

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
CRIMINAL SESSIONS CASE NO.259 OF 1991

UGANDA:..... PROSECUTOR

VERSUS

JOHN OKWONGA

ACCUSED

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

JUDGEMENT

In this case the accused is indicted for capital Robbery c/s 272 and 273 (2) of the Penal Code Act.

The particulars of offence allege that “the accused and others still at large at or about the 18th day of December, 1985 at Kibwona Village n the District of Masindi robbed Charles Dungu of cash Shs. 54,000/=, two shirts, four trousers, a jacket several gomasis, children wear and many others and immediately before or after threatened to use a deadly weapon to wit a gun and an axe on the said Charles Dungu.”

The words “and many others” appearing between words children “wear” and “*and* immediately” in the indictment render the indictment technically defective in as much as it violates S. 23 (c) (i) of the Trial on Indictment Decree, 1971 which requires property to be described.

That is proper ties must be named or described to show what they are. The case for the prosecution is that on 18th December, 1985 at 3.00 p.m. the accused and three armed soldiers invaded the home of the complainant Charles Dungu, tortured him and his family by use of guns butts and axe before robbing them of various items. The accused denied participation in the robbery and raised alibi. The prosecution called two witnesses only. These are Charles Dungu

(PW1) and his wife Justin Dungu (PW12). The accused made an unsworn statement. No: other witness

According to PW1 during February and March, 1985, he saw the accused twice in Kibwona Market in a village where accused and PW2 lived at that time. He remembers the accused well because the accused and other Arua boys used to indulge themselves in unseemly conduct. There was war in December, 15 1985 and people in villages were apprehensive and were not settled in their homes. He and his family lived near a river down a slope so he and other people used to hide there.

On 18th December, 1985 at 3.00 p.m. the accused in company of 3 soldiers invaded his home each approaching from a different direction .Accused was armed with a club while the soldiers had a gun each. Accused ordered PW1 to lie down with his face on the ground. He then picked axe and hit PW1 with it at the back. The soldiers hit PW1 with butts of their guns as they demanded for money. Wives of PW1 (who included PW2) and children were ordered not to run away. They sat on the verandah, 3-4 feet away from PW1. Attackers threatened to shoot anybody that would ran away. Thereafter the attackers entered the house and ransacked it taking away various items including Shs. 54,000/=As they left, the robbers left orders for nobody to ran away.

On 19th December, 1985 he reported the case to Masindi police Station and named the accused as one of the attackers. On 14th May, 1985 he learnt that accused was at Karujuga Sub County under arrest. PW2 supported her husband about what happened on 18th December, 1985. She claimed that on 17th December, 1985 accused had for the first time gone to her home. She suspected this to be raking because as accused was not relative nor friend of the family and had never gone there for anything else. According to her the robbery lasted about one hour. The out sleeved shirt and an orange pair of trousers.

Two other minor differences are that PW2 said accused pulled her husband down which the husband did not mention. Further whereas the husband enumerated more articles as having been stolen, PW2 enumerated fewer. Of most interest is that PW2 claims she identified accused on 18th December1 1985 because he had gone past her home on 17th December, 1985. However no

identification parade was held for her to identify accused since date of his arrest till she saw him in court.

The accused denied the robbery and raised an alibi that at time of the robbery he was in Arua. He however admits being in Kibwoma Market with his friends playing Adungu music. He stated that there were some soldiers referred to as Anyanya who used to terrorise people and this earned foreigners (non Banyoro) a bad name. He claimed that probably because of these soldiers there was tribalism and that is how he is being implicated. He claimed he left Kibwona by September, 1985, that is in effect long before the robbery.

In spite of criticism by Mr. Isingoma, learned counsel for the accused about whether the robbery was committed, my view is that the robbery was committed.

As I directed the assessors on the burden of proof of the guilt of the accused in a criminal trial is always on the prosecution. *Okethi Okalle Vs. Rep.* 1965 EA 555; *Bukenya Vs. Uganda* 1972 EA 549 and **Woolmington vs Director** of Public Prosecution 1936 25 CR App. R. 72: Such proof must be beyond reasonable doubt. In cases where an accused sets up an alibi, it is the duty of the prosecution to show that the alibi is false. On consideration of the evidence I directed the assessors that there was no evidence of use or threat to use a deadly weapon and the assessors agreed with me. This is because although a gun and an axe could be deadly weapons within the meaning of Section 273 (3) of the Penal Code where neither of them is employed as a deadly weapon during robbery, any robbery committed is not capital robbery. See: *Wasaja Vs. Uganda* 1975EA 181. Supreme Court Criminal Appeal No. 32 of 1989 (*Sgt. S. Birumba & another vs. Uganda*); and Supreme Court Criminal Appeal No. 4 of 1989 (*Sabiti vs. Uganda*).

Thus the major issue in this case is identification. If PW1 can be believed, the accused was not a stranger to him. Equally if PW2 can be believed the accused could not be a total stranger. I say so because PW1 claims he had seen accused in the market at the beginning of 1985, twice. As for PW2 she had allegedly seen accused the day previous to the robbery. Mr. Kabali, learned Resident State Attorney, submitted that both witnesses should be believed and accused should be convicted as charged. On the other hand learned counsel for the accused, Mr. Fred Isingoma, submitted that discrepancies in the evidence of PW1 and PW2 show that they did properly

identify the accused. He particularly referred to the difference in dress of accused as described by both PW1 and PW2. That pW2 attempted to ascertain the name of the accused from the village mates. That accused has been incriminated by association with Anyanyas which was a hated group.

The prosecution case is tainted with some loopholes-in some parts caused by police inaction.. The type I have criticised in Cr. S. Case No. 71/8 (B. Abdallah 3 others vs. Uganda) and Erika Sabiti vs. Uganda (Cr. S. Case No. 385of 1990). Initially I was told PW1 was on death bed. This was false.

PW1 claimed he had known the accused in the market. Yet during May 1988, (14/5/1988) when he learnt that the accused had been arrested he had to go to the sub county headquarters be out of curiosity though I have no evidence to that effect. The accused himself admits there *was* war in 1985. He admits playing music in the market where people came to know him. This lends support to PW1 that the accused was prominent in that market and that that is where and how he knew the accused. Accused stated that he left Kibwona area during September, 1985 that is before robbery. However he gave this answer to my question with great hesitation, He wore a troubled look on his face when he answered.

Defence counsel pointed out contradictions between PW1 and pW2. One of these is difference in duration of robbery. PW1 stated robbery lasted 30 minutes. PW2 says it lasted one hour. This is a difference alright but if it had been a day or a week or indeed half a day I would attach importance to it. PW1 said accused wore a shirt and a pair of trousers. While PW2 says he wore rugs or torn clothes. A shirt or a pair of trousers can be torn but still remain a shirt or a pair of trousers. PW1 did not say the clothes were new which would definitely have indicated that the two witnesses were talking about different things.

I have been feeling uneasy in the way prosecutions in several cases have been conducted during the current sessions. Invariably the prosecution calls the barest of witnesses. In this case the complainant (PW1) testified and accused agreed that, he was arrested by a Gombolola Askari. That askari has not testified. PW1 stated that in his first report to Masindi Police Station next day after robbery he named the accused at Masindi Police Station. Because of non availability of policeman, who recorded the information I asked both counsel (Mr. Isingoma for accused and

Mr. Kabali Resident State Attorney) to ascertain this from police file. After perusal, Mr. Isingoma frankly admitted that accused was named. Mr. Isingoma's frankness had been characteristic throughout the session which this court appreciates.

In view of that information I have no doubt that accused was actually named by PW1 in the latter's information to Masindi Police soon after, the robbery. The police appear to have been ineffective during the war in December, 1985. I directed the assessors to consider the evidence with great care. The evidence of PW2 is suspect although she impressed me as a very intelligent and forthright witness. Her evidence is suspect because she claimed that after the robbery she had to go around asking to ascertain the name of the accused. It is also suspect because she claimed that accused must be one of the gang of people who terrorized the village. This is of importance in as much as this witness had not known the accused before 17th December, 1988 the day she allegedly first saw accused while on a raking mission to her home. She could have seen the accused on 18th December, 1985. But her evidence doesn't rule out possibility that she is incriminating him by reputation.

PW1 impressed me greatly as a witness of truth. He had been accused twice before. He was, close to accused during robbery. PW1 was not so brutalized as not to be to observe the accused. Properly and recognize him. I am aware of the danger of relying on evidence of a single identifying witness. But in this case I find some support of the evidence of this witness, from the evidence of the accused he must have been in the market as claimed by PW1 during February and March, 1985. PW1 must have seen him. There is clearly evidence that PW1 named the accused to Masindi police as the person who participated in the robbery's. I watched the accused making his statement in court. He was worried. He was hesitant in giving information. I asked for clarification from him about when he left Kibwona Market. He deliberately hesitated; I had to repeat-my question. He answered it after further hesitation. I know that had earlier suggested that he could not recall dates. But he is mechanic and motor vehicle repairer.

According to him he had been in Masindi Town since he was born where he has been doing business of a mechanic. He is apparently also a musician. How he switched from motor repairing to music is not easily explained. I recognize that 1985 is a long time back. But considering the background of accused which I have just described. I believe that he could not fail to recall that

he left Kibwona Village either in September or some other time. The manner he answered left me in no doubt that he was lying and I find that as a fact.

I find as a fact that accused was Kibwona Village on 18th December 1985. That he together with three armed soldiers robbed PWI on 18th December 1985 during broad day time. I find as a fact that PWI is unmistakable in the identity of the accused. This shows that the alibi is false and I so find. If accused was born in Masindi and grew up in Masindi then his disappearance since 1985 till 14th May, 1988 when he was arrested on his way back is unexplained. On his own admission, he was arrested on the first day when he was returning to Masindi. This is 21/2 years since he disappeared. His conduct is evidence of guilt. I find this as a fact. This corroborates the evidence of PWI. I am satisfied beyond doubt that prosecution has proved of the guilt the accused as required in a criminal trial. I accept the opinions of the two assessors that the accused is not guilty of capital robbery but that accused is guilty of simple robbery. I find him guilty of robbery C/SS 272 and 273 (1) (a) of the Penal Code Act and convict him accordingly.

J. W. N.TSEKOOKO

J U D G E

13/12/1993.