

THE REPUBLIC OF UGANDA

**IN THE SUPREME COURT OF
UGANDA
AT MENGO**

**(CORAM: ODER, TSEKOOKO, KAROKORA MULENGA AND
KANYEIHAMBA, J J.S.C)**

CRIMINAL APPEAL NO. 09 OF 2004

BETWEEN

BESIGENSI EDISON ::::::::::::::::::::::::::::::::::::::

APPELLANT

AND

UGANDA: ::::::::::::::::::::::::::::::::::::::

RESPONDENT

(An appeal from the judgment and orders of the Court of Appeal -Okello, Mpagi- Bahigeine, Engwau, JJA, dated 05th November, 2004 in Criminal Appeal No. 127 of 2002)

JUDGMENT OF COURT

The appellant, Besigensi Edison was indicted, tried and convicted in the High Court for aggravated robbery, contrary to sections 285 and 286(2)

of the Penal Code Act. He was sentenced to death. His appeal to the Court of Appeal was unsuccessful. Hence this appeal.

The facts of this case may be summarised as follows: In the night of 4th, September, 1999, the complainant, Byamukama Manderu, PW1, and his two young children were sleeping in his shop situated at Kateretere trading centre, in Nangala, Bubare sub-county of Kabale District. Around midnight that same day, some one whom he later recognized as the appellant knocked at the shop's door three times. Byamukama woke up and went to inquire as to who was knocking at that late hour. The appellant who is locally popularly known as Mushure identified himself to the complainant and informed Byamukama that he had come to pay the debt of Shs. 52,000 which he owed the former for items of goods previously purchased from the shop. Byamukama advised the appellant not to worry about paying the debt that night as he could easily pay the same on any other day, during daylight. The appellant insisted on paying his debt that very night claiming that he had got a job in the District of Rukungiri where he would soon be going and staying for some two years and did not wish to leave still indebted to Byamukama.

Byamukama lit a candle and opened the door for the appellant. He fetched a book containing the list of debtors from the shelves of the shop and stood at the counter intending to ascertain the appellant's debt. Instead of paying his debt, the appellant requested Byamukama to supply him with more goods on credit. Byamukama proceeded to list the items of goods as each was requested by the appellant in turn.

Suddenly, the appellant blew out the burning candle and when Byamukama bent down looking for a match box to relight it, the appellant started cutting him several times with a panga. Realising that he was in mortal danger, Byamukama ran to his bedroom and as he attempted to enter it he heard the appellant's footsteps behind him. Byamukama fled from the house raising an alarm and shouting that it was Mushure who had attacked him. Neighbours answered the alarm and came to the rescue of the victim. Amongst the people who responded to the alarm were the appellant's own step-brothers, Benon Rubagyema and Godfery Turyahikayo who were later to testify at his trial as PW3 and PW5 respectively. Witnesses including Rubagyema and Turyahikayo heard Byamukama mention the name of Mushure as the attacker as he ran from his house. They all found Byamukama bleeding profusely from the wounds inflicted on him by the attacker. The persons who responded to the alarm were neighbours of both the victim and the appellant. They mounted a search for the latter within the neighbourhood. He was not found there. It was immediately realized by the people present that Byamukama needed to be taken to hospital for treatment of his bleeding wounds. Money was required for this purpose. Byamukama revealed that he had left a sum of Shs. 195,000 in the bedroom wrapped in a sweater. He directed some of the people present to go and fetch it so that a vehicle could be hired to take him to hospital. Neither the money nor the sweater was found where Byamukama had left them or anywhere else. Ultimately, other means were found and Byamukama was taken to Kabale hospital where he received medical treatment.

Dr. Tom Mugisha who examined and treated the victim found that he had cut wounds on the left arm and hand, the left thigh and the left small finger was completely cut off. The doctor classified Byamukama's injuries as dangerous harm. The doctor's opinion was that the injuries he saw and treated had been inflicted by a sharp object such as a panga.

In the meantime, the Local LC1 chairman, PW5, reported the incident to the police. Edison Twinomwe, D/Cpl. No. 26410, PW4, investigated the case and on 9th, September, 1999, he arrested the appellant at Ndorwa prison where the appellant had been detained as a tax defaulter. He charged him with aggravated robbery.

In his defence, the appellant pleaded alibi and alleged that he had been framed by the witnesses and his step brothers all of whom had a grudge against him. With regard to the defence of alibi, the appellant claimed that he had left his home on 28th August, 1999, to visit his sister in Rukungiri and that while he was there the LC1 chairman of the area arrested him because he did not possess any graduated tax ticket or identification cards on him. He was taken into custody of the Rukungiri police who in turn handed him over to the Kabale police station who sent him to Ndorwa prison. He was eventually apprehended and charged with robbery about which he knew nothing. As to the grudge between the appellant and his step brothers, the appellant testified that the latter had framed him because they wished to grab his land.

The learned trial judge disbelieved the appellant and convicted him on the prosecution's evidence which the judge believed had proved the guilt of the appellant beyond reasonable doubt. The appellant's Memorandum of Appeal to this Court originally contained one ground which was framed as follows:

That the learned Justices of Appeal erred in law when they failed to subject the evidence on record to fresh evaluation and scrutiny thus they (sic.) wrongly upheld the finding of the trial judge that the prosecution proved all the ingredients of robbery against the appellant.

Following a decision of the Constitutional Court in Petition No.6 of 2003, **Suzan Kigula and 417 Others V Attorney General**, which declared mandatory death sentences in murder and aggravated robbery unconstitutional and which decision is the subject of an appeal to the Supreme Court, an additional second ground was filed challenging the mandatory sentence that was imposed on the appellant by the High Court and confirmed by the Court of Appeal.

Counsel filed brief written submissions for both the appellant and the respondent. Through his counsel, the appellant admitted everything that was alleged against him in the indictment except the taking of the money and sweater which disappeared from the complainant's shop shortly after he had been attacked by the appellant and fled from it. Mr. Cramner Tayebwa for the appellant contended that the learned trial judge erred in fact and law when she found that it was the appellant

who took the complainants' money and sweater. Counsel contended that there was no evidence to suggest that it was the appellant who took those two items. He submitted that the evidence clearly shows that those goods could have easily been taken by the people whom the complainant sent to his shop to fetch the money. Counsel contended that failure by the prosecution to prove that it was the appellant who stole the money and sweater not only fatally weakens the case against him but means that he cannot be convicted of aggravated robbery. Counsel submitted that therefore the Court of Appeal erred in confirming the findings and decision of the trial court without itself re-evaluating the evidence and coming to its own conclusion. Mr. Tayebwa submitted further that after the appellant started assaulting the victim, the latter ran out of the house. He later testified that he heard the footsteps of the appellant following him in pursuit to finish him off. Counsel contended that there is no evidence that the appellant returned to the house to look for and find the money or the sweater which could easily have been removed and taken by the persons whom the complainant sent to the premises. Counsel submitted that in light of this, the prosecution had failed to prove the ingredient of theft which is essential in a charge of robbery.

For the respondent, Mr. Andrew Odit, Senior State Attorney, in written submissions, supported both the conviction and sentence of the appellant. In counsel's view the two Courts below took into account all the circumstances prior to, during and after the commission of the aggravated robbery. Counsel enumerated those circumstances to include the conduct of the appellant during the attack of the

complainant and his lies that he intended to pay the debt he owed to the latter. Counsel submitted that the evidence presented for the prosecution destroyed the appellant's alibi. Finally, counsel contended that had all the facts and circumstances been properly evaluated and re-evaluated by the courts below, the inevitable inference would have been that it was only the appellant who had the opportunity to steal and did steal the money and sweater of the complainant. In Counsel's opinion, the evaluation of evidence by the learned trial judge was correct both in law and fact, and as the Court of Appeal was satisfied with that evaluation, they were correct not to interfere with the findings and decision of the learned trial judge.

In our view, the Court of Appeal correctly and adequately reevaluated the evidence. We note that in the Court of Appeal, the question of who took the money and sweater was not one of the four grounds of appeal. We are satisfied that on the issues which were the subject of the appeal before them, the learned Justices of Appeal re-evaluated them properly and came to the correct and same conclusion as the trial judge.

Admittedly, theft of or attempted theft of property is an essential ingredient of the offence of aggravated robbery. We are satisfied that the learned trial judge was alive to all the ingredients of the offence. Thus, in her judgment, she observed:-

"In a charge for robbery with aggravation, that is, where a deadly weapon is used, the prosecution must prove three things, namely:

1. ***Theft of property in this case Shs: 195,000/= and the theft of a sweater***
2. ***A deadly weapon was used in the robbery***
3. ***The accused participated in the robbery."***

Thereafter, the learned trial judge proceeded to consider and determine whether the evidence presented at the trial proved that the appellant had committed theft. She reasoned out the issue of theft as follows:-

"Regarding theft, PW1 testified that in the morning after the robbery he directed people who had answered the alarm that there was Shs: 195,000/= in a sweater in his bedroom but no money or sweater were found. His evidence was corroborated by PW3 and PW5 that the money and the sweater were missing. So there must have been a theft. The victim heard footsteps following him to the bedroom where he escaped through the window. Besides the two small children with whom the victim was in the house, the accused was the only (adult) with the victim."

In our view, the Court of Appeal was correct to accept and confirm the learned trial judge's findings on the issue of theft. We are fortified in this view by three factors surrounding the robbery. The appellant admits all the other facts as presented by the prosecution. These facts include the deception by the appellant in waking up Byamukama on the pretence that he wanted to pay his debt. The fact that he instead asked for more credit for which he was prepared to kill the complainant is evidence that he was in dire need of money. He pursued the victim to

the bedroom where he was left when the victim escaped from the house. We are satisfied that both the money and the sweater were in the bedroom because Byamukama could not have told lies or being mistaken about it when he knew that without that money to take him to hospital immediately, and have treatment, his life was in mortal peril . It is also noteworthy that the appellant did not offer any other reason or reasons for visiting Byamukama's shop at that late hour and cutting him with a panga.

For the forgoing reasons, we are of the view, that there is no merit whatsoever in this appeal. It is accordingly dismissed. We confirm the conviction of the appellant for aggravated robbery. However, we postpone confirmation of the sentence under Article 22 of the Constitution in conformity with our decision in **Philip Zahura v. Uganda, Criminal Appeal No. 16 of 2004** until determination of the intended appeal against the decision of the Constitutional Court in **Constitutional Petition No. 6 of 2003**.

Dated at Mengo this 21st day of December 2005

A. H.O.Oder,
JUSTICE OF THE SUPREME COURT

J.W.N. Tsekooko,
JUSTICE OF THE SUPREME COURT

A.N. Karokora,
JUSTICES THE SUPREME COURT

J.N. Mulenga,
JUSTICE OF THE SUPREME COURT

G.W.Kanyeihamba
JUSTICE OF THE SUPREME COURT.