THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT BUSHENYI

HCT-05-CR-CSC- 198 OF 2004

UGANDA :::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

A1 KAMWAKA ASAPH }

A2 NUWAGIRA DAN } :::::::::::::::::::::::: ACCUSED

BEFORE: HON. JUSTICE P.K. MUGAMBA

JUDGMENT

Kamwaka Asaph (A.1) and Nuwagira Dan (A.2) are jointly charged with aggravated robbery, contrary to sections 285 and 286 (2) of the Penal Code Act. Five witnesses testified in support of the prosecution case.

PW1 was John Matovu, PW2, was, Provia Matovu, PW3 was, Molly Katusiime, PW4 was, Elly Komunda while No. 3001 A/CID Wanzala Herbert gave evidence as PW5. Medical evidence contained in police form 3 was agreed and admitted. The medical report is Exhibit P.1.

Each of the accused persons gave a statement on oath in their defence. They called no witnesses.

In brief the prosecution case is that at about 1.30 a.m. on 18th October 2003 PW1, PW2 and PW3 were in bed in the house where they all resided. It was then three men broke into the house and cut PW1 with a panga besides assaulting him with a stick. Both accused persons were recognised to be amongst the three intruders. Following alarm raised the assailants fled taking with them shs.40,000/= which was contained in a brief case besides other items of property. After the assailants fled PW1 disclosed to PW4 and others that he had been attacked by A.1 and A.2 amongst others. A panga was recovered at the scene. But accused persons were later arrested and charged with aggravated robbery.

The prosecution has a duty to prove all ingredients of the offence beyond reasonable doubt. Where there is any doubt in the prosecution case such doubt shall be resolved in favour of the accused persons, wherever applicable. This is because a conviction is secured on the strength of the prosecution case rather than on the weakness of the defence.

Where the charge is aggravated robbery the prosecution ought to prove that there was theft, that there was violence or a threat to use violence, that there was use of a deadly weapon or a threat to use it and that the accused persons or any of them participated in the crime.

PW1 and PW2 testified that shs.40,000/= which was in PW1's briefcase together with the briefcase itself was stolen by the intruders. Several other items of property such as a radio and a mattress were also said to have been stolen. This evidence was not challenged. The prosecution has proved this ingredient beyond reasonable doubt.

PW1 and PW2 in their respective testimonies stated that there was a struggle between PW1 on the hand and his assailants on the other. There is mention of the door to the house being forced open with a bang before the assailants entered the house. There is who mention of the assailants struggling with PW1 when he held them inside a curtain. There is mention of the injury inflicted on PW1 which caused him to release the assailants and retire to his bed at their prompting. There is mention also of PW1 being assaulted with a stick. Indeed PW1 did sustain injuries which are reported in Exhibit P.1. All the above is nothing but evidence of violence which was brought to bear on the occasion of the theft aforesaid. The prosecution has proved this ingredient also beyond reasonable doubt.

A panga was said to have been recovered at the scene of crime. It was received in evidence as Exhibit P.2. Remarkably however no evidence was led to show who recovered the panga, where it was recovered or when it was recovered. It is not clear even whose panga it was. What is more, no evidence was led to show that anything in it could suggest it could have been the one used in the attack. Next I turn to the medical report. In his remarks the medical appear noted:

> **"soft tissue injuries above could have been caused by sharp objects such as knife and rough objects such as sticks and blunt objects such as bricks and punches."**

In short the injuries noted were not necessarily caused by a knife.

Consequently I do not find the prosecution has proved beyond reasonable doubt to a deadly weapon be it a panga or a knife was used on the occasion.

PW1, PW2 and PW3 testified that they were able to see and recognise A.1 and A.2 at the scene. PW1 disclosed to PW4 the identity of the assailants as A.1 and A.2 soon after the attack. However this evidence of identification should be treated with caution. It was properly stated in **Abdalla Nabulere & Others Vs. Uganda [1979] HCB 77** that apart from light during the attack and familiarity of the assailant to the witness other factors such as the distance between them, the length of time the witness had to observe and even the opportunity to hear the assailant are factors to look for. Court added:

> **"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 to poorer the quality the greater the danger ------ when the quality is good, as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, <u>provided the court adequately warns itself of the special need for caution</u>".**

The emphasis above is added and I do take stock of the need for caution first as I did warn the gentlemen assessors to do.

It was the evidence of PW1, PW2 and PW3 that they were there to see the assailants when the assailants were in the house. They said the source of light were the torches which the assailants carried. The witness testified that they knew the accused persons before as they were residents in the same locality and they had known each of them over many years. A.2 was a half brother to PW1 and PW3. He was also a friend to PW1. The father of A.1 had bought cattle belonging to PW1's family over a long time in the past. It was the evidence of PW1, PW2 and PW3 that they even recognised the voice of A.2. It was the evidence of the three witnesses that the assailants

were in the house for about 30 minutes. There is also the evidence of PW4 who testified that at about 2.a.m. he had been going to the house of PW1 where the alarm had come from when he saw A.1 at a distance. It is the evidence of PW4 that A.1 immediately fled.

In their respective defences A.1 and A.2 denied any involvement in the offence. Each of them stated they were at their respective houses sleeping at the time of the alleged attack.

Regarding the evidence of PW4 that he had met A.1 somewhere on the way home at 2.a.m. this is disputed by A.1 who maintains he was at home sleeping. It was the evidence of A.1 that he did not know either PW2 or PW3 before. A.2 also testified he did not know Pw2 before and added that no blood relationship existed between him and PW1. He said they resided in the same locality.

When an accused sets up a defence of alibi he does not bear responsibility to prove it. It is the duty of the prosecution to disprove the alibi by adducing evidence which destroys it and places the accused person squarely at the scene of crime. See: **Uganda Vs. Sebyala [1969] EA 204.**

The two accused persons were well known to PW1, PW2 and PW3 who identified them owing to the light transmitted by the torches they carried. The assailants were in the house for over 30 minutes and at the earliest opportunity PW1 had disclosed to PW4 to identify of the attackers. I am satisfied favourable conditions existed for the proper identification of the two accused as the attackers. I find the prosecution places both accused persons at the scene of crime and that their respective who his not hereby disproved.

Consequently the prosecution has proved beyond reasonable doubt that A.1 and A.2 participated in the attack in the house in issue.

The gentlemen assessor in his opinion advised me to acquit the accused persons of the offence of aggravated robbery and convict them of a lesser offence. For the reasons I have given in the course of this judgment I am persuaded by that advice. I acquit both accused persons of the

charge of aggravated robbery. I convict each of them instead of simple robbery contrary to sections 285 and 286 (1) (b) of the Penal Code Act.

P.K. Mugamba
Judge
8th February 2007