

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL SESSION CASE NO. 178 OF 1991.
UGANDA:..... PROSECUTOR.

VERSUS.

MICHEAL NGABIRANO :.....ACCUSED.

BEFORE: THE HONOURABLE MR. JUSTICE J.W.N.TSEKOOKO:

JUDGMENT:

MICHEAL NGABIRANO (hereinafter called “the accused”) is indicted for Robbery Contrary to Sections 272 and 273 (2) of the Penal Code Act.

The particulars of offence allege that the accused and others still at large on 26/4/1987 at Kashenyi village in Rukungiri District robbed Florence Tirahweire of cash Shs,780,000/= and a wrist watch and at or immediately before or immediately after the said robbery used a deadly weapon, to wit a gun and a panga, on the said Florence Tirahweire, During the preliminary hearing held Under the provisions of section 64 of the Trial On Indictments Decree, 1971, the evidence of the following witnesses as admitted.

PW1 (D.Tumuhwirwe) a Medical Assistant of Bugangari Health Centre. He examined Florence Bagarina Tirahweire, the victim of the robbery on 27/1/1987. He found a cut wound on her right hand affecting the 2nd and 3rd Fingers measuring 11/2 cm long by - cm wide and 1/4cm deep. He classified the injury as harm. PW2, Dr. Kagyen a medical officer, examined the accused on 23/8/1988 and found him aged 20 years. PW3 Bashir Juma as RCI secretary for Security of Bujumbura village arrested accused on 26/7/1987 in connection with the present charge of robbery and handed him to Bugangari sub-county authority from where PW4 John Kamugisha, Administration Askari transferred the accused to Rukungiri Police Station.

As I directed the assessors and as both counsels agree, there are two principal issues to be considered thoroughly in this case in the light of the evidence adduced by the prosecution and the defence. One of the two issues is whether robbery was committed and if so whether it is capital robbery as charged. The second and in my considered view the most vital issue is identification

of the robber or robbers, The prosecution in addition to the evidence admitted under S.64 of Trial On Indictments Decree, 1971, quoted above called four witnesses to give oral testimony These are Mrs. Florence Bagarimu Tirahweire (PW5) James Mayanja (PW6) Hamujuni Leonard (Pw7) and D/AIP Karwemera (Pw8). As I directed the assessors during summing up there is only one single identifying witness for the prosecution. This is PW5.

The accused gave an unsworn statement as is his legal right Under Section 71 (2) (b) and 72 (I) of the Trial on Indictments Decree, 1971. His father Desiderio kageitite (DWI) testified for the defence.

In a criminal trial under our law, the burden of proof of the guilt of the accused person is always on the prosecution. See Okale vs. republic (1965) EA 555 and Ndege vs. Uganda (1979) HCB 162 and Nabulere & cithers Vs. Uganda (1975) HCB.I85.

It is the bounden duty of the prosecution to prove the case against the accused beyond reasonable doubt.

I think it is not disputed that PW5 and the accused were neighbors and had known each other very well. Nor is it disputed that robbery occurred at the home of PW5. As a matter of fact since there is clear evidence that the robbers used a panga in cutting the fingers of PW5 the offence committed is in law capital robbery within the provisions of section 273 (2) of the Penal Code Act; See page 10 of the judgment of the Supreme Court of Uganda in Criminal Appeal NO. 27 of 1989 (Sarapio nkamalirwe vs. Uganda), See also page 11 of the Supreme Court in its Criminal appeal NO.8 of 1989 (Yowana Serunkumma vs. Uganda).

On the evidence available on robbery and. on the basis of the decision I have just cited the first issue is answered. That is that robbery was committed under S.27 (2) Of Penal Code Act. In her testimony PW5 stated that on the night of the robbery she went to bed at 8.00 p.m. That by 9.30 p.m she was asleep. So were her young children. Her husband had spent that night with her co-wife miles away. According to her the accused ordered her to open from the rear door. Her door was banged 7 times. For her she opened the front door only to find Byanyima who shorn a torch at her ordering her to go back.. She did not explain how at that stage she was able to identify Byanyima. She returned to the bedroom. She was apparently followed by Byanyima. There she found accused. According to her, she recognised the accused because Byanyima who was behind

her shone a torch whose light fell upon the whole body of the accused. She recognized him. He was bare chested but wore a pair of shorts. Unfortunately the duration of the lighting on accused was not established. Accused raised a panga to strike her. She put up her right hand to protect herself. In consequences her fingers were cut. In the bedroom the accused removed Shs, 780,000/= (new currency) from under the pillow. He also removed her disco watch from a tray. The accused ordered her to close the rear door. As the two robbers left she immediately ran to PW6's home wearing only half slip and reported the robbery naming accused and Byanyima as the robbers. PW6 tied up her wounded fingers by way of first aid. In fact she claimed there was a third man armed with a gun that stayed outside her house during the robbery but she never identified him. That man had the gun slung over his shoulder. He threatened to shoot her. PW5 and PW6 went to one Fred watirayo, her brother to whom she reported the robbery. All the three returned to her home and stayed there overnight. The following day she sent information to her husband. On 29/4/1987, PW7, a brother of accused took a watch to her having recovered it from potato garden of father of accused. According to pw7 he did not know whose watch it was. Infact he had first taken it to his father (pw1) and brothers who said it belonged to none of them. They advised him to take it to PW5. She accepted it as hers.

According to PW5, she had earlier in the day seen Byanyima in the home of and the company of the accused. According to her the robbery lasted 3 minutes.

She subsequently received medical treatment. Apparently her husband, may be in her company, reported the robbery to Rukungiri Police Station. It is not quite clear when reporting was made because D/AIP Christopher karweremera (Pw8) who appears to have received the report muddled up his testimony in court. He gave me the impression that he did very little very casually and rather late by way of investigation. So his evidence is unreliable. I did not know whether the conduct of this witness was due to inexperience, lack of means of transport or the general malaise that affects some individuals about work.

The accused gave unsworn evidence and raised an alibi. He claimed that on the night of the robbery he was in bed sick. That he had been sick for some time (for about a month from 18/4/1987 to 19/5/1987). There after he went to his grandmother to attend to his gardens for 6 days. Upon his return he was obliged to visit and attend to his sick maternal Grandmother till

27/7/1987 when he returned. On his way home he was arrested by PW4 in connection with this case. Subsequently unsuccessful attempts were made to settle the matter with PW5's husband at Bugangari Sub county Headquarters. He claimed that PW5's husband caused this case to be planted on him (accused) because the accused had, before the robbery, refused to sell his land to PW5's husband. DWI, Desiderio Kagyentita, supported the accused generally about sickness, the visits and attempts to settle the matter. He also supported the accused that PW5's husband wanted to buy land which DWI had earlier given to the accused. As it emerged from DWI's evidence it appears it was DWI who actually wanted to have the land sold. There were some contradictions between the statement of the accused and the evidence of DWI which might have affected the validity of accused's alibi. However, the prosecution produced PW7, the brother the accused, who testified on behalf of the prosecution.

On oath PW7 stated that the accused was in fact sick and in bed on the day of the robbery. The answer was given casually following a question in cross-examination by defence counsel. This was before the accused made his unsworn statement.

It is the duty of the prosecution to prove the case against the accused beyond reasonable doubt. It was incumbent upon the prosecution to show by evidence that the accused's alibi was not true. Learned defence counsel submitted that the prosecution had not proved the case against the accused beyond reasonable doubt. That the period of 3 minutes available to PW5 and the circumstances obtaining at the time of the robbery could not allow proper identification. He said the alibi had not been proved false. On the other hand, Mr. Kikomoko, the learned Resident State Attorney, submitted that because of the knowledge of accused by PW5, in the circumstances of this case she identified the accused and, therefore, the alibi has been disproved. It is true PW5 knew accused very well. In fact I got a favorable impression of the way PW5 gave her testimony; she appeared to me to be an honest witness. However there are aspects in the prosecution case which casts a long looming shadow of doubt on the prosecution case. First PW6 and the brother of PW5 did not make any attempt at all to check at the home of the accused on the night of the robbery. That home is stated to be only 1/2km away. No explanation was offered for this omission. It would be reasonable to assume that even the husband of PW5 who has not testified did not check at the home after PW5 sent a report to him. PW5 claimed that the accused was in hiding. But there is no evidence to show that at least before 8/5/87 any efforts were made

to check on accused particularly at his home. Furthermore the evidence of Pw7 undoubtedly supports the alibi of the accused. True PW7 is a brother of the accused. But that is all. The prosecution called him to testify.

He did testify for the prosecution. In the process he tore up the prosecution case if not perforating it. There is nothing to show that he (PW7) was telling lies to save his brother's skin. His evidence has to be accepted .the story of the accused is suspect but that is all he cannot be convicted on suspension.

In these circumstances and as I directed the assessors the probability that PW 5 could have made an honest but mistaken identity of the accused has not been ruled out. In those circumstances I hold that the prosecution has not discharged the burden of proof of the guilt of the accused with the degree of certainty as required in criminal trial. The accused has benefit of doubt, the assessors agreed.

I therefore find the accused not guilty of the offence of robbery c/s 272 and 273(2) of the penal code act. The assessors advised acquittal. I acquit the accused unless the accused is held on some other lawful charge he is to be released forthwith.

J.W.N TSESEKOOKO

29/01/1992