

IN THE SUPREME COURT OF UGAND

AT MENG

(CORAM: MANYINDO, D.C.J, ODER, J.S.C & PLATT, J.S.C.)

CRIMINAL APPEAL NO.1 OF 1985

BETWEEN

1. PAULO KAYONDO

.....APPELLANTS

2. ABDU MUKASA

AND

UGANDA ..... RESPONDENT

(Appeal from the Judgement and Conviction of the High Court of Uganda at the Criminal Session held at Masaka by (Hon Mr. Justice P.A P.J. Allen) Dated 8<sup>th</sup> February, 1985)

IN

CRIMINAL CASE NO. 68 OF 1984.

JUDGMENT OF THE COURT

The Appellants Paulo Kayondo and Abdu Mukasa were alleged to have boldly ambushed the four complainants in this case, (and perhaps others), as they crossed a swamp. This happened between 6 p.m. and 6.30 p.m. on 20th January, 1983. The complainants had been trading in Kanamusaba market and were going home on their bicycles with their profits. The appellant Paulo pointed a gun at them and the appellant Abdu brandished a panga. The complainants were each stopped one by one, each one ordered to lay down his bicycle, and then throw his money on the ground. The general pattern then was that each person, divested of his money, was ordered to lie down in the bushes nearby out of sight. But with courage and presence of mind, the complainant Jowadu Kimera (PW1) got up and ran back towards the market and raised the alarm. The Appellant Paulo fired into the air and fortunately did not hit Jowadu. The alarm eventually led the Gombolola Chief of Kyanamukaka to collect two groups of men he captured these two appellants. Although the appellants protested that they were not the real robbers, they were arrested and identified by the complainants.

Having examined all the evidence, the learned Judge convicted each Appellant in the case of each complainant on four separate counts of aggravated robbery (contrary to sections 272 and 273 (2) of the Penal Code Act) thereby agreeing with the opinion of the assessors. He imposed the mandatory death sentence on the first count, leaving the sentences suspended on counts 2, 3 and 4.

The Appellants have appealed against these convictions and their sentence on two main grounds; on the first, they challenged the finding of the learned Judge that they had been identified beyond reasonable doubt as the robbers in question; and on the second, whether the gun could be classed as deadly weapon within the meaning of sec. 273 (2) of the Act, referred to above.

We find it convenient to take the second ground first. The learned Judge stated that it was settled law that for a gun to be a deadly weapon, the prosecution must show that the gun was capable of being fired and that it was loaded at the time of the robbery. We agree. He found that the gun produced was a small automatic weapon with a magazine containing a number of bullets. The gun had been fired once and therefore it was held that it was capable of being fired. Altogether the gun qualified as a deadly weapon in the opinion of the learned Judge.

Counsel for the appellants, Mr. Lutakome, carrying out his duty to put the case for the defence as well as he could, pointed out that as the Chief's two teams of men approached the appellants, the learned Judge acknowledged that the gun did not fire. The learned Judge related how the appellant Abdu called out to the appellant Paulo — "Shoot them! Shoot them!" The appellant Paulo pointed his gun at a group of people, cocked the gun but could not fire it. The learned Judge thought that the gun "jammed" each time that the appellant Paulo tried to fire it and commented the good fortune of the chief's men, because when the gun was seized the magazine was found full of bullets. The people themselves, not knowing this, thought that the appellant had no more bullets, and were thereby encouraged to close in. Luckily they were not hurt. The gun it seems was not capable of firing at this stage of the incident.

But that was not the case when Jowadu Kimera escaped to raise the alarm. At the stage the gun was fired over his head. In his case and that of his fellow complainants, the gun could have been a "deadly weapon". Whether the learned Judge was entitled to infer as rightly inferred, that the gun later "jammed", we do not know, as the gun was not examined. Of

course the description of jamming may not have been a technical description, but simply a way of saying that the gun did not fire when cocked. Whatever it was, there is no doubt that if the evidence of Jowadu and other complainants was reliable, during the course of the robbery concerning them, the gun was a deadly weapon.

That leads on then to the question whether the evidence of Jowadu and his fellow complainants was soundly evaluated and accepted as against the defences of the appellants. Counsel for the Appellants, submitted that there was not sufficient evidence to prove that the Appellants were identified as the actual robbers, beyond reasonable doubt. He referred to several aspects of the case. It was dusk at 6.30 p.m. The sequence of events was that each man had been confronted suddenly by an ambush, ordered to put down his bicycle and cash and lie down out of sight. They were surprised and frightened. The arrest occurred later on.

Jowadu related that he had said that he would look for more money, and by that ruse cheated the appellants and ran away. In his case, the identification related to the men he saw at the time of the ambush and then after their arrest. He could give no description of the appellants or their clothing. Edward Zake (PW2, the complainant in count 2) related how he had been confronted by two men, and then made to lie down until help came, after which the appellants were arrested; and that was the kind of evidence given by John Buyemba PW3, who was referred to in count 4). These two witnesses had the time to observe the robbers and their clothes. A similar description of the event and the clothing of the robbers was given by Anton Rugaju (pw6 in count 3). Chief Samuel Kirumira (Pw5) described the clothing of the arrested men in very similar terms to the eye witnesses.

The Appellants accepted that they had been at the scene. Paulo said that he had been robbed himself but had gone away, only to be falsely arrested. Abdu has also been robbed by a man with a run and another with a panga. When the alarm was raised the man with the panga handed the panga to him to keep guard. At that time there were three of them, a man with a gun as well as the man who had had the panga, and Abdu. Then as people ran away, Abdu also ran away.

There had been a suggestion in a police statement that there had been three men. This, together with the lack of clear physical identification and lapse of time, was the basis on which Counsel submitted that the identification was unsound. But the Assessors and the

learned Judge found no difficulty in accepting the evidence of the witnesses who had been robbed, who had seen Paulo fire over Jowadu's head, who had seen the people coming to arrest the robbers, and had seen them after their arrest. It seems to us that there were no really discordant discrepancies, and that following the closely related sequence of events, there was evidence which the trial court could accept that the appellants had been accurately identified in preference to the defences of the Appellants.

Having reviewed the evidence for ourselves, as it is our duty on this first appeal, we concluded that the trial Court correctly found that these two Appellants were the robbers, and that Paulo has indeed fired one shot over Jowadu's head. By the time Jowadu ran away, Edward Zake had been robbed and so had John Buyemba (although he did not realise the shot was fired because Jowadu had escaped). Anton Rugaju also observed the shot after he had been made to lie down and that was when Jowadu Kimera ran away. It is clear therefore that on each count, the gun was a deadly weapon. The Appellants were acting in concert, as the suggestion of Abdu that Paulo should shoot the people coming to arrest them, indicates. Consequently, the Appellants were properly convicted. The appeals of each Appellant are therefore dismissed.

It is sad to relate that very little money was recovered. But at least Jowadu and the men who supported the Chief, all of whom accepted the risk of being shot, will be able to remember the day that they rid the Namirembe swamp of these robbers.

Dated at Mengo this 11th day of August, 1989.

SIGNED:

S.T.MANYINDO

DEPUTY CHIEF JUSTICE

A.O. ODER

JUSTICE OF THE SUPREME COURT.

H.G. PLATT

JUSTICE OF THE SUPREME COURT.

I certify that this is  
a true copy of the Original.

B.F.B BABIGUMIRA

REGISTRY SUPREME COURT