THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

CRIMINAL SESSION CASE NO.38 OF 2000

UGANDA……PROSECUTOR

VS

OGOLA DAVID ……ACCUSED

OMODING JOHN FRANCIS

BEFORE THE HONOURABLE MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The two accused, Ogola David and Omoding John Francis were indicted in two counts, with robbery contrary to sections 272 and 273(2) of the Penal Code Act. It was alleged in the particulars of the indictment in count one, that the two accused and others not before court during the night of 24/5/1999, at Manakori B village, in Busia district robbed Etiang George of one radio cassette Sony, and a wrist watch, all valued at shs. 230,000/= and that during the said robbery, they used a deadly weapon, to wit a panga on the said Etiang George. In count two, it was alleged that during the night of 24/5/1999, at Manakori B village in Busia district, the two accused and others not before court robbed one Orono John of a bicycle, Avon AB-310 frame number 998064, valued at shs. 60,000/= and that during the said robbery, they used a deadly weapon, to wit a panga on the said Orono John.

Each of the accused denied the offences charged. The burden to prove a charge against an accused person lays on the prosecution. The Supreme Court held in Ojepan Ignatius vs Uganda Cr. App. No. 25 of 1995 (unreported), that the onus was on the prosecution, as it is always on the prosecution in all criminal cases except a few statutory offences, to prove the guilt of the accused beyond any reasonable doubt. See also Abdu Ngobi vs. Uganda Cr. App. No 10 of 1991, (SC), (unreported).

The offence of robbery as charged has three essential ingredients which must be proved by the prosecution beyond reasonable doubt.

A) that there was a theft,

B) that there was use or threat to use a deadly weapon during, immediately before or after the theft, or causing death or grievous harm, and

C) that the accused persons participated in the theft.

See Wassajja vs. Uganda [1975] HCB 181.

The prosecution produced four witnesses to prove the charge. The accused each gave an unsworn statement. They denied the offences and set up alibis. Two witnesses were called for the defence. It was the prosecution case that Etiang George was sleeping in his house on the 24/5/1999. At around midnight the door of his house was banged open with a big stone. Attackers whose number he could not ascertain entered. They were armed with pangas and had torches. They demanded for money which he did not have. They beat him up and took away with them his radio cassette Sony, a watch, and a bicycle. He recognised some of the attackers as including David Ekaikai, whom he knew previously, as he used to see him in the trading centre. This is David Ogola Al He was wearing a necklace around his neck which was glittering. He was also wearing a blue raincoat similar to that of the police. Etiang was in his house with his wife. She made an alarm when the attackers were in their house. Etiang's brother whose house is only 6 metres away was also attacked that same night. Etiang identified in court a metal chain as the necklace which Al was wearing during the night of the attack, plus a blue raincoat, and radio cassette. But strangely, these items were not put into evidence as exhibits. Etiang rushed to the police in Busia Uganda and also in Kenya and reported, as the attackers were seen heading for Kenya. Etiang said that there was bright moonlight outside that night. That was how he was able to know that there were other attackers outside.

PW2 Orone John testified that he is the brother of Etiang George. He was sleeping in his house on the 24/5/1999, when thieves broke in using a large stone. His house is only 6 metres away

from Etiang's house. The thieves ordered him not to look at them lest they would kill him. They told him not to make an alarm and he did not. They took away with them his bicycle. They were armed with pangas and clubs. They were many, others remained outside while some entered. He identified three of those who entered as Ogola David, who was wearing a metallic chain, Enimari who ferried out the bicycle, and Omoding who was putting on a white cap, and an overcoat. It was dark and he only managed to glance at the robbers. He was in any case frightened. He knew Ogola prior to this incident. One of the thieves was wearing a blue raincoat, while another was wearing yellow trousers. In his police statement which he made the morning after the incident, which was admitted as defence evidence, Orone John said that he recognised only Ogola David during the attack.

Police Constable Odong testified that he was on night patrol duty that night, when he heard alarms. He was with colleagues and on checking he found civilians who reported having been robbed and that the robbers had ran into Kenya, just across the road. Assistance was sought from Kenya police. Later lie moved to Dongosi police station in Kenya where lie was handed two suspects, Al and A2, together with a blue raincoat, a metallic chain which he brought to Uganda and handed over to his superiors.

Dr. Odong Pancras Odur examined both accused and found each of them to be of sound mental disposition.

The accused gave unsworn testimony. Ogola George stated that lie was on that material day at his home in Kenya. At around midnight, his father DW3 woke him up as there were alarms coming from the neighbouring village in Uganda. He was sick but he moved out as did his other brothers. He returned inside the house and slept. The following morning askaris came with the complainant and searched his house. They removed a dress and a necklace of his wife from the top of his suitcase, and carried them on the bicycle. He was arrested and on the way they met Omoding also being taken to the police. On the 27/5/1999, lie was taken to Busia police in Uganda.

DW2 Omoding John Francis woke up in the morning of 22/5/1999, and went to plough with his oxen. This was in Kenya. The first garden was that of his cousin. While he was at it, police came

with a photograph and asked him to identify himself which he did. He was ordered to accompany them to the police. On the way, he met Ogola also being taken to the police. He was tortured and asked about stolen property. On 27/5/1999, he was taken to Busia police station in Uganda. He said lie had no idea of the allegations leveled against him.

Joseph Emulat DW3 the father of Al. He more or less confirmed what Al said in his testimony. He said that during the night of 24/5/1999, there was a lot of alarming from the neighbouring village on the Uganda side. This is about 1/2 a kilometre away. He woke up his children including Al, at about 1.00 a.m. They all returned to bed. He might have gone to check on the reasons for the alarms in the morning but then the police came and arrested his son Al.

DW4 Patrick Emasset stated that Al is his brother, and A2 is his neighbour. On 24/5/I999, he was with his neighbour in the trading centre from about 6.00 p.m. in Uganda, drinking malwa, a local drink. This was at Amagoro trading centre. They left the bar at about 10.00 p.m. together with A2 and went home. They separated when they reached his home which is about 150 metres away. At 6.00a.m. The following morning, they moved together to plough with their oxen. A group of people came and arrested A2 as they were ploughing.

Mr. Mwambu learned Counsel for the accused did not contest the first two ingredients of the offence. He however strongly contested the third ingredient, the participation of the accused in the offences charged.

With regard to the ingredient of theft, I agree that there can be no doubt at all that there was a theft that night in the homes of Etiang and Orone. The testimony of these two complainants was to the effect that they were attacked that night by a group of people. Property was stolen. This included the radio cassette and wrist watch belonging to Al, and also the bicycle belonging to A2. These have not been recovered. That ingredient was, in my view rightly not contested. I therefore find that the ingredient of theft was proved by the prosecution beyond reasonable doubt.

The ingredient of the use or threat to use a deadly weapon caused me some unease. There was the evidence of PWI Etiang who testified that people attacked them at around midnight. They used a large stone to force the door open. This stone was not exhibited. Nobody even mentioned seeing it. Both PWI and PW2 Orone simply heard a big bang on their doors, and suspected that a

large stone had been used to force open their respective doors. I am not sure that even if this stone, assuming there was one, had been produced, its use in forcing open the doors would constitute use or threat to use a deadly weapon. There was talk of pangas by both PWI and PW2. None of these witnesses stated that these were used or threatened to be used on them. None was harmed in any way. No such weapon was recovered. With respect to each count, there is only the evidence of the complainant. There is no other evidence direct or circumstantial to support or corroborate that evidence of the complainants. I am aware of section 132 of the evidence Act which provides that no particular number of witnesses is required to prove any fact. The practice of this court is to exercise caution when dealing with the testimony of a single witness. What is required is other or independent evidence. When dealing with such evidence, the Supreme Court advised that by evidence of corroboration is meant independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particulars not only the evidence that the crime has been committed, but also that the accused committed it. Kibale Ishma vs. Uganda Cr. App. No. 21 of 1998. This was missing in this case.

In these circumstances I was not satisfied that the prosecution proved the second ingredient beyond reasonable doubt.

The last ingredient is the participation of the accused in the offences charged. PW1 testified that he identified Al on the night of the attack. This was from the metallic necklace which he was wearing at that time. There was otherwise no light inside the house. But there was bright moonlight outside. The robbers had torches. They ordered the witness to hand over money to the tune of shs. I million which he said he did not have. They took the radio cassette and the wrist watch. The witness knew the Al before. It is not clear about the other accused. There was no other eye witness. These are the conditions under which the identification was made. PW2 said that he was attacked in the middle of the night, by people who rushed in and ordered him not to look at them. He said that lie was very frightened, understandably so the best lie could manage was only a glance at them. It was dark inside the house. There was no light apart from the moonlight outside. But during the attack he did not venture outside. In his statement to the police he said that he recognised only Al, from the necklace. In court he said that he recognised three of

the attackers including the colours of their clothing. Those he recognised included Al and A2. It was the submission of Mr. Mwambu that the evidence of identification was not satisfactory.

During the summing up I warned the assessors and I warned myself of the need to take great caution when considering the testimony of a single identifying witness as was the case here.

The law relating to identification has been laid down by the superior courts following the celebrated case of Abdalla bin Wendo and Another vs. R. (1953) 20 EACA 166. See Abdalla Nabulere and others vs. Uganda (1979) HCB 79, and Bogere Moses & Another vs. Uganda Cr. App. No.1 of 1997, (SC). In the case of Uganda vs. George Wilson Simbwa (SC) Cr. App. No. 37 of 1995, it was held that while the identification of an accused person can be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest caution the evidence of such witness regarding identification, especially when conditions favouring correct identification are difficult. Circumstances to be taken into account include the presence and nature of light, whether the accused person is known to the witness before the incident or not, the length of time and opportunity the witness had to see the accused and the distance between them.

Where the conditions are unfavourable for correct identification what is needed is other evidence pointing to the guilt from which it can be reasonably concluded that the evidence of identification can safely be accepted as free from the possibility of error. The true test is not whether the evidence of such witness is reliable. A witness may be truthful and his evidence apparently reliable and yet there is still the risk of an honest mistake particularly in identification. The true test as down by the cases is whether the evidence can be accepted as free from the possibility of error.

The Court of Appeal for Uganda summarised the position in these words, “where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correct identification or identifications The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, that even a number of such witnesses can all be mistaken. The

judge should then examine closely the circumstances the identification came to be made, particularly the length of time, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good the danger of a mistaken identity is reduced, but the poorer the quality the greater the danger."Abdalla Nabulere and others vs. Uganda (supra)

From the evidence as I have analysed it above, it is clear that the conditions under which the identifications by PWI and PW2 came to be made were unfavourable. It was deep in the night. There was no light inside either house. From the sequence of events as described by these two witnesses the time the robbers spent in the houses was not much as they forced their way inside, ordered them to produce money. When this was not forthcoming the robbers took what they could lay their hands on. This makes for poor quality identification

What then is required is the other or independent evidence. This might have come from the recovery of stolen items. What was identified in court was not tendered in evidence. May be the reason being that the origin of these items was not clear. The police officer who testified about them only received them from the police in Kenya. It is not clear how and from who the Kenya police got them. In the absence of such evidence, it was difficult to connect them the accused. In the absence of any such other evidence, there remains a doubt on the identifications of the accused. I therefore find that the ingredient of the participation of the accused not to have been proved by the prosecution beyond reasonable doubt.

In view of that finding, and my finding in respect to the second ingredient, I do not find it necessary to go into a detailed analysis of the accuseds defence. Suffice to say that their alibis were not broken. They were not placed squarely at the scene of crime. The testimonies of the defence witnesses appeared credible. This was notwithstanding that the accused had no duty to prove any defence including alibi, when they set one up.

The two gentlemen assessors advised me to convict both accused as charged. They based their advice on the testimonies of the complainants. With respect, and for the reasons I have given above regarding identification and the absence of corroborative evidence, I do not accept their advice. I accordingly find the two accused not guilty of the offence of robbery contrary to

sections 272 and 273(2) of the Penal Code Act, and I acquit them on both counts. They are to be set free and at liberty forthwith unless they be held on other lawful grounds.

RUGADYA ATWOKI

JUDGE

20/03/01