

Hon. Mr. Justice
J.K.N. Tsekooko.

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

CRIMINAL SESSION CASE NO. 2 OF 1994.

UGANDA PROSECUTOR

VERSUS

A1: No. RA 93742 PTE OLANYA MARINO) ACCUSED
A2: NO.RA 81050 PTE CHARLES ODONG)

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

R U L I N G:

The 2 accused persons are charged with robbery contrary to sections 272 and 273 (2) of the Penal Code Act.

The particulars of offence are that No. R.A. 93742 Pte Olanya Marino - A1 and No. R.A. 81050 Pte Charles Odong on or about the 13th day of August, 1992 at Aloet Primary School in the Soroti District robbed Joseph Oba of Shs 60,000/- and one bicycle frame No. H738390 and at or immediately before or immediately after the said robbery threatened to use a deadly weapon to wit a gun on the said Joseph Oba.

To prove the allegation, Opio James Peter, PW2, a teacher at Aloet Primary School said that on 13.8.92 at dawn, he was sleeping with his family when a window to his bedroom was knocked open and the attackers threatened to throw a bomb in the house unless he opened the door. For fear he opened the door and he was driven out with his family. Immediately the attackers started beating him with the butt of a gun. He was forced to lie down by them. The attackers were demanding for money but when he failed to produce it, he was asked for the keys to the school office. He also failed to produce the keys so he was taken to the school office where the robbers tried to break the padlock with a gun but in vain.

The witness said the ordeal took about 30 - 40 minutes at his home. There was bright moonlight and it was dawn so he was able to identify the robbers. He made a self recorded statement to the Police on 13.8.92 in which he mentioned the name of A2 as one of the attackers.

In cross-examination, the evidence in-chief was shattered. He described the gunman as a short soldier and the one who entered his house and raped his wife as a tall man. He did not mention the name of the gunman as Olanya - A1 in his Police statement because he says he was in a hurry! Though it was dark and still night time, he claims that he had properly recognised the attackers as A1 and A2. He conceded that A1 was dressed in what appeared black clothes as it was still night time but A2 was wearing what looked like black rain coat.

The complainant, PW1, also stated that on 13.8.92 at dawn, he was deeply asleep in his house with the family when he heard a loud voice asking for the keys to the school office.

NO CASE

On the advice of his wife, he threw the keys through the ventilator but that did not save the situation. The attackers fired three bullets through the bedroom window, the sitting room and also through the door when he refused to get outside. For fear, he eventually got out and was made to lie on his stomach near PW2. He was seriously assaulted with the butt of a gun which resulted into three ribs being fractured and the fourth one was only cracked.

Due to severe beatings, he was forced to tell the robbers that he had some money in the house. One attacker then entered the house and removed shs 60,000/- being part of school fees and one bicycle frame No. H.738390 before fleeing away. The attack took about 45 minutes and with the help of moonlight he was able to recognise the two accused persons whom he had known very well before the incident. The accused and other soldiers used to drink in their staff quarters, he said.

During cross-examination, the witness was in trouble. He said inter alia that both accused were dressed in N.R.A. uniforms. He did not specifically mention which type. Although he reported the incident to the Police on 13.8.92 evening, he did not write his self recorded statement until 28.8.92. In that statement, he conceded, he had not mentioned the names of his attackers and had no good reasons for failing to do so. He only described one of them as dark and short. He explained to the court that in the normal course of business, he used to keep school fees in the cupboard in the office. He used to bank some fees or buy some materials for the school. No reasonable explanation was given for keeping the shs 60,000/-, being part of school fees, in his house on that particular occasion.

That was the evidence of key eye witnesses for the prosecution case. However, PW3 was the arresting Police officer who arrested A1 after his identification by Cpl Kyeyune of 39 Battalion based in Arapai. PW4 was another Police officer who received from N.R.A. Cpl. Bogere, Raja bicycle frame No. H. 738590, an SMG gun No. 1787 with 23 rounds of live ammunition, 4 empty cartridges for an SMG gun, 2 trousers of N.R.A uniforms and one stick grenade all belonging to A1. All those items were tendered in court for identification purposes only. However, there is no evidence of how the late Cpl Bogere recovered those items.

In light of the above evidence, the learned defence Counsel submitted that a prima facie case was not established to warrant the accused persons to be put on their defences. He strongly argued that no reasonable tribunal could convict in view of major inconsistencies in the prosecution evidence even in the absence of defence. He high-lighted the fact that PW1 said the attackers were dressed in N.R.A uniforms but did not describe what type. PW2 said A1 was dressed ⁱⁿ black combat uniforms but A2 was wearing black rain coat. Both witnesses claimed that they had known the accused persons very well before the incident and that they knew their names also but PW1 did not disclose the names at the earliest opportunity in a statement which he recorded himself to the Police.

Whereas PW2 mentioned the name of A2 but how come that they described the gunman as dark and short and the other as a tall man only.

Further, both PW1 and PW2 said they recognised the attackers with the help of bright moonlight. PW2 in cross-examination later changed the story that there was a dim moonlight on the fateful night and maintained that although it was dark and still night time, he nonetheless was able to recognise the attackers as A1 and A2.

It is submitted that the above contradictions are major and destroy this case because either PW1 and PW2 as eye witnesses never told the court the truth or were mistaken on the identity of their attackers on the ground that conditions were not favourable for correct identification.

For the learned Counsel for the State to argue that the accused persons were properly recognised by both PW1 and PW2 who had known them very well before does not hold water. Both PW1 and PW2 told court in the first instance that there was bright light on the night in question but PW2 later changed the story that there was dim moonlight and that it was still dark as it was night time. Worse still PW1 who made a self recorded statement a few days after the incident did not mention the names of the attackers. Instead both PW1 and PW2 described the gunman as a dark and short soldier and his colleague as a tall man.

My humble conclusion as regards evidence of identification is that there are major contradictions which go to the roots of the case which destroy it and the only inference is that conditions did not favour proper identification in the circumstances. If both witnesses knew the accused persons very well before how come that they did not reveal their names to the Police when they made their statements at the earliest opportunity. There is no evidence before court that N.R.A. soldiers of 318 Battalion at Arapai or the R.C. officials were called to reveal the names which PW1 and PW2 gave them. I'm in full agreement with the defence submissions stated above in regard to evidence of identification.

As regards the remaining elements, there is overwhelming evidence that shs 60,000/- and a Raja bicycle frame No. H.738390 were stolen from PW1. However, PW1, a Headmaster of about 5 years' experience failed to tell court why he made a departure of keeping school fees on that particular occasion. He used to keep the fees in the school office but on that particular occasion, he kept Shs 60,000/- in his house. He never even informed court where in the house. Any reasonable headmaster of that experience with due respect would certainly bank the money or use it for buying school materials when need arises.

Be that as it may, there is evidence to prove that a deadly weapon was used in the course of the alleged robbery. Both PW1 and PW2 said they heard three gun bullets and that 3 empty cartridges were collected from the scene by the N.R.A. Intelligence officer. In court, instead four empty cartridges were tendered for identification only. No evidence on record to prove that the gun tendered was the very one used by the robbers on the night in question. In fact there is no evidence to show how the gun, empty cartridges etc were recovered.

In conclusion, I do agree with the defence Counsel that the prosecution has failed to establish a prima facie case and under section 71 (1) Trial on Indictment, both accused are hereof acquitted of the offence of robbery as charged and they are to be released forthwith unless being held lawfully on some other crimes.



STEVEN GEORGE ENGWAU

JUDGE

25.4.94.

28.4.94: Both accused before court.
Mr. Kakembo for the accused.
Ms Nandawula for the State.
Ruling delivered in open court.



STEVEN GEORGE ENGWAU

JUDGE

28.4.94.