

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT FORTPORTAL  
CRIMINAL SESSIONS CASE NO.MPP 193 OF 1992

UGANDA:..... PROSECUTOR

VERSUS

JOSEPH WEBOHE:.....ACCUSED

BEFORE; HONOURABLE MR. JUSTICE J.W.N.TSKOOKO

JUDGEMENT

In this case the Indictment initially contained the accused and two other persons (William Sunday and Charles Baguma). Having noted that these two had in fact not been committed for trial by Magistrate's Court, I permitted alteration of the indictment by deleting the names of William Sunday and Charles Baguma before the hearing commenced.

The accused Joseph Webohe is indicted for the offence of Robbery Contrary to Section 273 (2) of the Penal Code 4ct. The particulars of offence allege that the accused with others still at large on the 15th of July, 1983 at Busoro Village, in Kabarole District robbed Silvano Kibubu of cash shillings 2,000/ one sack full of .cassava flour, half a tin of groundnuts, five kilos of salt all valued at shillings 5,000/= shs 78,000/= etc and at **or** immediately after the time of the said robbery threatened to use deadly weapons to wit pangas, knives and spears on the said Silvano Kibubu. The amount of money could have been made one figure instead of two.

This however does not affect the case.

The prosecution called five witnesses. *These* are Silvano Kibubu (pw1), John Baguma (pw3), George William Ruhweza (PW3), No. 9962 D/CPL. D. C. Ongwen (PW4) and No 18799 D/C, Egesa (PW5). These last two gave immaterial evidence.

This is one of those rare cases where I have had to invoke the Provisions of Section 117 of the Evidence Act in order to receive the evidence of PW1 who is dumb. That Section States: “ A witness who **is** unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written or the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

PW3, a half brother of and neighbor to PW1 interpreted PW1's signs into Rutooro and vice versa. The Court clerk, Mr. Mutegaya, acted as Rutooro/English interpreter to complete the circle. This type of procedure has drawbacks Thus thrice I had to tell **PW3** to interpret as best as he can what PW1's signs really meant rather than to give his own (PW3's) opinions or story as perceived by PW3. Imperfect interpretation *may* not be obvious as nobody else in Court could understand PW1.

PW1 was the only eye witness to the robbery. He lived alone in the house where he was robbed on 15/7/1983.

According to PW1, 4 robbers gained entry into his house through a window at 2.00 am and pounced upon him while in bed, bound his two hands and speared him near the left eye before they proceeded to ransack the house. He was also assaulted at the back and on one of the legs. Accused is claimed to be one of the two robbers who tied PW1's hands and so PW1 claims he was able to recognize accused and Baguma, a confederate of accused. Although PW1 claimed that he had lighted candle when the robbers entered he also testified that the robbers shone a torch lighted candles in order to see around as they ransacked the house.

The impression I get is that, if at all there Was a lighted candle, its light must have been dim; **that is why** the robbers had to light candles and to shine a torch. PW1 was not lead to establish the size of the house and whether it Was just a one **Several**

room house or a house with/several rooms. This would assist in assessing the ease or difficulty connected with vision of the robbers by PW1, at some point PW1 claimed that the accused and the other suspect (Baguma) were 3 meters in front of him. But it seems PW1 was **confined** to his bed for duration of 2 hours of the robbery which lasted till 4.00 am. PW1 later united himself and reported the robbery to PW2 and PW3 at 6.00.am after drumming. These two lived a bare 1 00 meters away. They never heard the drums. No explanation was given as to what was *happening* to PW1 between 4.00a.m. and 6.00a.m. PW1 described to PW2 and **PW3** and that the accused and Baguma were among the robbers. PW1 was taken to Chiefs thence to Fort Porta]/where police reports were made, neither Chiefs nor Police have testified about these first reports which is carnally Very important information.

In my view report to the Sub—County Chief would have been of value, in this case Because of the evidence by PW1 that he had identified accused on the night of the robbery held that at the close of prosecution case that the accused had case to answer.

The evidence of PW2 and 3was contradictory, in some respects but supported PW1 about his reporting at 6.00am after robbery.

The accused gave sworn evidence and denied the offence. He denied being at the scene of the crime but stated that on the relevant night he was moaning his dead grandmother in a neighboring village about 400 metres away from the scene of robbery, Thus the accused set up an alibi. There was some inconsistency about whether accused was in Kasese or at his grandmother's residence on 15/7/1983.

I directed the assessors as I now direct myself that in view of the fact that PW1 was the only **eye** witness, that the robbery took place in the dead of night and that Pw4 was roughed up and injured near the left eye almost immediately after robbers entered the house, these factors must be considered with great care and caution in order to conclude whether or not Pw4 had sufficient opportunity to make unmistakable and positive

identification of the accused as One of the robbers. Mr. Mugamba learned counsel for the accused submitted among other things that the circumstances were not conducive to proper identification of the attackers or robbers. he referred me to the cases of Ronia Vs. Republic (1967) E.A 583 and George Karyesabula Vs. Uganda (Uganda Court of Appeal Criminal Appeal no. 16 of. 1977) on the issue of correct identification. He also referred me to Vincent Rwamwaro Vs. Uganda (high court .Criminal Appeal No. 13 of 1988) on the law of disproving alibi which is that by setting up alibi accused does not thereby assume burden to prove its truth..

For his part Mr. Khaukha, the learned State attorney submitted that the prosecution has proved the case against the accused person beyond reasonable doubt.

As I pointed out to the assessors, PW1 enumerated many more properties which were allegedly robbed than those listed in the indictment.

The possibility that this is an improvement on the earlier story cannot be ruled out.

The period for which *PW1* could have known accused prior to 15/7/1983 was conflicting as narrated by *PW4*, *PW4* and *PW4*. *PW4* claimed at some stage that he had known the accused and at another that he had not seen or known accused before the day preceding the night of the robbery. Thus he had known him either for some time or for 1 day.

Yet *pw2* who lives on the same village as and is brother of *PW1* testified that he had known the accused for a long time and that accused was a village mate.

On the other hand accused claimed that he had known *Pw1* for over *a year*. The consequence of this is that either *PW3* misinterpreted the period for which *PW1* is said to have known the accused or *pw1* was deliberately avoiding to show that he had been a friend of the accused and had known him longer than one **day**.

Whatever would be the inference, the implication was to throw doubt on the veracity of *Pw1* or indeed on accuracy of interpretation of his signs by *PW3*. Accused **could** not have ordinarily claimed to have been friendly to and known by *PW1* for over a year knowing

that his identification as the member of robbers that attacked PW1 on 1/7/1983 depends on how long PW1 had known him unless the accused was being honest. Further more the claim by accused that his grandmother had died on 15/7/1983 was not challenged as being false. His claim that he did not hear alarm from home of pw1 on night of robbery is supported by way of inference drawn from the evidence of PW 2 and 3 who lived nearer to PW1 and yet neither of them heard any alarm until they were woken up at 6.00 a.m. by PW1. PW2 at first claimed that the accused was arrested on the day PW1 reported the robbery. In answer to assessor's question, he (PW2) claimed that accused was actually arrested in August i.e. a month after robbery. He thus confirmed accused's testimony yet PW3 claimed accused was arrested after a week. These conflicts and contradictions arise possibly because of the passage of time. **On** the other hand they may be due to the fact that none of the prosecution witnesses is telling the truth. Having considered all the evidence in the case my view is that the conflicts and inconsistencies in the prosecution case show that the 2 prosecution witnesses are not wholly truthful. I find that as a fact.

Pw1 gave the impression that despite his unfortunate incapacity, he was reasonably intelligent. However I believe that the circumstances during which the robbery was committed were not conducive enough to positive and unmistakable identification of the attackers.

Having been tied up, beaten and confined to the bed here he was found sleeping he never had sufficient opportunity to identify any of the attackers.

If he sighted the accused earlier in the day PW1 in all probability thought of accused as one of his attackers. The prosecution failed to disprove the alibi set up by accused there are some inconsistencies in the story of the accused, but that the guilt of the accused *must* be proved by prosecution evidence and not otherwise.

Besides there is no evidence as to what Weapon was used to inflict the injury seen on Pw1. The weapon could have been anything. The evidence of PW1 does not bring any weapon used within the requirements set out in Section 273 (2) of the penal code act.

Additionally I observe that whereas the indictment in the particulars of offence allege that the robbers threatened to use pangas, knives and spears on ,PW1, PW1 claims that he was actually speared. This again raises doubts about the accuracy of interpretation of the signs of PW1 into intelligible language.

Thus besides the evidence failing to establish capital robbery, the same evidence casts doubt on whether the signs of PW1 have been accurately interpreted so as to make his evidence reliable not only as evidence perse but also as evidence requisite in criminal trial to prove the guilt of the accused beyond reasonable doubt. Thus in the absence of any corroborative evidence the evidence of PW1 alone could not even if I had accepted it, be sufficient to establish the guilt of the accused.

There would have to be independent other evidence pointing to guilt of the accused.

Both assessors agree that PW1 could not have identified his attackers in the circumstances of this case- They advised me to acquit the accused.

Having considered the prosecution evidence and the defence evidence lam satisfied that the prosecution has not discharged the burden of proof of guilt of the accused requisite in a criminal trial. I agree with the opinions of the assessors.

In the result I find the accused not guilty of the offence of robbery .Contrary to Section 272 and 273(2) f the Penal Code act unless *he is held on some other charge* of any other offence. I acquit him he is set free forthwith.

**J.W.N.TSEKOOKO**

**Judge**

**29/5/1991**