

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE.

CRIMINAL SESSION CASE NO. 91 OF 1993.

UGANDA .....PROSECUTOR

VERSUS

A1 - MUHAMMED MUYANGU ALIAS )  
MUTENYI ).... ACCUSED  
A2 - MUTWALIBU MUZAMBA )

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

R U L I N G:

The 2 accused persons are indicted for robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

It is alleged in the particulars of offence that Muhammed Muyangu alias Mutenyi, Mutwalibu Muzamba and others still at large on or about the 15th day of March, 1992 at Makosi village in the Mbale District robbed Safina Kabuya of cash shs 360,000/- and one blanket and at or immediately before or immediately after the said robbery used a deadly weapon to wit a panga and a gun on the said Safina Kabuya.

To prove the alleged robbery, the prosecution relied on the evidence of an eye witness, PWL. She testified that on 15.3.92 at around 10 p.m. she was sleeping in her sittingroom when she heard a bang on the front door. To her it appears a stone was used and the door was forced open. Immediately 4 attackers entered the sitting room. By that time she was standing at a corner.

The witness claims that both A1 and A2 are her village-mates and in addition A1 is the son of her brother in-law. She recognised only A1 and A2 out of 4 attackers who entered her house. She recognised them by "tadoba light" which was on at the time. As she was standing at a corner, immediately A2 pressed her hard against the wall and A1 cut her on the left finger next to the thumb and she was also cut on the back of the head. She also sustained a fracture of the left arm but could not tell which weapon was used. However, the witness identified A1 who was dressed in black clothes with a long white head cap covering the face and A2 dressed in what she termed his usual clothes with the pair of torn trousers and shirt.

When the witness escaped and ran outside, she found unknown gunman who strangled her. The gunman released his hands when she started groaning. In a bid to save her life, she offered to give the gunman money which was in the house. She led the gunman to the bedroom and from the bag containing some cotton, she pulled out cash of 360,000/- which she gave to the assailants and by that time both A1 and A2 were also in the bedroom.

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As the attackers were still searching the bedroom and the whole house, she rushed outside and went straight to report the matter to the R.C official of the area. In the course of the alleged robbery, she says one Farida Nandutu was shot. When she returned to the scene with the R.C official, she found so many neighbours including R.C.1 Chairman had arrived but the attackers had already left. She also found her household properties scattered except that only her blanket was taken.

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Later, the R.C officials gave her a letter with which she reported the incident to Mbale Police Station. The Police sent her to Mbale hospital for treatment where she was admitted together with Farida Nandutu. At the close of that evidence, the prosecution offered no further evidence and closed the prosecution case which prompted the defence Counsel to make a submission of no case to answer.

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It is agreed by both the prosecution and the defence that the ingredients of aggravated robbery include the following:

THAT, a theft was committed, that a deadly weapon was used or threatened to be used and that the 2 accused persons committed the alleged robbery.

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As regards the first two ingredients, it is not in dispute that a theft was committed and that a deadly weapon was also used or threatened to be used. However, what is in dispute is the question whether the 2 accused persons were the persons who committed the alleged robbery.

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Evidence is that in the course of the alleged robbery, the witness recognised the attackers by help of tadoba light (candle) which was on at the time. During cross-examination, the witness admitted that she recognised A1 by his voice only.

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In re-examination, however, the witness denied recognising the attackers by candle light but asserted that she did so by the aid of moonlight.

Further, the witness admitted that she did not reveal the names of the assailants to either the R.C. officials to whom she immediately made the report or the crowd which gathered to the scene of crime soon after the incident. In the light of all that, it is the defence submission that the only inference which can be drawn is that the witness did not identify any of her attackers including the 2 accused persons.

The prosecution, on the other hand, submits that the witness knew the 2 accused persons before and was able to identify them by the aid of moonlight, torch light and candle light at different stages at the commission of the offence and even described how they were dressed. If any contradictions exist, such are minor which do not point that the witness was telling deliberate lies.

From evidence on record, it is evident that PW1 is not confident of her story. She says that she recognised the 2 accused persons by the help of a candle light, but in seconds of time she denies this version and emphasises that the assailants put off the candle light immediately they entered the sittingroom thereby giving her no chance of recognising them. Immediately, the thugs started assaulting her and she was so frightened that she was in total panic. One wonders whether in such a situation the witness was in a stable mind to recognise the attackers. If a torch light was used, as she wishes the court to believe her, it ought to have been used directly on her and not against the thugs. In that way, still she could not be able to recognise her assailants positively.

On the issue of moonlight, the witness says when the door was forced open by what seemed to be a stone, the door shutter fell down and through moonlight she recognised the 2 accused persons while in the sittingroom. Even that mode of identification the court finds to be insufficient in the circumstances.

All in all, a conviction can be secured by the evidence of a single witness provided the court warns itself of the danger to do so.

The testimony of a single witness regarding identification must be tested with the greatest care and the need for caution is even greatest where the conditions for securing a correct identification were difficult. In such a case "other" evidence is required. In the instant case, there is no such other evidence on record. The court is in great difficulty to find why the witness never mentioned the identities of her attackers to the R.C. officials or the neighbours who gathered soon after the incident, especially those whom she claimed to have recognised.

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A conviction based on visio identification evidence causes a degree of uneasiness because such evidence can give rise to a miscarriage of justice and there is always a possibility that a witness though honest can be mistaken for this reason. The danger is that innocent people might be wrongly convicted: Nabulere & 2 others Vs: Uganda (1977) HCB 77.

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In conclusion, the witness in the instant case, did not recognise her attackers including the 2 accused persons on the basis that conditions were difficult for her at the material time for correct identification. In the premises, the prosecution has failed to establish prima facie case against the accused persons warranting them to be put on their defence. Therefore, under section 71 (1) Trial on Indictment, the 2 accused persons hereof are acquitted and set free forthwith unless being held on some other lawful grounds.

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STEVEN GEORGE ENGWAU

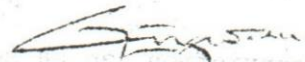
J U D G E

4.10.93.

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7.10.93: The 2 accused persons present.  
Mr. Wandera holding brief for Mr. Natsomi for the 2 accused persons on State brief.  
MS Nandawula for the State present.  
Ruling delivered in open court.

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STEVEN GEORGE ENGWAU

J U D G E

7.10.93.