THE HON. JUSTICE TSEKOKO.

THE REPUBIIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPAIA

CRIMINAI SESSION CASE NO. 46/93

UGANDA : PROSECUTOR

VERSUS

AIFRED OPIO : ACCUSED

BEFORE: THE HONOURABLE MR. JUSTICE C. M. KATO

J U D G M E N T

The accused person Alfred Opio, hereinafter to be referred to as the accused, is indicted for ~~aggravated robbery contrary~~ to provisions of sections 272 and 273(2) of the Penal Code Act. He was originally indicted with another man called Francis Mugaga who is said to have escaped from prison and a Nolle prosequi was entered in his respect.

The accused at first was faced with two counts both of which were for aggravated robbery but during the course of the hearing the court ruled that no prima facie case had been made against him in respect of the second count. He was accordingly acquitted for count two under section 71(1) of the TID. The present judgment therefore is only in respect of the first count.

The case for prosecution has been essentially that on 6/10/92 the accused while at Ndaiga bridge at Iyolwa village robbed one David Ogata of 6,000/= and motor vehicle Reg. no. UPP 905 and immediately threatened to use a deadly weapon on the said David Ogata. On his part the accused denied ever having taken part in that robbery.

It is trite law that the duty is upon the prosecution to prove its case against the accused beyond reasonable doubt, that duty does not shift to the accused Woolmington V. DPP (1935)AC 462 and Israil Epuku s/o Achietu V. R. (1934)1 EACA 166 at page 167. In a case of aggravated robbery like the present one prosecution is required to prove beyond reasonable doubt that there was theft,

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that there was violence, that there was threat to use or actual use of a deadly weapon within the meaning of section 273(2) of the Penal Code Act. It must also be shown that the accused directly or indirectly took part in the alleged robbery.

I will deal with the 1st ingredient first; prosecution called the evidence of Sister Mary Lucy and that of David Ogata who testified that on the morning of 6/10/1992, while travelling in a pick-up Reg. no. UFP 905 it was robbed from them at Ndaiga bridge and that 6,000/= were also taken away from PW2 David Ogata; this piece of evidence has not been challenged in any way. I therefore accept it as being truthful. That being the position I make a finding that there was an act of theft of both the motor vehicle and 6,000/= on the day in question. It is immaterial that the vehicle was eventually abandoned by the thieves after it had had an accident, the act of theft was completed the moment the vehicle was grabbed from the lawful owner without his consent.

On the issue of violence, prosecution case again was based on the evidence of PWI and PW2 who testified that when their vehicle was stopped they were forcefully told to get out of the vehicle which they did. This piece of evidence has not been seriously disputed by the defence. I accept it to be truthful and I hold that there was violence used by the attackers when they ordered the two victims to leave the vehicle.

Regarding the issue of using or threat to use a deadly weapon, here the evidence as given by PWI and PW2 is not very helpful for prosecution because although these people saw what they thought was a gun, they had no way of determining that it was actually a gun. The evidence of the police officer who was said to have recovered the gun was not received in court because prosecution could not trace him. The gun which was recovered was also not produced in court. D/AIP Ondole (PW3) frankly told the court that although he saw one of the suspects with the gun in the hospital he was not certain that the gun was working as he did not test it. In his confession which I will deal with later, the accused says the man with whom he was had a gun but again it was not possible for him to testify conclusively that the object he saw was a gun capable of shooting. In the case of: Wasaja vs. Uganda (1975)EA 181 in

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in particular at page 182 it was stressed that where the alleged weapon is a gun prosecution should bring evidence to establish that an alleged gun was not a mere toy or an imitation of a gun or a gun which was capable of firing. It was also pointed out in the same case at page 183 that if a gun is fired the court will have no difficulty in holding that it was a deadly weapon.

In the present case there was no convincing evidence that the object that has been referred to by the witnesses as a gun was in fact a gun and more especially as it was not fired as it was in the case of: Uganda vs. F. Kakoza (1984)HCB 1 where the court held that since the weapon was fired it must have been a gun. It is my finding that prosecution has not proved by evidence that there was a deadly weapon involved in the alleged robbery. The position being what it is I hold that no aggravated robbery was committed but a simple robbery was committed.

The next question to be considered is whether or not the accused participated in commission of that simple robbery. It is the case for prosecution that the accused fully and actively took part in the robbery. On the other hand the accused is seriously adamant that he did not have anything to do with the alleged robbery. This is an issue which involves identification of the accused at the scene of crime. Closely related to the issue of identification is the question of accused's alleged confession and his defence of alibi.

The evidence of identification upon which prosecution would have relied is that of PW1 and PW2 but both of these witnesses confessed before the court that they were unable to positively identify their attackers. Sister Lucy was hesitant to say that the accused was one of the people she saw, while Mr. Ogata was definite that he did not recognise anybody on that morning. There is however, the confession of the accused himself; in that confession the accused states categorically that he was at the scene of crime on that morning. In his unsworn statement the accused retracted the confession saying he made it while being beaten, but that allegation cannot be true since the confession was received in court without the accused objecting; it must have been voluntarily made. It is our law that a retracted confession like the one which the accused

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made, must be approached with caution and corroboration is required before it can be relied upon for any safe conviction: R. V. Mwangi s/o Maingi (1935)2 EACA 66 and Miligwa s/o Mwinje V. R. (1953) 20 EACA 255.

In the instant case however the accused's confession has been positively corroborated by the evidence of PWI and PW2 in material particulars. The description of what happened on that morning by the accused in his confession is totally in agreement with what both PWI and PW2 told the court in their testimony e.g. the two prosecution witnesses told court that three people were involved in the attack and one of them who was in a military uniform was armed with a gun and that is exactly what the accused stated in his confession. I find that the accused's confession places him at the scene of the crime on that day. The accused's defence of alibi cannot be sustained as his own confession has destroyed it. I find that prosecution has established beyond reasonable doubt that the accused participated in the robbery that took place at Mdaiga bridge on 6/10/1992.

The next point to be considered however is that of common intention. It is the law that where two or more persons form a common intention to commit a crime and in the process of fulfilment of their intention one of them commits a crime they are all criminally liable for that crime (see section 22 of the Penal Code Act). In his confession the accused stated that he merely accompanied the man who had a gun which means he was not an active participant. According to the evidence on record and in particular the accused's own confession the accused was an active and willing participant in the commission of the crime. He was not a mere on looker. He therefore had a common intention with the other people who were engaged in the robbery of the car and 6,000/=. It is immaterial that the gun was held by another man who is not before court.

In all these circumstances and in full agreement with the opinion of the gentleman assessor (one assessor was disqualified when he absented himself from court without any lawful excuse), I

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find that prosecution has proved beyond reasonable doubt that the accused committed simple robbery contrary to sections 272 and 273(1)(b) of the Penal Code Act. I however, find him not guilty of aggravated robbery and I do acquit him of that offence but do convict him of simple robbery under the above provisions of the law.

C. M. KATO
JUDGE
20/7/1994