IN THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: MANYINDO, D.C.J., ODOKI J.S.C., ODER J.SC.) CRIMINAL APPEAL NO. 19/91

BETWEEN

BENON MUSASIZI========== APPELLANT

AND

UGANDA==========RESPONDENT

Appeal against conviction and sentence of H/C decision holden at Kabala (Hon. Justice J. WN. Tsekooko) dated the 1 day of July 1991 from original H. C. Cr. Ss. No. 70/88).

JUDGEMENT OF THE COURT:

The appellant was indicated in the High Court on two counts of robbery with violence. He was convicted as charged on the first count but was convicted only of assault with intent to steal on the second count. He was sentenced to death on count 1. Sentence on count 2 was deferred.

He now appeals against the conviction on count 1 only, on two grounds. The first ground is that the evidence adduced by the prosecution did not establish the offence charged. The second ground, which is clearly related to the first one, is that the prosecution had not proved the allegation that a deadly weapon had been used in the robbery.

The robbery, which was not disputed, took place on 1-12-86 at about 9.OOp.m. at the houses of the complainants, Ephraim Rwemereza (PW1) and Alice Karyongo (PW2) in Rukingiri District. According to the first complainant, Rwemereza, he had just retired to bed for the night when two robbers entered his house. The appellant wore plain green Army uniform and was armed with a gun. The other robber wore, among others, an Army camouflage Jacket. The appellant pointed his gun at PW1's chest and ordered him to sit on the bed which he did.

Then the appellant informed PW1, that someone had paid him shs. 2m to kill him (PWI) but that he was prepared to spare his life if he would pay him shs. 5m. PW1 told the appellant that he had no money. The appellant's companion then searched the house for money, while the appellant guarded PW1 at gun point. A total of shs, 1.150,000/ was found and taken by the robbers. That is subject matter of count No.1

The appellant and his colleague then tied PW1 's hands and forced him to lead them to the house of his neighbour Alice Karyongo (PW2) so that they could steal more money from there. On their orders the first complainant asked Karyongo to open the door, which she did. The robbers then robbed her of money and property. Later they returned PW1 to his house to look for more money, but found none.

The defence case was that the appellant was employed by PW1 as a taxi driver (which PW 1 denied). On the day of incident the Appellant had brought PW1's taxi back to PW1's home together with a bag which a son PW1 had put in the vehicle. PW1 had found the gun in the bag and decided to frame up the present charge against the appellant. He planted the gun on the appellant and even dressed him in military uniform before handing him over to the Police. PW2 had implicated the appellant maliciously because he had impregnated her 12-year-old daughter.

The evidence of PW1 was corroborated in part by PW2 who stated that on the night of incident, at about 10.00p.m. the appellant, another man and PWI went to the house. PW1 was under arrest. The appellant and the other man demanded money from her. They went away with shs, 70,000/= and some property. In the light of PW2's evidence as to the sum of money stolen, the indictment should have been amended by substituting the sum of shs. 7,000/= in count 2 with the sum of shs. 70,000/=. While in her house the appellant had cocked his gun and threatened to shoot her and PW1. She denied the appellant's allegation regarding her daughter. In fact she stated that the daughter has never been impregnated by any one.

There was also the evidence of Beshumbusa (PW3) and Kakoki (PW4), both immediate neighbours of PW1. During the attack they rushed to the house of PW 1. On arrival the appellant cocked his gun and ordered them to sit down which they did. Apparently this was

after the attack on PW2. The appellant's colleague then struck PW3 on the hand with a metal wire.

As the appellant and his colleague were leaving the place, PW3, grabbed the appellant, disarmed him and arrested him. The gun had 12 rounds of ammunition. The second man escaped. That account was confirmed by PW4. In our view, prosecution evidence amply established the fact that the appellant had participated in the robbery. His defence was no doubt false. The witnesses did not know him before this incident. If he had been employed by PWI and even resided at PW1's house before this incident, as he claimed, PW2, PW3 and PW4 would have confirmed that fact. On the contrary, they denied the allegation. The first ground of appeal has not merit. It fails.

The gun which the appellant had was never fired during the robbery. After his arrest the appellant and his gun and its 12 rounds of ammunition were immediately taken to Detective Inspector of Police David Bakehemura (PW5) at Rukingiri Police Station. PW5 re-arrested the appellant and detained him. He then examined the gun. His testimony on the point is as follows: -

> ***"The gun can fire. I examined it and formed the view that it can fire. It was clean inside so I believed it could fire. I have handled firearms for 20 years. (After checking it by handling the trigger which clicked, this gun can fire even without oiling it)"***

In his judgment the trial Judge stated thus

> ***"I asked him (PW5) to prove that it (the gun) was capable of firing even by now. It looked rusty. He examined it and when he pulled the trigger, it clicked. He assured us it can fire. In the consequence both counsel and I gave up the idea of test firing it". (sic)***

Counsel for the appellant has argued that unless the gun is fired during the robbery or is test-fired subsequently, it is not a gun. The case of: ***Shaban Birumba and Another v Uganda,*** Cr.

Appeal No. 32 of 1989, (Supreme Court) was relied on. He also submitted that a Police Officer is not a firearm expert so that the evidence of PW5 was of no consequence. ***Gacheru s/o Njaguara v. R*** (E.A.C.A) Criminal Appeal No. 938 of *1954* was cited in support. We do not find Shaban (supra) relevant here. In that case the gun was never recovered and so it was never examined.

That is why the Court could not know whether or not it was capable of discharging a bullet. In the case before us the gun was recovered and alter examined by PW5. Contrary to the submission made by Counsel for the appellant, **Gacheru** (supra) in fact decided clearly that a Police officer engaged on operational work of a long time acquires sufficient practical experience or knowledge to qualify him to speak as an export on guns. In that case the appeal succeeded only because the Court was not satisfied with regard to the practical experience or knowledge of the Police witness.

In our opinion there can be no such doubt with regard to PW5.

The point perhaps is this. Is it to be proved that the gun discharged a bullet or that it is capable of discharging a bullet? We think that. it is enough for the prosecution to establish on expert evidence, that the gun is capable of discharging a bullet, although the best course to take would be to test - fire the gun. In this case the evidence of PW5 showed clearly that the gun was in good working order. That meant that it that it was a deadly weapon within the meaning of Section 273(2) of the Penal Code. Accordingly ground two appeal fails.

In the result the appeal is dismissed.

Dated at Mengo this 31st day of December 1993.

S.T. MAYINDO

DEPUTY CHIEF JUSTICE

J.B. ODOKI

JUSTICE OF THE SUPREME COURT

A.H. O. ODER

JUSTICE OF THE SUPREME COURT