

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO.1229 OF 2016

UGANDA

PROSECUTOR

VERSUS

1. (A1) MAGERO PATRICK

2. (A2) GUDOI DAUDA

3. (A3) CPL.GULOBA MICHAEL

ACCUSED

4. (A4) KALYANGO DAVID

BEFORE HO.JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

Magero Patrick(A1),Gudoι Dauda(A2),Corporal Guloba Michael(A3) and Kalyango (A4) hereinafter called the accused were indicted on four counts.

The accused were indicted for Aggravated Robbery contrary to sections 285 and 286(2) of the Penal Code Act. It is alleged that on the 22nd March 2016 at Kitala-Kikaya,Kawempe Division,the accused and others at large robbed a one Ahimbisibwe Sadiq of shillings 2,500,000/= and at or immediately after the said robbery used a deadly weapon, to wit a gun against the said Ahimbisibwe Sadiq.

The accused were also indicted for Murder contrary to sections 188 and 189 of the Penal Code Act .The Prosecution case is that on the 22nd March 2016 at Kitala-Kikaya,Kawempe Division,the accused and others at large with malice aforethought unlawfully killed Ahimbisibwe Sadiq.

In the third and fourth counts, the accused were indicted for Attempted Murder contrary to section 204 of the Penal Code Act. Particulars are that on the 22nd March 2016 at Kitala-Kikaya, the accused attempted to cause the death of Komakech Ockerson and Nuwahereza Sumaya.

The accused denied the offences and in a bid to prove its case, Prosecution lined up thirteen witnesses whom i will herein after refer to by their respective witness numbers. The witnesses are; Dr.Karungi Sam(PW1),Dr.Ojara Santos(PW2),Komuhangi Agnes(PW3) ,Katugume Phiona(PW4),Komakech Ockerson(PW5),Nuwahereza Sumaya(PW6), Naturinda Elias(PW7),D/AIP Mugisha John(PW8), D/CPL.Okello Michael Jackson(PW9), D/C Wabwire Allan(PW10) ,Atukwasa Jaffari(PW11) ,D/Seargent Muhumuza Richard(PW12) and Dr.Rodrigo Nyinoburyo(PW13).

At the commencement of the trial, the Prosecution and Counsel for the accused agreed to admit in evidence a Postmortem report on the body of the late Ahimbisibwe Sadiq. The exercise was carried out by PW1 on the 23rd March 2016. The cause of death was reported to be the gunshot wounds. All the accused were also medically examined by PW2 and their respective reports were admitted in evidence.

Prosecution evidence .

Komuhangi Agnes (PW3) operated a kiosk near the shop of the late Ahimbisibwe Sadiq and was at work on the 22nd March 2016. She told Court that she left her work place at about 5.00pm and went to a nearby bar for a chat with a friend for about 30 minutes. She saw A1 in the same bar drinking a soda sitting just close to where they sat with the friend. Later at about 6.30 pm, PW3 saw A1 standing near her work place looking in the direction of Ahimbisibwe's shop.

At about 8.30 pm as she worked, PW3 heard a loud bang and she ran towards the shop thinking it was an electricity short circuit but as she approached she heard another bang. She then realized the bursts were from gunshots as she saw A1 holding a gun with another man standing behind him. PW3 ran back and hid near the kiosk from where she saw A1 shooting Ahimbisibwe who was standing near the entrance to the shop. The man behind A1 jumped Ahimbisibwe and entered the shop. A1 later left followed by the other man and would shoot in the air whenever he heard people raising an alarm..

In cross examination, PW3 told Court that there were three bulbs that enabled her identify A1. There was one inside the shop, one at the entrance and one at the mobile money kiosk close to the shop. PW3 told Court that she did not properly identify the man behind A1 who jumped into the shop after Ahimbisibwe was shot. She however confirmed that it was A1 she saw in the bar and later stood near her kiosk talking on phone as he looked at the shop premises.

Katugume Phiona (PW4) also sold chips in a kiosk near Ahimbisibwe's shop. On the 22nd March 2016, she saw A1 passing by her kiosk at about 5.00pm. Later at 7.00pm, PW4 saw A1 standing near her work place facing Ahimbisibwe's shop. She asked him if he wanted any assistance but got no response. Later at about 8.30 pm, PW4 saw A1 in a jacket with a cape on the head ordering customers to leave the shop and soon thereafter heard gun shots.

PW4 then ran to her house at the back of the building followed by a man he identified as A2 who entered the shop from the behind door. When PW4 returned A1 was walking away shooting in the air whenever he heard people calling for help. She told Court that a man known as Komakech and Ahimbisibwe's daughter called Sumaya were injured by the assailants. In cross examination, PW4 confirmed that she saw A1 on three occasions on that day and told Court that there was bright light from the bulbs in and outside the shop. She further told Court that she later identified A1 and A2 at an identification parade conducted by Police at Kawempe.

Komakech Ockerson(PW5) had gone shopping at Ahimbisibwe's shop where he found many customers. As he waited to be served,a man shouted telling customers to move away, he heard a gunshot and realized he had been shot in the right leg. He looked behind and saw A1 with a gun standing behind him.PW5 ran through the shop to the back of the building as he heard more gun shots. When he later returned to the scene,he saw Ahimbisibwe's body at the shop entrance and learnt that Sumaya had also been injured in the fracas.

PW5 and Sumaya were taken to Mulago hospital for treatment. The right leg was operated and on the 6TH April 2016 visited a clinic managed by PW13 who examined him and filled Police Form 3A on which the sustained injury was classified as "*grievous harm.*"

Nuwahereza Sumaya (PW6) was serving customers in the shop with Ahimbisibwe when A1 came and told customers to move away. PW6 told Court that she was shot in the foot as she ran behind to PW4's house through the back door. Ahimbisibwe remained in the shop and she saw his body after the assailants had left the premises.A1 was putting on a jacket and a cape on the head according to PW6 and the shop was lit by bulbs. On the 5th April 2016,PW6 was examined by PW13 who classified the injuries sustained as" *harm.*"

Naturinda Ellias(PW7) operated a mobile money kiosk on the verandah at the shop premises.On the 23rd March 2016,A1 bought and loaded airtime at the kiosk at about 5.00pm.PW7 later at about 9,00pm saw A1 ordering customers away and subsequently shooting the late Ahimbisibwe.PW7 was in the kiosk which was placed less than four meters to the shop entrance and on realizing that Sadiq had been shot he ran away. Later PW7 identified A1 from an identification parade at Kawempe Police station.PW7 told Court that A1 had hidden the gun in a jacket at the time of the shooting.

D/AIP Mugisha John(PW8) conducted the identification parade at which A1 and A2 were identified by PW4 and PW7.D/Seargent Okello Michael (PW9) was the scene of crime officer called to the scene on the 22nd March 2016.He found the dead body lying in supine position in the door way with two bullet wounds.Two catridges and one live bullet were recovered from the scene of crime.

Detective Constable Wabwire Allan(PW10) was in 2016 attached to Kawempe Police station Flying squad unit. He received information about the 22nd March 2016 attack at Kikaya and deployed informers to gather intelligence information. An informer reported that he had known the perpetrators of the attack and they used a gun hired from A4.On the 2nd April 2016,the informer reported that another robbery was to be carried out at a petrol station at Mpererwe on the same day.PW10 and his squad booked out for Mpererwe.

At Mpererwe,PW10 and his squad intercepted a motorcycle carrying two men.The rider fled but the passenger, Guloba Michael(A3) was arrested with a rifle inserted into a water pipe. He confessed that they were proceeding to Mpererwe for a robbery and directed them to the place.At the petrol station Magero Patrick(A1) was arrested and one robber shot to death in an exchange of bullets.A1 and A3 confessed to the 23rd March 2016 robbery and narrated that the gun belonged to A4 who was arrested.A4 claimed that the pistol used in the shootout at Mpererewe belonged to Gudoi (A2).

Atukwasa Jaffari(PW11) worked with the deceased in the shop until he left at 8.00pm after counting and keeping shillings 2,500,000/= in the shop counter.He left for Gayaza Road and on the way back learnt of the death of his brother.When he checked the shop counter the money was not there and the Premises had been cordoned off by Police. Detective Seargent Muhumuza Richard(PW12) coordinated investigations from Kiira Police Division and ensured that Charge and Caution statements were recorded and suspects duly examined as required by the Law.

The Director of Public Prosecution entered a nolle prosequi in favour of A3 and A4 who were then discharged.The case proceeded against A1 and A2.

Evidence of the Accused.

A1,Magero Patrick in his defence denied any involvement in the offences he is charged with. He told Court that he was at his home all day on the 23rd March 2016 since he was not feeling well.His wife and daughter left and returned between 5.30 pm and 6.00pm. Regarding his arrest,A1 told Court that on the 2nd April 2016 he received a call from A3 requesting for assistance.A3 told him he was sick and did not have transport fare..A3 told A1 to go to Mpererwe from where he was to direct him to where they were to meet.

A1 got a motorcycle to Mpererwe but he told Court, he was arrested before meeting A3.The motorcycle rider was shot dead he told Court. He was taken to a car in which he found Guloba (A3).A1 admitted that he knew A1 and A4 before he was arrested.In cross examination,A1 told Court that he did not know where his relative A3 wanted to go and could not recall whether he gave his alibi for the 22nd March 2016 to Police at the time of recording statements.

Naula Jennifer(DW2) is a wife to A1 and she told Court that on the 22nd March 2016,she left for work and returned home at 4.00PM.Her daughter Auma also left home but returned before her.DW2 told Court that A1 told lies when he said that Auma returned home before her because she did not leave home.

Auma Jolly(DW3),the daughter of A1 told Court that she stayed at home on the 22nd March 2016. And her father was at home all day.DW3 told Court that she did not know A3 as a relative and had never heard of him.

A2,Dauda Gudoi denied any knowledge about the offence in the Indictment and told Court that he spent the 22nd March 2016 at home.A2 said he only left to go to the Mosque for prayers at 1.00pm,4.00pm and 7.00pm.On the 3rd April 2016,he was arrested from his home and accused of keeping a pistol which he denied. He told Court that his house was searched but no weapon was found.A2 Acknowledged that he was identified at a parade arranged at Kawempe Police station.

Submissions by Counsel.

Counsel for the accused submitted that Prosecution did not prove that shillings 2,500,000/= was stolen from the shop.PW11 who claims to have kept it in the shop counter was not

around when the shop was attacked. PW6 ran out of the shop on hearing a gunshot and there were many people around who could have taken the money. PW4's evidence relating to seeing A2 entering the shop from the back door was further attacked as untrue. Counsel argued that PW4 could not have properly identified the man who allegedly followed her to the back of the building.

It was further submitted that PW3 and PW4 could not have properly identified A1 and A2 owing to the fear and dust raised in the shop. Counsel attacked the Prosecution witnesses further arguing that whereas some claimed to have seen A1 with a hooded jacket, others told Court it was a cape on the head. It was further argued that Komakech and Sumaya were by the reports of PW13 reported to have been injured by a blunt object which would disqualify a gun as the deadly weapon used in the attempted murder of the two.

For the Prosecution it was submitted that PW3, PW4, PW5, PW6 and PW7 ably identified A1 and A2. They saw A1 before and during the attack while A2 was seen entering the shop premises from the back door. It was argued that there was ample light and they were all close to A1 and A2 at different times. It was further pointed out that PW8 carried out an identification parade from which both A1 and A2 were picked out of many volunteers by PW4 and PW7.

Summary of the Law

The Prosecution has the burden to prove the guilt of the accused by proving all ingredients of the offences charged. The threshold required to meet the standard of proof is that of beyond reasonable doubt. It is a cardinal principle of the law that a decision as to whether the accused is guilty or innocent is only arrived at after evaluating the evidence of both the Prosecution and the accused. Any doubt in the Prosecution evidence is resolved in favour of the accused and where any alibi is raised, the Prosecution has to discredit it with evidence that places the accused at the scene of crime as the perpetrator.

For a conviction to be secured on the charge of Aggravated Robbery, the Prosecution is required to prove that there was theft of property and a deadly weapon was used at, before or after the said robbery by the accused persons.

In the Murder charge, it must be proved by the Prosecution that there was death of a human being; that the death was unlawfully caused with malice aforethought by the accused.

Decision of the Court on Count 1: Aggravated Robbery.

The Prosecution is required to prove theft as an ingredient of the offence of Aggravated Robbery. Atukwasa Jaffari (PW11) was the only witness who testified about theft in this case. It is only him who claims that shillings 2,500,000/- was kept in the shop counter and he was away when the attack took place. Sumaya (PW6) told Court that at the time of the attack, there were about five family members serving over ten customers some of whom ran through the back door.

PW4 claims to have seen A2 entering the shop from the behind door and did not see him leave the crime scene. PW 11 could not prove in cross examination how the money he claims was stolen was raised since there were no records for the sales made on that day. No witness saw PW11 keeping the money or saw A1 or A2 accessing the shop counter where the money was allegedly kept.

The Prosecution evidence on this ingredient raises some doubt. There should have been records indicating the day's sales to paint a picture about what could have been gathered by the time the shop was attacked. PW11 was not an identifying witness who saw the accused access the counter where the money was allegedly kept and his evidence was totally unsupported.

For Court to rely on circumstantial evidence as in the case of the alleged robbery, the inculpatory facts must be incompatible with the innocence of the accused. There must not be other co-existing factors to weaken or destroy the inference of guilt. I do not find this to be the case in view of the evidence by PW11. I resolved the doubt in favour of the accused.

It is the finding of this Court that this ingredient of the offence was therefore not proved beyond reasonable doubt by the Prosecution.

All ingredients of any offence must be proved if a conviction is to be secured. Theft has not been proved in Count 1. I therefore do not deem it necessary to analyze the evidence in respect of other ingredients. I accordingly acquit both (A1) Magero Patrick and (A2) Guloba Dauda on the charge of Aggravated Robbery.

Decision of the Court on Count 11; Murder.

It was not disputed by both the Prosecution and Counsel for the accused that Ahimbisibwe Sadiq was killed on the 22nd March 2016. PW3, PW4, PW6, and PW11 saw the body. PW1 carried out a postmortem examination which confirmed the fact of the death. This ingredient of the offence was hence satisfactorily proved to the required standard.

As to whether the death was unlawful, it is a legal presumption that all homicides are unlawful save where death is a result of an accident or is authorized by the Law. The examination report admitted in evidence under section 66 of the Trial on Indictments Act indicates that Ahimbisibwe Sadiq died of gunshot wounds. This was neither a death resulting from an accident nor one authorized by the Law. In the absence of evidence to the contrary, I find it safe to presume that the death was unlawful.

Malice aforethought is required to be proved by the Prosecution. Section 191 of the Penal Code Act in part describes Malice aforethought as the intention to cause death. It is a question of the attacker's mind which can only be deduced from the circumstances surrounding the death in question. Courts normally consider factors like the nature of the weapon used, the parts of the body attacked, the conduct of the assailant before and after the attack to infer malice aforethought.

The postmortem report on the body of Ahimbisibwe Sadiq indicated an entry bullet wound on the right cheek and on the forehead with corresponding exit wounds .A gun is a dangerous weapon and the body part attacked is delicate. The only inference to be made is that whoever used such a weapon on that part of the body did not intend to see Ahimbisibwe alive after the attack.The act of fleeing from the scene after the attack further confirms the malicious intent of the attackers. This ingredient of the offence was therefore proved beyond reasonable doubt by the Prosecution.

Participation of the accused was contested on account of the possible failure of identification. The arguments are that there was panic during the attack and all the Prosecution witnesses did not know the accused before the offence was allegedly committed. Counsel also criticized the Prosecution evidence relating to how A1 was allegedly dressed and how PW4 could not have identified A2 as she moved to her house at the back of the shop during the attack.

PW3 told Court and was not challenged on the evidence that she saw A1 on three occasions between 5.00pm and 8,30 pm on the 22nd March 2016.It was her evidence that she spent about 30 minutes in the same bar with A1 as he drank a soda. She also saw A1 standing near her kiosk talking on a phone as he faced the shop.PW4 who works in the same location saw and talked to A1 at close range but he did not respond.PW7 sold airtime to A1 and he took time loading it on to the phone while standing at the kiosk.

PW5 and PW6 who were in the shop all saw A1 as he ordered customers away and later heard the gunshots.PW5 looked behind and saw A1 with the gun before he fled through the back door.

All the Prosecution witnesses talked about the bright light from the three bulbs and a fridge on the verandah.PW4 and PW7 ably identified the accused from an identification parade.PW3,PW4 and PW7 saw A1 in day light before the attack, were close to him and PW3 spent thirty minutes in the same room with him at 5.00pm.

I do not find merit in the argument that PW3 could not have properly identified A1 as there was dust after the first gunshot.PW3 moved closer after the first gunshot believing it was a short circuit. She had not been gripped with fear at the time.It is only after the second burst that she moved back and told Court she hid at a vantage point from where she saw A1 as the same person she had seen earlier in the day but with a jacket and cape added on to the original clothing.

It is the holding of this Court that the events from 5.00pm and the circumstances in which the offence was committed at 8.30 pm. All favoured correct identification of A1 as the assailant who shot and killed Ahimbisibwe Sadiq on the 22nd March 2016.

A2 was allegedly identified by PW4 who ran from her workplace to her house behind the shop when the attack started.PW4 told Court that she turned and saw A2 as she ran to her house. She saw A2 enter the shop from the back door.PW3 also told Court that A1 had another man behind him with whom he moved after the attack.The man was not known to her as a resident in the locality.

PW4 was the land lady from whom the late Ahimbisibwe rented the shop premises .As a close neighbor, it cannot be doubted that she knew all those who stayed in the premises with the late Ahimbisibwe which in my view enabled her positively identify the stranger following her and entering the shop.PW3 corroborated the presence of another person when she told Court there was another man who left with A1.I do find that A2 was too correctly identified by PW4 at the scene of the crime and at the identification parade.

I am alive to the requirement for the Prosecution to destroy the alibi evidence adduced by the accused through evidence placing them at the scene of crime.A1 told Court that he was at his home at 5.00pm where DW2 and DW3 found him after work .This evidence was challenged by his own wife,DW2 who said that DW3 stayed home all day and called A1 a liar in Court. The evidence of PW3, PW4 and PW7 squarely put A1 at the Kitala-Kikaya and not at Kireka Zone”C” between 5.00pm and 8.30 pm on the 22nd March 2016.

A1 also told Court how he was closely related to (A3) Guloba Michael, but his oldest child, DW3 strangely denied any knowledge of A3 as a relative. I further find the defence of A1 regarding his arrest corroborating the narrative by PW 10 about the planned attack of a Petrol station at Mpererwe.It further lends credence to the narrative that an informer gave credible intelligence information about the criminal gang in which A1 and A2 were involved.

The evidence of PW4 squarely placed A2 at the scene of crime. He did not at all challenge the evidence relating to the conduct of the identification parade given by PW8 which makes its denial in Court an afterthought. I further note that his alibi of being at the 7.00pm prayers does not cover the 8.30 pm attack on the shop premises at Kitala- Kanyanya.

PW4 was the single identifying witness who saw A2.I’ am alive to the need for Court to take great caution before convicting on such evidence. I am however convinced and have duly warned myself that PW4 ably identified A2 as one of the attackers that killed Ahimbisibwe.

I find that A1 and A2 are joint offenders who formed a common purpose to execute the murder of Ahimbisibwe Sadiq under section 20 of the Penal Code Act. I accordingly find them guilty.

Decision of Court on Counts 111 and 1V; Attempted Murder.

Dr.Rodrigo Nyinoburyo examined Komakech (PW5) and Sumaya (PW6) .In his evidence he told Court that the injuries he observed on PW6 were caused by a blunt object .This in my opinion ruled out the weapon used by A1 and A2 in the attack. In respect of PW5 ,the evidence was that the wound had already been de-bridged before he examined the victim. All the narrative he had was from the victim which could not amount to a confirmatory Professional opinion resulting from his own verification.

Even if it were to be found that a gun was used to cause the injuries, the parts of the body attacked would not point to the intention to cause death .I do not find these two counts proved by the Prosecution to the required standard. I accordingly acquit A1 and A2 on the third and fourth counts.

In conclusion ,i acquit A1 Magero Patrick and A2 Gudoι Dauda of Aggravated Robbery on Count 1.I also acquit A1 Magero Patrick and A2 Guloba Dauda of Attempted Murder on Counts 111 and IV.I find A1 Magero Patrick and A2 Gudoι Dauda guilty of the offence of Murder contrary to sections 188 and 189 of the Penal Code Act .I convict them accordingly.

Moses Kazibwe Kawumi

Judge

20th February 2018.