

Use of gun or toy - Capital Robbery

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CRIMINAL SESSION CASE NO.14/91

(ORIGINAL MJ.440/88)

UGANDA:.....:PROSECUTOR

VERSUS

ARAMANZAN MUGENYI:.....:ACCUSED

BEFORE: HONOURABLE MR. JUSTICE C.M. KATO

J U D G M E N T

The accused person Aramanzan Mugenyi, hereinafter to be referred to as the Accused, is indicted for robbery with aggravation contrary to Sections 272 and 273(2) of the Penal Code. The indictment alleges that on the 7th day of July, 1983 at Kasubi village in the District of Iganga he with another person who is now dead robbed the complainant Oburu Omusanga John of his bicycle and that immediately before or after the robbery threatened to use a deadly weapon to wit a gun, upon the person of Oburu Omusanga. The Accused pleaded not guilty to the indictment.

The case for Prosecution is based on the evidence of 4 witnesses two of whom are eye witnesses. The evidence of the 1st witness Paulo Mukwana was admitted under the provisions of Section 64 of the Trial on Indictments Decree. The evidence of PW2 P.C. Maiswa is simply that when he was at the Police Post of Bwuni he received a report in respect of a robbery which had taken place at the home of James, a Medical Assistant. Following that report he arrested the accused person and later on he received a bicycle which was said to have been robbed from the home of one Gaitano, who identified it as his own bicycle. With due respect I agree with the learned defence Counsel Mr. Kania when he says that the evidence of this witness is not relevant to this case as it concerns an entirely different robbery which was committed at the homes of James and Gaitano.

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

MEMORANDUM FOR THE DIRECTOR

DATE: 10/15/68

TO: SAC, NEW YORK

FROM: SAC, NEW YORK

Re: [Illegible]

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The evidence of Julius Nyakoli and that of Oburu Omusanga is materially that on the morning of 7th July, 1988 at about 4.00 a.m. they set on a journey while on their bicycles to Wakawaka. After they had travelled for a short distance they sighted two men ahead of them. When they approached these men they were ordered to put down their bicycles. They obeyed the order and placed their bicycles down. They were then ordered to produce their identity cards. They also obeyed this order. It was at this stage that PW3 noticed that the Accused was having something which looked like a gun and PW4 noticed that the Accused had a pistol and the second man had a big gun. PW4 then lit a box of matches to enable the Accused read the identity cards. It was at this time that the two witnesses were able to identify the Accused as a person whom they knew. When these witnesses realised that it was no longer safe for them to remain at that place they decided to run away, each of them taking his own direction. PW3 ran to the Police Post but did not get any assistance from there. He eventually went to the home of PW1 Paulo Mukwana who had a gun and who escorted him to the scene of crime where Oburu's bicycle was found still lying but the bicycle of PW3 had disappeared. Eventually Nyakoli's bicycle was discovered in the bush after an LDU man had helped them to indicate where it was and it was taken to the Police.

On the other hand the Accused denied any connection with commission of this crime and put up a defence of alibi. According to his story, on that night he was in Tororo at a place called Bisoni. He left Tororo in the morning and went to Eugiri to sell his sugar. As he was returning to Tororo after selling his sugar he was arrested and taken to the Police. He believes Nyakoli testified against him because sometime in February, 1988 they had a fight and therefore Nyakoli has a grudge against him.

It is trite law that the duty of proving the Accused's guilt beyond reasonable doubt rests upon the prosecution. That burden never shifts to the defence except in some rare cases where the statute requires the defence to do so; Woolnington V D.P.P. (1935) AC 462 and Serugo V Uganda (1978)

HCB 1 at 2. In a case of aggravated robbery like the one now under consideration the prosecution is enjoined to prove beyond reasonable doubt the following ingredients:-

- (1) that there was theft
- (2) that there was violence.
- (3) that there was a threat to use a deadly weapon or actual use of a deadly weapon as defined in Section 273(2) of the Penal Code.
- (4) that the accused person in the dock directly or indirectly participated in the commission of the offence.

For the sake of convenience I propose to deal with each of these ingredients separately starting with the first ingredient. It is the case for the prosecution that the Accused stole Oburu's bicycle, at least that is what the indictment says. Theft within the meaning of Section 245 of the Penal Code means taking away a person's property with the intention of permanently depriving the owner of the property. The case for prosecution on this point hinges on the evidence of the two eye witnesses PW3 and PW4. Both witnesses stated that when they run away from the scene they left their bicycles there. According to the evidence of PW3, when he went back to the scene with Private Paulo Mukawana he found the bicycle of Oburu Omusanga at the very place where they left it and he explained that, that bicycle was not taken because it was too old. The evidence of this witness clearly indicates that Oburu's bicycle was never stolen from Oburu. This case must be clearly distinguished from a case where property is stolen and later on abandoned. In this particular case the bicycle was never taken then later abandoned. According to the evidence of Nyakoli it would seem the thieves never intended to steal this old bicycle. It also

defeats common sense how two thieves could have decided to go on one bicycle and leave one which was in a working condition if they had ^{intended} to take it. I agree with the submission of the learned Counsel for the defence that prosecution has failed to prove that Oburu's bicycle was ever stolen.

Turning to the question of violence, although the witnesses agreed that the two people whom they found on the way ordered them to stop, it is not clear from their evidence that any amount of violence was ever used against them. According to the evidence of these witnesses the two attackers told them to sit down and they demanded money from them; according to the evidence of PW4, when they started running one of the attackers said "We want you alive", which is an indication that these attackers possibly did not intend to use violence upon these men. I am of a strong feeling that no violence was ever used upon these people (PW3 and PW4) as it is not even known as to how much force, if any, was used in preventing them from proceeding to Wakawaka.

Concerning the issue of a deadly weapon being used, the two eye witnesses PW3 and PW4 were not in agreement as to what they saw. PW3 was clear in his evidence that what he saw the Accused holding was something which looked like a metal. PW4 who impressed me as an ^{exaggerating witness} maintained that he saw the Accused with a pistol and his companion with a big gun. I do not accept the evidence of this witness as truthful on this point. It is surprising that these two people who were at the same place could not see the same things. There are a number of factors which indicate that what these people saw could not have been guns. One of those factors is that when these people started running those people did not shoot or fire in the air to frighten them. The other factor is that the two people could not have seen different things at the same time and place.

It is the law that prosecution must adduce sufficient evidence to prove that an object seen by the witness is in fact a gun and not a mere toy; Uganda V Kamusini (1976) HCB 159 at 160, Uganda V Peter Byamukama (1981) HCB 16 at 17 and Wasaja V Uganda (1975) EA 181. In this case it must be said that prosecution has not established beyond reasonable doubt that the people whom the two witnesses saw were armed with any deadly weapon at all nor is there any evidence to suggest that the attackers ever threatened to use any deadly weapon on the person of any of the two witnesses. The position being what it is I must agree with the learned defence Counsel that prosecution has failed to prove beyond reasonable doubt that there was any robbery committed within the meaning of Sections 272 and 273(2) of the Penal Code; according to the evidence on record it cannot be reasonably said that any other offence was committed which is cognant to the offence of robbery.

Having resolved that no robbery or any other crime was ever committed it would be superflous to consider the issue of whether the present accused ever took part in commission of any crime.

In these circumstances and in full agreement with the opinion of the two gentlemen assessors I find the accused not guilty and I do acquit him. He is to be released forthwith unless he is being held in prison for some other lawful purposes.

C.M. KATO
JUDGE

5.7.1991

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