

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

HCT-05-CR-SC-01 12-2003

UGANDAPROSECUTOR

VS

AI TUGUME HERBERT)

A2 MUHUMUZA JOHNSON)ACCUSED

BEFORE: THE HON. MR. JUSTICE P K MUGAMBA

JUDGMENT

Tugume Herbert (A.1) and Muhumuza Johnson (A.2) are jointly charged with aggravated robbery, contrary to sections 285 and 286 of the Penal Code Act.

Three witnesses testified for the prosecution. The complainant, Amutuhaire Bon was PW1, the owner of the motorcycle, Tindyebwa John Bosco, was PW2 while D/C Gumisiriza Nathan was PW3.

Both accused persons gave sworn statements in their defence. They called no witnesses. The prosecution case is that on the night of 17th November 2002 PW1 was hired by A.1 from Biashara in Mbarara for a ride, on the motorcycle PW1 managed, to Ruharo The fare was agreed at Shs. 1,000/-. Before they arrived at their destination A.1 told PW1 to stop at Kiyanja. A.1 said they did not have to continue to Ruharo. No sooner had PW1 stopped in compliance with the instructions than a man emerged from the roadside nearby holding a panga. The erstwhile passenger then held PW1 tightly by the neck. PW1 however managed to free himself from the grip and ran to a safe spot. Both the erstwhile passenger and the man found at the spot tried to make their escape on the motorcycle PW1 had dropped. PW1 however struggled with the erstwhile passenger long enough to cause the other man ride away alone. Thereafter PW1 raised an alarm which was answered by many people who found him with A.1. The people who

answered the alarm assisted PW1 take A.1 to Mbarara Police Station where A.1 was detained. At the Police

Station A. 1 gave information to Police which enabled it to hunt for and subsequently arrest A.2 in Bushenyi District. After A.2 was arrested he took a party which included PW1, PW2 and PW3 to a bush near Itendero trading centre where Yamaha Mate registration number UBC 153W, belonging to PW2 but managed by PW1, was recovered.

A. 1 and A.2 both denied involvement in the alleged offence. Their defence was of alibi. At the material time A. 1 said he was not at the spot where the motorcycle was allegedly stolen though he was nearby. A.2 said he was in Buremba many miles away at the time alleged and that he had been arrested in Buremba and not in Bushenyi as the prosecution alleged.

It is the duty of the prosecution to prove the case against the accused persons beyond reasonable doubt. It is not the duty of the accused persons to prove their innocence. See *Sekitoleko vs. Uganda* [1967] EA 531. Where the charge is aggravated robbery the prosecution should prove the following ingredients:

- i. that there was theft,
- ii. that there was violence or a threat to use violence,
- iii. that there was use or a threat to use a deadly weapon, and
- iv. that accused persons or any of them participated in the offence.

Concerning theft, PW1 and PW2 testified that motorcycle number UBC 153W, a Yamaha Mate was stolen from PW2 on 17th November 2002. PW3 stated that a report had been made to Mbarara Police Station regarding the theft. PW1, PW2 and PW3 all gave evidence that the motorcycle was later recovered. The motorcycle was never exhibited in court but prosecution evidence of the theft was overwhelming and the stolen motorcycle was sufficiently described. See *Uganda vs. Katusabe* [1988-1990] HCB 59. At any rate the evidence was not contested by the defence. I am satisfied the prosecution has proved this ingredient beyond reasonable doubt. PW1 who witnessed the attack testified that the motorcycle was taken from him after the man he had had as a passenger gripped his neck tightly. Where the complainant was held by force and slapped before money was taken from him this court held that it was sufficient evidence to

support the charge of robbery. See *Owor & Anor vs. U2anda [1975]* HCB 223. I am satisfied the prosecution has proved beyond reasonable doubt that violence attended the theft of the motorcycle in this case.

It was the evidence of PW1 that the man who emerged at Kiyanja had a panga with him. It is not PW1's evidence that the panga was ever used at the scene nor is there evidence of a threat to use it. Later the panga disappeared presumably having been taken by the person who rode away on the motorcycle. While a panga is a deadly weapon in terms of S. 286 of the Penal Code Act it does not emerge that PW1 came close enough to the alleged implement to identify it as a panga. Given the dubious role of the implement in this case I am not satisfied the prosecution has proved beyond reasonable doubt that there was a deadly weapon on the occasion.

It was the evidence of PW1 that he had struggled and apprehended the man who hired him. It was his evidence he did not know the man before that night. He stated that people had answered his alarm and assisted him to take the man from where he apprehended him to Mbarara Police Station. PW1, PW2 and PW3 gave evidence that when A. 1 was at Mbarara Police Station after his detention there he disclosed that he had participated in the crime together with A.2. Details of A.2 and the area where the motorcycle was to be taken were disclosed by A. 1. It was after this Police had recovered three other stolen motorcycles in a garage. Eventually A.2 was himself apprehended after which he led PW1, PW2 and PW3 and other security officials to a bush where the motorcycle which had been stolen from PW1 was recovered.

In his defence A. 1 stated that on the day of his arrest he had traveled from Muhanga in Kabale to Mbarara from where he was to proceed to his brother's residence in Ruharo. He had arrived at the Old Bus Park at 8.30 p.m. He had then walked towards his destination. While on the way, at Kiyanja, at about 9.00 p.m. he heard an alarm. It was while he was still wondering where the alarm came from he was set upon by many people who assaulted him and later arrested him. He was injured so badly that he was even admitted to the Mbarara University Teaching Hospital. It was his evidence, he was never at the scene of crime nor did he involve himself in the crime.

A.2 on the other hand testified that he was a resident of Buremba and that at the time material to this case he was at Buremba. He testified further that he was arrested near a stage in Buremba by

people who emerged from a pickup and put handcuffs on him. He was certain they were Policemen. He was later brought to Mbarara after he denied knowledge of names that were put to him on inquiry. He was emphatic he had no knowledge of the alleged crime.

A. 1 and A.2 said in their respective defences that they were not known to each other until they were detained,

When an accused person puts up a defence of alibi he does not bear the responsibility to prove it. The prosecution has a duty to disprove it by adducing evidence which places the accused person squarely at the scene of crime. See *Uganda vs. George Kasya* [1988- 1990] HCB 48. It was the evidence of PW1, PW2 and PW3 that A.2 led them to the discovery of the stolen motorcycle in a bush where he knew the contraption to be. The motorcycle was stolen on 17th November 2002 and was recovered on 22 November 2002. There was a short period of time between the theft and recovery and doubtless A.2 was the one who had it in his possession. The presumption is that he was one of the people who participated in the robbery. See *Andrea Obonyo vs. R* [1962] EA 542. The arrest of A.2 followed disclosure by A. I that he had together with A.2 taken part in the robbery of the motorcycle in issue. I find that but for A. 1 the apprehension of A.2 would not have easily been accomplished. A. I participated in the crime also hence his arrest near the scene of crime. The two formed a common intention as described under S.20 of the Penal Code Act and are equally guilty. I find the prosecution has disproved the defence of alibi put forward by either of the accused persons.

This ingredient of participation is proved by the prosecution beyond reasonable doubt.

The gentlemen assessors in their joint opinion advised me to find both accused persons guilty and convict them. For the reasons I have given in the course of this judgment I do not wholly agree with that opinion. I find both accused persons not guilty of the charge of aggravated robbery preferred against them and acquit them of the same. Instead I find them guilty of Simple robbery, contrary to sections 285 and 286 (1) of the penal Code Act and convict them accordingly.

PK Mugamba
Judge
20th June 2006

20th June 2006

Both accused persons in court

Mr. Katembeko holding brief for Mr. Magoba for accused

Mr. Onencan State Attorney

Mr. Tuhaise court clerk

Court:

Judgment read in open court.

P K Mugamba
Judge

Allocutus

State Attorney:

The offence is a serious one. It carries maximum sentence of life imprisonment. No past records of conviction. They have been on remand for 3 years. Give deterrent sentence.

Mr. Katembeko:

Take into account the past record of accused persons. They have been on remand for 3 years.

Convict 1:

I suffer from HIV and Asthma. I have children I take care of. I pray for a lenient sentence.

Convict 2:

I lost my parents and I look after a big family. I pray for a lenient sentence.

SENTENCE

I have heard what has been said by the prosecution as well as counsel for the convicted persons. I have also heard what was said by each of the convicts. They are lucky the evidence has not pointed to the charge they were originally charged with. The enterprise was no doubt a dangerous one which should be discouraged. While I take into account the fact that they are first offenders and that they have been on remand for a period of 3 years, which period I deduct from the sentence I would have handed down, I sentence them to 8 years' imprisonment each.

P K Mugamba
Judge

Right of Appeal explained.

P K Mugamba
Judge