

THE REPUBLIC OF UGANDA.

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE.

CRIMINAL SESSION CASE NO. 267 OF 91

UGANDA ..... PROSECUTOR

VERSUS

MUHAMAD PULUNYI ..... ACCUSED

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

R U L I N G:

The accused is indicted for robbery contrary to sections 272 and 273 (2) of the Penal Code Act. It is alleged that Muhamad Pulunyi and others still at large on the 14th day of November, 1988 at Mahanga village in the Mbale District robbed Augustine Watiti of 26 women busutis, 2 dresses, 2 Kaunda suits, 4 trousers, 12 shirts, 5 2 pairs of bedsheets, 6 pairs of shoes, 1 head of sewing machine, 1 coat, 1 rain coat, 1 flask, 4 safari bags, 1 panga, children clothings, cash 15,500/- all valued at shs 610,000/- and at or immediately before or immediately after the time of the said robbery threatened to use a deadly weapon to wit a gun on the said Augustine Watiti. 10

Under section 64 Trial on Indictment Decree the following evidence was admitted:-

Medical Officer, PW1, on 8.2.90 examined Muhamad Pulunyi whom he found to be of an apparent age of 30 years. He had no recent physical injuries and appeared mentally normal. 15

On 9.2.89 PW1 again examined Augustine Watiti and found the following injuries:-

Bruises on the left hip measuring 1" x 1" and 1" x 2," a bruise on the right foot 1" x 2" and 1" x 2;" bruise in the back 3" x 3" and 2" x 2", cut wound on the right manuary area 1" x 2"; cut wound on the right left ring finger 1" x 1" and cut wound on the right thumb nail 1" x 1," All these injuries were classified as harm and in his opinion they were caused by a blunt object. 20

PW2, Police Officer on 15.11.88 at around 9.18 a.m. was on C.I.D. stand by duty when one Vicent Wandiba, homeguard brought in Pulunyi on an allegation of robbery. After interrogation, the witness detained him in the cells and forwarded the file to O.C., C.I.D for further action. 25

Evidence of PW3 is that on 14.11.88 at around 11.30 p.m., he was asleep in the house together with his family. He heard a bang at the door which woke him up and immediately saw torch lights being flashed in the sitting room. The torch lights reached his bedroom through the ventilators. At that time the witness realised that some people had come to attack him and immediately raised an alarm.

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Before the assailants could reach his bedroom, the witness kicked open the bedroom window in a bid to escape. Just as he was about to jump out through the window, the witness heard a gunshot. He was forced to retreat into the bedroom. He claims to have recognised at that time the gunman standing on the verandah. He recognised the gunman as the son of one Juma Pulunyi but did not know him by name.

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One of the attackers entered the bedroom and hit the witness on the forehead with a stick and he (PW3) fell down. The attacker tied the hands of the witness with a bedsheet. Another attacker entered and removed the head of a sewing machine from the wardrobe in the bedroom. He passed the head of the sewing machine through the window to the gunman. The witness recognised the gunman as the accused now in court. By torch light at the door, the witness saw the accused enter the bedroom through the window. The accused pointed a gun on the heart of the witness while demanding money. He did not have any money but instead all his household properties were looted. By that time his wife was also tied near him. The robbers were altogether four in number, but he did not recognise the rest except the accused.

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When the robbers had gone, neighbours came to the scene while shouting. He told them that the only person he had recognised from the group was the son of Juma Pulunyi. He described him as one of the homeguards at Nabumali road block and that he had met him once at a burial place. The matter was reported to the chairman R.Cl of the area, Mr. Charles Wepukhulu. The homeguard boss of the area, Vincent Wandiba led a group to the home of Juma Pulunyi where the accused also had a house. They reached the home of the accused around 1 a.m. but did not find him except his wife. The group guarded the home for the remaining hours of the night until 6.30 a.m. when the accused appeared. He denied the allegation. However he was ordered by his boss Vincent Wandiba to get his (accused's) gun and accompany them.

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The group went back to the home of PW3 where again he was identified by PW4 as one of the thugs who attacked PW3 the previous night. Immediately Vicent Wandiba arrested the accused and took him to Mbale Police Station.

Evidence of PW4 is that on the night of 14.11.88 he was sleeping in the house of PW3. He heard a bang at the door which woke him up. He was very much frightened. PW3 and his wife started raising alarm and the witness heard a gunshot. So he climbed into the roof in the room where he was sleeping. A gunman entered the room and threatened to shoot him. He climbed down. The gunman had a big torch light which enabled the witness to identify him as the accused. He had known the accused before as a homeguard of the area.

When the witness came down from the roof, the gunman, now the accused pulled him to the sitting-room where he beat the witness. At that time some thugs were beating PW3 in the bedroom and others ferrying property outside the house, including one head of sewing machine, 4 rolling bags and some cash. The whole episode took about 30 minutes from the start to the end. But when the witness went outside after the attackers had gone, he found a gunman who chased him but managed to escape. There was dim moonlight at the time. The following morning the witness identified the accused as the only person he had recognised among the 6 people who attacked them the previous night.

PW5 was the chairman R.C.1 of the area and on the night of 14.11.88, PW3 with a group of people reported to him the case of robbery. PW3 informed the witness that he had recognised the son of Pulunyi as one of the robbers. The matter was then reported to the boss of homeguards of the area, PW6. The witness accompanied the search team to the home of Pulunyi. The accused was not found in his house. The group guarded the house until 6.30 a.m. when the accused emerged from a different house. Before then, the mother of the accused had revealed that the accused was in the house of his brother with a visitor, indeed a girlfriend. The accused denied the allegation.

Evidence of PW6 is that in 1988, he was in-charge of homeguards of Busoba Sub-County and was Secretary for defence. The accused was under his command. On 14.11.88 at around 1 a.m., he was awakened by a group of people including PW3. He was informed that the home of PW3 had been robbed and that PW3 had identified only one of the robbers. He is a homeguard and the first son of one Juma.



The witness joined the group and started looking for the accused. The group reached the house of the accused but did not find him. The wife of the accused confirmed that the accused was not present at the time. So the group after failing to get the accused anywhere in the night decided to guard his house. 5

Before the accused resurfaced at 6.30 a.m. his mother had informed the group that the accused had spent the night with a girlfriend in the house of his brother. After the accused had emerged, the witness saw the said girlfriend also get out of the house. He confirmed that was the girlfriend of the accused. In fact the witness saw a serious fight break out between the wife of the accused and the girlfriend. The girlfriend ran away before the witness could talk to her. 10

Despite all that evidence, both PW3 and PW4 insisted that the accused was one of the robbers whom they had identified. The witness arrested the accused who he took to Mbale Police Station for the offence now before court. 15

The Police investigating officer, PW7, testified that on 23.11.88 he visited the scene of the alleged robbery at the home of PW3. He observed some signs of violence on the front door. He formed the opinion that a stone was used as some pieces were on the wooden shutter. The window to the master bedroom was broken. The witness drew a sketch plan herein tendered as Exhibit P2. On 5.12.89 the witness also visited the home of the accused and similarly drew a sketch plan, Exhibit P3. On interrogation the accused denied the allegation and said on the night in question, he had a girlfriend at his brother's house which was also confirmed by PW6 in the Police statement to the witness. 20 25

At the close of the prosecution case, it is the submission of the defence Counsel that a prima facie case is not established to warrant the accused to be put on his defence. 30

Both the prosecution and defence agree that for the offence of robbery contrary to sections 272 and 273 (2) of the Penal Code Act, the ingredients include the following:- That there was a theft; that in the course of theft use of violence or threat was used to the victim of property and that in the course of theft there was use of violence or threat by a deadly weapon at or during or immediately after the theft by the accused. 35



It is conceded by the prosecution and the defence that on 14.11.88 there was theft of property of PW3. Evidence of both PW3 and PW4 describes how various household properties were stolen within the meaning of sections 244 (1) and 245 of the Penal Code Act. In that respect court rules accordingly.

As regards use of violence or threat in the course of theft by whoever did it to the victim of property, the defence submission is that both PW3 and PW4 were deeply asleep when they were awakened by abang at the door. Realising imminent danger, PW3 kicked the bedroom window open in a bid to escape while PW4 climbed up to hide in the roof. There was no light in the house at the material time. Both witnesses, however claimed that the assailants used torch lights with which they managed to identify only one person now the accused. Again both witnesses say immediately they heard a gunshot outside PW3 was forced to retreat from his attempt to escape through the window to retire into the bedroom. It is submitted that if a gun was fired at all, which is denied, it must have been fired somewhere not in connection with the alleged robbery. Evidence is that at the time there was insecurity in the area and that there is no evidence to show any spent cartridge at the scene. The defence concedes that PW3 says that he was tied "Kandoya style" and was beaten with clubs and sticks which evidence tallies with the evidence of the doctor who examined him and formed the opinion that weapon used was a blunt object and classified injuries as harm which reduces the offence to simple robbery.

On the other hand, it is the prosecution submission that evidence of PW3 and PW4 proves that a gun was fired at the scene of crime. PW3 feared to jump through the window because of the gunshot. It is incredible to attribute the gunshot to the insecurity in the area at the time. Not every time a gun is fired, it is submitted, an empty cartridge should be recovered. In the instant case, so many people visited the scene with a possibility that they disturbed the scene of crime.

To resolve the above contentions, evidence on record is that some officials and students at Nabumali School and neighbours later arrived at the scene while shouting. None of them was called to give evidence whether or not any of them had heard a gunshot. In normal circumstances an empty cartridge ought to have been found at the scene although not always is the case.



The fact that very many people had visited the scene is not a convincing reason that they had disturbed it. If anything, they would have been anxious to find and hand over any empty cartridge to the authority. However, according to the evidence of PW3 and PW4, the court is satisfied that a gun was fired at the scene of the alleged robbery amounting to use of threat by a deadly weapon within the meaning of section 273 (2) of the Penal Code Act as opposed to medical evidence which classified the injuries on the victim as harm and formed the opinion that a blunt object was used. 5

The next issue for determination is whether it was the accused who was identified at the scene of crime. This issue lies on whether there was an accurate and unmistakable identification of the accused. 10

The learned defence Counsel submitted that the incident happened at night when both PW3 and PW4 were dead asleep and there was no light in the house at the time. A bang at the door woke the witnesses and as the attack was sudden PW3 was prompted to kick open the master bedroom window open to seek escape while PW4 climbed up in the roof indicating that both witnesses were frightened and were in panic. In such a situation PW3 who wanted to flee had no sufficient time to identify the gunman outside. Moreover in his statement to the Police, he stated that he saw 2 people on the verandah. Immediately PW3 was tied "Kandoya style" followed by simultaneous beatings and in that regard, he was a captive who must have been in fear for his life to see and recognise anything. If any torch light was used, it must have been flashed to the witness and not to the accused and in that way conditions would be too difficult for identification. 15 20 25

Further it is submitted that PW4 similarly had an encounter with a gunman in his bedroom. He says the gunman flashed a torch at him and threatened to shoot him unless he came down from the roof. He fell down overwhelmed and in such a state of mind he was not calm enough to recognise the attacker bearing in mind that the source of light was pointing at him and not at the attacker. He was dragged into the sitting room where he retired with the attacker in darkness and beaten therein. 30 35

It is also submitted that 30 minutes after the assailants had left the scene, PW4 went outside fleeing for his life.



There was dim moonlight and immediately he was chased by a gunman giving the witness no time for identification. The learned defence Counsel therefore emphasised that the circumstances prevailing at the time were unfavourable for identification. Both PW3 and PW4 were not in a calm frame of mind to identify the accused person positively and accurately and for that other evidence to corroborate their evidence is required. Other evidence is in favour of the accused. The prosecution witnesses admitted that on the material night, the accused was with a girlfriend in another house which evidence removes the accused from the scene of crime. Evidence of PW6 and PW7 is to that effect. In the premises, under section 71 (1) Trial on Indictment Decree the accused be acquitted.

The prosecution on the other hand submits that a prima facie case is established against the accused and he should be put to his defence. It is conceded that the attack happened at night but PW3 and PW4 clearly identified the accused as one of the attackers. By the help of torch lights during the robbery, PW3 and PW4 were able to identify the accused, whom they had known before the incident: Abdala Nabulere & 2 Others Vs. Uganda (1979) HCB 77. The incident took some considerable time, it is submitted, in which PW3 and PW4 were able to recognise the accused person.

It is also submitted that the incident started at around 11 p.m. and the search team went to the home of the accused at about 1 a.m. According to the sketch plan of the accused's home, Exhibit P3, it was possible for the accused to rush to his father's homestead even when the team looking for him had arrived. An alibi raised by the accused be rejected, evidence is that he was at the scene of crime. There is no need for corroboration in the evidence of PW3 and PW4. In any case a fact can be proved by one witness alone.

Having considered the circumstances of the case, there is no doubt that the alleged robbery took place at night. According to evidence of PW 3 and PW4 there was no light in the house at the material time. The only source of light was from the torches lit by the attackers. PW4 says that there was dim moonlight at the time. Both PW3 and PW4 were stiff scared and frightened when a bang at the door woke them up. In fact PW3 immediately kicked the bedroom window open in a bid to escape.




When he tried to jump out through the window he heard a gunshot being fired from the door towards the window and he was forced to retire into the bedroom. The attackers gained entry into his bedroom through the broken door and then through the sittingroom. Immediately the attackers flashed torch lights towards him, he was tied "Kandoya style" and beaten up at the same time household properties were being looted. By that time PW4 was up in the roof hiding but again he was also brought down by a gunman who threatened to shoot him. 5

PW4 was taken to the sitting room and beaten up. The sitting room was also dark at the time. Even when the attackers had already left the scene, PW4 went outside trying to escape but again he found a gunman who chased him. The moonlight was dim but he managed to escape. In a situation such as described, neither PW3 nor PW4 had any sufficient time to recognise the attackers even if they had known the accused before the incident. 10 15

To crown it all, PW6 clearly says that he checked and confirmed that on the material night the accused had a girlfriend in another house. The investigating officer, PW7 also confirmed that PW6 told him the same story. In that regard both PW6 and PW7 support the alibi raised by the accused in that they remove the presence of the accused from the scene of crime on the night of the incident. The prosecution evidence on record does not rebut sufficiently the defence of an alibi raised by the accused. Evidence of PW3 and PW4 as already pointed out in the ruling does not exonerate the prosecution of its burden to prove the defence of alibi. The court is aware that at this stage, the prosecution is not required to prove the case beyond reasonable doubt: Wibiro alias Musa Vs. R (1960) E.A 184. However, the prosecution is required to adduce evidence where a reasonable tribunal properly directing its mind on the facts and law would convict if the accused said nothing in defence. 20 25 30

In the instant case this is not the case for reasons stated elsewhere in this ruling. The net result is that the prosecution has not established a prima facie case against the accused person and under section 71 (1) Trial on Indictment Decree, he is acquitted and set free forthwith unless being held lawfully on some other crimes. 35

  
STEPHEN GEORGE ENGWAU

JUDGE  
10.9.93.

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21.9.93:

Accused before court.

Mr. Dagira for accused on State brief.

M/S Khiisa for the State.

Ruling delivered in open court.

  
STEPHEN GEORGE ENGWAU

JUDGE

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21.9.93.

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