

THE RE PUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL SESSION CASE NO. 526 OF 19

UGANDA

PROSECUTION

VERSUS

BAFAKULERA DEO SENDAGIRE

ACCUSED

**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE.**

**JUDGEMENT**

1. The accused Bafakulera Deo Sendagire is indicted of two counts of robbery contrary to sections 272 and 273 (2) of the Penal Code Act. Count 1 is to the effect that Sendagire and others still at large on or about the 18<sup>th</sup> November 1993 at Kajjaga village in Rakai district robbed Namisango Mauricia one radio Kabawo National and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun and knives on the said Namisango Mauricia. Count 2 is to the effect that Sendagire and others still at large on or about the 18<sup>th</sup> November 1993 at Kajjaga village in Rakai district robbed Mrs Walugembe of one radio National Panasonic, one torch and shs.500.000/= and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun and knives on the said Mrs Walugembe. Sendagire denied these charges.
2. The case for the prosecution was that Sendagire and others still at large on the 18<sup>th</sup> November 1993 between 8.00 p.m. and 9.00 p.m. attacked the home of Paul Sebandeke (PW2). Namisango Mauricia (PW1), the wife of Sebandeke was at home cooking dinner. In her

company was one Walakira (PW5) who had visited them. Namisango was sitting in the doorway of the kitchen house. She was talking to Walakira who was seated outside. On arrival the assailants who were talking in Swahili immediately seized Walakira who was attempting to stand up. He was ordered to sit down and was threatened with a knife. He was blindfolded with his own shirt sleeve. Namisango recognised Sendagire only who was dressed in a flowery shirt like an army fatigue uniform with a cap on his head. She was able to recognise him because one of the assailants flashed a torch from behind and light shone on Sendagire's face who was ahead. Sendagire was holding a gun. Sendagire did not talk to Namisango at all during the incident.

3. Namisango attempted to withdraw into the kitchen and one of the assailants picked up a hoe and hit her with it. She was then blindfolded by one of the assailants. She was then ordered to the main house. Before entering the main house they demanded for money and she said they had none in the house. They entered the main house and went through every room. They then demanded that the witness takes them to her father in law's house. She agreed and they led her to her father in law's house. She was still blindfolded. On arrival at the house she called out and her mother in law Mrs. Walugembe, opened but on seeing the assailants attempted to shut the door. She was overpowered and the assailants entered the house. Namisango was ordered to sit down. After sometime they were led out of the house and then were ordered back into the house. They were instructed not to make any alarm. The assailants then left. After some time Mrs Walugembe untied her daughter in law and they were went outside the house.
4. Namisango was escorted back to her house by her husband's relatives living nearby. She found at home that Walakira had been locked in the kitchen house when she opened it. She

also found that in the main house a radio was missing. She reported this matter the following day to her husband when he came back. It is Sebandenke rather than her who made a report to the local council officials. In 1995 they called to Kakuuto Police post to make statements. She stated that she knew Sendagire because he used to live on the next village at an uncle's home. She was able to recognise him as it was a clear night and there was torch light used by the assailants.

5. Walakira, PW5, stated that of assailants she was able to recognise Sendagire who was previously known to him. Before he was tied up and blindfolded, Sendagire tied up and blindfolded Namisango. As he was doing so, he put a torch between his legs either to free his hands or to provide light to himself as he tied up Namisango. During this process, the torchlight shorn on Sendagire's face and Walakira was able to identify him. Walakira was emphatic that it is Sendagire who tied up Namisango while he was observing. He claimed he was blindfolded later.
6. Neither Mrs Walugembe nor Namisango reported this incident to the authorities. Mrs Walugembe did not recognise any of the assailants. The assailants took from her home shs. 500.000/=, a radio National Panasonic and a torch. After a very long time his son Paul Sebandeke brought to her a radio which he said had been recovered from the robbers. She could not identify it as the radio stolen from their home as she did not know the serial numbers of the stolen radio. The radio was taken for repair and has never been brought back home.
7. Sebandeke stated that upon return home the day following the robbery he was informed by his wife of what took place. She told him she had recognised one of the attackers as Sendagire. Sebandeke reported the matter to the R.C. 1 chairman of their village. He told him

that one of the assailants was Sendagire who lived on Kitasiba village a few kilometres away from their village. The chairman told him they will investigate the matter. He checked on him again and he advised him to carry out his own inquiries as well. He subsequently reported to the RC 2 Chairman. He went in the company of his wife. They first went to the RC 1 chairman but his wife did not mention Sendagire's name. They never reported the matter to the police until some time in 1995 at the conclusion of their own inquiries. He was not aware when Sendagire was arrested.

8. Joseph Ssemwangu was PW4. He was a special police constable of Luti police post, Gayaza in Rakai district. He knew the accused. The accused came to their village, Gayaza, with a radio a long time back. He would not recall the date. Following this Joseph went to Kakuuto to bury a relative. While at the funeral he inquired if anybody there had lost a radio cassette. He was told that one was stolen from a nearby village. On coming back to his village, he found the Sendagire selling the radio cassette to one Kalule. He intervened and asked for a receipt from the Sendagire. Sendagire replied that it was in his clothes hanging outside. He went to pick it and then disappeared. Sebandeke came looking for his radio. Together they attempted to trace Sendagire without success. On the same day as Joseph was coming back from Kasasa he saw Sendagire eating pancakes. He stopped the vehicle and when Sendagire saw him, he ran off into the bush. Since then, he has never seen him until the day he testified and saw him in court. Sebandeke brought a receipt to the RC 1 Chairman and the radio was given to him.
9. The final witness for the prosecution was No.23070 D/C Kamuyeke Charles. He was stationed at Kalisizo police station from 1992 to 1997. On 27th May 1994, he was allocated a robber file for investigation. The suspect was Sendagire who was at large. On 20th March

1995, he was informed by his in charge that Sendagire had been handed in at the counter by Kakuuto Police. He was instructed to take a statement from him, which he did. He prepared a charge sheet for robbery and on that very day produced him before a magistrate's court. And that was the close of the case for the prosecution.

10. Sendagire testified on oath. He stated that Namisango and Mrs Walugembe were known to her as people living on Kajjaga village. He did not know Walakira. He denied ever having been involved in robbery at the home of either Namisango or Walugembe. He stated that he has ever owned a radio cassette having bought it from One Mugerwa Steven of Kitasiba village probably in 1994 for shs.30.000/=. Mugerwa was a herdsman of RC 1 Chairman of their village Mr. John Samula. The agreement for the purchase of this radio was written by the chairman himself who retained the agreement, promising to make it available whenever required. It was witnessed by Charles Kalema and Sabasitiano Wasswa.
11. He went to visit a friend, Vincent Ssekide, on a village in Kyotera. He went with his radio. He was not selling it. Semwangu who testified as PW4 came and asked him if the radio was his. He replied in the affirmative. He asked him how he had got it. Sendagire told him that he had purchased it. After some other questions, Semwangu told Sendagire to go and get his sale agreement. He walked away to his village to get the sale agreement. Before he arrived on his village, he saw Semwangu on a pick up with some policemen. At the time, the police officers were looking for Sendagire for an assault case. He had fought with a one Dominico. On seeing them, Sendagire ran away. He went to his village, Kitasiba, where he was arrested from later. He was taken to court on the assault charges and he pleaded guilty. He was fined and after paying the fine, he was released. He was re-arrested by police and eventually arraigned on the current charges.

12. Sabasitiano Wasswa was DW2. He testified that he is a resident of Kitasiba village. He knew Sendagire. He was present at the time in 1994 when the Sendagire bought a radio. He bought it from Mugerwa Steven, a porter of John Samula, the RC1 chairman at the time. It was a national Panasonic. He paid shs.30.000/= for it. An agreement was signed written by the chairman. Wasswa witnessed the agreement by thumb marking it. In cross-examination, he admitted that he was in prison but denied that he was facing robbery charges. And that was the close of the case for the defence.
13. The offence of robbery contrary to sections 272 and 273 (2) of the Penal Code Act has the three elements. (a) There must be theft of property. (b) At or immediately before or immediately after the time of theft an offender uses or threatens to use a deadly weapon to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. And (c) that the offender or one of the offenders is the accused before the court. It is the duty of the prosecution to prove beyond reasonable doubt that the accused before the court committed all the above elements. The accused has no obligation to prove his innocence.
14. The testimony of Namisango and Mrs Walugembe is sufficient in my view to establish that theft occurred on the night in question. At the home of Mrs Walugembe shs.500.000/=, a torch and a radio were robbed. Force was used as Mrs Walugembe was pushed down to the floor. Though it can not be said that a deadly weapon was used in the theft at Mrs Walugembe's home. On the other hand, at the home of Namisango a hoe was used to hit at Namisango when she attempted to withdraw into the kitchen house. This as has been conceded by the defence is a deadly weapon. The assailants went through the house. After they were gone, Namisango discovered that a radio was missing. In the circumstances, this

leads to only one reasonable conclusion that the assailants that ransacked the house were the ones that stole the missing radio.

15. I would find that with respect to count 1 it has been proved beyond reasonable doubt that the radio was stolen and at the time a deadly weapon, to wit a hoe, was used upon Namisango. What remains to be established is whether Sendagire was one of the assailants? With respect to Count 2 I find that it has been established that Shs 500.000/=, a torch and a radio were stolen from Mrs Walugembe. No deadly was used or has been shown to have been used at the home Mrs Walugembe, though on the evidence available, force was used. As to whether Sendagire was one of the thieves this will depend on whether in part he is shown to have either been properly identified at the home of Namisango by Namisango and Walakira or if he was indeed found in possession of the stolen radio belonging to Mrs Walugembe.
16. The evidence of identification of Sendagire by both Namisango and Walakira is what may be called visual identification evidence. Namisango and Walakira claim to have identified Sendagire as one of the assailants. The law applicable in such cases was discussed in the case of Abudalla Nabulere and others v Uganda, Criminal Appeal No. 9 of 1978 (unreported) in the following words, “ A conviction based solely on visual identification evidence invariably causes a degree of uneasiness because such evidence can give rise to miscarriages of justice. There is always the possibility that a witness though honest may be mistaken. For this reason, the courts have over the years evolved rules of practice to minimise the danger that innocent people may be wrongly convicted. The leading case in East Africa is the decision of the former Court of Appeal in Abdalla Bin Wendo and Another v R (1953) 20 EACA 166 cited with approval in Roria v R [1967] EA 583. The paragraph which has often been quoted from Wendo (supra) is at page 168. The ratio decidendi discernible from that case is that: (a) The

testimony of a single witness regarding identification must be tested with the greatest care.

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult. (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to the guilt. (d) Otherwise, subject to well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone."

17. The court continued and later on in the same judgement stated, " The reason for the caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of identification evidence. If the quality is good, the danger of mistaken identity is reduced but the poorer the quality, the greater the danger."
18. Sendagire was known to Namisango and Walakira according to both these witnesses. That makes it easier for both of them to have identified him if there was light and opportunity to observe him. Both have testified that there was torch light from a torch held by one of the assailants. It is the description of the what took place at the scene of attack that raises questions as to whether the identification is free from error. Namisango asserts that on arrival the assailants first tied up and blindfolded Walakira before blindfolding her. If that is so then Walakira could not have seen the subsequent actions of blindfolding Namisango, especially since he claims this is when he was able to recognise Sendagire as he tied up and blindfolded Namisango. Walakira in his testimony stated that the assailants first tied up Namisango and



blindfolded her before they blindfolded and tied him up. If they did then Namisango could not have seen the assailants blindfolding Walakira as she stated in her testimony. This is a major contradiction in the testimony of the only two eyewitnesses to the incident.

19. Where there are contradictions and discrepancies between the prosecution witnesses, which are minor, and of a trivial nature these may be ignored unless they point to deliberate untruthfulness. Where the contradictions and discrepancies are grave this would ordinarily lead to the rejection of such testimony unless satisfactorily explained. See Alfred Tajar v. Uganda, Criminal Appeal case no. 167 of 1969 (unreported); Emmanuel Nsubuga v Uganda, Supreme Court Appeal No. 16 of 1988 (unreported); and Suleiman Katusabe v Uganda, Supreme Court Criminal Appeal No. 7 of 1991(unreported).
20. This contradiction in the account of these two vital witnesses for prosecution has not been explained. It renders their testimony on the question of identification of the accused totally unreliable. This situation is worsened by the failure of the prosecution to call the first official or officials that received the first reports of the crime. The RC1 Chairman to who Sebandeke is supposed to have made the first report was not called. The RC 2 Chairman to whom Sebandeke made a report together Namisango was not called. The police officer to who the first information was given of this crime was not called. First reports are very important pieces of evidence in crimes of this nature where witnesses claim to have identified a suspect at the time a crime was committed. First reports ought to be recorded in writing and produced at the trial.
21. The former Court of Appeal for Uganda in Clement Namulambo & Anor v Uganda Criminal Appeal No. 1 of 1978 (unreported) discussed the question of first reports. It quoted with approval the following passage from Tekerali s/o Korongozi & others v Reg., (1952) 19

E.A.C.A. 259 at Page 260, “ Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safe guard against later embellishments or the deliberately made up case. Truth will often out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.” The absence of any testimony from the people in authority who received first reports of this crime creates unease in my mind.

22. It is not clear when this case was reported to the police. What is clear is that this was not immediate or anywhere near the date of commission of the offences in question. Sebandeke said he did not know crimes are reported to police. He did make a report to the police in 1995. This is more than year after the crime was committed, in fact coming on close to two years. Combining the absence of evidence of a first report naming Sendagire as one of the assailants, the inordinate delay in reporting this crime to the police and the serious contradictions in the testimony of identifying witnesses would seem to suggest that no visual identification was made of the assailants or any one of them that evening.
23. Mr. Simon Khaukha the learned Resident Senior State Attorney submitted that there was evidence of the Sendagire being found in possession of recently stolen property. This evidence coupled with the strange conduct of the accused, he submitted, was strong enough to prove that he committed the offences of which he was charged with. I do not think it has been proved that Sendagire was in possession of recently stolen property. The radio in question was not exhibited. The person it was recovered from was not called to testify. The person who authorised that it be given to Sebandeke after producing a receipt for it was not called to testify. The receipt on the strength of which it is alleged to have been released was

not produced. Sebandeke who is supposed to have collected it from Kitasiba village and taken it to the owner, Mrs Walugembe, did not testify at all on the recovery of this recently stolen property and his role in recovering it.

24. On the other hand, Sendagire has given an explanation for both the possession of the radio and his strange conduct. He claims to have bought the radio in question and Wasswa supported this explanation when he testified that he was a witness to the purchase agreement. For his strange conduct, he said he had a pending case for which the police wanted to arrest him and he was avoiding arrest. This explanation is probable. An accused should be convicted on the strength of the prosecution case and not the weakness of the defence case. In my view, the prosecution has failed to discharge its burden in this case. Sufficient evidence is lacking to prove beyond reasonable doubt that the offences in question were committed by the Sendagire.
25. Accordingly, I do not find the accused in this case guilty of the two counts of robbery. I acquit him of both counts. I order his immediate liberation unless held some lawful charge.

Signed, dated and delivered this 8th day of November 1998.

FMS Egonda-Ntende

JUDGE