

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE

CRIMINAL SESSION CASE NO. 85 OF 1990

UGANDA .....PROSECUTOR

VERSUS

MICHAEL WAGISHA ..... ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

R U L I N G:

The accused is charged in the 1st Count with robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

It is alleged that Michael Wagisha and others still at large on or about the 6 - 7th day of June, 1987 at Namabasa village in Mbale District robbed one Mustapha Mayende of one Hero bicycle frame No. C365150, 3 gomases and cash 560,000/- and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun against the said Mustapha Mayende. 5

On the 2nd Count, the accused is indicted for robbery contrary to sections 272 and 273 (2) of the Penal Code Act. 10

In the particulars of offence, it is alleged that Michael Wagisha and others still at large on or about the 6 - 7th day of June, 1987 at Namabasa village in the Mbale District robbed one Hakim Were of one National radio, one Contec radio, a box-full of clothes, beddings, one pair of shoes and several school textbooks and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun against Fatuma Namaja. 15

Evidence of the first victim, PW1, is that on 6th - 7th June, 1987 apparently at midnight, he was attacked by robbers in his house. In the first place he recognised Mukama and Wagisha, now the accused, by their voices. The main door to the house was kicked open but there was no light in the house. He saw Mukama armed with a panga and stick but the accused was armed with a gun. He was made to sit down with his hands up and ordered to produce identity card and Graduated Tax tickets. 20 25

Mukama together with the recovered articles were taken to Nakaloke Sub-County Headquarters where he was detained.

On 5.7.87 Mukama and another man were killed in a mob justice at Namabasa village where he had gone to produce more stolen property to the authority. On the same day the Civil Intelligence Officer at Mbale handed over the Hero bicycle, 2 gomas and one Contec radio cassette to PW1 in the presence of the witness after identification. PW5 who together with PW4 tracked the robbers up to Kidongole gave similar story as that of PW4.

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Under section 64 Trial on Indictment Decree, evidence of PW6 was admitted. He was Chairman R.C2 of the area of the incident. Local inquiries revealed that the accused and his group were implicated in the robbery now before court. The accused and his group disappeared from the village after the incident and all the efforts to trace them failed. However a reward was published in a newspaper and an informant responded which led to the arrest of the accused at Kamwokya in Kampala. With the help of Police at Kampala the witness and the accused were escorted to Mbale Police Station for further investigations.

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From the submissions of both Counsel, it is not in dispute that robbery was committed in both counts. Property stolen included 2 bicycles, 3 gomases, 2 radios, a boxfull of clothes, beddings, one pair of shoes, several textbooks and cash 560,000/-. Two robbers were seen armed with a gun and a panga respectively. The alleged robbery took place at around midnight. It is also not in dispute that a gun and a panga are deadly weapons capable of causing death. Evidence is that the gun was not fired at the scene of crime but later at another home of one Yibu in the course of their robbing spree.

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The only contentious issue is evidence of identification of the alleged robbers. The prosecution relies on the evidence of 2 eye witnesses, PW1 and PW2. It is to be noted from the onset that PW2 at the commission of the alleged robbery was a child of tender age at Primary 3 level whose evidence at the material time requires corroboration. At the time of giving evidence in court she was 18 years old and therefore an adult.

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Evidence is that both PW1 and PW2 knew the accused and one Mukama before the incident as their village-mates. When the house of PW1 was attacked at around midnight, he recognised the accused and Mukama in the first instance by their voices only.

Immediately he was dragged outside and made to sit down with his hands raised up. On this occasion, the witness claims he recognised the accused and Mukama by the help of moonlight. He saw the accused armed with a gun and Mukama had a panga. He remained with the accused on the courtyard while Mukama was looting the house of PW3. Thereafter the <sup>witness</sup> was kicked several times while being taken back to his house for money and more property. In this third instance he claims to have recognised the very people through torch light which torch Mukama looted from the house of PW3.

PW2, a child of tender age at the time says that the thugs dragged her outside and started assaulting her, but with the aid of moonlight she recognised the accused who was armed with a gun and Mukama who was armed with a panga. She was made to carry the boxfull of clothes looted from her brother's house, PW3, where she was sleeping. She walked with the thugs for the rest of the remaining hours of the night visiting several homes purportedly of rich people in the village. The thugs were talking to her in Kiswahili but she was replying in Luganda. In the course of her ordeal, the order was never to look at the faces of the assailants but all the same she claims to have recognised them. At dawn, she was abandoned at the home of one Yibu with another order to keep lying down. It was at Yibu's home that she heard two gunshots before the thugs completed their task. It is submitted that she too had ample time during which she recognised the accused and Mukama whom she knew before as members of the same village.

On the other hand, the defence Counsel submits that PW1 testified that he recognised the attackers by their voices only, but in cross-examination he switched the story that he recognised them by torch light and yet in his Police statement, the story was that he recognised them by the aid of moonlight. In those three versions of his story which is the correct state of affairs? The only inference, it is submitted which can be drawn is that PW1 did not recognise any of his assailants. To fortify that contention evidence is that both PW1 and PW2 made their first Police statements on 22.6.87 and additional statements on 14.7.88 well over one year after the incident. In the circumstances, it is submitted, that neither PW1 nor PW2 had recognised the robbers on the fateful night. The Police statements which they claimed to have made the following day after the incident are nowhere to be found. If anything is to go by, the Police statements are nothing but an afterthought and they were made after some property allegedly robbed was found in Kidongole, Teso District.

Evidence is that Mukama and one Stephen Gidali were arrested in connection with this case and through mob justice, they were both killed. In any case according to PW3 the moonlight on the night of the incident was dim and as a result, he fled without recognising any of his attackers either physically or through their voices. In those circumstances it is submitted conditions favouring correct and unmistakable identification were not good for both PW1 and PW2 to identify the accused positively.

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As regards the conduct of the accused, it is the submission of the State Counsel that he fled away from the village and went to live in diverse places in Kampala until his arrest in Kamwokya in 1988 and this points to guilt. The defence submission is that in cross-examination it is admitted that the accused was in Kampala and had even once reported home for the burial of a relative where he stayed for more than 3 days. If any reward advertisement was made for his arrest, which is denied, such newspaper should have been produced in court.

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From the submissions of both Counsel, it is not in dispute that the alleged robberies took place around midnight when both PW1 and PW2 were in their deep sleep. They were stiff scared and frightened when they were attacked. PW2 was a child of tender age at the time and corroboration of her evidence is required in law. The only corroborating evidence is that of PW1 but this witness has contradicted himself in material particular to the case that critical observation is inevitable.

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Before court PW1 testified that he recognised the accused and one Mukama by their voices only. There is no special characteristics peculiar to the voices of both the accused and the said Mukama brought to the attention of court. As if that was not major contradiction yet in cross-examination the witness admitted that he actually recognised the accused and Mukama through the help of torch light. It is not clear in which way the torch was flashed to enable him recognise the accused and his colleague, especially in such a situation robbers tend to hide their identities from torch lights. Further, in their Police statements on 22.6.87, just a couple of weeks after the incident, evidence is that they recognised the assailants through moonlight. It is difficult in such a situation to choose which story to believe in respect of identification.

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Police statements made one year after the incident even creates more doubt on the matter and the prosecution cannot be heard to say that the Police investigating officer bears the blame for carelessness in recording the dates and the events which followed the reports without treating such a witness hostile or otherwise.

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In the end result, court rules that benefit of the doubt goes to the accused person and that the inconsistencies aforementioned are not minor but major and they go to the root of the case and point deliberate untruthfulness of the witnesses: Alfred Tajar Vs: Uganda, Criminal Appeal No. 167 of 1969; and on the principles laid in Bhatt Vs: R 1957) EA 332, prima facie case is not established in the instant case. Under section 71 (1) Trial on Indictment Decree, the accused is hereof acquitted of the offences charged in the 1st and 2nd counts and set free forthwith unless being lawfully held for some other crime.

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STEVEN GEORGE ENGWAU

J U D G E

28.9.93.

6.10.93: The accused before court.  
Mr. Wegoye for accused on private brief.  
MS Nandawula for the State.  
Ruling delivered in open court.

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STEVEN GEORGE ENGWAU

J U D G E

6.10.93.