

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT FORT PORTAL

CRIMINAL SESSION CASE NO.47/89

UGANDA:.....PROSECUTOR

VERSUS

A1: BYARUHANGA WILLIAM

A2: YOWERI MUGUME

}**ACCUSED**

BEFORE: THE HONOURABLE MR. JUSTICE .I. MUKANZA

JUDGMENT

The two accused persons. Byaruhanga William and Yoweri Mugume hereinafter referred to as A1 and A2 respectively were indicted with others still at large of Robbery contrary to sections 272 and 273 (2) of the Penal Code. They pleaded not guilty. The particulars being that the accused persons and others still at large on or about the 2nd day of May 1987 at Bukwali village in Kabarole District robbed Mrs. Anna Mwangusha of his 2 radio cassettes, Sanyu radio, 3 pairs of bed sheets, a coat, plates, dresses, trousers, pairs of ladies and mens shoes, children clothes and cash Shs. 30,000/= and immediately before or immediately after the time of the said robbery used a deadly weapon to wit a panga on the said Mrs. Anna Mwangushya.

The prosecution in an endeavour to prove its case called in aid the evidence of about five witnesses.

PW2 and PW3 were asleep in their house at night between 1.00 and 2.30 am when they were invaded by robbers. PW2 was in her room with a baby whom she was breast feeding whereas PW3 was in another room with two young children belonging to PW2 and her husband PW1.

Another girl Mbabazi was in another room. She was sick. It was the prosecutions case that while PW2 was in her bedroom she was surprised when three men entered into her room. Because of the electric light which was on in her room she recognised two of the assailants as A1 and A2. The first man to enter her room was the stranger who was armed with a panga. He was followed by A1 whom she had known before and the latter was followed by A2 a relative of PW1 the husband of PW2 and who prior to the incident he A2 had stayed in their home for about five months. A1 & A2 were armed with short thick sticks. The panga man cut her on the arm using the blunt side of the panga. She never bled. The panga man demanded for money and directed him to the baby cot where the panga man got 30,000/= Shillings. Several properties then collected from the various places in the room by A2 whom PW2 said knew the geography of the house because he had lived there before. The properties were passed over to A1. In the course of robbery A2 beat PW2 on the neck with a stick and saliva had to come out of her mouth also she was cut on the shoulder with panga. She did not recognise the assailant who cut her. PW3 who was in the room opposite to that of PW2 was visited by two of the assailants. She was able to recognise one of the assailants as A1 whom she had known before. A1 was dressed in white shirt and black trousers. When robbers left PW3 went and reported the incident to Nyakabwa DW3, A2 and DW4. Meanwhile PW2 who was in a critical condition was rushed to Virika Hospital for treatment where she was admitted and was discharged after four days. Both PW2 and PW3 were positive that they recognised the accused persons. PW3 recognised A1 and PW2 recognized both A1 & A2. Because of the screams PW2 made some people came to her rescue and rushed her to Hospital. According to PW2 and PW3 it rained very heavily in that night as the robbery continued. PW3 was specifically invited to go and keep the company with PW2 an the house where robberies took place because PW1 the husband of PW2 had gone to attend a wedding party of a co-worker and an accountant Mr. Kanaga.

On the following morning, PW1 visited PW2 in the Hospital where PW2 informed him (PW1) that he had recognised A1 and A2 as some of the people who had robbed her in the previous night and injured her. PW1 visited the scene and confirmed the robbery and subsequently caused that arrest of A1 & A2.

PW4 was a driver of the ministry of works. On the date of the incident he was at Kanago's place on wedding party (Kasiki). He had gone there with a government vehicle to deliver goods and

people at the party. He knew both PW1 and A1 as co-workers in the ministry of Works and he was together with them at the party. At around 9.00pm he drove the Government lorry back to the Ministry of Works court yard and parked it there. He came with some people on the lorry when they left Kanago's place but A1 was not among the people he brought to Fort Portal on the lorry.

PW5 was at the wedding doing some wiring for the louder speakers at Kanago's place. He knew A1 as a co-worker in the Ministry of works and A1 was also at the wedding party. He left for home at around 6.30pm to go and collect some wire's for the loud speakers. As he returned to the party at Karamaga play ground he met A2 going to Bukwali. A2 enquired from PW5 whether PW1 would be returning home at Bukwali after the party. PW5 replied as they would return at night. He did not tell him the truth. When he reached at the wedding party at Kanago's place he started wiring the music system. He said he was with A1. Then A1 was dressed in a white shirt & black trouser boarded Mustafa's (PW4's) vehicle around 9.30 pm and left for lot Portal. Then it started raining up to 3.00am .A1 returned and PW5 even talked to him. The former returned having changed his attire. A1 was putting on a black short sleeved Kaunda Suit and black shoes.

In his sworn statement A1 as (DW1) testified that he used to work as a night watchman in the Ministry of Works. He knew PW1 and also knew PW2. On 1st May 1987 he attended the wedding party at Kanago's place. He was together with PW1. He assisted very much in the activities of the party. He collected a cow for the party together with PW1 and also participated in the slaughter of the goat for the (Kasiki) wedding party and off loaded the beers for the party from a lorry. *He* stayed in the party till the following morning. Mrs. Mwangusha PW2 had a grudge against him because whenever PW1 was wanted on duty he used to go and call him. PW2 thought he was taking her husband to other women. He denied the allegation and put up an alibi.

A2 as DW2 testified that he stayed with A1 for about five months prior to the incident and went to live, with DW3 another relative of his. He left PW1's home in February 1987. He conceded that on 2/5/87 at around 8.00pm he met PW5 at the playground at Karamagi and enquired for the whereabouts of PW1. He explained why he made the enquiry. He proceeded home and joined

Nyakabwa DW3 and family, had their supper and went to bed at around 10.00pm. He shared the bed with DW4 Solomon Isaka son of DW3. At around 6.30am PW3 went and informed them that they had been attacked by robbers and it had been admitted in the Hospital. PW3 did not inform them whether had recognised any of the robbers. (A2) DW2 together with DW3 and others went to see PW2 in the hospital. They talked to her PW2 did not reveal to them the names of the robbers who had attacked them in the previous night. They went to Mwangushya's place and went and searched in the surroundings for the stolen properties but never recovered anything.

He was arrested at 2.00pm on 2/5/87, like A1 (DW1) had a grudge against him (DW2) because in January 1987 while still living with PW1 and PW2 one evening when he A2 and PW1 returned home a man raised out of the house through the rear door and disappeared. PW1 Who was in front of the house enquired from PW2 who the intruder was A2 confirmed that the rear door was open suggesting that a man had just ran out of the house.

PW1 was very much angered by what he had seen and a serious fight ensued between PW1 and PW2. PW2 was seriously injured by PW1. After the incident the relationship between A2 and PW1 was at its lowest ebb. After the incident he left for home. PW2 blamed her for the incident.

PW2 and PW4 were positive that A2 spent the whole night of 2nd May 1987 with them and never went out. They were only awakened by PW3 who reported the incident to them.

DW3 went even to the extent of making some searches of the lost properties in the surroundings in A2's room after the latter's arrest but could not find any. He could not even trace any footsteps to his house since it had rained that night.

DW5 was a police officer. He arrested A1 & A2 and recorded statement from both PW5 and PW2. He was using English when PW5 and PW2 were talking in Rutoro language. He did not have an interpreter but because he was musamia he understood a bit of Rutoro but not much. According to DW5, PW2 was using deep Rutoro which he could not understand. He did not therefore record all the words that Alleruya PW5 informed him. And he could not tell whether PW5 knew English. He did not include all information in their statements because of language barrier. He conceded however that he read the statements back to PW2 & PW5 and they were

stratified that their statements were true and correct after which PW2 and PW5 signed them and he too countersigned the statements. Statements by PW2 and PW5 were tendered in evidence as exhibit D1 & D2 respectively after being identified by DW5.

The evidence connecting the accused persons with the charge that was preferred against both of them was partly direct and partly circumstantial. It is direct in the sense that both PW2 and PW3 testified that they recognised the assailants in the night of 2nd May 1987 among whom included A1 & A2. PW2 recognised both A1 & A2 whereas PW3 recognised A1. And the other evidence was circumstantial because PW5 Alleruya Robert testified that when he was at the wedding party with A1 the latter left him and others in the party and disappeared on about two occasions and later returned and that was in the very night when the incident happened. The same witness testified that when he was returning to the party after collecting the wires he met A2 who enquired from him whether PW1 would be returning home from the wedding. I would deal with the evidence of PW5 later in my judgment. The crucial issue here was identification of the accused persons whether there were conditions favorable for the proper identification of the accused persons by both PW2 and PW3.

In **Roria .v. Republic EACA 1967 p.583** their Lordships justices of Appeal quoting with approval the decision in **Abdalla bin Wendo and Anor 1953 20 EACA P.166** had this to say about identification:-

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence. Whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from possibility of error.”

In **Uganda .v. Omukono (1977) HCB P.63** it is held that the possible exceptional circumstances include factors such as;

(a) That the accused persons were well known to the identifying witness.

(b) That the witness immediately told the people who answered the alarm the names of the suspects.

(c) the existence of some form of light at the time of the alleged identification and where those circumstances exist they distinguish this case from those of Roria and Abdalla Obendo Supra.

In the instant case A2 as recognised in the night in question by PW2 alone. A1 was recognised by both PW2 and PW3. According to PW2 & PW3 there was electric light on. The accused persons were known to both PW2 and PW3 and that the incident took a long time. These were the possible exceptional circumstances which distinguish the case from that of the two cases referred to above in Roria and Abdalla's case. But there were other possible exceptions in Omukono's case supra and that was that both PW2 and PW3 did not inform the people who came to answer the alarm the names of the accused.

According to Pw2 she screamed, and made some kind of alarm and people answered to her alarm. PW2 testified that *she* never recognised any of those people who came to her assistance. Even when DW3 visited her at the Hospital she did not mention the names of the assailants.

In her police statement recorded from her on 4/5/87 and admitted in evidence as exhibit D1 she stated that three men entered her house on that fateful night among whom she recognised only Byaruhanga (A1). The second man was short and had a stick whereas the third person had also stick. PW2 further stated in her police statement that she raised an alarm after their departure and two people responded to the alarm. She gave their names as John Serwadda and David Muziro.

Similarly PW3 who went to report the incident to her father DW3, A2, & DW4 her brother never mentioned to those people that she had recognised A1 in the night of the incident. I do not see any reason why PW3 failed to inform her father DW3 and her brother DW4 that he recognised A1. After all she never recognised A2 in the night in question whom she met at Dw3's house.

There was still some contradictions and or inconsistencies in the testimony of PW4 and PW5 as to whether A1 Byaruhanga left on PW4's vehicle when the latter left for Port Portal. PW5 testified that he saw board on the vehicle and PW4 testified that Byaruhanga did not board on his

vehicle to Port Portal. I am of the opinion those contradictions showed that one of these witnesses told this court lies.

The police statement of PW5 formed part of the record liked that of PW2 was identified by Oguttu who recorded the statements from those 2 witnesses.

In Alfred Tajar vs Uganda Criminal Appeal No. 167/1969 a decision by defunct Eastern court of Appeal. It had this to say about inconsistencies and consistency in the testimony of a witness:—

“Of course in assessing the evidence of a witness his consistency or inconsistency is a very relevant consideration. Grave inconsistencies, unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies will not usually have that effect unless the trial judge thinks they point to deliberate untruthfulness. Moreover, it is upon the trial judge to find that a witness has been substantially truthful even though he had lied in some particular respect.”

In the instant case PW2 told this court that she recognised A1 & A2 but in her police statement she stated that she recognised only A1. She further testified that when she made the alarm after the robbers had left she did not recognise any one who came to her assistance whereas in the police statement she said one David Muzira and Serwada answered the alarm. I am of the opinion that these inconsistencies and/or contradictions in the prosecution's case were major ones and they point to deliberate untruthfulness. The veracity of the prosecution witnesses i.e. PW2, PW3, PW4 and PW5 has been assailed. Those prosecution witnesses have been found to be untruthful one way or the other and in the absence of reasonable explanation the remainder of their evidence could only be accepted with great caution. Francis Tinkahirwe vs. Uganda EACA App. No. 67/72, quoted with approval in Tomasi Omukono Vincent Tuken Cr. No. 4 of 1977 (CAU) Rep. Judgments of the court of Appeal for Uganda 1978 Vol. page

The two accused persons gave their own versions of the incident. A1 testified that he was at the party the whole time and that PW2 was trying to incriminate him simply because of the grudge and A1 said that he remained at DW3's home throughout after his encounter with PW5 at Karamag playground. He too testified that PW2 had a grudge against him and brought two

witnesses to fortify his assertions. DW3 impressed me as an honest witness. That A2 stayed with them i.e. DW3 and DW4 the whole night of the date of the incident. Though it had rained and DW4 said he slept throughout but the moment DW2 (A2) woke up in the following morning he too DW4 also woke up. DW4 slept the whole night because nothing disturbed him. I do not believe PW2's testimony that after the robberies A2 asked her whether she PW2 had recognised her and that A1 appeared the most kind of the robbers. Where a robber or robbers are known to the victims they try as much as possible to disguise themselves so that they are not recognised by the victim and when they do not do that sometime they end up killing their victims for fear that the victims would later identify them.

Moreover A1 & A2 put up an alibi as their defence. It is trite law that an accused person who puts up an alibi as a defence does not thereby bear the burden of proving his defence. It is the duty of the prosecution to destroy and or disprove the alibi by placing the accused persons (in this respect A1 & A2) to the scene of crime. See *Sekitoleko .vs. Uganda* 1967 EA 531. The prosecution has failed to destroy the alibi simply because of the inconsistencies and contradictions and unexplained episode in the prosecution case. This court also had the impression that the evidence of the prosecution's case was in a way a concocted one and it was confined by the testimony of DW5 a witness called by the defence. DW5 apparently supported the prosecution's case that in recording statements from PW2 and PW5 he was using English whereas PW2 and PW5 were replying him in Rutoro. He went on to testify that he did not understand complicated Rutoro and that he did not record all that PW2 and PW5 informed him and that he had no interpreter. In essence DW5 tried to convince this court that what PW2 and PW5 told this court was the only truth because he did not include all the information from them in their police statements. It is inconceivable that policemen of DW5 caliber and experience could have had those guts to come and tell open lies to the court. He gave the impression that he was a blatant liar and as a witness he was useless.... The police statement from PW5 and DW2 the latter were replying him in English and therefore the first information.

PW2 and PW5 gave to the police was the correct version of the event and the subsequent testimonies of PW5 and PW2 in the court here were an afterthought and fabrication since I have found that PW2 and PW5 told lies. I have great doubts whether PW2 identified both A1 & A2 in her room. Also PW5's evidence that A1 left the party and went to Bukwali to commit the crime

is also untrue and I do not think that because A2 enquired from PW5 whether PW1 would returning home in the night after the party that alone was not enough evidence to suggest that A2 made the inquiries because he wanted to go and rob PW1 in his home when the latter was away. I found both PW2 and PW5 not credible witnesses And before drawing an inference of the accused guilt from circumstantial evidence as given by PW5 the court has to be sure that there a no other existing circumstances which would weaken or destroy the inference. Taper VR 1952 AC 80 at p.489. See also Yowana Serwada vs Uganda Cr. App. No.. 11 of 1977 (UCA). In the instant case the circumstantial evidence did not irresistibly point to the guilt of the accused persons. There were other existing circumstances which would weaken or destroy the inference that the accused persons never committed the robberies.

After the evidence of PW2 and PW5 been discredited the evidence by PW3 as stated above was not enough to connect A1 with the commission of the crime since I have held that PW3 never reported to her father that she had recognised A1 and only said so long after when the statement was being recorded from her and since I held the view that PW2's evidence plus that of was concocted, PW3 was associated with PW2 and was, under the influence of PW.2. I cannot accept her testimony as being the truth.

There was one other matter which was raised by the learned State Attorney. In his submission the learned state attorney was of the view that the statements by PW2 and PW5 which were tendered in court as exhibit PW1 and DW2 respectively were inadmissible. I do not agree with the learned counsel.

Under section 153 of the Evidence Act Cap 43, the credit of witnesses as may be impeached by the adverse party or with the consent of the court by the party who calls him.

(a)

(b)

(c) By proof of former statements inconsistent with any part of his evidence which is liable to; be contradicted.

Under section 155 of the same Act in order to corroborate the testimony of a witness any former statement made by such witness relating to the same fact or about the time when the fact took place or beyond any authority legally competent to investigate that fact may be proved.

In the instant case it was in order when PW2 and PW5 were cross examined by the learned counsel appearing for the accused on the previous statements they made at the police in order to impeach their credit in order to prove that what they were telling the court was not an afterthought. Therefore the statement exhibits D1 & D2 recorded both PW2 and PW5 respectively from there were admissible after being identified and proved by DW5 recorded the same from a both PW2 and PW5.

Finally since the accused were indicted together the prosecution had to prove that the two had a common intention to prosecute an unlawful purpose in conjunction with one another as per section 22 of the Penal Code. I do not see the common intention here because the prosecution failed to place the accused at the scene of crime because of the inconsistencies in its Case.

The sole gentlemen assessor advised me to find the accused guilty and convict them as indicted. With respect he did not address himself to the contradictions in the prosecution's case and whether the prosecution's witnesses were truthful. I disagree with the gentlemen assessor. I find that the prosecution failed to prove its case beyond reasonable doubt and of the versions of the events of the incident the defence case was preferable to that of the prosecution. I therefore find the accused persons not guilty of the offence of Aggravated Robbery contrary to section 272 and 273 (2) of the Penal Code and I acquit them of the charge and unless they are being held for any other lawful charge. I order for their immediate release.

I. MUKANZA

JUDGE

16/8/90