THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT SOROTI

HIGH COURT CRIMINAL SESSION NO.0046/1999

UGANDA …….PROSECUTOR

VERSUS

OCEN NELSON ……..ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE D.N. MANIRAGUHA

JUDGMENT

The accused person stands indicted for aggravated robbery on two counts c/ss 272 and 273 (2) of the penal code Act.

On count I the particulars allege that OCEN NELSON and others still at large on or about the 25th day of August, 1996, in Awasi village in Soroti district robbed Ochonga Alfred of cash shs 300,000/= one prison uniform, rain coat, 4 skirts, 3 blouses, two dresses and a Kitenge and at or immediately before or after the said robbery used a deadly weapon to wit a panga on the said Ochonga Alfred.

On count II they allege that OCEN NELSON and others still at large on or about the 15th day of august, 1996 at Awasi village in Soroti District robbed one Arego Agnes of 3 gomasi, three dresses, six saucepans, 10 mugs and at or immediately before or after the said robbery used a deadly weapon to wit a panga on the said Arego Agnes."

The brief facts that led to the arrest and prosecution of Ocen Nelson are that at around 10:00 p.m. on 25.8.1996 some people forcibly broke into Ochonag's house, cut him repeatedly as others removed his property which they finally made away with the attackers numbered four. At the same time the four people went into the house of Arego Agnes, cut her with a panga at made for with various items.

These victims claim to have recognized their assailants who included Ocen nelson, hence his arrest on the next day.

When the accused person was arraigned before this court on 29/5/2001 he categorically denied being involved in the robberies. By so doing he put all the ingredients in issue and the prosecution has to prove the whole of their cases.

R vs Sims [1946)1 KB 531.

The burden is of proof beyond reasonable doubt.

R vs Johnson [1961) 3 All E.R 969, and Serugo vs Uganda [1978] HCB I

This burden of proof is not made any less even where the accused person sets up the defence of alibi as he does not thereby assume the duty of proving the same. It remains the burden of the prosecution to adduce rebuttive evidence not only placing the accused person at the scene of the crime but also connecting him with the commission of the alleged offence. ***Nyanzi Stephen vs Uganda Cr. Appeal no 42/1997 (C.A)*** (unreported) ***Sekitoleko v Uganda 1967 E.A 513 Bogere Moses & anor vs Uganda Criminal Appeal no 1 of 1997 S.C. U (unreported) and Kibale Isma vs Uganda Criminal Appeal No 21 of 1998 S.C. U (unreported).***

Turning to the merits of this case, the prosecution has to prove the following ingredients:

a) that there was a theft

b) that there was use or a threat to use actual violence immediately before, at or immediately after the theft.

c) That there was use or threat to use a deadly weapon, and

d) That the accused person participated in the robbery

Uganda-vs Mawa alias Matua [1992-19931 HCB 65 Uganda vs Kagezi Yusuf Senyomo [19961 HCB 37 Opoya vs Uganda (1967] E.A 752 AT P. 757.

Considering the first ingredient, Mr. Elayu learned counsel for the defence has argued that this has not been established. His contention is that the evidence of Ochonga and Arego did not specify the amounts of items stolen.

I have looked through the evidence very carefully and do find that a theft was committed. The attackers came not to mate out revenge and go away, but to steal. This is evidenced by their taking away various itemized clothes from each of those houses as well as other property like mugs, saucepans, etc. I have no doubt that these items were stolen and mere non numbering of property stolen while testifying does not mean that no such property was stolen as itemized in the indictment. This ingredient has been established.

The second issue as to whether violence was used or not. Counsel for the defence has conceded it as established. I have looked at the evidence of Ochonga, Arago, Oumo Michael, and Sam Tamali's medical Report. I personally saw the scars on Ochonga and Arego in court. It is not disputed that they were the result of that night's attack. I find that this ingredient has been established.

Thirdly, whether or not there was use of a deadly weapon. Section 273 (2) of the penal code Act defines what constitutes a deadly weapon."

In order to establish that the weapon is deadly the prosecution must prove that it is deadly in the sense that it is capable of causing death. ***Uganda vs David Mukasa & another (1976] HCB 86, and Wasajja vs Uganda [1975] E.A 181.***

Evidence showing the nature and extent of injuries incurred during the robbery, coupled with the description of the weapon by the eye witnesses backed by medical evidence and opinion are a useful guide in coming to a conclusion on this issue.

Here the witnesses described the weapon as a panga. A panga is a common tool and has been held in numerous cases by this court to be a deadly weapon. Here there is no doubt that the weapon was described as a panga, the medical evidence described the injuries as caused by use of a sharp weapon. They were cut wounds on Arego in three places and classified as 'Harm".

Court had a chance to see the scars on both victims. I have no doubt that the weapon used a deadly weapon. I am in agreement with the assessors' opinion in my finding that this ingredient has been proved beyond reasonable doubt. I do so find.

Lastly whether the accused person participated in the robberies or not. This inevitably revolves around two factors namely of correct identification, and the issue of the alibi set up by the accused person.

On identification, on count I there is the evidence of a single identifying witness, and therefore there is need to take the greatest care in testing this type of evidence of visual identification especially where the conditions favouring correct identification are difficult as was the case here.

Uganda vs George Wilson Simbwa S.C.U Criminal appeal no 37/97 (unreported). The circumstances to be taken into account before ruling out the possibility of innocent but mistaken identity are the presence and the nature of light available at the time of identification, whether the accused person was known to the witness before or not, the length of time the witness had to identify the accused, the opportunity the witness had to see the accused, and the proximity between the two.

In my summing up to the assessors I did warn them of the dangers of relying on such evidence, and I did elaborately explain to them the guidelines to take into consideration. I further warned them that such care is not required in respect of a single eye witness only, but is necessary even where there is more than one witness so long as the issue is that of identification.

Bogere Moses & anor vs Uganda [1996] HCB 5.

I duly warn myself similarly before proceeding to analyse the evidence on identification on count I in respect of a single eye witness, and count II two eye witnesses

In so doing I bear in mind of the need to consider the factors that rendered the identification difficult along with those that could have facilitated correct identification.

Also there is the need to look for other evidence, pointing to the guilt from which it can reasonably be concluded that the evidence of identification can be safely accepted as free from the possibility of error.

George William Kalyesubula vs Uganda Cr. Appl no 16 of 1977.

Turning to the evidence of Ochonga Alfred [PW1] he was alone in the house when he was attacked. His claim to correct identification is based on his having known Ocen before having been village mates as well as attended primary School with him. He says that when they entered, some were flashing torches looking for things, there was moonlight, and they were talking. So as he was conversant with Ocen's voice he was able to recognize him. That they stayed in the house for fifteen to twenty minutes.

Despite those helpful factors, however, admittedly the attack was abrupt and very violent giving no chance of properly seeing the assailants before he was seriously injured on both sides of the head front. He stated, "the door opened up and I saw the flash of a torch before I could take my position two men entered and straightaway cut me with a panga. Two others entered. As they continued cutting me others were taking away my things….."

At that juncture he does not seem to have recognized any of his assailants. Looking at the injuries on the front part of the head right and left, the suddenness of the attack and those grave injuries must have deprived him of his full senses of vision which was in fact first lessened the flash of the torch.

Also as he guarded against the blows of the pangas resulting in the multiple outs on the right arm could not have left him with a chance of clear vision to see the attackers in those dark circumstances.

Moreover, in cross examination he admitted that at police in his statement he said he recognized his assailant as Opeca (statement shown to him).

When confronted with that discrepancy he changed and said, I knew that person as OCEN outside."

If Ocen was outside, then the witness could not have seen him as the attackers were inside cutting him. He then goes ahead to say Ocen was in the doorway. Still this would mean he could not have seen him due to the manner of the attack. I highly doubt his testimony on having recognized Ocen in such difficult conditions.

I have weighed the circumstances carefully, I have no other evidence to rely upon pointing to Ocen's guilt from which I can safely rely on visual identification as free from the possibility of error.

I am thus not satisfied with the evidence on correct identification. The doubt is resolved in favour of the accused.

Regarding count II PW2 Agnes Arego, again the time was dark and the attack sudden, immediately they entered they cut her also severely. Tough she claims she managed to identify them. She does not claim to have known the accused by name. When they entered they ordered her to lie down facing down and were flashing a torch.

On how she managed to recognize them she said "It is God who enabled me to see those people."

This answer came as a result of realization that she could not see properly while testifying.

When she claimed she could recognize the attackers if they were in court, she said Ocen was there but her eyes could not see properly." I cannot see him from here. I can see you (state Attorney hazily. I can see at close range. I can't see him…. my eyes cannot see. "although she added her loss of eye sight was last year. She failed to pick Ocen out of the dock when she even moved nearer to him.

I cannot believe that her loss of eye sight hit her last year.

Her evidence is totally unreliable in light of her bad eye sight, the way she was cut and made to lie down also could have interfered with any chance of correctly identifying her assailants whom she appears not to have been very familiar with.

As for PW 3 Oumo Michael who was staying with Arego that night. He was asleep when the attack took place. He woke up when they were already in the house. When he woke up he says he ran outside the house to hide.

His testimony is however doubtful when he says they even had a gun which is not mentioned by other witnesses. Claiming to have recognized the attackers from moonlight when they were inside the house is incredible unless it had glass windows allowing moonlight inside. To say he recognized some outside as he ran is also doubtful as he does not mention whom he saw outside and where.

In his flight I doubt how he could have correctly identified the attackers.

On this count also other evidence is lacking on which to rule out the possibility of correct identification.

Consequently I doubt whether OCEN was properly and correctly identified as present at the scene and participating in the robbery.

Turning to the alibi put forward by the accused person, he stated in his defence that during that night he was at the home of his brother in law called Elupu where he had gone to attend a party following a millet harvest.

On alibi the duty is upon the prosecution to adduce evidence rebutting it, placing the accused at the scene, and involving him in the commission of the offence. ***Ssekitoleko v Uganda [1967) E.A 537 Kagunda Fred vs Uganda Crim. App. No 14/1998 S.C. U (unreported), and Sirasi Kisembo vs Uganda Crim. Appl No 13/98 S.C.U (unreported).***

Before this court can reject such an alibi it must consider it sufficiently to see whether the story is inherently improbable or otherwise not worth of credit.

The accused person did call three witnesses besides himself to support his alibi.

Mr. Kaamuli, learned Resident State Attorney, asked court to disregard the alleged alibi on two grounds:

First that whereas the accused said he was invited by his mother-in-law, whereas Elupu said he was the one who had invited him and the mother-in-law was staying in a different place from Elupu.

Secondly that the defence witnesses testified only to the fact of the accused having been at Elupu's and stopped, causing suspicion of a fabricated alibi.

Also there is a discrepancy as to when Ocen slept that night. Whether it was at 11:00 p.m. or cock crow.

Counsel for the defence explained that in the village the mother in law could invite her son-in-law to attend such a function at her son's place.

I have considered the prosecution and Sons of the alibi and find that the discrepancies are minor and capable of explanation. First it is not refuted that the child was sent by the mother in law so Ocen could have received the message of invitation from her but the party being held at Alupu's.

Secondly the prosecution has not brought any rebuttive evidence to show that there was no such a party and that Ocen was there till the next day when his wife went for him.

As to the time Ocen slept it is explained that he was drunk and could not correctly tell the time. This is credible for Ocen had started by drinking enguli on the way to Ocen's place early in the day arriving late at Alupu's.

On Ocen being at Elupu's there is plenty of evidence to establish this. All defence witnesses confirmed his story.

After the attack took place people mobilised in the village to look for the culprits. Ekong and Oteba went to Ocen's place, were told he was at Elupu's and they went and found him there. This is uncontroverted. The accused was also there till the next day at 1:00 p.m.

The prosecution has failed to discharge the burden of disproving the alibi and place the accused at the scene. Kagunda's case (supra). The accused's alibi is credible and has not been rebutted, and I have seen no reason to doubt it. I do accept it.

The prosecution having failed to bring evidence conclusively identifying the accused as one of the assailants, also having failed to place the accused at the scene of the crime and connecting him with the offences, they have not discharged the burden of proof beyond reasonable doubt, and the accused person is entitled to an acquittal.

The two gentlemen assessors advised me to convict the accused on both counts. I do disagree with them because first they never appreciated the issue of correct identification though I extensively explained the same to the

Secondly they failed to appreciate the fact that the prosecution had failed to adduce evidence to rebut the alibi set up by the accused person.

Uganda vs Dusman Sabuni [1981] HCB 1 Semande James vs Uganda Cr. Appl No 23/99 S.C.U (unreported)

Consequently I find the accused person not guilty and acquit him of aggravated robbery c/ss 272 and 273 (2) of the penal code Act on both counts.

The accused Ocen nelson shall be set at liberty unless otherwise lawfully held.

D.N. Maniraguha

Judge

26/11/01.