

UGANDA / JUDGMENT

Uganda v Katerega (Criminal Session Case 92 of 2024) [2024] UGHC 1098 (11 December 2024)

[2024] UGHC 1098

COURT

High Court of Uganda

BEFORE

David S.L. Makumbi, J

CASE / FILE NUMBER

Criminal Session Case 92 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KASESE

HCT-25-CR-SC-0092-2024

UGANDA=====PROSECUTOR

VERSUS

KATEREGA VICENT=====ACCUSED

BEFORE JUDGE DAVID S. L. MAKUMBI

JUDGMENT

REPRESENTATION:

Chief State Attorney Harriet Adubango for Prosecution

Chan Geoffrey Masereka for Accused on State Brief

BACKGROUND:

The indictment in this case is for Aggravated Robbery contrary to Sections 266 and 267 of the Penal Code Act.

The Prosecution case is that on the 13th day of September 2023 at Umoja Cell in Kasese District the Accused and others at large robbed one Kule Moris of UGX 75,000 and one Nokia Mkopa C32 Mobile phone worth UGX 800,000 and threatened him with a panga.

The Victim Kule Moris identified the Accused at the scene and this led to the Accused's subsequent arrest.

The Accused pleaded not guilty to the indictment and opted to give unsworn evidence in his own defence and not to call witnesses at the close of the Prosecution case.

ANALYSIS OF THE EVIDENCE:

According to the time-honoured case of **Woolmington v DPP (1935) AC 462**, the Burden of Proof in criminal trials is always on the Prosecution. In that regard the Prosecution always has the duty to prove each of the ingredients of the offence and generally speaking the burden never shifts onto the accused except where there is a statutory provision to the contrary.

It is equally trite that proof beyond reasonable doubt does not mean proof beyond any shadow of doubt.

The determination of whether or not the burden and standard of proof have been discharged is based on the Supreme Court decision in **Abdu Ngobi v Uganda – Criminal Appeal No. 10 of 1991** where it was held that,

“Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weaknesses of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt.”

Section 266 of the Penal Code provides that any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.

Section 267(2) of the Penal Code Act provides that notwithstanding subsection (1)(b), where at the time of or immediately before or immediately after the time of the robbery, an offender is in possession of a deadly weapon, or causes death or grievous harm to any person, the offender or any other person jointly concerned in committing the robbery, shall on conviction by the High Court, be liable to suffer death.

In the case of **Uganda v Mawa alias Matua (1992-93) HCB 65** it was held that to secure a conviction in aggravated robbery, the prosecution must prove beyond reasonable doubt that there was use of or threat to use a deadly weapon at or immediately after the theft and that the accused participated in the commission of the robbery

For the Accused to be found guilty of Aggravated Robbery the following ingredients must be proved beyond reasonable doubt by the Prosecution.

1. Theft – In proving theft the Prosecution is expected to prove the following: (see **R v Turner (No.2) [1971] 1 WLR 901**)

2. Taking of property belonging to another
3. Lack of consent or claim of right
4. Intention to permanently deprive another person of property
5. Participation of the accused
6. The Accused used or was in possession of a deadly weapon
7. The Accused participated in the offence

The Prosecution led evidence from two witnesses:

PW1 Kule Morris the Victim testified that he is a boda boda rider residing in Umoja Celll and that he knew the Accused as Kagaba and that he was a neighbour in Umoja Cell.

PW1 went on to testify that on 13th September 2023 he got a passenger at around 8.20PM in Nyakasanga. He had then ferried the passenger to a location near Uganda Martyrs playground. Once he had dropped the passenger he heard a person who he later determined to be Kagaba calling out for a ride at the playground. Once Kule had approached the Accused, the Accused had grabbed him by the scarf at around 8.30PM while they were discussing price.

PW1 went on to testify that the Accused whom had always known as a neighbour pulled out a short panga and put it on his neck. He had then demanded to take the motorcycle or else he would cut PW1. PW1 pleaded for him not to take the motorcycle as it was not his to which the Accused had then ordered him to empty his pockets. PW1 initially handed over UGX 5000 but the Accused had pointed out some people standing near trees at the school and had threatened to call them over to cut PW1. PW1 then removed a phone worth UGX 800,000 that he had purchased on a loan which also contained UGX 40,000 hidden in the cover plus another UGX 30,000 from his back pocket and handed them over to the Accused.

PW1 testified that the Accused had refused him to remove the sim card from the phone and had slapped him on the right cheek warning PW1 that he had taken opium. PW1 had then proceeded to the LC1 Chairman's workshop to report the matter. The LC1 Chairman then referred him to Nyakasanga Police after failing to engage the Accused. PW1 further testified that the Accused had also threatened him with death after he reported him to police.

The Accused was eventually arrested in November 2023 by the O/C in Kizungu where the DPC Nyakasanga had referred the case. The O/C Kizungu took a statement from PW1 and had also informed him that the Accused threatened to cut the O/C.

During cross-examination, PW1 testified that the Accused had threatened him 4 days after the robbery and that the O/C had a prior case against the Accused.

PW1 testified that he was able to see the Accused by means of lights at the school building near the trees which he said were about 80 metres away. PW1 further described the Accused as having worn a black cap, black t-shirt and black trousers. He further stated that he had seen the Accused by means of the headlight on his motorcycle and had heard him speak.

Counsel for the Defence questioned PW1 about contradictions in his statements for which he stated that he was illiterate and had simply signed the statements.

Counsel for the Defence particularly pointed out the inconsistency in the events which PW1 testified about in court. Counsel Masereka queried the witness as to why whereas he had stated in court that the Accused was the only one who assaulted him, he had stated in his Police Statement of 13th September 2023 that the Accused had assaulted him with four other persons. PW1 went on to state that the person who recorded his statement was speaking Luganda while he was speaking Lukhonzozo and so he believed that the person may not have understood him well. Defence tendered in the police statements of PW1 as Defence Exhibits 1 and 2 as evidence of inconsistencies.

I have considered the testimony of PW1 carefully especially given that neither the allegedly stolen items nor the panga were recovered. The law on contradictions and inconsistencies is well settled. Grave inconsistencies and contradictions of the sort that go to the heart of the matter must be resolved in favour of the Accused while minor contradictions or inconsistencies which do not go to the root of the matter may be ignored unless they point to deliberate untruthfulness (see *Alfred Tajar v Uganda EACA Criminal Appeal No. 167 of 1969* affirmed in *Sarapio Tinkamalirwe v Uganda – Supreme Court Criminal Appeal No. 27 of 1989*).

In this matter the inconsistency in the events as testified in court by PW1 and his Police Statement (Defence Exhibit 1) is grave as it goes to the heart of the question of how the robbery took place. Whereas the witness testified in court that it was only the Accused who actively robbed and assaulted him and that the other accomplices were some distance away, he had initially stated to police that the Accused had assaulted him along with the other accomplices. The explanation that there was a language barrier while the statement was being taken may or not be a valid concern but either way the gravity of the inconsistency is such that it can only be resolved in favour of the Accused as it creates reasonable doubt about how or even whether the robbery actually took place.

In addition to the inconsistencies apparent in PW1's testimony there were other details he alluded to that I found to be hard to believe. During the examination in chief he stated that the Accused had pulled out a panga and threatened him with it. It took Court to ask him from where the Accused had removed the panga that PW1 then claimed the Accused removed it from inside his trousers. I found it difficult to believe that a panga no matter how short could be easily concealed and removed from inside a pair of trousers. It was also hard to believe that the Accused would have accomplices who would simply stand some distance away while the Accused committed the robbery.

PW2 No. 50050 Cpl Babala Joseph testified as the arresting officer from Kizungu police post and confirmed that in November 2023 he received PW1 from the O/C in Nyakasanga as they had failed to trace the Accused. He had then gone to the Accused's home with two other officers and PW1 at around 10AM. He went on to testify that when they got to the Accused's home he had confronted them with a panga threatening to cut them. He further testified that he did not know the Accused personally but had received previous complaints about him but the complaints were never followed up. The Accused was arrested a few days after that by one of the officers who had previously accompanied PW2 to arrest him. PW2 testified that the Accused had a pending case of threatening violence in court for which he was released on bail and then re-arrested for Kule's case.

Upon cross-examination PW2 stated that he was neither the arresting officer nor the investigating officer in the case and that he had nothing to show court that the Accused had a panga.

Counsel Masereka contended that no evidence was ever led to prove that PW1s phone was ever stolen and there was similarly no evidence that money had been stolen from him.

Counsel Masereka further contended that there was no evidence of violence in the theft as there was no medical report detailing injuries to PW1 and the scarf that PW1 was wearing was never exhibited. Similarly there was no corroborative testimony of the events of that evening. It was also contended that no panga was produced in evidence and nobody beyond PW1 had seen the Accused use a panga.

Counsel Masereka also contended that the Accused's home was never searched in order to recover any of the stolen items. Furthermore there was nobody in court to corroborate the events of the attempted arrest. Counsel also contested the lighting conditions in terms of identification.

For its part the Prosecution contended that all the ingredients had been proved based on the testimonies of PW1 and PW2. Prosecution particularly pointed out that PW1 had seen the Accused with a panga during the robbery and then when police had initially tried to arrest him he had threatened them with a panga. Prosecution contended that these were not actions of an innocent man.

With regard to the foregoing evidence I noted that the evidence of PW2 was of little value in establishing whether the Accused did in fact commit the offence in question. By his own admission PW2 never investigated the case and even during the one failed attempt to arrest the Accused there is no evidence that PW2 had the presence of mind to search the premises of the Accused. There was therefore no evidence led in court with regard to tracing the allegedly stolen items. I therefore found no sound basis to link the actions of the Accused as testified by PW2 to the offence for which he is standing trial. This is especially since the Accused himself gave unsworn evidence in his own defence in which he alluded to PW2 having direct interest in him over another case. This evidence while unsworn was also consistent with PW2s testimony that he knew about the Accused from previous cases. The Accused's reaction to the attempted arrest cannot therefore be considered as reliable circumstantial evidence that he committed the crime for which he is presently on trial.

Having considered the Prosecution case in its entirety alongside the submissions of the defence it is my considered view that the Prosecution has not led sufficient evidence to establish any of the ingredients of the offence of aggravated robbery against the Accused.

The Prosecution was required to prove theft. In this regard the only evidence that was led about theft came from PW1 whose testimony exhibited grave inconsistencies that only served to generate reasonable doubt. The inconsistencies inherent in PW1s evidence also similarly cast reasonable doubt on the use of a deadly weapon and whether the Accused actually robbed him. The testimony of PW1 needed corroboration especially given the apparent inconsistency between what he was stating in Court and what he initially stated to police.

The Prosecution similarly failed to demonstrate that any kind of investigation had ever taken place and the subsequent findings therefrom. Without evidence of any kind of investigation and findings, this left all the testimony given by PW1 hanging and manifestly unreliable given the grave inconsistencies established by the Defence. Insufficient investigations or the complete absence thereof may not necessarily prove fatal in terms of proving a criminal offence provided that witnesses appearing in Court are consistent and truthful. However, in situations of inconsistency in testimony of witnesses, it is normally the testimony of the investigator concerning their findings that will help Court make up its mind especially concerning the guilt of an accused person. The evidence of police investigators should therefore never be taken for granted.

The value of evidence from police investigators lies in the oft repeated cardinal principle of criminal law that the burden of proof is always on the Prosecution and the Accused ought not to be convicted on the weakness of the defence case but on the strength of the Prosecution case (see *Uganda v Oloya s/o Olovani Omore* [1977] HCB 4).

It is therefore my conclusion that the Prosecution has not proved beyond reasonable doubt any of the ingredients of the offence of Aggravated Robbery against the Accused.

ACQUITTAL:

In light of the analysis above, I agree with the opinion of the Assessor and find the Accused Katerega Vicent alias Kagamba not guilty of the offence of Aggravated Robbery contrary to Sections 266 and 267 of the Penal Code Act.

Katerega Vicent is accordingly acquitted and is free to go unless facing other lawful charges.

Right of Appeal explained.

David S. L. Makumbi

JUDGE

11/12/24

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