

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT SOROTI

CRIMINAL SESSION CASE NO. 155 OF 1994.

UGANDA PROSECUTOR

VERSUS

No. RA 102506 L/CPL JAMES OBICHO ACCUSED

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

J U D G M E N T

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

In the particulars of offence, it was alleged that No. RA 102506 L/Cpl James Obicho on or about the 20th day of March, 1993 at Obule village, Asuret sub county in the Soroti District robbed Elamu Sam of one Radio Cassette of 3 bands, one rolling bag, one yellow jacket, one black pair of trousers, nine compacts and cash shs 80,000/- and at or immediately before or immediately after the said robbery used a deadly weapon to wit a gun and caused the death of one David Eryenyu.

In his testimony, PW1 said that on 20.3.93 there was a party at the home of one Emeru Nikanori which he attended. He entertained visitors to music. He had a Radio Cassette, International of 3 Bands black in colour.

At around midnight, there were gunshots from the path leading to the home where the party was being held. PW1 reacted by stopping the music and put the radio cassette into the rolling bag. In that bag there were also nine compacts, a pair of black trousers, one yellow jacket and cash shs 80,000/-. The witness then moved to the edge of the compound in a bid to hide.

As PW1 took cover, a gunshot was fired above his head and a person dressed in plain N.R.A. uniforms in Kiswahili said "leta yote", meaning "bring all." So he surrendered the rolling bag with the items mentioned above to that stranger. Returning to the compound, PW1 found one David Eryenyu lying down dead. He was shot on the back with an exit bullet on the right side of the chest. The body was covered with blood that was gushing out from the gunshot wounds.

In that great panic, Angau Nimurodi with a few people picked courage and went to report the incident at a nearby N.R.A. military detach at Asuret Sub-County Headquarters. The soldiers did not visit the scene until the following morning.

Hon. Justice Engwa
T. S. C.

According to the witness, the soldiers picked some empty cartridges and authorised the burial of David Eryenyu.

On 26.3.93 at around 3 p.m. six days after the alleged robbery, boda boda operator No. 333 was seen carrying a passenger holding the rolling bag robbed from PW1. On 27.3.93 at about 8 a.m. PW1 in the company of two other people traced and found the said bodaboda at Pamba in the suburb of Soroti Municipality. The bodaboda operator was identified as Ewaku Jimmy Calvin - PW5 and the accused was caught red handed with all the items stated in the indictment except cash shs 80,000/-. For identification purposes, PW1 ably identified the stolen property in court. The accused was trembling on his arrest and was taken to Asuret detach.

The bodaboda operator, PW5 said that on 26.3.93 at around 4 p.m., he went back for late lunch at his home in Pamba. He found the accused and a certain woman drinking "ajon" - which was there for sale. The accused then hired him at shs 200/- to pick a child from Katakwi stage. After that the accused again hired him to go and pick his property from Asuret at an agreed price of shs 1000/- for to and fro journey.

When they were at the corner of Asuret detach, the accused told PW5 to remain behind and he went alone. The witness did not see from where the accused got his property which were in a black rolling bag. On his return, the accused handed the rolling bag with contents but asked PW5 to change position which he did. The accused went back for a second time. At around 6 p.m. the accused returned and both of them returned to the home of PW5 at Pamba. The accused continued drinking until he eventually spent a night at the home of PW5.

On 27.3.93 at around 8 .m. before the witness could take the accused to Katakwi stage to wait for transport, the searching team led by PW1 arrived. The accused started trembling when the rolling bag was being searched. After PW1 had identified his property, the accused was arrested and taken to Asuret detach and PW5 made a statement accordingly.

On 29.3.93, Sgt. Mugarura Felix who identified himself as an Intelligence Officer of 26th Battallion, 307 Brigade in Soroti, handed the accused to PW4 allegedly for a murder case. The witness re-arrested the accused and detained him in Soroti Police cell. On the same day, PW1 reported to PW2 that he was robbed of some property on 20.3.93.

On 30.3.93 a rolling bag in which there were one radio cassette, International of 3 Bands, one pair of black trousers, 8 compacts and one yellow jacket were handed to PW2 by Sgt. Mugarura of Asuret detach. It was PW3 who kept the above items in the Police exhibit store and later identified them in court as Exhibit Pl.

In his defence, the accused said that on the night of 20.3.93, he was on duty at Asuret detach quarter guard when a group of people came wanting to see the Intelligence Officer. He took them to the I.O. but later heard a whistle being blown to mean that each soldier should take position. While in the "andaki," Sgt Charles Omongot who was the orderly officer on duty ordered for the arrest of Cpl Odeke who was missing from the barracks at the time. At around 1 a.m. Cpl Odeke returned and was arrested but escaped the following day, 21.3.93.

On 26.3.93 the accused denied ever being at the home of PW5 and also denied spending a night there. He was for the whole day in Asuret detach. However, on 27.3.93 at 7 a.m. he was granted permission to escort a child to Katakwi stage in Soroti Town for the child to return home at Katakwi which he exactly did. But on his return journey to Asuret detach, a group of people in which PW1 was, arrested him on the mistaken identity that he was Cpl Odeke. He claims to have been tied with a rope and brutally assaulted around Pamba and also on the way back to Asuret detach. He alleges it was during that time that PW1 planted the rolling bag with its contents on him - Exhibit Pl.

After 3 days in Asuret detach on detention, he was brought to Soroti Police station, i.e. about 29.3.93. The accused denied the offence of robbery in toto.

In their submissions, it is agreed that on the night of 20.3.93, PW1 was robbed of the property stated in the indictment. In that regard, the prosecution has proved the first ingredient of robbery as charged.

The second essential requires the prosecution to establish that at or immediately before or immediately after the said robbery, a deadly weapon was used which caused the death of one David Eryenyu.

Evidence is that the ceremony went up to midnight when gunshots were fired resulting into the death of David Eryenyu.

Evidence of the Police officer who re-arrested the accused, PW4 is that Sgt. Mugarura Felix on 29.3.93 handed the accused to him at Soroti Police Station allegedly charged with the murder of David Eryenyu. Although no forensic evidence is on record but nonetheless it is not strenuously disputed that gunshots were heard at the material time of the alleged robbery.

The N.R.A. soldiers who visited the scene in the morning of 21.3.93 collected some empty cartridges but were negligent in failing to hand them over to the Police. Be that as it may, I'm inclined to believe the evidence of PW1 that in the course of the alleged robbery a deadly weapon to wit a gun was used which killed David Eryenyu who had a bullet wound from the back with an exit on the right side of the chest.

The next ingredient for consideration is whether it was the accused who robbed PW1 and caused the death of David Eryenyu. It is defence submission that there is no evidence of identification putting the accused at the scene of crime. PW1 who was at the scene never identified the person who allegedly robbed him.

On the other hand, the prosecution relies on the doctrine of recent possession. The stolen property was recovered from the accused intact except money six to seven days after the alleged robbery. It is the contention of the learned Counsel for the State that if the accused was not the robber then he was a guilty receiver. It is argued that the accused failed to account for the property found in his possession. Evidence that he was arrested on the way and property planted on him be rejected.

In Uganda Vs. Mohamed Bikwasizahi & Specito Luyinda (1978) HCB 220, where property was recovered a couple of hours after the robbery, the doctrine of recent possession of property applied.

In the present case the stolen property included a radio cassette, nine compacts, one yellow jacket, one pair of black trousers and cash of Shs 80,000/- all in a rolling bag. All were recovered intact except the cash of shs 80,000/- and they were recovered from the accused six to seven days after the alleged robbery according to the evidence of PW5 and PW1. Factors such as the nature of the property stolen, whether it be of a kind that readily passess from hand to hand, and the trade or occupation to which the accused person belongs have all been taken into account: R. Vs Hassani s/o Mohamed alias Kinyonyoke (1948) 15 EACA121.

Accordingly there is no direct evidence to link the accused with the alleged robbery. However, the conduct of the accused from the time of his arrest with the stolen property, raises the presumption that he is a guilty receiver. According to PW5, the accused asked him to remain behind meanwhile the accused went to collect the stolen property. Even after collecting the property, the accused again asked PW5 to change position. The only inference to be drawn is that the accused did not want PW5 to know where he had collected the property from and by asking him to change position, certainly there was fear in the mind of the accused in regard to the property.

Evidence of both PW1 and PW5 is that on 29.3.93 when the accused was arrested, he started trembling greatly. He was arrested before reaching Katakwi stage where he would have boarded a vehicle to go and hide the stolen property in his village in Katakwi.

The conduct of the accused gives only one inference that he is a guilty receiver of the stolen property. His contention that he was arrested on the mistaken identity of Cpl. Odeke does not arise because it was his bosses who actually handed him subsequently to the Police at Soroti. Another argument that the property was planted on him is overwhelming rebutted by evidence of both PW1 and PW5. The accused has failed to account for the property found in his possession.

The end result is that I find the accused guilty of a lesser cognate offence of receiving or retaining stolen property contrary to section 298(1) of the Penal Code Act and convict him accordingly, contrary to the opinions of gentlemen assessors, with due respect.

STEVEN GEORGE ENGWAU

J U D G E

6.9.94.

15.9.94: Accused before the court.
Mr. Kakembo for accused on State brief.
Nandawula for the State.
Opio Emmy interpreter in Ateso language.
Judgment delivered in open court.

STEVEN GEORGE ENGWAU

J U D G E

15.9.94.

SENTENCE: The fact that the accused is first young offender and the fact that most of the stolen property was recovered and also that the accused has been on remand for almost 18 months have all been considered. However, the society needs protection against those who receive stolen property but never look for their owners and in the process get cheaper markets for such property. Life was lost in the course of theft of property in this case.

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Accordingly, accused sentenced to three years' imprisonment.

STEVEN GEORGE ENGWAU

J U D G E

15.9.94.

R/A explained.

STEVEN GEORGE ENGWAU

J U D G E

15.9.94.

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