came following them on the road before they were robbed at about 7.30 pm. They did not tell Court how far behind the deceased was from them. The incident took 10 to 15 minutes it was stated in Court. Residents heard a person calling for help at about 8.00 pm and no one responded. Those who allegedly heard the person calling for help were not brought to Court as witnesses. No one told Court that it was the deceased calling for help.

The witnesses did not tell Court how much time they spent at the home from where PW1 received first aid and the time they took to arrive at the trading center from where they heard of the murder of a person they later came to know was Namanya Andrew.

In **R Vs Dalip Singh [1943] 10 EACA 21** it was held that

“the test used in determining whether two offences were founded on the same facts is the proximity in time between the commission of the two offences.”

The Prosecution evidence as to the sequence of events does not meet the test laid out in the above binding authority and this Court is not inclined to convict the accused on the hearsay evidence by PW4. It is safe to presume that no one knows at what time the deceased was murdered and by which person. The accused is thus acquitted on the murder charge.

All the Prosecution witnesses positively identified the accused as the attacker on the 4th June 2011. They all claim it was about 7.30 pm but there was bright moon light. The witnesses were all certain about the dark clothing and cape the accused was putting on and they were about one meter away from him when he ordered them to surrender what they had. PW1 readily revealed his name to Police from hospital on the 5th June 2011. PW2 told Court that the accused had returned to their village and was staying with his grandmother at the time the robbery took place.

The accused on the other hand raised an alibi that he was in Mitooma District at the time of the alleged robbery but used to return to the village whenever his grandmother required him around. The evidence by PW2 to the effect that the accused was staying with his grandmother was not at all challenged in cross examination. The accused readily admitted that the witnesses had known him for a long time.

Considering all the above and the time the whole incident took, i' am inclined to believe the version by the Prosecution witnesses that the accused was positively identified at the scene of crime. The circumstances created no room for a mistaken identity. The person they all did not identify was the second person who remained sitting and did not confront them.

I find it pertinent to comment on the allegation that PW4 granted bond to the accused person in response to the accusation that he escaped from lawful custody. If this Court were to believe that PW4 released the accused on Police bond it did not amount to being discharged as a suspect. A Police bond is conditional with a reporting schedule which the accused ought to have complied with.

There is no dispute that property was robbed from the victims. The order to surrender the property the witnesses were carrying to the accused followed with the injury to PW is sufficient evidence of the use of force. A knife as the one used to injure PW1 is a deadly weapon. I find that the Prosecution has sufficiently proved all the ingredients of the offence beyond reasonable doubt.

I do not agree with the assessors who advised me to convict the accused on both charges. The Prosecution failed to prove the murder charge. I find him guilty on the charge of Aggravated Robbery contrary to Sections 285 and 286 (2) of the Penal Code Act and I accordingly convict him.

Moses Kazibwe Kawumi

Judge

11th May 2017.