

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT TORORO**

HCT-04-CR-SC-0052-2010

UGANDA.....PROSECUTOR

VERSUS

ABELLE ASUMAN.....ACCUSED

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

The accused Abelle Asuman together with others who are now convicts is indicted for robbery contrary to sections 285 and 286 (2) of the Penal Code Act. Prosecution alleges that he on 15th day of February 2006 at Tiira village in Busia District robbed Moses Ochieng of cash 1,000,000/= and a mobile phone and at or immediately before or after the robbery used a gun No.563649678 on the said Moses Ochieng. The accused denied the indictment thus casting the burden of proving him guilty onto the prosecution as required by the law. In this regard five prosecution witnesses testified.

The first PW.1 was the complainant Moses Ochieng who told court that he knows the accused as one of the people who robbed him on 15.2.2006 between 8-9p.m.

PW.1 is a businessman who had gone to Chawolo village to buy millet. The millet was loaded on a vehicle to carry it to Tiira. In the vehicle was the driver and another person. When the vehicle reached Tiira primary school at around 8:00p.m they found three people who had mounted a road block using classroom desks. They were stopped. One of the people had a gun and was wearing an overcoat. 2 were in army uniforms and caps on their heads. They were ordered out of the vehicle one by one. At first PW.1 thought it was a Uganda Revenue Authority roadblock. That when the driver stopped, he was ordered to switch off the headlamps but the cabin light remained on. That PW.1 used this to identify the accused amongst others. There was moonlight as well. That the accused assaulted and injured PW.1. That the accused was wearing on army uniform. When they stopped, the robbery began. That the accused removed from Abolla Fabian 150,000/= and a Siemens phone. He removed 60,000/= and a Sendo Phone from the Driver. He also removed 1 million and a Nokia phone 6230 from PW.1.

That as the robbery went on another on-coming vehicle flashed headlamps into the scene. On seeing this vehicle the accused hastily ordered PW.1 and his colleagues into the vehicle and drive back to where they came from. Instead, they drove to Busitema police and reported the case.

Investigations commenced and on 24.3.2006 one Ojam a defence Secretary sent for PW.1 to go to police to identify some items recovered. Only a Siemens phone robbed from Abolla Fabian was recovered. After another week PW.1 was called at police to attend an identification parade to try and identify the robbers. He managed to point out the robbers including the accused.

In cross-examination, PW.1 said he managed to identify the accused because he is the one who stood by the vehicle door and ordering the occupants to get out one by one. He was the one ordering whoever got out to lie facing down. That when the oncoming vehicle stopped, the accused ordered the occupants not to get out. On realizing that they were wrong people, PW.1 got scared. He had seen the robbers for the first time. The incident lasted between 7 to 10 minutes.

Abolla Fabiano testified as PW.2. He was one of the passengers in the vehicle carrying millet. PW.2 said he knows the accused as the person who robbed him on 15.2.2006 at Tiira primary school at 8:00p.m. PW.2 was with PW.1 and Omongin Patrick. That they came across classroom desks across the road. The vehicle was stopped. The driver was ordered to put off headlamps and occupants to get out and remove whatever was in their respective pockets, hand it in and thereafter lie facing down. That he identified that accused using moonlight, the cabin bulb which was lit and headlamps of an oncoming vehicle. The accused was wearing an army uniform, army cap and military shoes. PW.2 was beaten on the head and arms. That it was the accused who demanded and took 150,000/= and a Siemens Phone from PW.2, 60,000/= and a phone from Omongin Patrick and 1 million and a phone from PW.1. That it was the accused who searched the witnesses and colleagues.

PW.2 recovered his phone from Busia Police Station when police called them to try and identify lost items. He identified the accused in an identification parade comprising many people on 24.3.2006.

In cross-examination, PW.2 said that although the accused wore a cap, he briefly removed it while removing them from the vehicle. PW.2 was the third to be removed. That the robbery took between 3 to 5 minutes. That he saw and identified the robbers and their appearances using the moonlight and headlamps of an oncoming vehicle.

PW.3 was Omongin Patrick, the vehicle driver. He testified that on 15.2.2006 at 8:00p.m he was driving millet to Tiira. He was in the vehicle with PW.1 and PW.2. He had put on full light. On reaching Tiira primary school he saw people carrying school desks to the road. They stopped him. He was ordered to put off lights. The cabin light remained on. He was ordered to close the left door glass window. All the vehicle occupants were ordered to exit through the driver's door. After being robbed another vehicle came with full lights and they were ordered back into the vehicle and drive away.

PW.3 was robbed of 60,000/= and a phone.

PW.3 further testified that on 24.3.2006 he was summoned to Busia Police Station to identify the recovered properties. Only Ochieng's property was recovered. Later he identified the robbers in an identification parade including the accused person. The robbery took about 10 minutes. PW.3 said the accused was the one standing at the driver's door who searched him when he got out. The accused had a torch also.

In cross-examination PW.3 said he had never seen the accused person before. During the robbery he was scared. The accused held him by the shirt collar. That he identified the accused using the cabin light.

PW.4 was D/IP Othieno who conducted the identification parade involving 5 suspects in a robbery case. The accused was one of the suspects. He informed the suspects about the parade. He followed the law and told them they were free to attend or not and to call a lawyer or relatives. All said were willing to participate and did not call relatives or lawyers. PW.4 talked to the witnesses who said they saw the robbers and could identify them. He then got form 69 and followed the procedure outlined therein.

PW.4 arranged 3 parades. One parade had one suspect and 8 volunteers. The second parade had 2 suspects and 12 volunteers. The third had 2 suspects and 12 volunteers. He made a sketch of the parade on form 69. That the accused chose to be in the 5th position from the right and 10th from the left. The accused was picked out by Fabiano (PW.1). The accused was picked from another parade by Omongin. When asked, the accused said the parade was fairly conducted. The witness recorded the names of the 14 volunteers and suspects and the volunteers signed and PW.4 signed as the person who conducted the parade. He drew a sketch of the parade indicating the position of the accused person. Police form 69 was tendered as Exhibit P.1 and the sketch as Exhibit P.2.

PW.4 acknowledged during cross-examination that he did not indicate whether the suspect was identified. He also acknowledged that Abolla Fabian did not sign as having identified the accused due to oversight. Another witness Omongin did not

sign. Certification as to age or height as being similar to the accused is not indicated. PW.4 said he did not manage to get people of similar age or height as the suspect. The age of volunteers was between 15 and 30 years. That the parade form 69 with all particulars was tendered in the earlier trial.

D/IP Odiek Bernard testified as PW.5. He traced and arrested all the suspects. PW.5 testified that in 2006, there were rampant robberies in Busia. Police engaged informers. PW.5's informer told him the people committing robberies were Ogiti Mubarak, Njola Shiraj, Abelle Asuman (the accused), Onjiga and John Olen. The informer promised to lead PW.5 to arrest them. He led him to the arrest of Siraj Njola who was interrogated and led to the arrest of Ogiti Mubarak. Later Abelle Asuman was arrested by the same informant. At night PW.5 was taken to the home of Onyinga and Olema who were both arrested. He interrogated one by one starting with Siraj Njola who led him to his home where 2 magazines of live ammunition were recovered together with army uniforms. When asked where the gun was Shiraj advised PW.5 to ask Ogiti Mubarak. He picked Ogiti Mubarak who took him to his home and showed an uncovered pit. Besides was a tree on which the gun was tied and suspended into the pit. PW.5 recovered the gun with one magazine. It was exhibited at police.

The accused herein was interrogated but he denied being part of the group. He interrogated John Olem and recovered a Siemens phone belonging to PW.2 Fabian.

PW.5 arrested the accused because his information was that he was part of the group of six. All the suspects were army veterans. The recovered gun was tendered in court in the 2008 trial.

This was the close of the prosecution case.

In his unsworn defence Abelle Asuman denied the offence. Describing himself as a cobbler at Busia Post Office, the accused testified that on 23.3.06 he was called by PW.5 to police. He went there and PW.5 told him somebody was calling him at the cells. The accused went there. PW.5 brought Siraji Njola outside the cells and asked the accused if he knew him. The accused said he knew him as his customer and village mate. That is when the accused was arrested and detained. After two days an identification parade was done wherein the accused and other suspects were mixed and he was identified. After the identification parade, the accused was taken to record a statement. It was at that moment that he knew he was a suspect in a robbery case. He was produced in Tororo Court. He was released before committal after six months but was re-arrested on 2.3.2009. After spending a night, he was released but was re-arrested in September 2009 to date.

This was the defence case.

In criminal trials, court can proceed to convict an accused person if prosecution has proved all the ingredients of the offence charged beyond any reasonable doubt. The burden of proof lies on the prosecution throughout the trial. At no one time does it shift except in rare instances where the law provides otherwise.

In a trial for robbery like in the instant case, prosecution has the duty to prove that:-

(1) Theft occurred,

(2) Before the theft there was use or threat to use a deadly weapon or there was a threat to use a deadly weapon at, during or immediately after the robbery.

(3) The accused participated in the robbery.

I will deal with each ingredient separately.

(1) Whether there was theft:

From the evidence adduced by the prosecution comprised in the testimonies of PW.1, PW.2 and PW.3, it has been established beyond doubt that PW.1 lost 1 million and a phone. PW.2 lost 150,000/= and a phone. PW.3 lost 60,000/= and a phone. Apart from PW.2 who recovered his phone, the victims were deprived of their properties permanently. Whoever took the items had one intention of depriving the owners thereof permanently. Even if PW.2's phone was recovered the offence of theft had been committed since asportation took place. There is no indication that those who committed the theft had any claim or right. The ingredient of theft has been proved to my satisfaction as required by the law.

(2) Whether at or immediately before or immediately after the said robbery a deadly weapon was used?

PW.1, PW.2 and PW.3 testified that when they met a classroom desks roadblock, they were stopped by 3 assailants. They were armed with sticks. The victims were assaulted using sticks and there was threat to use a gun during the robbery. The witnesses saw the sticks and what looked like a gun in a distance with someone standing at the school fence. Recently the Penal Code Act amendment

gave a liberal interpretation of what amounts to a deadly weapon. A deadly weapon includes: an instrument made or adapted for shooting, stabbing or cutting or any imitation of such instrument or any substance which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm; and any substance intended to render the victim of the offence unconscious.

In the instant case even if only sticks were used during the robbery is enough to prove that deadly weapons were used. Sticks can be adapted to causing grievous harm or death. The three eye witnesses testified that they saw the attackers wielding sticks. One (PW.3) saw something like a gun in a distance which scared him otherwise he would have confronted the robbers. This ingredient has been proved beyond any reasonable doubt.

(3) Whether the accused participated in the robbery.

None of the prosecution witnesses knew the accused before this offence was committed. The offence took place at night under difficult circumstances. It was 8:00p.m at night. The victims PW.1, PW.2, PW.3 were in shock. Each testified that he identified the accused by the aid of moonlight and the cabin light which was on throughout the robbery. The witnesses further testify that in addition, they were able to observe and record in their minds the appearance of the assailants including the accused with the help of the timely appearance of an oncoming vehicle with full lights on. PW.3 said that at one moment the accused removed his cap when ordering them to move out of the vehicle.

According to the learned Resident State Attorney conditions favoured correct identification of the accused person. On the other hand Mr. Majanga for the accused contends that the circumstances prevailing at the time of offence did not support proper identification given the way the assailants were dressed.

The law regarding identification evidence in cases which depend on such evidence has been variously outlined in decided cases both in this and higher courts.

In ***RORIA V. R [1967] E.A. 583***, the principles to be followed while evaluating and considering such evidence are that in a case resting entirely on identification the court has a duty to satisfy itself that in the circumstances of the case it is safe to act on such evidence which must be free from mistake or error on the part of the identifying witness. The evidence of such witness must be tested as to its truthfulness and any possibility of a mistake or error excluded. Where conditions for correct identification are favourable, such task will be easier. But where the conditions are difficult, it would be unsafe to convict in absence of some evidence connecting the accused with the offence.

See also ***FRANK NDAHEBE V. UGANDA SCCR APP. 2 OF 1993***.

This caution was told to the assessors and this court will itself of the dangers of relying on uncorroborated evidence if identification in difficult circumstances.

In the instant case, the robbery was at night. There was however moonlight. A vehicle approached the scene of robbery with full lights on and illuminated the said scene. All prosecution witnesses testified that this enabled them identify the

accused person as amongst the robbers. He played a leading role. He was the one who approached and stood near the driver's door. Prior to that, the vehicle lights were on in full. He ordered PW.3 to switch off the lights. He did not order the switching off of the cabin light. It remained on throughout the robbery. He ordered the occupants of the vehicle to come out one by one starting with the driver. He ordered the driver to close the passenger window glass. When PW.3 came out he stood at the door. The accused pulled him out of the vehicle by the shirt collar. PW.3 talked to the robber. All this time the witness PW.3 was looking at the accused. The other two passengers were observing from inside albeit in a terrified condition. From PW.3, the accused ordered PW.1 and PW.2 out. He searched all the victims. He ordered the victims to remove whatever they had in their pockets. He got 1 million and a phone from PW.1 and gave the items to his friends. The robbery took between 10 to 15 minutes. The accused ordered PW.1, PW.2, and PW.3 to lie facing down after robbing them. Then an oncoming vehicle with full lights arrived at the scene. In apparent panic the accused ordered the victims to board their vehicle and drive to where they came from. He then descended onto the next vehicle which he ordered to turn and drive back.

I believed this narrative from the prosecution witnesses. I found them truthful and think that despite the trying moment they each were able to see and identify the accused as one of the robbers. Their testimony put the accused at the scene of crime. Though difficult the conditions allowed the witnesses see and identify the accused. Although the evidence of identification in difficult circumstances requires corroboration, in case court believes and finds the witnesses truthful, it can go ahead and accept that evidence alone after warning itself and the assessors of such dangers. I have warned myself of such dangers. This evidence would have

been corroborated by the evidence of the identification parade. Unfortunately legal technicalities cannot allow the evidence as it stands to be admitted against the accused. The said evidence does not indicate that the accused was identified. The witnesses did not sign. The volunteers' appearances and age appeared to be at variance with the accused. The parade was not conducted in accordance with the approved guidelines as enunciated in *SSENTALE V. UGANDA 1968 E.A 365*. The rules to be followed are as follows:-

1. The accused should be informed that he may have an advocate, friend or relative when the parade takes place.
2. The officer in charge of the case, although he may be present does not carry out the identification parade.
3. Witnesses should not see the accused before the parade.
4. The accused must be placed among at least eight persons as far as possible of similar age height, general appearance and class of life of himself or herself.
5. The accused should be allowed to take any position he chooses. He should be allowed to change position after each identifying witness has left, if he so desires.
6. Care has to be exercised that witnesses are not allowed to communicate with each other after they have been to the parade.
7. People with no business at the venue must be excluded.
8. A careful note should be made after each witness leaves the parade, recording whether the witness identifies or other circumstances.
9. If the witness desires that the accused walk, hear him speak, see him with a hat on or off, this should be done. All participants must do the same as a precautionary measure.

10. The witness must touch the person he/she identifies.
11. At the end of the parade or during the parade the accused should be asked if he/she is satisfied that the parade is being conducted in a fair manner and a note of the answer should be made
12. When introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Do not say “pick out somebody,” or influence him in any way whatsoever.
13. While conducting the parade the responsible officer must act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

In view of the omissions and irregularities pointed out by the defence in the way the identification parade was conducted, it would be dangerous to adopt it as corroborating the evidence of identification by the prosecution witnesses. The parade evidence was not of any value in view of the disparities in the appearance and age of the volunteers.

Prosecution relied on circumstantial evidence adduced by PW.5 D/IP Odiek Bernard outlining the circumstances under which the accused person was arrested. Circumstantial evidence is evidence of surrounding circumstances, which when considered together leads to only one irresistible inference, that of guilt of the accused person. Before such evidence is admitted before deciding to convict, court must find that inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any hypothesis than that of guilt. All reasonable doubt must thereby be excluded.

PW.5 told court that due to rampant robberies in Busia, police enlisted informers. One informer confided in PW.5 that he knew the gang behind the robberies. He singled out Ogiti Mubarak, Njola Shiraj, Abelle Asuman, Onjiga and John Olem. With the arrest of these people except the accused police was able to recover army uniforms, live ammunition, an AK 47 rifle, a phone belonging to PW.2 which was robbed from him during the robbery. One of the suspects Siraj Ngola pointed out the accused as one of them. The accused acknowledged that Siraj Ngola is a village mate and a customer. It so happens that this implication corroborates the identification evidence I have admitted earlier in this judgment that PW.1, PW.2 and PW.3 identified the accused as one of the robbers who robbed them on the fateful day. The other suspects were tried earlier. The suspects were connected by the revelation that they were all army veterans.

I am satisfied that the evidence of identification of the accused is sufficiently corroborated by the circumstantial evidence adduced by PW.5 that the accused was part of the gang that robbed the complainant (PW.1) of 1 million and a phone. Although the gun recovered was not tendered in evidence as the one used during the robbery, there is sufficient evidence to prove that the victims were assaulted using sticks by the accused and his colleagues. As regards failure to adduce medical evidence that the complainant and colleagues sustained harm during the robbery from assault by the accused is not fatal to the prosecution case. The witnesses narrated a consistent story as to how they were tortured at the hands of the robbers.

I am satisfied beyond any reasonable doubt that participation of the accused in this offence has been proved by the prosecution.

The gentlemen assessors in their unquestionable wisdom were equally satisfied that the accused has been proved guilty beyond any reasonable doubt. I have been advised to convict the accused and find him guilty as indicted. I am in total agreement with the opinion of the gentlemen assessors.

Consequently Abelle Asuman is found guilty of Robbery contrary to sections 285 and 286 (2) of the Penal Code Act. He is accordingly convicted.

Musota Stephen

JUDGE

30.11.2010

30.11.2010

Accused produced.

Bwiso Resident State Attorney.

Majanga on State brief.

Assessors in court.

Khamiza Interpreter.

Resident State Attorney: Case for judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE

30.11.2010

Resident State Attorney:

I have no record of the convict. I pray for a deterrent sentence. He wasted court's time and resources. Cases of robbery are prevalent. It is the duty of court that the public is protected by eliminating criminals. The convict is elderly. He should not have participated. The law provides for a death sentence. I pray court should not depart from it. The accused be given maximum sentence.

Majanga:

The Constitution says an accused is entitled to trial so you cannot say convict wasted time. He is a first offender. He has lived a crime free life. We pray justice be tempered with mercy. The circumstances of this case show it is an old case. We pray court exercises discretion and sentence the convict to a lesser sentence.

Sentence and Reasons

The convict is a first offender. The offence he is convicted of is a grave one. The objective of sentence will be considered. The offence is rampant. This offence was committed under terror of innocent people. Taking into account the respective submission by respective counsel and the apparent remorsefulness of the convict, I will sentence him to life imprisonment.

Right of appeal explained.

Musota Stephen

JUDGE

30.11.2010

Order: The victims will be compensated in the sum of shs.1, 250,000/=.

Musota Stephen

JUDGE

30.11.2010