

UGANDA / JUDGMENT

Uganda v Akena and Another (Criminal High Court Session 21 of 2019) [2023] UGHCCRD 95 (30 May 2023)

[2023] UGHCCRD 95

COURT

HC: Criminal Division (Uganda)

BEFORE

Muwata, J

CASE / FILE NUMBER

Criminal High Court Session 21 of 2019

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL SESSION CASE NO.21 OF 2019

UGANDA-----PROSECUTION

VERSUS

1. AKENA SIMON 2. SSEKIBAMU HENRY-----ACCUSED

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The accused persons are charged with two counts of aggravated robbery contrary to section 285&286(2) of the Penal Code Act.

On the first count, it is alleged that the accused persons and others still at large on the 20th day of January 2018 at Namugongo Jjanda Kyaliwajjala village Kira Municipality in Wakiso District robbed a one D/ASP Nantajja Nicholas of a Samsung 096 mobile phone and clothes and at or immediately before or after the said robbery used a deadly weapon to wit pepper spray chemical and knives on the said D/ASP Nantajja Nicholas

On the second count, it is alleged that the accused persons and others still at large, on the 20th day of January 2018 at Namugongo, Kiryamuli Zone, Namugongo, Kira Municipality in Wakiso District robbed one **Babirye Damali** of cash 4,900,000/= (**four million Nine hundred thousand shillings**) and at or immediately before or immediately after the said robbery threatened to use deadly weapons to wit paper spray chemical and knives on the said **Babirye Damali**.

At the hearing the accused persons were represented by counsel Serwanga Geoffrey while the prosecution was represented by State Attorney Amerit Timothy.

Ingredients of the offence of aggravated Robbery

- 1. Theft of property belonging to another.
- 2. Use or threat of use of violence at, before or after the theft or that the accused caused grievous harm to the victim.
- 3. Use of deadly weapon

4. The accused participated in commission of the robbery.

Counsel for the accused submissions

Accused's counsel did not contest the 1st and 2nd ingredients required to be proved in cases of aggravated robbery. The contention is only in respect to the participation of the accused persons

Counsel argued that the conditions for proper identification could not enable the victims to properly identify the accused persons. He submitted that the incident took a short time for the accused to be properly identified.

Counsel also argued that the process of conducting an identification parade was flawed. He cited the case of **Sentale V Uganda [1968] 1 EA** where the proper procedure was laid out

Consideration

The burden of proof in criminal cases lies on the prosecution to prove the offence against the accused beyond reasonable doubt. That means that regardless of the defence raised by the accused person, the accused person can only be convicted on the strength of the prosecution case.

The burden of proof is on the prosecution to prove its case beyond reasonable doubt and any doubt and any doubt must be resolved in favor of the accused person

As already stated above, the first ingredient to be proved is theft, theft occurs when a person fraudulently and with intent to deprive the owner of a thing capable of being stolen takes that thing from the owner without a claim of right. For this ingredient, there must be proof of what amounts in law to an asportation (that is carrying away) of the property of the complainant without his consent or lawful claim of right. **See: Section 254 (1) of the Penal Code Act.**

PW1 and PW2 told court that the assailants attacked them and took their bags with one bag containing money, this fact is not disputed.

The prosecution was further required to prove that during the commission of that theft, the assailants used or threatened to use violence. For this ingredient, there must be proof of the use or threat of use of some force to overcome the actual or perceived resistance of the victim. PW1 told court that that they wrestled with the assailants, this fact is also corroborated by the evidence of PW2. The prosecution has proved that there was use of violence or threat of use of violence

The prosecution was further required to prove that immediately before, during or immediately after the said robbery, the assailants had a deadly weapon in their possession. A **'deadly weapon'** is defined to include any instrument made or adapted to... stabbing or any imitation of such instrument which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person, that it is likely to cause death or grievous harm. A Knife is a deadly weapon because it is made or adapted for cutting or stabbing and used offensively on a person it can cause death. **See: Supreme Court, Kwesimba Vs Uganda SCCA N0. 14/95**). Equally a spray containing an unknown substance is capable of inducing fear in a person.

PW2 told court that he feared that the 3rd assailant had something that looked like a knife, PW2 told court that one of the assailants got a spray and sprayed on her husband while the other assailant had with him a knife. PW1 also told court that one of the assailants sprayed a substance on his body

I am satisfied that the Prosecution has proved beyond reasonable doubt that the commission of the offence involved the possession of a deadly weapon.

Participation

This ingredient is satisfied by adducing evidence, direct or circumstantial, placing the accused at the scene of crime as the perpetrator of the offence. The last ingredient that was required to be proved is that each of the accused participated in committing the offence with which they are indicted. This is achieved by adducing direct or circumstantial evidence, placing each of the accused at the scene of crime not as a mere spectator but active participant in the commission of the offence.

PW1 and PW2 testified that the alleged offence took place in the night which raises the question of whether there was proper identification of the accused persons

PW1 and PW2 claimed to have identified the accused persons as the people who attacked them. The accused persons set up an alibi to the effect that on the night the victims were attacked they were at the home and not at the crime scene. In effect the case for the prosecution depends entirely on the evidence of visual identification of the witnesses which has been a subject of discussion in a number of cases.

In the case of **Moses Bogere and Another Vs Uganda (Supreme Court Criminal Appeal No. 1 1997)** Court stated the approach to be taken by a trial Court in dealing with evidence of identification by eye witnesses in a criminal case and held that the starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of mistaken identity.

In the case of **Abudalah Nabulele & 2 Others Vs Uganda (Court of Appeal for Uganda Criminal Appeal No 9 of 1978)** the following principles with regard to identification were stated;

- a. The testimony of a single witness regarding identification must be tested with the greatest care.
- b. The need for caution is even greater when it is known that the conditions favoring a correct identification were difficult.
- c. Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.
- d. Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the Judge adverts to the danger of basing a conviction on such evidence alone.

The same authority highlights some factors which will assist Court to determine whether the conditions under which the identification is claimed to have been made were or were not difficult. This, according to the case of **Moses Bogere Vs Uganda (supra)** is the starting point. These factors are the length of time the accused was under observation, the distance, the light and the familiarity of the witness with the accused.

PW1 told court that the incident happened at 11pm, he also told court that he was able to identify A1 because of the light that was coming from across his gate from Kiryamuli Primary School. It was also his evidence that the distance from his gate and where the light was coming from is about 5-6 meters. He also told court that the incident lasted for about 30 minutes.

PW2's evidence was to the effect that the incident happened at 11pm and that there was light coming from the nearby school that enabled her identify the accused persons. The prosecution also adduced evidence of an identification parade where in PW3 stated that the accused persons had been properly identified. The accused persons however raised objections to how the identification parade was conducted.

The accused persons also raised the defence of alibi. It is a well established principle that the duty to disprove alibi lies on the prosecution which must disprove the alibi by adducing evidence placing the accused at the scene of crime.

In the case of Moses Bogere and Another Vs Uganda (Supreme Court Criminal Appeal No. 1 1997) the court stated that;

Where the prosecution adduces evidence showing that the accused person was at the scene of crime and the defence not only denies it but also adduces evidence showing that he was elsewhere at the material time, it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and hold that because of that acceptance per se the other version is unsustainable. DW1 and DW2 both stated on the fateful day, they were at their respective homes.

I have considered the circumstances in which the identification was done, I have also taken into account the manner in which the identification parade was conducted. PW1 and PW2 stated in their evidence that there was ample light from the nearby school and that the incident lasted for about 30 minutes. But because of the objections raised by defense counsel about the identification parade, I find it necessary to state the rules governing an identification parade.

The rules governing how an identification parade should be conducted, were stated in *R v. Mwango s/o Manaa* [1936] 3 EACA 29 and emphasized in *Ssentale v. Uganda* [1968] EA 365 and are;

1. That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.
2. That the officer in charge of the case, although he may be present, does not carry out the identification.
3. That the witnesses do not see the accused before the parade.
4. That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.
5. That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.
6. Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.
7. Exclude every person who has no business there.
8. Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.
9. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.
10. See that the witness touches the person he identifies.

11. At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.
12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "Pick out somebody", or influence him in any way whatsoever.
13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

PW3, who conducted the identification parade had this to say;

After receiving these 2 witnesses that is Nantaja and the wife Damalie, I organized a room where I had to put them. They sat in a certain room to avoid them seeing the suspects before the parade is conducted. I organized 3 different parades, because I had five suspects.

Yes, they were somewhere I had sat them in a certain office away from where the suspects were in order not to see the suspects before parade is done.

In the first parade I got 12 volunteers and among them, I placed 2 of the suspects and that was Akena Simon who is A1 in this case and there was another one called Kisa Victor. So, in that parade I briefed the suspects to choose a position they were feeling comfortable to stand, so each of them chose a comfortable position. And after organizing them in a horizontal line, I then sent the cells guard Tumusiime to call Nantaja where I had put him.

Nantaja came and I introduced to him members of the parade, where I informed him that here, is a group of 14 people, where you could find or you may not find one of those people 2 or 3 that had attacked you. So, I told him, you can look around if any of these 14 could be having similar features or could have been among the people that had attacked you.

Nantaja moved around and looked through the 14 people and eventually identified Akena and touched on his shoulder, and I took a photo when he had touched him. And that photo is on file. After that Nantaja was matched now in a separate room not to meet his wife Damalie, before Damalie could also come in.

Then I called in Damalie whom I also briefed the way I did to Nantaja and she had to move around and looked through the parade and again Identified Akena. None of them identified Kisa Victor and hence Kisa was left out.

Kisa Victor was not identified by any of the witnesses who was among the suspects in the same parade. that is the first parade and it was closed.

In the next parade I got 12 volunteers among whom I placed 2 suspects, that is Sekibamu Henry and another one was called Munimu Godfrey. Like I did in the first parade, now the witnesses were in the separate rooms, so, I sent the cells guard who called for me Nantaja, I introduced to him the parade as before, he looked around but he did not identify any.

Then, I called in Damalie the wife to Nantaja, she came in and I did the same procedure. She looked through and after looking through she asked the volunteers on the parade to do some talking and I told them to say why are you here, kneel down, hands up. So she kept on asking each of the people who were on the parade, then when she reached Sekibaamu, she asked me again and again and then she said this is the real voice that was telling us, why are you here, kneel down, hands up. So she basically identified him by voice and she touched on his shoulder and I took a photo to show what she has done.

I then organized the 3rd parade, this had 8 volunteers and one suspect placed among them, and the suspect was Kakembo James following the previous procedure I called in witnesses but none of them identified Kakembo James.

So all in all, out of the 5 suspects we had in custody, 2 of them were identified that is Akena Simon and Sekibaamu Henry. The three were not identified.

In the first parade I decided to remove all their shirts so that they look so uniform to avoid these issues of may be colour of the shirt or what, so, in the first parade I made them bare chest.

The second parade I allowed them to put on shirts but each would choose any shirt he wants, of a friend or whatever to avoid these issues of may be the shirt a suspect was arrested in or not.

After the parade, I recorded additional statements of each of the witnesses to briefly talk about how she or he managed to identify the suspects.

I filled the police form 69 which is an identification parade form and in it I asked the suspects whether they were satisfied the way the parade was conducted and both of them said yes they were satisfied.

I also recorded the identification by the witnesses. I told them to countersign on where they have said yes. I recorded yes and they had to countersign to confirm that is the response they had given me.

For the witnesses, where they had not identified I indicated no, and they had to countersign.

In objection to the above procedure, DW2 testified that on the day they made a parade, a lady came with the CID at the entrance of the cell where they were; the CID called him by name Sekibamu Henry and asked where he was. He was sleeping and he woke up, he came at the window of the cell, when he came at the window, he saw the CID officer with a lady whom he thought was also a police officer and he did not suspect that she was the complainant. That the CID officer told the lady that he was the person who was involved in the robbery. That the CID officer asked the lady whether she had seen me and the lady said yes.

That he was asked to go back to his cell which he did. That after about 15 minutes, they came back and opened the cells and he was told to come out together with other inmates, they walked them to the identification parade and then the very woman who was with the CID before, came and started touching people and when she reached where he was standing she stopped there. OC Police was holding a smart phone and he didn't realize he was taking photos. That after the parade they told them to go back to the cells.

DW1 also testified that he was not happy with how the parade was done reason being that prior to identification parade, he saw a CID officer with a man who came to them. That they stood at the door of the cells and after that within 10 to 15 minutes the parade was mounted and I believe that this CID officer the man came to show that I was a suspect in this matter.

That after they were taken to a parade and we were put in a line. That he was put in people who were short and yet he was taller than them. That the person whom he saw with the CID earlier is the same person who came moving and touching people, and when they reached him he stopped and held him and talked in Luganda then the police officer came and photographed him using a smart phone.

Bearing in mind the guidelines of conducting an identification parade, it is my considered view that the process was flawed for the following reasons that, the witnesses saw the accused persons prior to the parade, the accused persons were never informed or requested to have an advocate or friend available as the identification parade was being conducted, the accused persons were not placed among persons of similar height since it was the testimony of DW1 that he was put in people who were short and he was taller than them and PW3 did not act with scrupulous fairness as he seemed to have coached the witnesses when he asked PW2 whether she had seen the accused person moreover after informing her that this is the person who was involved in the robbery and then went on to ask whether she had seen him and the PW2 said yes. This was contrary to

rule that the officer is not supposed to coach a witness on whom to choose among the paraded suspects. In essence, the officer in charge of the case carried out the identification contrary to the procedure laid above.

The circumstances raise doubt regarding whether the accused persons were properly identified at the scene. Was it that witnesses had already seen the accused persons prior to the parade, was it that the police officer had already informed the witnesses that the accused persons were involved in the robbery that influenced the witnesses. These are serious matters that must be considered especially when the case is relying exclusively on identification evidence.

In cases depending on identification with no other corroborative evidence, the court must be certain that the identification is correct and the possibility of mistaken identity is eliminated. Whatever the case therefore, where there is doubt raised it must be resolved in favor of the accused.

The participation of the accused persons has not been proved beyond the required standard. The accused persons are accordingly acquitted on each count of the offence of aggravated robbery.

They should be set free unless being held on other lawful charges.

I so order.

30/5/2023

JUDGE

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