Hon. Mr. Justice Tsekooko

Robbery identification

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HOLDEN AT MASAKA.

CRIMINAL SESSION CASE NO. 57 OF 1988

(Original Crim. Case No. MMA. 858 of 1986 of Chief Magistrate's Court Masaka).

UGANDA .... PROSECUTOR

versus

HERMAN KAKOOZA .... ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE C.M. KATO

JUDGMENT

The accused person Herman Kakooza is indicted in two counts for the offences of Robbery, contrary to sections 272 and 273(2) of the Penal Code. The indictment alleges that on the 8th February, 1985, the accused with others still at large, robbed one Seyi Vicent a sum of shs.200,000/=, that on the same night he also robbed John Ssempijja of an unknown amount of money. The incident is said to have taken place at Namiwunda village in Rakai District. The accused pleaded not guilty to the indictment.

The case for prosecution has been briefly that on that particular night at about 10.00 p.m., the family of the late Vicent Seyi had finished taking their supper and they were conversing in the sitting room, when they were attacked by 3 robbers who included the accused. The accused was armed with a gun which he fired 4 times and in the process he injured Nakanwagi (PW2) on the thigh and that on that same night both Seyi and Sempijja were shot dead after the former had been robbed of 200,000/= and the latter had also been robbed of unknown amount of money.

The case for the defence has been that the accused was not at the scene of crime. When he went there after hearing the shoutings and sounding of drums he found his brother Seyi and

...../2

Sempijja having been murdered. He arranged to have the injured Nakanwagi taken to the hospital and later on he reported the matter to the authorities.

It is our law that the duty of proving the guilt of an accused person beyond reasonable doubt lies upon the prosecution throughout and that burden never shifts to the accused: Uganda v Joseph Lote (1978) HCB 269 at 270, Y. M. Kiiza v Uganda (1978) HCB 279 at 280. In a robbery case like this one the prosecution must prove, inter alia, that there was theft, violence and threat to use or actual use of a deadly weapon and that the accused person in the dock participated in that exercise. (Sections 272 and 273(2) of the Penal Code) I will briefly deal with these ingre- dients one by one starting with the first ingredient.

It has been the case for prosecution that 200,000/= was stolen from Seyi and unknown amount was also stolen from Sempijja. It has not been possible for me to discover how the prosecution witnesses came to know that the amount of money taken was in fact 200,000/= when no witness counted that money when it was being taken. Be that as it may, there is an explanation from PW3 and PW2 that they knew about the money because they were keeping it together. It is most likely therefore that this money was in fact taken although it may not have been the amount stated. Regarding the unknown amount taken from Ssempijja, this is a mere speculation because nobody saw money being taken from this man although PW3 claims to have seen the accused getting money from that man. PW3's evidence was nothing but an opinion because she had heard Ssempijja saying "take money from my pocket and leave me alive", thus she assumed that money had been taken from him.

Regarding the issue of violence I have no doubt in my mind that that on that night there was actually an attack on the home of Seyi which involved a great deal of violence upon members of that family, this is confirmed by the accused himself.

On the issue of a deadly weapon being used there is over- whelming evidence on record that on that night the home of Seyi

...../3

was attacked by men one of whom had a gun. I find that there was shooting at the home of Seyi and in that process a gun was used. This view is also confirmed by the evidence of the accused who testified that he heard gun shots at the home of his brother Seyi and that when he went there, he found both Seyi and Ssempijja having been injured.

In all these circumstances, I hold that robbery was committed at the home of Vicent Seyi to the prejudice of Seyi but there is no evidence that Sempijja was also robbed.

The next point to be considered is whether the accused person participated in that robbery. The case for prosecution here rests on the issue of identification. It is the law that where prosecution case entirely depends on evidence of identification such evidence must be water tight before conviction can be based on it: Musoke v Uganda (1983) HCB 1 at 2. The 3 prosecution witnesses: PW2, PW3 and PW4 in this case testified that they had identified the accused as being one of the people who attacked them. PW3 and PW2 are sisters-in-law of the accused and PW4 is his niece. These people said they had known the accused for a long time and that there was a lamp burning in the house, but the accused has categorically denied having been involved with the matter and he gave detailed account of what happened on that night. Considering the fact that prosecution witnesses contradicted themselves sharply on the issue of how the accused was dressed, that the accused being a brother of the deceased could not have openly shown himself to these people who knew him, that there was great deal of confusion in the house at that time so that witnesses for prosecution were not well composed to know exactly what was going on and in view of the detailed evidence as given by the accused person himself, I am inclined to believe the accused person when he says that he was not at the scene of the attack on that night and that the prosecution witnesses must have been mistaken as to the persons whom they saw that night.

....../4

This case must be clearly distinguished from the case of: Uganda v Kakooza (1984) HCB 1 in that in that case the identifying witness mentioned the name of the attacker to the Police and also identified him at an identification parade which has not been the case in the present case.

The subsequent conduct of the accused viewed together with the evidence of PW1 and that of prosecution witnesses clearly show that the accused could not have been a party to the attack on the home of his brother on that night e.g. on that night he went to his brother's home, assisted in the recovery of the body then went to check on the members of the family who had taken refuge at the home of Yokana Nsigayahe, assisted PW2 to be taken to the hospital for treatment, went to the Mutongole and Muluka chiefs to report the incident, then went to the Police where he reported the matter and came back with them to the scene; took the dead body to the hospital then back for burial. To me all these were not acts of a person who had committed such a terrible crime. This view is supported by the failure of the witness to mention the name of this man to the Police who came to the scene the following morning, their explanation as to why they did not do so is not convincing. Having said that the accused was not at the scene of crime his defence of alibi must succeed.

In all these circumstances and in full agreement with the unanimous opinions of the two gentlemen assessors, I find that prosecution has not proved its case against the accused beyond reasonable doubt in respect of both counts and I do acquit him. The accused is to be set free unless he is being held in prison for some other lawful purposes.

C.M. KATO
JUDGE.
4/1/1990.