HON. JUSTICE TSEKOKO

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA

CRIMINAL SESSION CASE NO.175/92

UGANDA :: PROSECUTOR

VERSUS

MOSES MUKAMA :: ACCUSED

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

J U D G M E N T

The accused person Moses Mukama is indicted for robbery contrary to the provisions of sections 272 and 273(2) of the Penal Code Act. He was originally indicted in respect of three counts for the same offence but at the close of the case for prosecution he was acquitted on the first count under the provisions of 71(I) of TID. This judgment therefore applies to the remaining two counts i.e. counts two and three. The accused pleaded not guilty to the indictment.

The material facts as established by the prosecution are that on the night of 23rd August, 1991, the accused in a group of some other 2 people not in court, at Buyala village in the District of Jinja robbed one Aloni Mukamba of Shs.1000-(Ct.2). On the same night at the same village he robbed one Omukada Yona of Shs.1000-(Ct.3). It is also the case for prosecution that during these robberies the accused's colleagues threatened to use a deadly weapon which was a gun. The accused denied having been involved in any of the alleged robberies as on that night he was in a different village called Kibiri which is about 2½ miles from where the alleged incident of robbery took place. The two assessors who assisted me in this case advised me to convict the accused on the two counts as charged.

It is the law of this land that the duty to prove the guilt of an accused person beyond reasonable doubt lies upon prosecution throughout and that burden never shifts to the accused person: Woolmington V D.P.P. (1935) AC 462, Serugo V U (1978) HCB I and Okath Okale V Republic (1965) EA 555 at 559.

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It is also the law that the accused person should not be convicted on the weakness of his case but he should be convicted on the strength of the case as established by prosecution: Uganda V Oloya s/o Yovan Omeka (1977) HCB 4 at 6 and Isreail Epuku V R (1934) I EACA 166 at page 167. In a robbery case like the one now before court Prosecution is required to prove beyond reasonable doubt that there was theft, that there was violence and that there was a threat to use or actual use of a deadly weapon as defined in section 273(2) of the Penal Code Act. Prosecution also is enjoined to prove beyond reasonable doubt that the accused in the dock directly or indirectly participated in the commission of the alleged offence.

I propose to deal with the above ingredients seperately starting with the ingredient of theft. It is not in dispute that Aloni Mukamba (PW3) was robbed of Shs.1000/= which he claims he had obtained from the sale of his "tonto" (local brew). I find it as a fact that Mukamba was in fact robbed of that amount. Regarding the third count Yona Omukada (P 2) testified that on the night in question he was robbed of Shs.1200/= which he was ordered by one of the attackers to hand to him. He told his wife to get the money from the house which she did and she handed it to one of the three attackers who was armed with a gun. Although the amount stated in the indictment is Shs.1000/=, the amount stated by the witness in court is slightly more than that by Shs.200/= I have a feeling that this complainant Omukada was in fact robbed of that money (Shs.1,200/=). It is therefore my finding that theft took place in respect of both counts.

As for violence, Mukamba testified before court that when he met these people he was held by the back of his head, then he was ordered to sit down. In my opinion that was an act of violence exercised on Mukamba, therefore prosecution has established violence in count 2. Regarding the third count, Omukada told the court that he was ordered out of his house and when he came out he was ordered to sit down under the verandah of his house. This in my view was sufficient violence within the meaning of section 272 of the Penal Code Act.

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As for the question of the use or threat to use a deadly weapon both complainants testified that one of the three attackers was armed with a gun which he did not fire. In the case of Wasajja V U 1975 EA 181 in particular at page 182 the court of Appeal for East Africa (as it was then) stressed that where the alleged weapon is a gun prosecution should bring evidence to establish that the alleged gun was not a mere toy or an imitation of a gun or a gun which was not capable of firing.

In the present case I can only say that what the witnesses saw cannot be conclusively defined as a gun as that object was never tested by an expert. The position would have been quite different if the gun had been fired. In these circumstances I find that prosecution has failed to prove beyond reasonable doubt that during the alleged robbery any deadly weapon was involved. Following the decision in the case of Wasajja (Supra) and in view of what I have said earlier I find that no aggravated robbery was committed under section 273(2) of the Penal Code Act but there is overwhelming evidence that a simple robbery under section 273(i)(b) of the Penal Code Act was committed in respect of both counts.

The next question which comes up for consideration and determination is whether or not the accused was involved in robbing PW2 and PW3. Closely connected to this issue is the accused's defence of alibi and his identification.

PW3 while testifying in respect of count two told the court that on that night he was going home from his place of work where he used to sell "tonto" (local brew) when he met the accused in company of two other people but immediately he met them the accused whom he had known for two months came to him and caught him by the neck demanding for money and ordered him to sit down. He stated that he was able to recognize him because there was moonlight and he was very close to him. The two assessors who assisted me in this case found it as a fact that the accused was properly identified by this particular witness.

It is the law that before prosecution can be considered to have proved its case on the issue of evidence by one identifying witness caution must be taken and I warned the two assessors of the dangers of basing a conviction on the evidence of such a witness.

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In the case of: James Kaweka Musoke V U 1983 HCB I at page 2 it was stressed that such evidence should be water tight. Considering the fact that the accused was known to the complainant and that the complainant was held up by the accused for sometime and that there was moonlight, I find that the accused was positively identified by PW3 as conditions favoured such an identification. In case of the 3rd court PW2 Omukada told the court that when the accused went to his home he called him out and when he (witness) went to the window he pulled the curtain and saw the accused at a very close range. The accused then moved away and started giving orders to the others. He also heard the accused pleading with a gunman not to shoot the complainant. There was moonlight which helped him to recognize the accused. I here also find that the accused was properly identified by this particular witness. In these circumstances the accused's defence of alibi cannot be sustained as the proseed prosecution evidence has put him at the scene of crime at the time the crime was committed.

That leads me to the issue of common itention. Both complainants admitted that the money was not directly handed to the accused but to his colleagues with whom he was.

It is the law that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another each of them is deemed to have committed the same offence. Considering the circumstances of this case I am ofthe view that the accused person had a common unlawful purpose with the other people to steal money from the two complainants. He is therefore equally liable despite the fact that the money was not directly handed to him but to his colleagues. His common intention may be infered from the fact that he never disassociated himself from the acts of the other two people, in fact he actively participated in the robbery according to the evidence of PW2 and PW3.

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In the final analysis and in full agreement with the unanimous opinions of the lady assessor and gentleman assessor I am satisfied beyond reasonable doubt that prosecution has proved its case to the required standard to secure a secure conviction of the accused person in respect of both counts for offence of simple robbery but it has not proved the offence of aggravated robbery. I therefore find the accused not guilty of the offence of aggravated robbery and do acquit him of that offence in all the two counts, but find him guilty of simple robbery and I do convict him of that offence in both counts under the provisions of sections 272 and 273(I)(b) of the Penal Code Act: (Wasajja V Uganda (I975) EA I8I followed).

C.M. KATO

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15.12.92