

UGANDA / JUDGMENT

Musasizi v Uganda (Criminal Appeal 19 of 1991) [1993] UGSC 34 (31 December 1993)

[1993] UGSC 34

COURT

Supreme Court of Uganda

BEFORE

Manyindo, DCJ, Odoki, JSC, Oder, JSC

CASE / FILE NUMBER

Criminal Appeal 19 of 1991

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\$26/11/93\$ al- accu IN THE SUPERIE COURT OF UNNEA

AT NITGO

(CORAM: MANYHIDO - DCJ. ODOKI - JSC. \$ODER - JSC\$)

CERTINAL ATTEAL NO. 19/91**BETWEEN**

DENON MUSASIZI: \$:\\$ \ddot{\cdot}\\$ \overline{1}\\$: \\$\ddot{\cdot}\{\}\\$: : \\$\overline{z}\\$ \\$ \ddot{\cdot}\{\mathbf{z}\}\\$ \mathbf{1}\\$ \mathbf{1}\\$ \mathbf{1}\\$ \mathbf{1}\\$ APPELLANT

A N D

UGATIDA: RESPONDENT \$\ddots\$ \$\overline{1}\\$ \overline{1}\\$ \\$11\\$ \$\overline{1}\\$ \overline{1}\\$ \pm 1 \\$:\\$ \overline{1}\\$ \ddagger\$ \$\ddagger\$ \$\overline{1}\\$

> (Appeal against conviction and sentence of H/C decision holden et Kabalo (Hon. Justice J. W. N.
Tseekooko) dated the 1st day of
July 1991 from original H. C. Cr. Ss. No. \$70/88\$).

Judement Of The Court:

The appellant was indicted in the High Court on two counts of robbery with violence. He was convicted as charged on the first count but was convicted only of assault with intent to steal on the second count. \$\mathbf{H}\ \mathbf{e}\$ was sentenced to death on count 1. Sentence on count 2 was deferred.

now He nw appeals against the conviction on count 1 only, on two grounds. The first ground is that the evidence adduced by the prosecution did not establish The second ground, which is clearly the offence charged. related to the first one, is that the prosecution had not proved the allegation that a deadly weapon had been used in the robbery.

The robbery, which was not disputed, took place on 1-12-86, at about 9.00 p.m. at the houses of the complainants, Mohmain Responses (NI) and Alice Kamyongo (202) in Ruhmgiri District. According to the \$M\$ complainant, Inveneress, he had just retired to be/for the night when two robbers entered his house. The appellants were plain green Army Uniform and was armed with a gam. The other robber were, among others on Jacket. The appellant pointed his Army camouflage gun at M1's chest and ordered him to sit on the bed which he did.

Then the appellant informed FWI, that someone had paid him Sh. 2m, to kill him (FG1) but that he was prepared to spare his life if he would pay him Sh. 141 told the appellant that he had no mercy. The appellant's companion then searched the house for money, while the appellants guarded IVI at gun point. A total of Sh. 1,190,000/- was found and taken by the robbers. That is the subject matter of count No. 1.

The appellant and his colleague then tied FUL's hand and forced him to lead them to the house of his neighbour Alice Karyongo (IV2) so that they could overtake more money from her. On their orders, the appellant asked Karyongo to open the door which she did. The robbers then robbed her of money and property. Later they returned to his house to look for more money, but found none.

bed

$\mathbf{3}$

The defence case was that the appellant was employed by IMI as a text driver (which FMI denied). On the day of incident the appellant had brought FW1's taxi back to Fil's home to return with a bag which a son of FIL had put in the vehicle. FIL had found the gun in the bag and decided to frame up the present charge against the appellant. I to even dropped the appellant and in military uniform before handing him over to the Police. PA2 had implicated the appellant maliciously because he had impregnated her 12 year old daughter.

The evidence of NI was corroborated in part by W 2 who stated that on the night of incident, at about 10.00 p.m. the appellant, another man and FUL went to her house. Fil was under arrest. The appellant and the other man demanded money from her. They went away with Sh. 70,000 and some property. In the light of FW2's evidence as to the sum of money stolen, the indictment should have been amended by substituting the sum of Sh. 9000/= in count 2 with the sum of Sh. \$70,000/=\$. While in her house the appellant had cocked his gun and threatened to shoot her and PWL. She denied the appellant's allegation regarding her daughter. In fact she stated that the daughter has never been impregnated by anyone.

There was also the evidence of Reshunbusha (383) and Kakoki (1914), both immediate neighbours of 1911. During the attack they rushed to the house of FM1. On arrival the appellant cocked his gun and ordered them to sit down which they did. Apparently this was after the attack on FW2. The appellant's colleague then struck FW3 on the hand with a metal wire.

\$1000/4\$

\$4 \quad \blacksquare\$

As the appellant and his colleague were leaving the place, FW3 grabbed the appellant disarmed him and arrested him. The gun had 12 rounds of ammunition. The second man escaped. That account was confirmed by \$PV4\$.

In our view, prosecution evidence amply established the fact that the appellant had participated in the robbery. His defence was no doubt false. The witnesses did not know him before this incident. If he had been employed by PVI and even resided at PVI's house before this incident, as he claimed, PW2, PW3 and PW4 would have confirmed that fact. On the contrary, they denied the allegation. The first ground of appeal has no merit. It fails.

The gun which the appellant had was never fired during the robbery. After his arrest the appellant and his gun and its 12 rounds of ammunition were immediately taken to Detective Inspector of Police David Eakehemura (FV5) at Rukungiri Police Station. FV5 re-arrested the appellant and detained him. He then examined the gun. His testimony on the point is as follows:-

> " The gun can fire. I examined it and formed the view that it can fire. It was clean inside - BO I believed it could fire. I have handled firearms for 20 years. (After checking it by handling the trigger which clicked, this
gun can fire even without oiling it). "

In his judgment the trial Judge stated this:-

I asked him (FW5) to prove that it (the gun) was capable of firing even by now. It looked rusty. He examined it and when he pulled the trigger, it clicked.
He assured us it can fire. In the consequence both counsel and I gave up the idea of test firing it." (sic).

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Counsel for the appellant has argued that unless the gun is fired during the robbery or is test-fired subsequently, it is not a gun. The case of: Shaban Eirumba and Another v Uranda, Cr. Appeal No. 32 of 1989, (Supreme Court) was relied on. He also submitted that a Police Officer is not a firearm expert so that the evidence of FW5 was of no consequence. Gacheru σ /o Nierwara v R (E. A. C. A.) Criminal Appeal No. 938 of 1954 was cited in support. We do not find Shaban (supra) relevant here. In that case the gun was never recovered and so it was never examined.

That is why the Court could know whether or not it was capable of discharging in bullet. In the case before us the gun was recovered and later examined by PW5. Contrary to the submission made by Counsel for the appellant. Gachera (supra) in fact decided clearly that a Police Officer engaged on operational work for a long time acquires sufficient practical experience or knowledge to qualify him to speak as an expert on guns. In that case the appeal succeeded only because the Court was not satisfied with regard to the practical experience or knowledge of the Police witness.

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In our opinion there can be no such doubt with regard to K5.

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this case the evidence of K'5, showed clearly that the the Penal Code. falls. k u-Tt is to be proved gun ms in good working order. That meant that it was a deadly weapon within the meaning of Section 273(2) of Accordingly ground tv.o of appeal also The point perhaps is this. that the gun discharged a bullet or that it is capable of discharging a bullet. ^ V.e think that it is enough for the prosecution to establish, s/n expert evidence, that the gun is capable of discharging a bullet, although the best course to take would be to test - fire the gun. Tn

In the result the appeal is dismissed.

DATED at Kampala This; 1993. Day of:..?.....

> S. T. MAKYHTDO DEPUTY CHIEF JUSTICE

> > E. O. ODOKI

JUSTICE OF THE SUPREME COURT

A. O ODER

JUSTICE OF THE SUPREME COURT

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