

UGANDA / JUDGMENT

Uganda v Gidudu and Another (Criminal Session 38 of 2017) [2020] UGHCCRD 161 (18 December 2020)

[2020] UGHCCRD 161

COURT

HC: Criminal Division (Uganda)

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Criminal Session 38 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

CRIMINAL SESSION NO. 0038 OF 2017

(Arising from Criminal Case No. 059/2016; CRB 1714/2016 Mbale)

UGANDA :::::::::::::::::::::::::::::::::: PROSECUTION

VERSUS

A1. GIDUDU ROBERT :::::::::::::::::::::::::::::::::: ACCUSED A2. DAADA
SWALIKI

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] The 2 accused persons Gidudu Robert (A1) and Daada Swaliki (A2) stand indicted with the offence of *Aggravated robbery contrary to Sections 285 and 286(2) Penal Code Act.* It is alleged that on the 09th day of August, 2016 at Namakwekwe Cell, Northern Division in Mbale District, the 2 accused persons and others still at large stole a 42 inch flat screen TV, an HP laptop, an iPhone with its sim card and its charger, a Victoria Beckham Handbag containing shs. 5,050,000/-, 2 Africell modems, a radio subwoofer with 2 speakers, a solar flash light, a flat iron, all valued at approximately shs. 16,750,000/- the property of Akello Irene and at the time of the robbery, they were in possession of a deadly weapon to wit, a

knife.

- [2] The brief facts of the case are that on the 07th day of August, 2016, the complainant/victim with the help of a one Ajok Beatrice and another went to A1's furniture workshop looking for chairs to purchase. At A1's workshop, the complainant/victim identified a sofa set whose price was negotiated but because the victim did not have the agreed price, the payments were deferred to another day.
- [3] A¹ offered his telephone number to the complainant/victim so that when the agreed upon purchase price is got, the victim would be able to call him and arrangements for securing the sofa set would also be made. During the same time, A¹ introduced A² whom he referred to as his son who worked with him at the workshop and who would be able to help the complainant/victim in case A¹ is not available.
- [4] On the following day, the 08th of August, 2016 at around 10:00am, the complainant/victim made a phone call to A¹ to alert him that the purchase price of the sofa set has been secured and would be available in the evening to pay and collect the sofa set.
- [5] At around 04:00pm, once again while in the company of Ajok Beatrice (PW2), they went to A1's furniture workshop to effect payments for the sofa set. A² was at this time not present at the workshop. Upon effecting the payments of the agreed price, they were told to wait as A¹ finally concluded the sofa set by sewing its cushions. As they waited, A¹ started an inquiry from the complainant/victim by asking what appeared to be innocent questions regarding where the sofa set was to be taken, whether the complainant/victim was guarded or married to a police officer or prisons officer and whether the victim was willing to accept his offer of transporting the sofa set to its place of destination. The victim replied all A1's questions save for being married to a security man and also rejected the offer of transport because the victim had already made arrangements for the carriage of the sofa set.
- [6] When transport to carry the sofa set arrived, it was loaded on the pickup but during the loading, A¹ and his colleagues left the workshop leaving the complainant/victim and those loading behind. However, as the victim moved towards Namakwekwe, the destination of the sofa set, she saw A¹ and his other colleagues around the stadium also walking towards the victim's same direction of Namakwekwe. Then, after a few minutes, the victim saw 2 motorcycles follow their pickup that carried the sofa set but because this appeared normal, she ignored the incidence.
- [7] Upon reaching Namakwekwe, the residence of the victim, the sofa set was offloaded and then fixed in the house. At around 08:00pm, the victim closed and locked the entry metallic door of her house and started comfortably to do her work on the laptop. It was a self-contained accommodation that had a sitting room and one bedroom. Then, at around midnight, the victim saw A¹ calling on her phone. The victim wondered why A¹ was calling yet there was no longer any business from him. The victim did

not pick the phone call. As the victim concentrated on work on the laptop, she saw A² enter her bedroom while aiming a knife at her. A² was shouting in various languages which the victim could not understand but was mentioning "money", "money" as the victim also shouted for help. Another person entered and started picking whatever was in the house including the victim's handbag that had shs.

5,050,000/- and certain documents which were related to her work. As she struggled with A² who was aiming to stab her, he ended up tearing the mosquito net on the bed and the mattress, with the help of the knife he held. With the help of the light in the bedroom, the victim was able to see and identify A¹ lift the 42" T. V "LG" brand and take it outside as the other unidentified person picked the other items like the laptop set with its accessories, the flat iron which he took to A¹ who in turn took them outside.

- [8] In the process, the victim managed to throw A² through the bedroom door entrance and he fell on the door in the corridor. The victim was able to successfully close the door by pushing him into the sitting room. That is when the victim realized and felt injured on the shoulders and had cut wounds on the palms. The iPhone apple phone had also been taken, save for the victim's other phone, a nokia which had survived. The victim used it to call mobile patrol police which immediately responded but found when the assailants had left. This is when the victim realized that the radio woofer, a solar torch, 2 Africell modems had also been stolen.
- [9] The victim told the patrol police that the suspects were A¹ and his group and offered them A1's telephone number which they rang but the call was answered by a lady who described herself as A1's wife. The victim also informed a one David who is the caretaker of the premises the victim occupied that the assailants were the very people who had sold her the sofa set.
- [10] The patrol police maintained their presence at the victim's home until morning when the victim went to police and made a statement. At around 11:00am, the victim went with police to A1's workshop whom they found and had him arrested. Later, A¹ led police to his house, but nothing important to the case was recovered. It is when A2 also appeared at police while following up A1, that the victim who was still at police identified him to them and he was also arrested. Police went to his place but recovered nothing, even the short sleeved blue shirt the victim had identified and stated to had been worn by A² during the previous night of the attack was not found.
- [11] In their sworn defence, each of the accused persons denied participating in the alleged robbery but admitted the dealings they had with the victim on the 07th day of August, 2016 and the next day regarding the sale of

the sofa set. Both of them pleaded alibi, that during the night of the attack, they were in their respective homes with their wives and families.

- [12] It is trite that on a charge of *Aggravated robbery contrary to Sections 285 & 286(2)(3)(a) (4) Penal Code Act*, the Prosecution has the burden to prove the following elements beyond reasonable doubt;
 - i. Theft of property belonging to the victim.
 - ii. That the theft was accompanied by use of violence or threat of use of violence.
 - iii. Possession of a deadly weapon during the theft.
 - iv. Participation of the accused persons in the commission of the offence.
- [13] It is incumbent upon the Prosecution to prove all the 4 elements to the required standard, beyond reasonable doubt; *WOOLMINGTON VS. DPP (1935) AC 426* and *SEKITOLEKO VS. UGANDA (1967) E. A 53*. Where the accused person raises a reasonable doubt, either through the weakness of the Prosecution case or by his defence, then, he must be acquitted; *ABDU NGOBI VS. UGANDA, CRIMINAL APPEAL NO. 10/1991 (S. C)*.
- [14] In the instant case, theft of property belonging to the victim, use of violence or threat of use of violence during the theft and possession and use of a deadly weapon during the theft appear not to have been contested by the defence. Needless to say, the complainant/victim testified how the attack took place during the night of 08th/09th August, 2016. One of the assailants was armed with a knife which was used to stab the victim on the palms as clearly reflected in P. F3 (P. Exh. I) where the victim was medically examined and was also found to have sustained cut wounds on the palm (fingers) and had tenderness on the right shoulder. The kind of object that could have caused the injuries was established to be a sharp and blunt object. This clearly corroborated the victim's evidence that the assailant was armed with a knife, and an iron bar was also used to inflict her harm on the shoulders.
- [15] A knife is a deadly weapon within the meaning of *Section 286(3) Penal Code Act* since it is adapted for stabbing or cutting and when used for offensive purposes, it is likely to cause death.
- [16] In this case, the victim's mattress and the mosquito net which were torn by the knife stabs as the victim battled the assailant were exhibited together with the P. F3 form by consent during the preliminary hearing

under *Section 66 Trial on Indictment Act*. The victim narrated to court all the items that were stolen as indicated in the Indictment.

- [17] The totality of the above proved beyond reasonable doubt that there was theft and use of violence or threat of use of violence by the assailants of which one of them had a knife that was used to inflict the injuries sustained by the victim.
- [18] The next issue and most important one is whether the accused persons participated in the robbery.

- [19] This case wholly depends on the identification by the victim of the assailants. It is the evidence of the complainant/victim that during the attack, there was electric light from the bedroom where the victim was comfortably working on her laptop. It is the victim's contention that A¹ and A2 were properly identified by the help of the electric light from the bedroom save for the other 2 persons that were not known to her but were A1's colleagues working at his workshop of furniture where the previous day she had purchased the sofa set from.
- [20] What is astonishing however is that during cross examination, when the statement the complainant/victim had made at police was brought to her attention, the names of the assailants were not revealed. The victim explained that the statement was being recorded by Gishu police officers and that she had been alerted that if the names of the assailants are revealed, police will tip them off. She however insisted that the names and the telephone number of A1 was offered to the patrol police officers who arrived at the scene first during the night of the attack and when the A¹ phone number was rang, it was received by A1's wife. A1's wife, Nabulo Juliet who testified in defence of A1 as A1/DW3 admitted to this. The victim stated that nevertheless, the names of the assailants were revealed in the additional statements which were recorded by a non Gishu officer, Tabingwa (PW3). The victim's statements were admitted in evidence as D. Exh. I. Upon perusal of the statements, this court was able to indeed find that the additional statements which were recorded about 2 hours from the 1st statement were recorded by Tabingwa (PW3). In the additional statement however, A¹ still, is not named as one of the assailants. It is only A² who A¹ introduced as his son that is named as the one who attacked the victim with a knife. That A² aimed to switch off the light to avoid being seen/identified but failed to immediately locate the switch as the struggle with the victim ensued. The victim mentioned A¹ in the 2nd additional statement which was also recorded by Tabingwa (PW3), a non Gishu officer.
- [21] The question is, why didn't the victim name A¹ during the recording of the 1st additional statement before Tabingwa (PW3) a non Gishu officer if the fear was leakage by the Gishu officers? My view is that A1 was not identified by the victim but mentioned his name as an afterthought. If it were so as the victim explained that A¹ had been identified, his name would have been revealed during the recording of the 1st additional statement. As observed by Justice Musoke – Kibuuka (RIP) in *UG. VS. BENEDICT BYAMUKAMA H. C. CRIM. SESSION CASE NO. 67/2000* at Bushenyi, "... normally and quite naturally, in a crime such as robbery, the first thing to articulate in a complaint to the police or any authority, by the victim of the robbery, would be identity of the perpetrator of the crime where such perpetrator has been identified or is known". This is also my position, unless the identifying witness offers a plausible explanation as to why he/she failed and or declined to reveal the name of the identified perpetrators in his/her statement.

- [22] In *ABDULLA BIN WENDO VS. R. [1953] EACA 166 AND ABDALLA NABULERE & ANOR. VS. UGANDA CRIM. APPEAL NO. 9/1978* both outstanding authorities on identification, it was stated that where the case against an accused depends wholly or substantially on correctness of one or more identification witnesses of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need to caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made, particularly the length of the time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of identification evidence. If the quality is good the danger of a mistaken identity is reduced but the poorer the quality the greater the danger.
- [23] In *UGANDA VS. EDIRISA SSALI & 3 ORS. [1991] HCB 40*, Berko J (RIP) (as he then was) held that police statements taken on caution are not worthless merely because they are not given under oath. At least they can be used to show inconsistency when tendered in evidence to prove

contradictions that have not been admitted. Secondly, that Prosecution evidence which is unreliable and tainted with discrepancies and contradictions cannot be relied on to convict the accused.

- [24] In the instant case, it is my view, after cautioning myself of the dangers of relying on the single identifying witness evidence by the victim, that though the conditions of identification were good, at least in the bedroom of the victim where the encounter with the assailants took place, the conditions for proper identification were difficult in the sitting room. A1 never went to the bedroom as per the victim's evidence. The claim by the victim that the light from the bedroom was enough to enable the victim under attack, while struggling with A2, properly identify the assailants in the sitting room causes some abut of uneasiness. The victim had encountered A1 two times at the workshop, the claim that such was sufficient period to enable the victim master the voice of A¹ also causes some uneasiness. Now, when the above is coupled with the failure by the victim to name A¹ during the recording of both the main statement, which has been explained, and the 1st additional statement, which has not been explained creates doubt in mind that actually the victim identified A¹ and that he therefore participated in the robbery.
- [25] A1 on his part defended himself by raising a defence of alibi. It is the law that once the accused raises the defence of alibi, he does not assume the responsibility to prove it. The burden remains on the Prosecution to lead sufficient evidence placing the accused at the scene by destroying the alibi; *SEKITOLEKO VS. UGANDA [1968] EA 531.*

- [26] The contradiction regarding A¹ stating that on the eve of the robbery he went home with a pint of milk or whatever and ½kg of meat only, and his wife Nabulo Juliet (A1/DW3), stating that A¹ came home with bread and milk is so minor and therefore this court is entitled to ignore it.
- [27] In view of the totality of the above, in disagreement with the gentlemen assessors who advised for conviction of both A¹ and A2, I do find that the Prosecution has not proved its case beyond reasonable doubt that A1 participated in the robbery.
- [28] As regards A2, it is my view that there was sufficient light in the bedroom for proper identification. The victim had known A² before the alleged commission of the offence because A¹ had shown and introduced him to the victim during broad day light at the workshop where the victim was

to later purchase the sofa set. The encounter and struggle during the attack took a long reasonable time. A2 hoped to switch off the light to avoid being identified but he was unable to be very fast and easily locate the switch of the electric light. The scuffle between the victim and A² ensued in the presence of the electric light and the victim had therefore ample time to confirm her identification of the assailant as A2.

- [29] The victim mentioned that the assailant who was armed with a knife was putting on a blue shirt. Both A² and his wife Nabulo Janet (A2/DW3) conceded that indeed, on the eve of the robbery, that is the shirt A² was putting on. Surprisingly, when police and the victim went to search A2's house, this shirt which was on the agenda for recovery, it could not be found. No explanation from the defence as to where this shirt disappeared to. It should be recalled that on 08th August, 2016, A² never appeared at all at the workshop. This means that the victim did not have any opportunity to see him and be able to know how he was dressed. But as conceded by A² and his wife Nabulo, that is the shirt he wore that day. It follows therefore that the victim was truthful in the description of the assailant she saw during the robbery.
- [30] I noted contradictions in the alibi of A2. Whereas he claimed in his evidence that on the 08th day of June, 2016 when he returned home in the evening at around 09:00pm, he found when his wife had taken a child to Dekke Clinic Cathedral Avenue and that they had 2 children whom she took along with. On her part, Nabulo, A2's wife testified at first that she left home with A2 as they took the child to Dekke Clinic and then he left for work. It should be remembered that for him, A2, he stated that he was not at home. He only returned to find his wife having taken the child to Dekke Clinic. Then, his wife, during cross examination, she stated that she had left the younger child with her mother at the shop. A² stated that she went with both of them. In re-examination, she revealed that actually, she left the younger child with her sister behind at home as she went to the clinic.

- [31] The above contradictions and inconsistencies point to the untruthfulness on the part of A² and his wife. They programmed their evidence to fit in the alibi. That is why they both dwelt on A² preparing milk for the baby before the wife returned as if that was important in their alibi.
- [32] The situation was made worse when A² in order to show that during the nighttime of the alleged robbery he was at home, testified that their neighbor Moses came at around midnight and called them out to help

her wife who was in birth labor. That together with his wife left for Moses' place but for him he remained outside waiting for his wife who was helping in cutting the umbilical cord of the baby but when it came to the evidence of his wife, she stated that both entered the house and congratulated the mother of having safely delivered a baby. She merely prepared for her tea. It was therefore a lie for him to state that he remained outside the house waiting for her to return.

[33] The above inconsistencies and contradictions go to show that A² and his wife were not together on the evening and during the night of 8th/9th August, 2016 when the robbery took place. When the foregoing is coupled with the proper identification of the victim of A², he is placed at the scene of the crime. In agreement with the gentlemen assessors, I therefore find that A² was one of the assailants that attacked the complainant/victim and robbed the household items named in the Indictment. I find that the Prosecution has proved its case beyond reasonable doubt as regards the participation of A². I find him guilty of the offence charged and I convict him accordingly. It is A¹ who stands found not guilty and acquitted. He is to be set free unless there are other lawful charges against him.

Order accordingly.

Dated at Mbale this 18th day of December, 2020.

Byaruhanga Jesse Ruggyema

JUDGE

18/12/2020

18/12/2020:

2 accused persons present. Mr. Mulirofor State. 2 Assessors present. Ms. Luchivya for Counsel Kanyago and Obedo for defence. Mr. Masola: Clerk.

Court:

Judgment delivered in the presence of the above.

Byaruhanga Jesse Rugyema JUDGE**State:**

This is a grave offence carrying a maximum sentence of death. The victim suffered grievous harm and lost valuable property all valued at shs. 16,750,000/- and this offence is rampant in this area. I pray for a deterrent sentence of 25 years. I also pray for compensation as under *Section 286(4) Penal Code Act* for the victim of the money and property stole. That is all.

Ms. Luchivya:

The convict is a first offender. He is aged 36 years, carpenter and capable of making use of his life outside prison. The convict has a wife a 2 young children who need care of a father. He has also been on remand since September 2016, approximately 5 years. The 5 years have been good enough for the convict to reform. I pray that it be put into consideration. I object to the prayer of compensation because there is no way he can pay it while in prison. We therefore pray for a lenient sentence.

Court:

The accused is a 1st offender aged 36 years and who has been on remand pending trial since 07th September, 2016. It is evident that he has a young family. On the other hand, I find it extremely out of order for the accused of his age with work to do as a carpenter, follows up his customers and does what he did! The offence of Aggravated robbery is a grave one carrying a death sentence as the maximum. The offence is rampant in this area. Surely, the aggravating factors in this case outweigh the mitigating factors. This court nevertheless has to be considerate of the accused's situation. In the circumstances, after considering all the above, I do sentence the accused to 20 years imprisonment. However, since he has been on remand since 07th September, 2016, he is to serve a sentence of 15 years and 9 months.

As required by *Section 286(4) Penal Code Act*, this court is mandated to award compensation to the victim of the robbery who suffered loss as a result of the robbery. The value of the items stolen during the commission of the offence was not contested. In the premises, the convict upon expiry of the sentence, he is to pay a sum of shs. 16,750,000/- to the victim. Akello Irene. In addition to the foregoing, the convict shall be subject to police supervision as required *by Section 124(1)(5)(a) Trial on Indictment Act* for a period of a year whereby he

shall have to report to Mbale Police Station once a month. Order accordingly. Right of appeal explained.

Byaruhanga Jesse Rugyema JUDGE

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