

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT SOROTI
CRIMINAL SESSION CASE NO. 239 OF 1993

UGANDA PROSECUTOR

VERSUS

A1: OPOLOT PATRICK) ACCUSED

A2: AEENU s/o EYODU)

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

RULING:

At the trial, a nolle prosequi was entered against Okwi s/a Aneru on the ground that he had died in Soroti Government Prison before.

In the amended indictment, the two accused persons are jointly charged in three counts with robbery, contrary to sections 272 and 273(2) of the Penal Code Act.

In the 1st count, it is alleged that Patrick Opolot alias Okolimong and Aeemu s/o Eyodu on or about the 27th day of October, 1990 at Ogetenyang village in the Soroti district robbed Oluka of cash shs 3000/- and during the said robbery caused the death of the said Oluka.

In the 2nd count, it is alleged also that on the same day in the same village, both accused robbed Sisiria Acuo of cash 8000/- and at or immediately before or immediately after the said robbery used a deadly weapon to wit a gun on the said Sisiria Acuo.

In the 3rd and last count, they are again alleged to have robbed Sunday Oyibi on the same day in the same village of unspecified amount of money, chickens and one duck and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun on the said Sunday Oyibi.

In brief the prosecution evidence is that on 27.10.90, PW1 had served her late husband Oluka with supper and before he had completed his dinner some thugs banged the door and PW1 was forced to open the door. At the cortyard she saw three people and two of them were armed with guns. Immediately the attackers started beating her several times on the head with the butt of a gun while demanding money from her.

In a bid to rescue her, Oluka pleaded for her life and told her to give the attackers shs 10,000/- which she did but instead the thugs demanded for more money and as a result assaulted Oluka with the barrels of their guns to death.

*Hon. Justice
J.N. Tschabala
J.S.C.*

Before their departure they also robbed five ducks, one pair of bed-sheets, one mosquito net and one shirt.

There was moonlight on that fateful night but PW1 identified the thugs when her husband Oluka mentioned Okolimong and Okwi by names while pleading that they were killing him for nothing.

None of the stolen property was recovered except the mosquito net which PW1 found and identified at Serere Police Post as hers but such a mosquito net was not identified in court at the trial. Eventually Oluka was buried without any medical examination on the body.

PW2, as a neighbour, on 27.10.90 at around 9 p.m. learnt that some strangers were assaulting PW1, her late husband Oluka and PW5. In a ditch 200 metres away from the home of PW1, she took cover and with the help of moonlight she claims she recognised the three assailants. She was able to identify them because she knew them before as people of Okodo village who used to drink in their village.

The witness said A1 was dressed in army uniform and was armed with a gun but both Aenu and Okwi were dressed in civilian clothes. In court she identified A1 as Aenu - A2 but did not recall the name of A2.

Evidence of PW3 is that on the night of 27.10.90, he heard some people at his door saying "kodi, kodi" but he refused to open the door. However, on hearing a gun being corked, he was forced to open the door. As he was getting out, at the door he was held by the neck and thrown down. Immediately the attackers started beating him with two chairs until they were completely finished.

Although the witness was made to lie face down, he claims that he managed to identify only one person out of the three people. He recognised A1 as Okolimong whom he knew before as a friend. He said only A1 was armed with a gun. In court the witness identified A2 as Okwi one of the thugs on the fateful night but evidence is that Okwi died before the trial commenced.

On 27.10.90 at around 6 p.m., PW4 had seen Okolimong, A1 in the company of Aenu, A2 and Okwi now deceased in Okodo village before the incident. He said A1 was dressed in N.R.A. combat uniforms but A2 and Okwi were dressed in civilian clothes and all were heading towards Ojetenyang village where the alleged robberies took place. Okwi was armed with a gun.

At around 11 p.m. the witness heard several gunshots coming from the direction of Ojetenyang village. The following morning he learnt that Oluka was murdered and several people in the village were robbed.

In the night of 27.10.90, PW5 said she was in her house but on the same compound with PW1 when thugs attacked PW1 and her late husband Oluka. She heard Oluka crying that Okolimong was killing him for nothing.

Later, PW5 says three thugs came to her house and pushed her outside while demanding for money. She gave them shs 8000/- but still they said that was very little. Although she has poor eye sight, she managed through moonlight to recognise A1 whom she knew before as a boyfriend of her daughter and he used to eat from her home. However, as it was night, A1 was putting on something like an army uniform whereas the late Okwi and Aeenu - A2 were dressed in civilian clothes, but she could not tell who was Okwi or who was Aeenu, yet she maintains that Okwi was armed with a gun.

In light of the above evidence the defence side promptly submitted that a prima facie case is not established by the prosecution to warrant A1 and A2 to be put on defence. In support of that argument, the defence Counsel relied on R. T Bhatt Vs. R. (1957) EA 332 in which it was held inter alia that the onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out of it, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction."

The question whether there is a case to answer cannot depend only on whether there is "some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence."

It is submitted that where there is no evidence to prove all the essential ingredients of the offence charged and where the prosecution evidence has been discredited in cross-examination or it is manifestly unreliable that no reasonable tribunal could safely convict on it, an accused deserves an acquittal: R. Vs. Shabudin Merali M.B. 38/63 and Stephen Onyango and 3 others.

In the present case, both the defence and the prosecution concede that in the night of 27.10.90, Oluka was robbed of property stated in the indictment and in the course of the alleged robbery met his death. Similarly, on the same night both PW3 and PW5 were robbed respectively of the property stated in the indictment.

It is also conceded by both sides that a deadly weapon to wit a gun was used or threatened to be used before and after the commission of the alleged robberies.

Evidence of PW1, PW3 and PW5 as eye witnesses points clearly that the thugs had a gun or two. In addition, those witnesses including PW4 said they heard gunshots on the fateful night being fired by the robbers. Although empty cartridges were collected the following morning and handed to the authority, it is unfortunate that they were never tendered in court as exhibits. It is also evident, however, that the thugs shot dead the pig of PW3.

The main controversy lies on the evidence of identification of the alleged robbers on the fateful night. Evidence of the eye witnesses is materially contradictory that one can assume that conditions for correct identity were not favourable on that fateful night.

Whereas PW1, PW3 and PW5 saw three robbers that night, PW1 said two of them were armed with guns but PW3 and PW5 said only one man was armed with gun. According to PW1, it was A1 and the late Okwi who were armed with guns, But PW3 and PW5 said it was only A1 who was armed with a gun.

Although there was moonlight on the fateful night, PW1 who claimed that she knew A1, A2 and the late Okwi before, admitted in cross-examination that she came to identify Okolimong (A1) and Okwi (now deceased) only when her husband Oluka pleaded that Okolimong and Okwi were going to kill him for nothing.

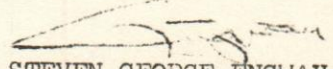
In yet another development, PW2 and PW5 said they heard the deceased Oluka crying that only Okolimong was going to kill him for nothing. In both stories, what the late Oluka said amounts to a dying declaration. There is no rule of law that to support a conviction there must be corroboration of a dying declaration, but it is generally very unsafe to base a conviction solely on an uncorroborated dying declaration: Pius Jasunga s/o Akumu Vs. R (1954) 21 EACA 331. In the instant case, what PW1 heard Oluka say, in my humble view is different from what PW2 and PW5 heard and their evidence therefore does not corroborate PW1.

Since PW1 based her identification of the attackers only when Oluka mentioned the names of Okolimong and Okwi, otherwise conditions were not favourable for her to identify all the three robbers. PW2 who was 200 metres away from the scene certainly could not identify the robbers with the help of moonlight as she alleged. Similarly, PW3 who was made to lie face downwards could not in that position identify his attackers. Moreover there was no breathing moment for him as he was being assaulted simultaneously until two wooden chairs got finished completely on him. It is inconceivable for a witness in that state of affairs to accurately identify his attackers in my view.


In yet another turn which created doubt, in court PW1 who claimed that she had known both A1 and A2 before could not give the names of A2. PW2 made matters even worse by calling A1 Aeenu who is actually A2. To crown it all, in court PW3 identified A1 as A2 and A2 as Okwi - but Okwi died before the trial commenced.

On how the robbers were dressed on the fateful night, PW1 said A1 was dressed in plain green N.R.A. uniforms but PW3 said combatant N.R.A uniforms. Both PW1 and PW3 said A1 was armed with a gun but PW2 and PW5 said it was the late Okwi who was armed with the gun.

In conclusion, the above ~~inconsistencies~~ ~~regarding evidence of identification~~ are grave ~~inconsistencies~~ which point at either deliberate untruthfulness of the eye witnesses or tend to show that conditions were difficult and not favourable for correct identification of the culprits suspected for offences now before court. Evidence so far adduced does not conclusively put both A1 and A2 at the scene of crime. In that regard the prosecution has failed to establish that A1 and A2 actually participated in the alleged robberies. In the premises, A1 and A2 are hereof acquitted and set free forthwith under section 71 (1) Trial on Indictment Decree, 1971 unless lawfully being held for some other crime.


STEVEN GEORGE ENGWAU
J U D G E
20.9.94.

23.9.94: Both accused present.
Mr. Oyoit for accused on State brief.
Ms Nandawula for the State.
Ruling delivered in open court.


STEVEN GEORGE ENGWAU
J U D G E
23.9.94.