

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

CRIMINAL SESSION CASE NO. 22/1992.

UGANDA PROSECUTOR

VERSUS

MUTSONGO S/O WAKALEMBE ACCUSED

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

R U L I N G:

In the first count, the accused is indicted for robbery contrary to sections 272 and 273 (2) of the Penal Code Act. It is alleged that the accused and others still at large on the 9th day of September, 1990 at Bumukoye village in the Mbale District robbed Wilson William Pekke ^{of} a national panasonic radio, a wrist watch, a weighing scale, a primus stove and other household goods all valued approximately at 786,000/- and at or immediately before or immediately after the said robbery caused grievous harm to the said Wilson William Pekke. 5 10

In the second count, the accused is charged with attempted murder contrary to section 197 (a) of the Penal Code Act. In the particulars of offence, it is alleged that the accused Mutsongo s/o Wakalembe and others still at large on the 9th day of September, 1990 at Bumukoye village in the Mbale District attempted unlawfully to cause the death of Wilson William Pekke. 15

In the third count, the accused is indicted for attempted murder contrary to section 197 (a) of the Penal Code Act. It is alleged that Mutsongo s/o Wakalembe and others still at large on the 9th day of September, 1990 at Bumukoye village in the Mbale District attempted unlawfully to cause the death of Betty Nabutono. 20

In the light of the above charges the prosecution called the evidence of PW1 who testified that he knows the accused very well. The accused is his neighbour and that his (PW1) son has a kid with the sister of the accused. 25

On 9.9.90 at around 1 a.m. while PW1 was asleep, he heard a bang at the rear door. In the house were also Betty Nabutno and Irene Nandutu all his granddaughters. He woke up and sat on the bed.

Immediately he saw a group of people entering the house in a single line while some of them were flashing torch lights. With the help of those torch lights, he managed to recognise the accused and another one Kyabi s/• Wanasolo. They were all dressed in women clothes.

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When the group reached him, he was hit on the left shoulder with something like a hammer. He fell on the bed. Immediately one of the group stabbed him on the left cheek with a knife followed by several cuts all over the head. Due to much pain he could not recognise anybody. However he heard a voice saying, "he is finished let us go."

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As the assailants were leaving the bedroom, PW1 saw Kyabi return from the door and by force removed his watch which force made him fall down on the floor. When the attackers had gone, Irene Nandutu started raising an alarm which was answered first by Zipola Walekhwa, the sister of PW1. It took about 2 - 3 hours before the neighbours could arrive at the scene. By the time they had arrived, PW1 had already received first aid treatment. In the course of that attack, Betty Nabutono had also sustained some injuries.

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The neighbours whose names were not revealed then took both PW1 and Betty Nabutno to Bududa Hospital where they were admitted for further treatment. The following morning at the hospital, the late O.C. C.I.D., Charles Natolo visited the victims and PW1 says he told Natolo that the accused and Kyabi among other people attacked them the previous night. The same morning hours, both PW1 and Betty Nabutono were transferred to Mbale Hospital for further treatment. Later, PW1 was again taken to Mulago Hospital for more examination and treatment. On his discharge, PW1 returned home only to find that his household properties were stolen including a stove, a radio, a hurricane lamp, a torch and a bunch of keys. He claims that those items were taken by the robbers who had attacked them.

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Evidence of PW2, the investigating Police officer, is that in September, 1990 he was attached to Mbale Police Station in charge of Mbale C.I.D. South Zone. On 13.9.90 the witness was allocated a file from Bududa Police Post regarding a robbery case in Bukigai Sub-County. The victims of the alleged robbery were PW1 and Betty Nabuton•. He went first to Bududa Police Post where the officer in-charge took him to the scene of crime. The relatives of the victims led him to the bedroom where the alleged offence was committed.

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The witness observed that the robbers gained entry into the house through the rear door and also left the house through the same door. He drew the sketch plan and gave it a key. After identifying the sketch plan through his handwriting and the signature thereon, it was tendered as Exhibit P1. After visiting the scene, PW2 returned to Bududa Police Post where he was handed 7 suspects including the accused. He re-arrested them and took them back to his station at Mbale Police. 5

Thereafter, PW2 visited PW1 and Betty Nabutono at Mbale Hospital. After interrogating them, the witness filled Police Form 3 requesting a doctor to examine and treat the victims, which the doctor did and the Police form returned to PW2. Medical evidence admitted under section 64 Trial on Indictment Decree reveals that PW3, Medical Officer at Mbale Hospital found the following injuries on PW1 and Betty Nabutono respectively:- 10 15

On 24.9.90 PW1 had a cut-wound on the left temporal region, 3" x 1" classified as grievous harm. He also had another cut-wound on right temporal region 1" x 1", a cut-wound on temporal occiput 1" x 1" and another cut-wound on the same occiput 2" x 2" and 1"x1" all classified as grievous harm. Also a cut-wound on left jaw 2" x 3" classified as grievous harm. PW1 also had a cut-wound on the right hand shoulder 1" x 1" classified as harm; a depressed fracture of the left temporal region of the skull and a fracture on the left gum. Medical evidence tendered as Exhibit P2. 20

As regards medical evidence on Betty Nabutono, it was only tendered for identification purposes. She did not adduce evidence in court. However, she had the following injuries:- 25
Cut-wound on the face, 2" x 3" and 2" x 1" both classified as grievous harm. Another cut-wound on the left axillon, 2" x 3" classified as harm. 30

At the end of all that the prosecution closed its case and the learned defence Counsel was thereby prompted to make a submission of no case to answer. The learned Counsel submitted that in Count 3, the accused is charged with the attempted murder of Betty Nabutono, but there is no evidence on record against the accused. Nabutono has not adduced evidence in court nor is there other evidence to that effect. In the premises the accused be acquitted on that count. The prosecution conceded and agreed that the accused be acquitted on Count 3.

Accordingly, the accused is acquitted under section 71 (1) Trial on Indictment Decree on Count 3 of attempted murder contrary to section 197 (a) of the Penal Code Act.

As regards Counts 1 and 2, it is submitted that the only evidence implicating the accused is that of PW1 to the effect that he saw the accused at the scene of crime. It is argued that this evidence was perceived when the condition favouring the identification was very difficult. The witness saw people enter the house after a big bang at the door, they went straight to him and hit him with a hammer and immediately started cutting him. The sequence of events shows that there was no sufficient time in which he could make proper identification. In fact the witness admitted that he was in so much pain that he could not see and recognise anybody. In that regard, eyes are the only means of identification and without sight it was improbable that the witness was able to identify any of the assailants.

In cross-examination, the witness said that the assailants were dressed in clothes which looked like women clothes. If he could not know exactly the clothes put on by his assailants likewise he could not identify the accused. By failure to see whether the attackers had shoes or hats on, the witness also failed to identify their faces. Moreover the distance between the door and the bed was only about 5 ft. This is such a short distance that it could not have been probable for him to appreciate the identity of the accused in a gang of 5 people. Worse still the assailants came in a single line directly facing the witness with torch lights in such a situation he would not be able to see the people torching him.

It is further submitted that PW1 had a land dispute since 1983 with the family of the accused. This fact would operate in the mind of the witness especially where circumstances of identification are difficult to jump into the conclusion he did. First information to the Police is that the witness was attacked by unknown people. Even the letter from the office of the area Gombolola chief reporting the matter to the Police stated the same thing. Neighbours who answered the alarm 2 or 3 hours after the incident, PW1 never told them who actually attacked him. All these put together, PW1 did not identify the accused. In Uganda Vs: Abdalah Nasur (1982) HCB 1, where it was held that an otherwise truthful witness giving apparently reliable evidence, may nevertheless make an honest mistake of identification in darkness accompanied by some terrifying and frightening circumstances executed in a flash as when armed robbers brandishing deadly weapons descend on their helpless victim at night and quickly carry out the robbery and vanish.

This is exactly what happened in the instant case, according to the evidence of PW1.

Further, it is submitted that the facts of the present case are similar to those in Abdu Lubowa Vs: Uganda (1975) HCB 304 where the appellant was convicted of the offence of robbery and the only issue was on identification. The appellant and the identifying witness were neighbours. The witness said he identified the appellant on a torch flash in the house. 5

It was held that these circumstances were not favourable for proper identification of the appellant and the conviction was quashed and sentence set aside. 10

In conclusion, the learned defence Counsel submitted that in Bhatt Vs: R (1957) EA 332, prima facie case is defined as one on which a reasonable tribunal properly directing its mind to the law and evidence could convict if no explanation is offered by the defence. Even if the accused kept quiet in the instant case, he would not be convicted as conditions were not favourable for his identification and that being the only evidence linking him with the offence charged. The learned Counsel therefore prayed that the accused be also acquitted in the first and second counts. 15 20

To the contrary, it is the submission of the learned Counsel for the State that a prima facie case is established against the accused person in the 1st and 2nd counts:

In the 1st Count, the prosecution has proved that a theft was committed. Evidence of PW1 names the property stolen from him to include a watch, a hurricane lamp, a radio etc. Evidence of PW2 supports him. The fact of robbery is not disputed by the defence and the deadly weapon used as described by PW1 and confirmed by the medical report, Exhibit P1. Similarly Count 2 is attempted murder against PW1 who testified that he was stabbed on the head which is a vulnerable part of the body and the assailants inflicted several wounds on him as per medical evidence, Exhibit P1. Before the assailants left him they said, "he is finished let us go." They presumed him dead. 25 30 35

The only issue for the prosecution to prove is who committed the offences in the 1st and 2 counts? The prosecution relies on the evidence of PW1 who is the sole eye witness.

It is trite law that to prove anything no plurality of witnesses is necessary provided the judge is to warn himself together with assessors before convicting the accused in reliance to the correct identification of a single witness. Caution is necessary because the witness may be mistaken as to the identification: Abdala Bin Wendo & Anor. Vs: R (1953) 20 EACA 168.

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It is submitted that in the instant case, PW1 testified he heard a bang at the door, sat up on the bed and saw 5 people entering and flashing their torches anyhow and among the 5 people, he identified the accused and one Kyabi whom he had known before very well. In such circumstances, there was no possibility of mistaken identity. Moreover at Bududa hospital the following morning after the incident, PW1 mentioned the same names to the Police officer in-charge Bududa Police Post, the late Charles Natolo and also repeated to PW2 at Mbale hospital resulting into the arrest of the accused and other suspects with whom he had land dispute. However, the demeanour of PW1 is that he was honest, straightforward and even during vigorous cross-examination, he never faulted.

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As for fear and pain suffered by PW1, in Nabulere & Others Vs: Uganda (1979) HCB 77, it was held inter alia that when considering the behaviour of a person in time of attack or other crises, the test in such case is not what an ordinary person sitting in court would do but whether the witness would have reacted in the manner he did. In the instant case, it is submitted that PW1 was a brave person in the circumstances who could not fail to identify the assailants.

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By not telling the neighbours of who had actually attacked him, it is contended that at that time, saving life was a priority rather than to discuss who were the assailants and that alone would not rule out that he did not recognise the attackers.

On the issue of land dispute with the family of the accused, it is submitted that that piece of evidence did not affect the mind of PW1. If anything is to go by, he identified that all the attackers were dressed in "gomas" without hats or shoes. He only suspected the people he did not see properly to be those he had land dispute with. The accused be put in his defence in 1st and 2nd counts.

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In the 1st Count of robbery contrary to sections 272 and 273 (2) of the Penal Code Act, it is the duty of the prosecution to prove the following elements beyond reasonable doubt:-

That theft was committed; that it was the accused who committed it and that immediately at or before or after the said robbery, a deadly weapon was used to cause grievous harm to the victim. Having heard both sides, it is not in dispute that a theft was committed and that immediately before or during or after the said robbery a deadly weapon was used to wit a knife to cause grievous harm to the victim, PW1. 5

In the 2nd Count of attempted murder contrary to section 197 (a) of the Penal Code Act, the prosecution has relied on the evidence of PW1 and the medical report Exhibit P1, the injuries inflicted on PW1 and the vulnerable parts of the body thereto. 10

Be all that as it may, the underlying question in both counts is who actually committed the alleged offences?

Evidence is that the incident happened at about 1 a.m. By that time PW1 and his family were already deeply asleep and there was no light of any sort in the house. They were awakened by a bang at the door. In such a situation one reckons that PW1 and the family immediately got stiff scared and frightened of what was happening at the time. Immediately the robbers who disguised themselves by dressing in what looked like women dresses, entered the house in a single line. In the process, torch lights were flashed at PW1 and immediately he was hit with something which looked like a hammer on the left shoulder. In no waste of time followed cuts on the left cheek and all over the head. Evidence is that PW1 was in great pain and fear and did not see anybody. 15
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In circumstances of that description, the court rules that conditions were difficult to favour proper identification of the assailants. May be that explains why PW1 reported the accused and other members of the family as suspects arising from long standing land dispute. He admitted that he was accused of grabbing land yet he is a foreigner, meaning a person of a different area. 30

Further, in normal course of events, PW1 should have informed neighbours who answered the alarm on the night of the incident after all he had already had first aid treatment. For the neighbours to labour in taking him to Bududa hospital without any single indicator as to who actually attacked him, on the face of it, the inference is that he did not recognise the assailants. No wonder the first information to the Police supports me on this finding that the people who attacked the victims were unknown. 35

It suffices without endeavouring in great details that the court concedes to the defence Counsel's submission in total as opposed to those of the learned Counsel for the State. In the premises, under section 71 (1) Trial on Indictment Decree the accused is also acquitted in the 1st and 2nd Counts as charged and set free unless being held on some other lawful grounds on the ground that the prosecution has failed to establish a prima facie case warranting the accused to be put on his defence.

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STEPHEN GEORGE ENGWAU

JUDGE

6.9.93.

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23.9.93: Accused before court.

Mr. Wandera for accused on State brief.

M/S Nandawula for the State.

Ruling delivered in open court.

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STEPHEN GEORGE ENGWAU

JUDGE

23.9.93.

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