Hon: Justice Tsekoko.

Robbery
S 273(2)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT JINJA

CRIMINAL SESSION CASE NO. 255/91

UGANDA :: PROSECUTOR

V E R S U S

NO. RO 4361 2ND LT. ASADI MONGO :::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. JUSTICE MR. C.M. KATO

J U D G M E N T

The accused NO. RO 4361 2nd Lt. Asadi Mongo, whom I shall hereinafter refer to as the accused, is indicted for 5 counts each of which is for robbery contrary to the Provisions of sections 272 and 273(2) of the Penal Code Act. He was initially indicated for 8 counts but at the close of the case for prosecution it was found that no prima facie case had been made out for him to answer in respect of counts 2,3 and 7 he was accordingly acquitted in respect of those three counts. This judgment therefore concerns only counts 1,4,5,6, and 8. The accused pleaded not guilty to all the counts.

The case for prosecution has been materially that on 27/3/90 the accused robbed one Abel Iyundhu of 50/= an identity card and other personal documents (count 1); that on the same day at about the same time (7.45 p.m.) he robbed Valantino Lajuru (PW11) of Identity cards (count 4); that on that same day at about the same time the accused also robbed Patrick Emuge Odongo (PW111) of 80,000/= and one identity card (count 5); that on that same evening the accused robbed Gathbert Akemo of 18,000/= and an identity card (count VI) and that on the same day at the same place of Kimaka village in the District of Jinja the accused also robbed Margret Akemo of 10,000/= (count 8). It is also the case for prosecution that at the time of the alleged robberies the accused threatened to use a gun on each of the five complainants.

In his unsworn statement the accused states that on the day in question (27/3/90) he was patrolling his men who were on duty, then he was confronted by those people who claim that he robbed them. They wanted to rob him of his gun and he started shooting in the air but he heard one of them crying that he had been shot.

He (accused) went and reported the incident to the police where he was arrested and detained. He denies having been involved in any robbery.

It is important to point out from the start that the burden of proving accused's guilt beyond reasonable doubt is upon prosecution: Okathi Okale v Republic (1965) EA 555 at page 559 and Woolmington v D.P.P. (1935) AC 462. It must be further pointed out that the accused should only be convicted on the strength of the case as proved by prosecution but not on the weakness of his defence: Uganda v Oloya s/o Yovani Omeka (1977) HCB 4 at page 6 and R v Israili Epuku s/o Achietu (1934) I EACA 166 at page 167.

Where an accused is indicted for aggravated robbery as is the case in the present case, the prosecution is required to prove beyond reasonable doubt, inter alia, that there was theft, that there was violence, that there was a threat to use or actual use of a deadly weapon as defined in section 273(2) of the Penal Code Act and that the accused participated in the alleged robbery. Needless to say that prosecution must prove these matters, by way of evidence direct or otherwise.

Since the accused stands indicted for 5 counts each of which constitutes a separate offence I feel that I should deal with each of those counts separately for the sake of convinience and for the sake of being orderly.

I will deal with the first count first. In this count the indictment is alleging that the complainant Abel Iyundhu was robbed of 50/= and an identity card. Here it should be stressed that an identity card is property capable of being stolen within the meaning of sections 244(1) and 245 of Penal Code Act.

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In order to prove its case in respect of this particular count prosecution relied heavily on the evidence of the complainant Abel Iyundhu (PW1). This witness in his testimony, which was quite detailed, explained what happened on that evening. According to his evidence he was returning from duty to his home. His place of work is the Owen Falls Power station and his home is at Amber court village. When he reached the junction where the path he was using meets the main road he found a soldier searching some people some of whom were standing and others were sitting. The same soldier ordered him to stop, he obeyed and he was told to remove everything that he had in his pockets. The complainant produced 50/= that being the only money he had on him, he also produced his UEB identity card together with graduated tax tickets for the last 3 years. At the time these things were being produced the soldier who was armed with a gun insisted that anybody who tried to run away he would shoot him. At one time when the villagers from the neighbouring village started raising alarms the soldier shot once in the air. The complainant testified that he and another man whom he could not remember were made to carry the loot to Kimaka village and the soldier continued saying that anybody who tried to run he would shoot him. While at Kimaka village the soldier demanded that anybody who wished to be set free had to pay 2000/= but none of those present had any money. The soldier then ordered his captives to remove their shirts but they refused, on that refusal the soldier sarted shooting he released several bullets, when the complainant tried to run away he discovered that he had been shot in both legs. When the soldier went near him, he thought he had gone to finish him so he grabbed his gun with the view of removing it from him but in vain so he gave up the venture. When the soldier was collecting his loot other soldiers came and arrested him. The complainant was meanwhile collected and taken to Jinja hospital where he was admitted for 8 months. On his return home he found his identity card and graduated tax tickets having been recovered but not the 50/=. He frankly told the court that he did not identify the soldier who

caused him all the suffering which he continues to endure as he can no longer walk without a stick and his left leg is now lame. He said that he could not recognise the soldier due to fear and it was night the time having been between 7.00 p.m. and 8.00 p.m.

The complainant (PW1) impressed me as a witness of truth. His evidence that his 50/- and identity card for UEB were taken away from him must be taken to be truthful; as to whether any deadly weapon was used in the process, I would say there is over whelming evidence that the soldier who was holding the gun did not only threaten to use it several times but he actually used it to shoot the complainant's legs. Prosecution has proved beyond reasonable doubt that aggravated robbery was committed to the prejudice of the first complainant Abel Iyundhu (PW1), there having been theft and use of a deadly weapon.

One pertinent question which must be answered is, however, who robbed this unfortunate complainant. As pointed out earlier in this judgment, the complainant frankly said up to now he does not know who his attacker was. All that the complainant remembers is that the man who robbed and injured him was dressed in an army uniform which had some dots. PWVII AIP Otim Rymon who received the accused at the police station that evening and who visited the scene of crime said the soldier who was brought to Nalufenya police station was wearing an army uniform which was plain without any dots. It is therefore difficult to say conclusively that the accused who was seen by this police officer at the police station that evening was the same person who had been seen by the complainant earlier that evening. In his unsworn statement the accused says that on that evening he was attacked by a group of people one of whom grabbed his gun with the view of robbing it and during that exercise he shot in the air but he heard someone crying that he had been shot. This statement by the accused in itself cannot be relied upon to show that the person whom he might have shot was the present complainant since the accused does not say as to whom he shot and the complainant also does not tell the court as to who shot him.

It is true that there is a strong suspecion that the accused might have robbed and shot the complainant, but in our law suspecion however strong cannot be a basis for a conviction: R v Israili Epuku s/o Achietu (1934) I EACA 166 at page 168 (followed). The evidence available does not satisfy me beyond reasonable doubt that the first complainant was in fact robbed and injured by the present accused, for this very reason I cannot accept the advice of the gentleman assessor that the accused should be found guilty of an offence of causing grievous harm to the complainant, such advice could only have been considered if there was evidence conclusively indicating that the accused had taken part in the robbery.

The position being what it is, I find that prosecution has not adduced sufficient evidence to connect the accused with the robbery mentioned in count 1 of the indictment.

I now turn to count 4 (accused having been acquitted of counts 2 and 3 under section 71(1) of T.I.D). In this count it is being alleged that on 27/3/90 the accused person robbed the complainant Valantino Lajur (PWII) of an identity card. The evidence of Valantino Lajur was called to support the 4th count in this case.

Lajur (PW11) testified that on 27/3/90 at about 4.00 p.m. he left his home for Amber court place. On his way he met the accused who ordered him to stop. He stopped and at once the accused removed from the pocket of his shirt an identity card which this witness has never seen again. When the complainant (PWII) asked the accused to return his card he became aggrassive that made the complainant to go home. The accused was armed with a gun but he did not fire it. The following day (28/3/90) Lajur went and reported the incident to Nalufenya police post. After about 2 or 3 days he went and identified the accused from some other people at Jinja central police station.

The first thing to be considered here is whether or not any robbery was ever committed to the prejudice of the complainant. The second matter to be dealt with is whether or not the accused did take part in that robbery if at all it was ever committed. I have already outlined the main ingredients of robbery in this judgment, it may not be necessary to repeat them here. According to the evidence of PW11 there is no doubt that his identity card was removed from him subject to what Iam about to say. Earlier in this judgment I pointed out that an identity card is property capable of being stolen in view of the provisions of sections 244 and 245 of the Penal Code Act, here I might possibly add that an expired identity card may not be treated as property since it is worthless and of no value to anybody. In the present case prosecution had a duty to prove that the identity card which was removed from PW11 was still valid, and therefore capable of being stolen. It may be argued that if the card was not valid then why should the complainant have been carrying it at the material time. That argument may be answered by a simple statement that many people in this world do carry documents which are invalid or useless but without their carriers knowing that fact. Since prosecution has not proved the validity of the card it is not legally prudent to say that it was property capable of being stolen. The position would have been different if it was a graduated tax ticket which remains valid even after the year for which it was issued has ended since it must be produced on demand by the authorities to prove that the carrier is not a tax defaulter who owes the government some money in form of tax; although the complainant says his tax tickets were also robbed but the indictment does not say so. The next point to be considered is whether or not there was use of a deadly weapon and violence. The complainant (PW11) quite truthfully told the court that although the accused was carrying a gun he di not fire it.

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The complainant says the accused was aggrassive but he does not say whether or not he threatned him, in fact the complainant says apart from telling him to stop the accused told him nothing more. In the cases of: Wassaja v Uganda (1975) EA 181 and Uganda v Peter Byamukama (1981) HCB 16 it was emphatically pointed out that prosecution has a duty to adduce evidence proving that the object seen by the complainant was a gun and not a mere toy or imitation of a gun. In Wassaja's (Supra) case it was further stated that where such an object is fired the duty of the court in deciding that it was a gun is made easier. In the present case there is no evidence to establish that what Lajur saw was not a mere toy or imitation of a gun which is not capable of firing. The position would have been different if the gun had been fired: Uganda v Firimigo Kakooza (1984) HCB I. According to the evidence available it cannot be said with any degree of certainity that prosecution has proved that there was use or threat to use a deadly weapon, nor is there anything to suggest that any amount of violence was exercised upon the complainant or anybody else.

The final outcome is that no robbery was committed in respect of the 4th count. Both counsel and the gentleman assessor invited me to find the accused guilty of a lesser cognate offence of obtaining or demanding property with menances, I have found it improper to consider such an alternative finding having decided that prosecution has not proved that the identity card which was removed from the complainant was capable of being stolen as its validity was not proved. Having made this finding i,e, that no robbery or any lesser offence was committed it would be quite superflous to proceed to consider the participation by the accused in a crime that was never technically committed.

That leads me to the fifth count which is that on 27/3/90 the accused robbed Patrick Emuge Odongo (PW111) of 8,000/= although the complainant in his evidence quotes the amount as 8,800/=.

The evidence of Patrick Emuge Odongo (PW111) upon which prosecution based their case in respect of count 5, is essentially that on 27/3/90 at about 8.00 p.m. he was returning to his home from Amber court area,

When he was half way he heard a voice ordering him and his companions to stop. He stopped and he was ordered to put up his hands, then he saw the man who was making the orders had a gun. He and his colleagues were ordered to put down whatever they had. He put down 8,800/= which he had obtained from the sale of fish together with his identity card. The money was placed in a box which was about 3 metres from where the gun man was. At that time the man with a gun then fired the gun in the air and the complainant run away. He later on reported the matter to Nalufenya police post, while at the same police post the same man whom he had seen earlier was brought to the station by some soldiers.

The evidence of this witness does not leave any doubt in my mind about robbery having been committed to his prejudice. His 8,800/= was forcefully taken from him and there was use of a gun which was fired. The only issue which requires consideration is whether the present accused took part in that robbery. According to the evidence of the complainant he was not able to recognise the person who took away his money because that person ordered him not to look at him in the face. This same witness however contradicted himself when he said that he was able to recognise him as the accused person when he was taken to the police post where he (PW111) had gone to report the matter. I cannot see how the complainant came to think that the person whom he saw at the police post later was the same person who had earlier robbed him of his money when in fact he had not recognised him while at the scene of crime. The complainant's evidence as to the identity of the accused at the police post and at the scene of crime is faulty so it cannot be accepted as truthful. The accused's story that he was attacked by a group of people and that he went to the police station to report the matter does not in any way lend any strength to the prosecution case as he (accused) does not say the complainant (PWIII) was one of the people who attacked him. The evidence on record does not sufficiently establish that the accused was the person who robbed the complainant (PWIII), with that holding count five stands disposed of.

At this stage I must move to the 6th count in this case, prosecution in this count alleged that on 27/3/90 at about 7.45 p.m. at Kimaka village the accused robbed the complainant Guthbert Akemo (PWIV) of 18,000/= and an identity card. In his evidence Akemo (PWIV) told the court that on the day in question he was on his way to his home when he met an armed man who ordered him to remove everything that he had in his pocket. He removed 18,000/= and an identity card which he put on the ground but another man who was with the complainant put those things in a box which the complainant had been using for selling fish. After extracting money from everybody present the gun man then ordered everyone to remove his clothes and when those present resisted the armed man fired his gun in the air at that time everybody run in different directions. He run to the police station to report the matter and when he was making a statement a man whom he suspected to have been shooting was brought to the same police post.

A critical examination of the above evidence shows that although an offence of robbery with aggravation was committed to the prejudice of the complainant, it is not known who the robber was. The complainant truthfully told the court that he did not recognise the robber as it was dark. According to that evidence it would be highly dangerous and speculative to connect the present accused with that robbery.

I must finally deal with the last and eight count, (the accused having been acquitted of count 7 under section 71(1) of T.I.D.). In this count it is being alleged that the accused robbed one Margret Akemo of 10,000/= on 27/3/90 at Kimaka village in the district of Jinja. Margret Akemo was called as the 5th witness in this case. In her evidence she testified that on 27/3/90 at about 8.00 p.m. she was going to her home from Amber court where she had been selling "malwa" (local brew). She was in a group of other people who included her husband Odongo and Amuge.

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Before reaching their home they met somebody who ordered them to stop. As the man was harsh she became frightened she put down 10,000/= which she had got from the sale of "malwa". She did not know what happened to the money after she had put it down as she was ordered not to look around. The man then told all those present to undress but they refused and one of them then raised an alarm, at that juncture the man shot his gun in the air. On hearing the gun shot she run back to where she had been selling "malwa" and she has never recovered her 10,000/=, before she run away she had not recognised the man as he had ordered her and other people not to look at him.

Of all the evidence provided by prosecution in this case it would seem that of Akemo (PWV) was the weakest. Judging from her evidence it is not easy to say that robbery was ever committed to her prejudice because she just threw the money to the ground and she does not know what happened to it she was apparently frightened by the sight of the gun. Margret Akemo (PWV), like most prosecution witnesses in this case, was a frank witness when it came to the identity of the person who attacked her on that evening. According to her she did not recognise the man because the man had warned her and her colleagues not to look at him and it was a dark evening. Her later claim that she had recognised the man at the police post is an emotional nonsense because there was no way she could tell whether or not the person she saw at the police station was the same as the one whom she had not recognised at the place of the attack. There is nothing in Akemo's or anybody's else evidence to suggest that the accused had anything to do with the robbery alleged in count 8 of the indictment.

I feel I have said enough about this rather long case which must now be brought to its conclusion; but before I close it all I should make a few observations about the opinion of the gentleman assessor who assisted me in this case after his colleague had been discharged for non-attendance.

In his opinion he advised me that the accused should be convicted of causing grevious harm but not robbery, I have not followed that advice because there is nothing conclusive to suggest that the accused is the one who injured P.I in count 1 as I have already pointed out elsewhere in this judgment. He also advised me to convict the accused of simple robbery in count 4, here again I have not taken his advice for reasons given earlier in this judgment. I however, agree with his opinion in respect of counts 5,6 and 8.

The position being what it is I find that prosecution has not proved its case against the accused beyond reasonable doubt so as to obtain a satisfactory conviction on any of the five counts (i.e. counts 1,4,5,6 and 8). I find the accused not guilty in respect of all the five counts and I do acquit him on all the five counts. He is accordingly acquitted and he is to be set free unless he is being held in prison for some other lawful purposes.

C.M. KATO
J U D G E.

16/4/93