

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA  
CRIMINAL SESSION CASE NO. 229/94

UGANDA .....PROSECUTION

VERSUS

KASOZI STEPHEN.....ACCUSED

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

The accused person one Stephen Kazozi, whom I shall hereinafter refer to as the accused, is indicted for 3 counts of aggravated robbery c/s 272 and 273(2) of the Penal Code Act. In the first count the indictment alleges that on 22-2-94 at the village of Kayunga in the district of Jinja he robbed Mekidard Kigongo of a motor vehicle UXF 689 and 27,000/=, in count two the same indictment is alleging that on the same day at the same place the accused robbed Eric Ogozo Opolot of a pair of shoes and cash of 15,000/=in the third count it is being alleged that this same accused robbed Ogozo Ida Mugabi of a Timex watch, a pair of shoe and 5,000/=. The accused pleaded not guilty to the indictment.

It is trite law that the burden of proving the accused's guilt is upon prosecution. The accused does not bear the burden of proving his innocence except in some few statutory cases: Woolmington v DPP (1934) AC 462. In a case of robbery with aggravation like the one now under consideration prosecution is enjoined to prove, inter alia, that there was theft, that there was violence, that there was threat to use a deadly weapon or actual use of a deadly weapon within the meaning of section 273 of the Penal Code Act, it must also be shown that the accused took part in the robbery.

To prove the first ingredient of this offence prosecution called the evidence of Eric Ogozo Opolot (PW2) who told the court that on the day in question he lost 20,000/= together with a pair of shoes and a watch although the indictment talks of 15,000/= the fact remains that some money was taken away from Ogozo Eric. There was evidence of Ida Ogozo the wife of PW2 who testified that she too on that night was robbed of some money which exact amount she could not remember. Mekidard (PW4) said he lost 27,000/= and the vehicle was taken

away from him. It is immaterial that the vehicle was later on found abandoned. The evidence of these witnesses as to what they lost on that fateful night was not challenged in anyway. I find as a fact that there was theft of property from PW2, PW3 and PW4.

Regarding the second element of this offence, there was evidence from PW2, PW3 and PW4 to the effect that the moment their vehicle was stopped they were ordered out of the vehicle and one of the robbers grabbed the key from PW4, they were again ordered back into the vehicle and were driven for some distance then the vehicle stopped and they were ordered to run out. In my view the conduct of the attackers amounted to violence within of section 272 of the Penal Code Act.

On the question of whether or not there was a use or threat to use a deadly weapon prosecution again relied on the evidence of PW2, PW3 and PW4 who said that one of the attackers was armed with a gun which he fired in the air at the time the vehicle was being ordered to stop and later on when they were being ordered out of the vehicle. These witnesses also testified that they were in the vehicle when the gunman pointed the gun at them as the vehicle was being driven towards Kamuli. In the case of: Wasaja v Uganda (1975) EA 181 in particular at page 183, the court of appeal emphasised that where guns are fired the court finds no difficulty in holding that a deadly weapon was involved in the robbery a similar view was expressed in the case of: Uganda v Kakooza (1984) HCB 1 at page 2. Applying the facts of the present case to the law as stated in Wasaja's case I find that there was a deadly weapon used during the theft of the property. The position being what it is I find that prosecution has proved beyond reasonable doubt that on the night of 22-2-94 there was an aggravated robbery committed to the prejudice of Mekidard Kigongo, Eric Ogozo and Ida Ogozo Mugabi.

The next question which comes up for consideration is whether or not the accused participated in that robbery. It was the case for the prosecution that the accused in fact participated in the robbery and that he was identified by Kigongo ( PW4). On the other hand the accused is adamant that he did not take part in the commission of this offence and he put up the defence of alibi to the effect that on that particular night he was in his home at the village of Mbiko. The law as stated in the case of: R v. Abudula Bin Wendo(1953) 20 EACA 166 is that court views with caution evidence of one identifying witness especially where things happen at night conditions for correct identification are difficult, a similar view was expressed in the case of: Uganda v. Kokooza (1984) HCB 1. In the instant case the only evidence of identification relied upon by prosecution is that of Mekidard Kigongo (PW4)

who Claims to have identified the accused on that night. The other two witnesses PW2 and PW3 frankly told the court that they did not identify the attackers. Ikongo testified that he was able to identify the accused as he was close to him and he was the person who removed the key for the car from him, he knew the accused's appearance before although he did not know him by name. Judging from the evidence of these witnesses who were at the scene on that night it seems there was a great deal panic and confusion this is because of the order they claim they were made to it in the vehicle, PW2 says that the driver and two of the attackers sat in the front seat but his wife says that the robbers sat in the front seat but the driver sat with them behind. Kigongo said he also sat behind while three of the attackers sat in front. These contradictions may not be so major but they are important in determining whether or not the witnesses were composed enough to notice what was going on. PW4 impressed me as an exaggerating witness who claims to have noticed a scar on the cheeks of the attacker. It is not very common for a person to observe a scar on the person at night especially on the cheek. Considering all these circumstances of this case I feel that PW4 was not in a position to positively identify the accused as one of the people who robbed them as conditions favouring such identification did not exist.

In these circumstances I hold that prosecution has not destroyed the defences of alibi put up by the accused, it follows that his defence must be sustained as he could not have been properly identified at the scene of the crime at the time the crime was being committed. In full agreement with the opinion of the gentlemen assessor, Lighyalingi who assisted me in this case the second assessor having been discharged as he did not appear when the case had been adjourned. I find the accused not guilty on all the counts and I do acquit bin accordingly. He is to be released from prison unless he is being held there for some other lawful purposes.

C.M. KATO

JUDGE

20-9-1995