THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SESSION CASE No. 0023 OF 2003

UGANDA:: PROSECUTOR

-VERSUS-

KABALEBE YUSUF :: ACCUSED

BEFORE: HON MR JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The Accused person Kabalebe Yusuf alia Bahati stands indicted for aggravated robbery contrary to Section 272 and 273 (2) of the Penal Code Act. It is alleged that the Accused and others still at large on or about the 30th day of November, 2001 at Aga Khan Primary School, along Makerere Hill Road, Old Kampala in Kampala District robbed Mutumba Robert of a motor vehicle Reg. No. UAD 418 P and at or immediately before or immediately after the said robbery used a deadly weapon to wit a pistol, upon the said Mutumba Robert. The Accused pleaded not guilty to the indictment.

The substance of the case for the prosecution is that on 30/11/2001 the complainant one Mutumba was driving a motor vehicle Reg. No. UAD 418 P. He went to Aga Khan Primary School on Makerere Hill Road to collect a child. He parked the vehicle on the main road and entered the school. That as he returned with the child, entered the car and no sooner had he started to drive away that the Accused Kabalebe Yusuf alia Bahati together with another unknown person still at large drove a motor vehicle and blocked the complainant's path as he was about to drive off. That immediately Accused and his co-robber jumped out of their vehicle and put Mutumba at gun point. They threatened to shoot him if he made any alarm. The robbers drove off the vehicle after throwing out Mutumba and the child. However, the car was stalled by the driver using a remote control device, which he activated and blocked off the fuel. The robbers tried to start the vehicle but failed. Both robbers are then said to have left the vehicle and started to run as the complainant raised alarm which attracted many people who together with Tight Security guards deployed at the school pursued them and arrested Accused. The second robber escaped. It is the prosecution case that during the chase the Accused fired a bullet from his pistol in an attempt to scare off the people pursuing him. The Accused was accordingly

charged with this offence. On his part, the Accused does not deny being at or near the scene of crime. His defence is that he was on his was to Makerere when people shouting thief! Thief! Pounced at him and claimed that he had taken part in the robbery of someone's vehicle. His defence is therefore that he was an innocent pedestrian who was mistakenly branded a thief.

It is trite that the prosecution bears the burden of proving the case against the Accused person beyond reasonable doubt. It is also a cardinal principle of our law that the Accused should not be convicted on the weakness of his defence or on mere suspicion but he should only be convicted on the strength of the case as proved by the prosecution.

In a case of aggravated robbery, the prosecution must prove beyond reasonable doubt that:-

(i) there was theft of some property;
(ii) there was violence;
(iii) there was actual use of a deadly weapon or a threat to use it; and that
(iv) the Accused person took part in the commission of the offence.

To prove the first ingredient of the offence, the prosecution relies on the evidence of PW2 Robert Mutumba. In November 2001 he was taking his boss's children to school as a driver. He was driving motor vehicle Reg. No. UAD 418 P Corolla Model 100, silver in colour and property of one Matovu. Then on 30/11/2001 around 1.00p.m., he parked the vehicle outside Aga Khan Primary School and went to collect a child. As he was entering his vehicle to drive off, there appeared a vehicle from Old Kampala side. It blocked his way. Two people emerged from it and put him at gun point. They demanded for the key, he gave it to them and they sat in it. The vehicle moved a short distance and it stopped. Using a remote control device, he had activated and blocked off the fuel. So the robbers were unable to drive away the vehicle on account of that.

The offence of theft is committed when a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of that property. Any assumption by a person of the right of the owner amounts to an appropriation. When the thug removed PW2

from the steering wheel and took over control of the motor vehicle without his consent, the intention could not have been otherwise than dishonest. The legal position in Uganda regarding the act of taking or carrying away as an element of the crime of theft is same as in England. See Sula Kassira Vs. Uganda; S.C. Criminal Appeal No. 20 of 1993. There must be what amounts in to law an asportation, i.e. carrying away, of the goods of the prosecutor without his consent but for this purpose, provided there is some severance, the least removal of the goods from the place where they were is sufficient, although they are not entirely carried off. The removal, however short the distance may be, from one position to another upon the owners premises is sufficient asportation. In cases where asportation cannot be proved but where the prisoner intended to steal and did some act in furtherance of that object, he may be convicted of attempting to steal. The offence of lacemy is complete when the goods have been taken with a felomious intention, although the prisoner may have returned them and his possession continued for an instant only. See para 1484, Vol. 10 of Halisburys Laws of England, 3rd Edition.

I have considered PW2 Mutumba's evidence in this case. It is the only evidence there in on the issue of asportation. To use his own words, "the two started the vehicle, it moved a short distance and it stopped". The law does not define how short the short distance should be to constitute asportation. The decision is for the Courts to determine, depending of course on the evidence on record. My considered view on this is that there ought to be a distance, a measurable one. In the instant case, the police officers who investigated this case did not visit the scene of crime. If they had done so, I reckon their evidence would have been helpful on the distance factor. The impression I got from the complainant's evidence, without more, is that on being thrown out of the vehicle, PW2 reached for the remote control device in his pocket and immediately blocked the flow of fuel which stalled the engine. The thieves could not therefore start it. In these circumstances, it appears to me that the thugs, intending to steal the motor vehicle in issue, began to put their intention into execution by means adapted to its fulfillment. They manifested their intention by some overt act, i.e. they threw Mutumba, PW2, out of the vehicle. However, they did not fulfil their intention to such an extent to commit the offence of theft. In my view, they attempted to steal the vehicle. The facts therefore disclose an offence of attempted theft rather than the completed offence of theft. I so find.

Regarding the issue of whether or not there was violence, PW2 Mutumba testified that the key was removed from him forcefully and at gun point. He was violently thrown out of the vehicle with threats that if he raised an alarm, he would be shot. In law, where a demand is made at gun point, there is a threat implied in the very act of brandishing such a gun at the victim. It is therefore my considered opinion that these acts of the thugs upon PW2 Mutumba amounted to violence within the meaning of Section 272 of the Penal Code Act. The second ingredient of the offence has been proved beyond reasonable doubt.

This leads me to the issue of whether or not there was use of a deadly weapon or a threat to use it. In Wasajja Vs Uganda [1975] EA 181 it was held that where gun shots are fired in the course of the robbery, the Court finds it easier to hold that a deadly weapon was used. In the instant case, the thieves were, according to PW2, armed with a pistol. He saw it and they threatened to shoot him if he dared raise an alarm. On failing to drive the vehicle, one of them fired in the air in attempt to scare off the people pursuing him. PW3 Lt Kibuuka and PW8 Safari heard the gunshot.

The said seven rounds of ammunition in the magazine was recovered from him. The Ballistics expert, PW1 Robinah Kirinya, found the gun's essential components intact. It was successfully test fired using a bullet from the attached magazine. A spent cartridge was recovered from the vicinity of the gunshot and the Expert's opinion was that it was capable of having been discharged from the pistol, Exh.P2. I found PW2 a truthful witness. I accept his evidence that one of the thugs was armed with a pistol. The said pistol was fired in an attempt to scare away the pursuers. I did not find any break in the chain of exhibits to raise doubt in my mind that the exhibit is not what discharged the shot which PW3 and PW8 heard. In all these circumstances, I find that the prosecution has proved beyond reasonable doubt that a deadly weapon was used against PW2 Mutumba.

The next and final issue for determination is whether or not the Accused took part in the failed robbery. The prosecution case is that the thug who pushed PW2 from the driver's seat, put him at gun point, took over the control of the motor vehicle and took to the heels when the going got tough is the Accused in this case. The Accused vehemently denies it. He says he was on his way to Makerere, heard a gunshot and people converged on him saying he was a thief. I have

considered the evidence of PW2 Mutumba. I am satisfied that his assailant ran from near Aga Khan Primary School towards Martin Road, Old Kampala. It was a straight stretch and therefore he did not lose complete sight of the thug, the distance of about 400metres between them notwithstanding. I have also considered the evidence of Lt Kibuuka, PW3. He too heard the gunshot and saw a person running towards some point where there were some banana plants. There was no through road where that person was running to. When the man could not advance any further, PW3 daringly approached the man for a gun. The man had by now sat down and PW3 tried to search him for any weapon. The gun, Exh.P2, was recovered from the very point where the thug had taken cover.

I have considered the length of time the suspect was under observation by PW2 Mutumba and PW3 Lt Kibuuka and the distance between these two witnesses and the suspect. I have also considered the fact that this was during broad day light, around 1.00p.m on a straight road stretch. PW2 had been face to face with the thug. He continued seeing him as he fled and so did Tibo Muzamil, PW5, the Guard with Tight Security who was on duty at the said school. From this evidence, even if the vehicle was not exhibited, and its tender in evidence would not have added any value to the case any way, I have not even the slightest doubt in my mind that one of the persons who failed to drive away the vehicle, shot in the air and was arrested in the circumstances described by PW2 Mutumba, PW3 Lt Kibuuka and PW5 Tibo is the Accused in this case. The credible evidence of these three witnesses completely destroys the Accused's story that he was arrested near the Gate of Aga Khan Primary School. I am satisfied that he was arrested a good distance away from the School. His defence is a worthless pack of lies and reject it.

From the evidence, the robbers were three. Two attacked Pw2 and the third drove away after successfully blocking him (PW2). Each of the thugs had a role to play in the operation. It was a joint action of offenders prosecuting a common purpose as provided in section 22 of the Penal Code Act.

Both Assessors, Mr Robert Lubega and Balintuma Elly, were of the opinion that the offence of aggravated robbery had been proved. For reasons I have detailed above, I disagree with their

opinion in as far as the ingredient of theft is concerned. In view of my conclusion regarding asportation, I acquit the Accused of the offence of aggravated robbery contrary to sections 272 and 273 (2) of the Penal Code Act. However, I find sufficient evidence to support a conviction for attempted robbery. I therefore find him guilty of attempted robbery contrary to section 274 (2) (b) of the Penal Code Act and in accordance with Section 86 of the Trial on Indictments Decree, 1971 as amended convict him on that offence.

YOROKAMU BAMWINE

JUDGE

4/6/2003

4/6/2003:-

Accused present.

Mrs Bukenya for state.

Mr Sensuwa for the Accused.

Both Assessors present.

Court:-

Judgment delivered.

YOROKAMU BAMWINE

JUDGE

4/6/2003.

Mrs Bukenya:-

We have no record of any previous conviction. We take it that he is a first offender. However, he committed a serious offence carrying sentence of life imprisonment. The convict was a Security Operative. His actions were an abuse of his office. It contravened the requirements of his office as a Security Operative. Besides, offences of this nature are rampant. There is need to have these offences curbed. The convict's actions of shooting in the air exposed the complainant and

the residents in the area to the risk of losing their lives. In view of the above, I pray for a stiff and deterrent sentence. This would go a long way to act as a lesson to any would be offender. I so pray.

Mr Sensuwa:-
He is a first offender. He has no previous record. He is aged 29 years. He was pursuing a course at University and he is married with children. He has been on remand for one year and half. He is going to lose his studies at University. His future has already suffered a set back. He is also likely to lose his job. I pray that all these factors be taken into account. He is sorry for what he did. The period he has been on remand has served as a lesson to him. The learning was from day of arrest. If it was not for Lt Kibuuka, perhaps he would not have survived the mob action. Long term in jail may not reform the convict. A short time with some counseling may achieve this purpose. Much as I agree that offences of this nature are rampant, he should be given a light sentence.

Convict:-

Allocutus:-
I had property which was taken from me.

Mrs Bukenya:-
The convict was here when Police Officer denied taking anything from him. In any case, he was arrested by a mob.

Court:-
Sentence – reasons for it:-
The convict is a first offender. He has been on remand for one year and half. The offence he committed carries a maximum sentence of life imprisonment. He is lucky that he survived the mob action. He claims to have been a Security Operative attached to State House. However,

instead of using the gun to protect people, he became a source of insecurity in utter abuse of his calling.

In all these circumstances a man who has been on remand for one year and half, I consider a sentence of seven (7) years imprisonment appropriate. I accordingly sentence him to (7) seven years imprisonment.

YOROKAMU BAMWINE
JUDGE
4/6/2003

Court:-
Right of Appeal explained.

YOROKAMU BAMWINE
JUDGE
4/6/2003