

Robbery

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

CRIMINAL SESSION CASE NO. 15 OF 1992.

UGANDA ..... PROSECUTOR

VERSUS

NO. RA 23556 CPL. KIBIRA PHILIP .... ACCUSED.

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

J U D G M E N T

The accused No. RA CPL Kibira Phillip is charged with robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

It is alleged that No. RA 23556 Cpl Kibira Phillip and others still at large on the 30th day of March, 1989 at Plot No. 29, Nkokonjeru Court Mbale Municipality, in the Mbale District, robbed Peter Ederu of cash Shs 200,000/- and at or immediately after the said robbery threatened to use a deadly weapon to wit a gun on the said Peter Ederu.

To prove the offence, the prosecution called 4 witnesses:-  
Evidence of PW1 is that on 30.3.89 at around 9 p.m. he was in his house together with the family and his neighbour Mary Namakola. When M. Namakola wanted to leave, Akello A, opened the door for her. At that time emerged a gunman dressed in the army combat uniforms weilding his gun at the door. He ordered M. Namakola and Akello A to return inside the house. He too entered the house and ordered everybody inside to sit down. The gunman used Kiswahili while weilding his gun. He then called his companion who entered the house but dressed in civilian clothes. At that time the electric light was on. The gunman ordered all the people therein to produce their identity cards. PW1 informed the gunman that his was in the bed-room. Immediately he was ordered to stand up. He led the gunman and his colleague dressed in civilian clothes to the bed-room.

In the bed-room there was also electric light on. The gunman then ordered PW1 to open the big cupboard therein. In the cupboard there was a polythene bag containing cash of Shs 200,000/- which was put in by the wife of PW1. The gunman grabbed the polythene bag together with Shs 200,000/- and handed to his companion dressed in civilian clothes. PW1 was ordered by the gunman to produce his identity card but as his wife was not in, he failed to trace it.



Being followed at gun point, PW1, the gunman and the man dressed in civilian clothes returned to the sitting-room. He saw the man dressed in civilian clothes hand over the money in the polythene bag to another colleague of theirs standing at the window. At that time another man was guarding the door.

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For a second time, PW1, the gunman and the man dressed in civilian clothes were to go back into the bed-room. Before they could reach the bed-room, PW1 picked courage and held the gunman tightly around the chest together with his gun. His friend got frightened and ran outside. The family members started raising alarms while PW1 was being re-enforced by his wife to hold the gunman more tightly. PW1 and his wife overpowered the gunman and took him outside the house where they forced him to lie down on his back. At that time, before PW2 arrived to give more re-enforcement, the accused released one bullet in a bid to scare PW1 and his wife. However, the bullet strayed but never hurt anybody.

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When PW2 re-enforced PW1 and his wife, he removed the gun from the accused. PW1 advised PW2 to run with the gun to Mbale Police Station which he did. But PW1 and his wife remained on top of the accused never to let him get away with it. At that time PW4 arrived. Realising that the accused had some colleagues outside the house, for security reasons, the accused was forced back into the house. It was at that time that the accused identified himself as a Corporal Phillip Kibira, an escort of the District Medical Officer, Mbale.

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When the Police arrived together with PW2, they re-arrested the accused and took him to Mbale Police Station. PW1, PW2, PW4 and some family members also followed and made statements to the Police as first information. Evidence of PW2 is similar to that stated by PW1 except that he does not mention that the accused robbed the said Shs 200,000/-. He also says that when he re-enforced PW1 and the wife, he held the accused tightly by the throat in a bid to disable the accused so that he could remove the gun from him. In that confusion one bullet went off but never hurt anybody. When he removed the gun he ran with it to Mbale Police Station, where he made a report at the counter. Both PW1 and PW2 identified the gun as one with a metal butt which can be folded. To them it is a common gun used by army personnel.

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Evidence of PW3 is that on the day in question, he was working at the counter at Mbale Police Station when PW2 reported with an SMG gun No. 1322. He then deployed 2 Policemen to go with PW2 for the purpose of arresting the suspect now the accused.

The accused was re-arrested and brought to the Police Station where the witness detained him. The witness tendered the said SMG No. 1322 together with one magazine and 29 rounds of live ammunitions as exhibit P1.

In conclusion, the prosecution witness, PW4 testified that at the material time of the incident, he was a mobiliser in the District Administrator's office Mbale. When he arrived at the scene, he found both PW1 and his wife stuck on top of the accused. He rescued the accused from imminent death. He saw a gun at the scene but did not know who took it away in that confusion. Later the Police arrived and re-arrested the accused whom they all followed up to Mbale Police Station. It was at the said Police Station that the accused identified himself as Corporal Kibira an escort of Dr. Kalong, 3rd Division Medical Officer, Mbale. The accused informed the witness that he was taken to the house of PW1 by one Mohamad and Nsubuga. On the information from the accused, PW4 traced and arrested the said Mohamad from Mbale Bus Park and handed him to Mbale Police Station. He could not trace the said Nsubuga because the accused did not know where he came from. The witness did not know what happened to Mohamad at the Police Station thereafter. However, the witness identified exhibit P1, in court, but throughout the whole of his evidence, he does not mention the robbery of Shs 200,000/- or that PW1 made a complaint of the loss of the said money to him.

In his defence, the accused denied the offence with which he is charged. He says that on 30.3.89 at about 7.30 p.m. his boss Dr. Atukunda ordered him to go and bring one Mr. Senoga, the Supplies Officer. He left Plot 9, Peter Paul Lane for Senoga's house on Nkokonjeru Road. He had been there once before. However, it was a dark night. He knocked at the door informing the occupants that he was Cpl. Kibira. When the door was opened, he heard the occupants speaking a language he did not know. But without giving any chance, one occupant held him together with his gun tightly. He was at the time standing on the left side of the door.

The occupant who held him was assisted by his colleagues and they removed the gun from him. He was forced down and he fell on his back. The back of his head hit the ground rendering him unconscious. He gained his conscience at Mbale Police Station. He admits that he was an escrot of Dr. Atukunda and on the day of the alleged incident, he was dressed in N.R.A. combat uniforms. He had an over-coat, a shirt, a pair of long trousers and a hat. In addition, he was armed with a gun but the magazine containing live ammunitions were all in his pocket. He never saw PW4 on the day of alleged incident except at his trial in court. He admits that PW1 was one of the people who held him when he knocked at the door. He does not know whether the door he had knocked belonged to the house of one Senoga. He must have lost his way to that house but denied being taken there by the said Mohamad. He does not know the said Mohamad nor did he tell PW4 about him. He did not robe PW1 of shs 200,000/- or at all. Briefly this is the case for defence.

It is the defence submission that the accused had lost his way to the house of PW1. He was attacked without being given chance to explain whereas he had knocked at the door. Evidence of PW1 is that he held the accused inside the house, why he took him outside is unbelievable.

On the question of the said shs 200,000/-, it is submitted that the story should not be believed because PW1's wife was not called to confirm it. It is further submitted that as the accused was thrown down unconscious, he could not have released the bullet. There is no evidence to prove how the accused went to the Police station. Defence case is that he was carried unconscious. If robbery was committed at all, which is denied, it ought to have been simple robbery because the gun was not loaded. It is submitted that unloaded gun is not a deadly weapon: Uganda Vs. Kamusini s/o Seku & Anor. (1976) HCB 160.

It is also the defence submission that there are discrepancies in the case which go down the roof of it for destruction. The learned counsel pointed out that PW4 told court that it was his wife who informed him that PW1 was attacked. This piece of evidence is inadmissible as hearsay.



PW1 said that the accused ordered Akello A and M. Namakola to return into the house, but it is submitted that M. Namakola was not at the scene because PW4 said he left her in their house. In the evidence of PW2, he said he brought Police to the scene yet PW4 says he was the one, and again PW2 said he found PW4 interrogating the accused at the scene whereas PW4 says by then he had taken the accused to the Police station to save his life. Consequently, it is the defence submission that the above contradictions are major and destroy the case. 5

On the other hand, it is the submission of the learned State Counsel that the prosecution has proved its case beyond reasonable doubt. Evidence reveals that the accused stole the Shs 200,000/- from PW1. At the time of robbery a deadly weapon was used, and that was a gun, exhibit P1. The accused admits that he went to the house of PW1 holding a gun. Even PW3 heard the gunshot at the Police station. The gun was deadly weapon capable of causing death and it was fired at the scene: Sgt. Shaban Birumba Longi Robert Vs. Uganda, Criminal Appeal No. 32/89. 10 15

As regards violence at the scene, it is submitted that evidence of PW1 and PW2 proves this element. Moreover, at the Police Station PW3 also heard the gunshot. The gun was removed from the accused by force and he does not deny his gun. 20

On the issue of discrepancies, it is submitted that they are minor and should be disregarded as they do not go to the root of the case: Tindigwihura Mbahe Vs. Uganda, Criminal Appeal No. 9/87. In the case before court, the incident happened in 1989, but witnesses have testified in 1992. Human memory cannot remember minor details. It is not in dispute that the accused was found at the home of PW1. He also said so. Getting lost should be disregarded as a lie. Light was at the home of PW1. Falling down by the accused unconscious should be rejected on the ground that he felt pain as he said when he was at the scene. The prosecution witnesses at the scene be believed for they had no grudge with the accused. 25 30

For the offence of robbery under sections 272 and 273 (2) of the Penal Code Act, the essentials to be established by the prosecution beyond reasonable doubt are that there was intention to steal, use of violence or threat to use actual violence, before, at or after the theft and use of a deadly weapon. 35



The prosecution evidence of PW1 and PW2 is that on 30.3.89 at about 9 p.m. the accused emerged at the home of PW1 armed with a gun and dressed in army combat uniforms. When Akello A opened the door for M. Namakola who was leaving the house at the time, the accused stopped them at the door and ordered them to return into the house. The accused entered the house weilding the gun and ordered the occupants present to sit down and produce their identity cards. In the course of that ordeal, the accused robbed cash Shs. 200,000/- from the bed-room of PW1. PW4 said the accused informed him that he was taken to the house of PW1 by one Mohamad and Nsubuga.

Be that as it may, according to evidence before court, it is PW1 who alleged that the accused robbed him of Shs 200,000/- from the bed-room. Another eye witness PW2 in his evidence never mentioned the theft of the said Shs 200,000/-. Even PW4, a neighbour who found the accused at the scene never mentioned anything to do with the alleged theft of shs 200,000/-, and the Police officer, PW3 to whom the report was made that night, never adduced evidence regarding the alleged theft. The defence case is that on the night in question, the accused had lost his way to the home of PW1. He was going to the home of one Senoga as he was directed by his boss to go and call him. The home of the said Senoga was also on Nkokonjeru Court.

It is inconceivable in the premises that only PW1 alleged the robbery of shs 200,000/- but not the rest of the prosecution witnesses. If it is true, according to PW1 that it was his wife who kept the shs 200,000/- in the cup-board, how did PW1 know for certain that the money in the polythene bag was shs 200,000/- since there was no counting at the time of the alleged robbery. The prosecution did not call the wife of PW1 to confirm this matter. Consequently there is doubt as to whether the accused had actually robbed PW1 of the shs 200,000/- for which the benefit of the doubt goes to the accused. It is also possible that the accused on the night of the alleged incident lost his way to the home of PW1 as he so testified. Evidence that he was going to call one Senoga whose house was also on the same street/road is not challenged by the prosecution. He is to be believed on that piece of evidence for his defence.

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As regards use of violence or threat to use actual violence before, at or after the theft, evidence of PW1 and PW2 as eye witnesses is that the accused emerged at the door weilding his gun and ordered the occupants to sit down and produce their identity cards. At the time PW1 alleges that the accused robbed him of Shs 200,000/- in the bed-room, apparently force was not used on him. Evidence tends to show that from the time it is alleged that the accused appeared at the door armed, weilding his gun up to the time he is alleged to have grabbed the money in the bed-room, threat to use actual violence is evident. But the defence story is that when he knocked at the door, he introduced himself as Cpl Kibira. He was never given any chance to explain the reason for his being there but PW1 grabbed him tightly together with his gun and throw him down unconscious. In the course of that struggle, one bullet went off into the air. This evidence was confirmed by PW2. The accused did not fire in order to scare anybody as claimed by PW1.

Evidence of PW3 is that he heard one gunshot while he was at the Police station. PW4 says he saw a gun at the scene of the alleged crime, but asserts that he found PW1 with the wife on top of the accused vigorously roughening him. Had it not been for him, the accused would have been killed. It would appear therefore that use of violence or threat to use actual violence is doubtful according to evidence before court benefit of which again goes to the accused.

As to whether a deadly weapon was used or not during the alleged robbery, evidence of PW1 is that when his wife re-enforced him to arrest the accused, the accused fired in order to scare them. But PW2 says that as he was helping the couple to remove the gun from the accused, in that confusion the bullet went off. PW3 who was at the Police station also said he heard a gunshot. The accused does not deny this evidence as he claims he was already thrown down unconscious. In the light of all that, there is evidence to show that the gun, exhibit F1, was fired at the scene. It was therefore a deadly weapon capable of causing death within the meaning of section 273 (2) of the Penal Code Act.



In the end, it is trite law that the prosecution must prove all the ingredients of the offence with which an accused person is charged. It is also trite law that where there is doubt on any one element or more, the benefit of the doubt is normally given to the accused. The gentlemen assessors in the present case have given their opinions that the prosecution has proved its case beyond reasonable doubt to warrant a conviction. However, with due respect to them, I beg to differ for reasons stated elsewhere in this judgment.

Accordingly, I find the accused not guilty of robbery contrary to sections 272 and 273 (2) of the Penal Code Act as charged. He is hereof acquitted forthwith and set free unless being lawfully held for some other crime.

  
S.G. ENGWAU

JUDGE

23.7.93.

9.8.93: Accused before court.  
Mr. Ochwo for accused on State brief dead.  
Khiisa for the State present.  
Judgment delivered in open court.

  
S.G. ENGWAU

JUDGE

9.8.93.