

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA**

AT ENTEBBE

HCT-00-CR-SC-0721-2016

UGANDA :::::::::::::::::::: PROSECUTOR

VERSUS

1. GEORGE OGWAL (A1)

2. ANDREW AGEM (A2) :::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE J. W. KWESIGA

JUDGMENT:

The two accused persons above are indicted under Section 285 and 286 (2) of the Penal Code for Aggravated Robbery.

It is alleged that Ogwal George (A1), Agem Andrew (A2), Angulu Sten and others on 11th April 2015 at Lubowa, Makindye, Wakiso District being armed with a gun and a hammer robbed Nsubuga Emmanuel of a motor vehicle Registration No. UAW 125V, Land Cruiser Prado, blue in colour and at or immediately before or immediately after the time of the said Robbery used physical violence to the said Nsubuga Emmanuel.

The two Accused persons pleaded not guilty and a full trial was conducted. Although the summary of evidence and the indictment has 4 Accused persons, that is including Angulu Steven (A3) and Acir Jacob Ezira, the last two people were not produced or talked of by the prosecution as to what became of them.

This does not affect prosecution of A1 and A2 because each person has his or her criminal liability.

Ms. Awelo Sarah appearing for the Defence on state brief submitted rightly, in my view, that the burden of proof is on the prosecution to prove all the elements of the offence beyond reasonable doubt. That is the legal

position. The elements of the offence that the prosecution must prove the following elements of the offence:-

1. That there was theft of property.
2. That there was use of actual violence at, before or after the theft or that the culprit caused grievous bodily harm to the complainant.
3. That the culprit was armed with a deadly weapon during the theft.
4. That the Accused person participated.

In order to secure a conviction of the Accused person, the prosecution must prove each and every essential element of the offence that the Accused person is charged with beyond reasonable doubt. Any doubt as to the guilt or otherwise of the accused person must be resolved in favour of the accused person. See:- *Woolinaton Versus DPP (1935^ A.C 462*. The accused person shall be convicted on the strength of the prosecution case and never on the weakness of the defence or lack of defence. See:- *Israel Epulu S/O Achielu f:934^ EACA 166*.

I will examine the evidence on each element of offence. The defence in final submission conceded that the prosecution proved all the other elements of the offence except participation.

It is the duty of a trial court to evaluate the evidence received in the trial and come to its own findings and/or conclusion on whether a particular fact has been proved. This is so because at times the trial Advocates in the trial may deliberately mislead the court or genuinely made erroneous submissions. Cases, always, are proved by evidence and not by submissions however, good they may appear or sound.

PW2, Nsubuga Emmanuel is the victim of the robbery. He was the driver of motor vehicle Registration Number UAW 251V which was robbed from him. He was asked for the vehicle, a land cruiser for hire by one Jacob, and agreed to hire and drive the said Jacob and his group at Ug. Shs. 200,000/= per day.

This witness negotiated for the motor vehicle with Jacob and Al Ogwal George (the tall man).

He drove Jacob and Al to Entebbe. From Entebbe he drove them to Mukono. On the way to Mukono they stopped at Jokas hotel where they were joined by another person with a bag. They drove up to a home at Katosi.

In Katosi, Al got out, entered a house, returned with a suit carrier. Jacob, Al and another man asked PW2 to drive them to Lubowa and they reached Zana at 7:00 p.m

Jacob was seated next to the driver while Al and another were at the back seat.

The two (Al and another) grabbed him from the back, tied him with a rope, pulled him to the back, and drove the car. He saw Jacob with a gun and threatened to shoot PW1. He was hit with what sounded as a hammer. He got a cut on the head and started bleeding. They threw him off the vehicle and drove away.

They took the car, money, his telephone and identity cards. The car was not recovered. He had spent the day driving them from 8:30 a.m up to 7:00 p.m, so he knew them by face.

Under cross-examination he stated, he was called by Jacob who also called Al and he stayed with them throughout the day.

PW3,D/C Masereka Nelson told court it was Al who disclosed that he was with A2 Agem Andrew whose gun he used to rob the car. He said a gun was recovered from the home of A2. He stated:- "***—we found a bag under the bed. On opening it, there was a gun, b/ack in colour with a magazine plus 20 rounds of ammunitions: We brought them and handed them to head of the investigations, Maxwell for further investigations***

However, the second accused person denied ever being searched or a gun being found in his possession as alleged by this witness. It is noted that no search certificate was produced which would have shown the particulars of the gun recovered and witnesses who were present when the alleged search and recovery of this important exhibit was recovered.

I have examined the whole evidence and I have found nothing that supports the allegations that A2 Agem was found with a gun hidden or kept at his residence at Kyebando or elsewhere.

AIP, Ogaba Woard (PW1) attempted to adduce evidence of an alleged confession by A2, Agem was rejected after a trial within a trial on grounds that it was obtained after torturing Agem A2.

This evidence of PW1 became useless. The state called no further evidence. The final defence by A1 was total denial. He admitted knowing A2 before the arrest and used to call him on his telephone.

A2 denied the charges. He stated that he was never taken for search at his residence. No gun was recovered from him.

In the opinion of the Assessors, the state failed to prove the case against the Accused persons. I have examined the available evidence and I am satisfied that the prosecution evidence proved the fact that theft of a motor vehicle took place and a great deal of violence was used against PW2, Nsubuga (the victim of the robbery. He was tied with ropes. He was hit with a weapon that rendered him senseless. He was thrown out of the car believed dead and the car was taken away. He suffered grievous bodily injuries. The instrument used was a deadly weapon.

I have considered the quality of evidence of identification by PW2, Nsubuga and I have found it not sufficient for the following reasons.

- (i) First and foremost, this was a very poorly investigated case which has been Aggravated by failure to produce the alleged exhibits that would have supported PW3 Masereka's allegations of linking A1 to A2 in the alleged criminal acts.
- (ii) No Investigating Officer was called to testify as to why these very persons were arrested and why the other two people in the indictment were left out.
- (iii) The victim was a single identifying witness who was not favoured for correct identification despite the fact that he was carrying his attackers for many hours for the following reasons
- (a) Throughout the trip and before the trip he was acquitted with one Jacob who sat in the front seat while the other people sat at the back and he had no close opportunity to master their faces.
- (b) There was no independent corroborative evidence that was desirable particularly because he did not know his attackers before.
- (c) Amuriat Robert (PW1) who connected the victim to Jacob did not know any of those two Accused persons.
- (d) The Accused person's explanation that they were on a different charges but only fixed them on this particular case after police failed to investigate the case created doubt in whether this was prosecution in good faith.
- (e) The summary of evidence, basis of the indictment suggested that A1 & A2 were involved in various robberies using a gun. ***"Al led police to the recovery of the said gun No. 12125 (ANC.1970) BAR 7794) with 25 rounds of ammunition from A2 Agem Andrew"***. As much as this was not brought in the trial, it is part of the summary of evidence attached to the indictment on which this trial is founded and therefore, part of the state pleadings. Contrary to this, D/C Masereka stated that they were led A2 to Kyebando. ***"We went to Kyebando, he opened***

the house, we entered, we found a bag under the bed, there was a gun, black in colour with 20 rounds of ammunitions

I have already observed that these alleged exhibits were not produced. PW4 must have told court lies. He produced no search certificate where he would have signed, the accused person would have signed, LCs or Landlord would have signed to witness the search. No other officers named as present or signed. There is no evidence of these being exhibited.

In my view, these ought to have been two independent cases and the accused person were conveniently put on this charge sheet and imprisoned without proper links to the robbery complained about by Nsubuga, PW2.

The prosecution has totally failed to prove beyond reasonable doubt that these two accused persons robbed Nsubuga of the alleged car. They are hereby acquitted but shall be kept in prison pending trial of the case pending at the High Court at Mukono as disclosed and conceded to in the defence.

ORDER:

A1 and A2 are acquitted but remanded for lawful reasons stated above. Dated this **11th** day of **June 2018** at Entebbe.

J. W. Kwesiga

HighCourt Judge

11/06/2018