

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA**

HCT-05-CR-SC-0206-2000

UGANDAPROSECUTION

-VS-

TUMUHIMBISE BENJAMINACCUSED

BEFORE: THE HON. JUSTICE P. K. MUGAMBA

JUDGMENT

Tumuhimbise Benjamin, the accused, is indicted for aggravated robbery contrary to sections 272 and 273 (2) Of the Penal Code Act. In support of its case the prosecution called in all four witnesses. The complainant Kamukama Posiano was PW1, Kemitunga Rosemary was PW2, Kamukama Deus was PW3 and Muheebwa Johnson was PW4. In his defence the accused made a sworn statement and called one witness.

Briefly the prosecution case is that on the night of 15th June 2000 PW1 and his grandmother, PW2, had gone to bed in their house at Nyakabungo cell, Mbarara Municipality, when they were attacked by five men who had a gun with them. The intruders shot PW1 and held his neck in order to strangle him. The men went away with his two shirts and cash Shs.60,000/=. He recognized accused only. Accused was later arrested and charged.

Accused in his defence denied being part of the gang of intruders who attacked PW1 on the relevant night. Being an LDU in the locality he went to answer the alarm just like several others did, he contended.

The prosecution bears the burden to prove all the ingredients of the offence beyond reasonable doubt.

See *Uganda - vs- Kahitira [1988-1990] HCB. 30.*

In a case of aggravated robbery the prosecution must prove the following ingredients:

- (a) that there was theft;
- (b) that the theft was accompanied by violence or threat of violence;
- (c) that a deadly weapon was used during the robbery;
- (d) that the accused person was responsible.

I shall proceed to discuss the above ingredients in light of the available evidence.

Regarding theft, there is the evidence of PW1. I find the defence does not contest that PW1's two shirts and Shs.60,000/= were stolen on the occasion. In the circumstances this ingredient has been proved by the prosecution beyond reasonable doubt.

The second ingredient is whether the theft was accompanied by violence or threat of violence. PW1 testified that an attempt was made to strangle him by the intruders besides shooting him. He was forced to lie on the ground facing the sky. The defence does not contest this ingredient. This court has held that violence was used where in a robbery a victim was held with force and slapped.

See *Kenan Owori & Anor - vs- Uganda [1975] HCB. 223.*

I am satisfied that here too the prosecution has proved this ingredient beyond reasonable doubt.

The third ingredient is whether a deadly weapon was used during the robbery. Again the defence does not contest this ingredient. PW1 showed court the scars on his body where the bullet had entered and left it. There was no medical evidence regarding this testimony but since there was evidence of the scars and evidence of witnesses who had seen PW1 injured coupled with lack of dispute of the injury on the part of the defence I am satisfied a gun was used on the occasion. Once a gun is fired at the scene of crime it is deemed to be a deadly weapon for the purposes of the offence of aggravated robbery.

See *Wasaija - vs- Uganda [1975] EA 181* and

Birumba - vs- Uganda S.C. Criminal Appeal No. 32 of 1989 (unreported)

Consequently I find the prosecution has successfully proved this ingredient also as a gun is a deadly weapon.

The fourth ingredient concerns the identity of the perpetrator of the offence. PW1 testified that he was able to identify accused on the night in issue. He knew accused before and there was some light. This court in *Uganda - vs- Manuel Epacu and Another [1976] HCB 267* has held that it is unsafe to find a conviction on the evidence of a single identifying witness especially where the conditions favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to guilt is needed. Both PW1 and PW3 testified that on the relevant night accused had a gun. Both PW3 and PW4 stated that a gun had been signed for by accused in his capacity as an LDU. They state also that he was given 14 rounds of ammunition to go with the gun. PW3 told court that after he had expended two bullets and heard accused shoot once he found 11 bullets remained. Yet in his testimony PW1 had told court that at his premises three bullets had been expended that night. If it was accused using the same gun that originally had 14 bullets surely the bullets would be far less than the 11 bullets PW3 counted. Some explanation has to be made concerning where the other bullets came from and that is not the duty of the accused at all. Accused is said to have been wearing a T-shirt of LDU when he attacked PW 1. Upon his return to answer the alarm he had a full LDU blue uniform. That means that some explanation has to be made how his dress had suddenly changed. According to PW I there was an interval of 18 minutes between the time accused left his premises and when he returned to answer the alarm. PW3 told court that his house is between accused's house and that of PW1. When PW3 heard gunshots he got up and went outside. He saw accused on his way to answer the alarm. If the prosecution case is to be believed surely PW3 would have been aware of accused going to his house from the premises of PW1 immediately after the attack. As it was he saw him on his way to answer the alarm. I find that accused is being connected with the offence because PW1 thought he saw him on the occasion. Given the circumstances of that evening and the fact that accused had been injured it is unsafe to convict on his evidence without corroboration. This is the warning I gave to the assessors and it is a warning I take as premium. As it is I find no corroboration of PW1's testimony.

In his defence accused set up an alibi. It is not the duty of the accused to prove his alibi. It is the duty of the prosecution to disprove and destroy the alibi by adducing evidence which puts the accused person squarely at the scene of crime.

See Vincent Rwamwaro - vs- Uganda [1988-1990] HCB. 70.

It is the testimony of the accused person and that of his witness that at the time relevant to this case they were in their house sleeping. I note that there were some discrepancies in the testimonies of accused and DW2 concerning whether DW2 eventually left the house and went to the scene of crime and whether or not accused had his wife in bed that night. I find such discrepancies minor. They could be attributed to the passage of time or poor memory retention. In any case I do find that there is agreement that the two happened to be together in the house at the crucial time. The discrepancies in defence evidence should not materially affect the alibi as it does not go to the root of the case.

See Uganda - vs- Katusabe [1988-1990] HCB 59.

It does not point to deliberate untruthfulness.

See Uganda - vs- Twikirize [1988-1990] HCB. 37.

The alibi set up by the defence has not been disturbed by prosecution. I have already pronounced myself about the prosecution evidence of identification which I find weak. In the circumstances as identification is key to incriminating the accused I find the prosecution has failed to prove this ingredient either on the basis of identity or in community with some other evidence.

For the reasons I have given in the course of this judgment I find I do not agree with the joint opinion of the assessors when they advise me to convict. I find accused not guilty of the offence alleged against him and I acquit him.

P.K. Mugamba

Judge

20th August 2002

20th August 2002

Mr. Murumba State Attorney

Mr. Dhabangi for accused person

Accused in court

Ms Tushemereirwe court clerk

Court:

Judgment read in open court.

P.K. Mugamba

Judge