

UGANDA / JUDGMENT

Uganda v Lubega & Anor 2 (Criminal Session Case No. 78/89) [1989]

UGHCCRD 2 (29 November 1989)

[1989] UGHCCRD 2

COURT

HC: Criminal Division (Uganda)

BEFORE

Kato, J

CASE / FILE NUMBER

Criminal Session Case No. 78/89

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THE REPUBLIC OF UGANDA

Just

IN THE HIGH COURT OF UGANDA AT KAMPALA

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HOLDEN AT MASAKA

CRIMINAL SESSION CASE NO.78/89

(Original Crim. Case No. MMA.398/85 of Chief Magistrate's Court Masaka).

..... PROSECUTOR UGANDA

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\$\\bigvee\\limits\$ A1. MOSES LUBEGA ACCUSED \$\\check{Q}\$ A2. FRED SUNA

THE HONOURABLE MR. JUSTICE C. M. KATO BEFORE:

JUDGMENT

The accused in this case is Moses Lubega (A1) hereinafter to be referred to as the accused. He is indicted for the offence of aggravated robbery contrary to sections 272 and 273(2) of the Penal Code. He pleaded not guilty to the indictment and set up a defence of compulsion.

The brief facts of the case as established by prosecution are that on the night/ \$15/4/85\$ the accused person together with 4 other people not in court went to the home of one Joseph Kibuka (PW7) at the village of Kasango and while there they robbed his wife Goret Nanono (PW8) of a number of house hold property which included shs. 300,000/=, 8 gomesi, 2 blankets, a sanyo radio, table clothes and other materials. It is also the case for prosecution that at the material time one of the robbers was armed with a gun which the robbers threatened to use. upon the occupants of the house if the house was not opened for them.

Prosecution case essentially rested on the evidence of Nanono (PW8) and her husband: (PW7). The evidence of Joseph Kibuka (PW7) was to the effect that the accused is his friend and brother-in-law. That he was keeping \$300,000/\$ which the accused had entrusted to him for safe custody. That on the

run away to hide where there was a funeral, later on when the returned on the same evening he found his home robbed and his father who was at a different home had been shot; he also testified that on that night a number of homes were robbed in the village.

In her evidence Goret Nanono (PW8) testified that on the evening of \$15/4/85\$ at about 8.30 p.m. she was making beds for her children when she heard gun shots. She put off the light, she then heard the accused calling her husband's name 4 times, when there was no response to that call the accused went behind the house at the window. Lubega (accused) told her to open as those "men wanted to kill him." She opened the house and the accused together with 4 other persons entered. Accused was the first to enter and he told her to start looking for money with him. They looked for the money until they got 300,000/= which the accused handed to one of the robbers saying: "Sirs, the 300,000/= I told you about is here". The accused then started picking things from the house handing them to the other robbers. The things included 3 blankets, 8 gomesi, table clothes and a radio. Those things were put in a bag and the accused carried them out of the house. During the exercise the man with the gun was just holding the gun and did not threaten to shoot any member of the family although on arrival a threat had been made to shoot members of the family if the house was not opened. In her opinion the accused did not appear to be acting under orders.

On his part the accused person agreed with the prosecution witnesses that on that particular night he in fact was in a group of robbers who went and robbed Goret Nanono in the manner described by Nanono herself, but he put up a defence of compulsion. It is his case that he was compelled to take part in the robbery at gun point. According to his story on that night he had taken some cigarettes to one man called Kibale who was in a bar but when he was there the bar was attacked by robbers one of whom was armed with a gun and one was armed with a stick.

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When the bar was attacked, he tried to run through the back door of the bar but when he was there he met the gun man who robbed him of \$1600/\text{\AA}\$ and who forced him back into the bar where he was made to lie down, one of them asked "Is that not the one?" in kiswahili. After that question was put he was grabed by his trousers and dragged out of the bar. He was asked

whether his name was not Lubega "Tight". After the question had been put to him a number of times he admitted that he was the one. He was assaulted and he fell down. Two of the robbers lifted him up then they demanded for 100,000/= from him or else they would kill him. They demanded for the money which he had raised from that day's sale. He told them he had raised \$15,000/\$ = which was at home. At that stage one of them hit him with a stick on the head. They told him that they would kill him but he pleaded with them not to kill him that he had given some money to one person whose name he did not mention. Then they told him to take them to that man's home. He led them to Kibuka's home. On reaching Kibuka's home he was ordered to call Kibuka's name out but when Kibuka failed to respond to his call, he addressed Mrs. Kibuka (PW8) by calling her "mamma Basi". When she answered he told her: "please open and give me money because these men want to kill me" after she had asked him "what is the problem taata Sunday". She eventually opened to them and he was ordered by the robbers to enter; when he entered the house he was followed by 4 robbers. While in the house she collected the money which she gave to him. He gave the money to one of the robbers saying: "here is the money do not kill me". He was ordered to collect things in the house which he did and later he was made to carry the things out. which we will not all the lines in the theory the $\mathcal{L}$ things oil. As he was going away he said: "maama Basi these men are going to kill me." They eventually went to his home where they robbed him of 15,000/= and they demanded for more but he told them that he did not have any more money. From his

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After that he was led to his shop from where they removed some few things which included cigarettes and some boxes of matches. From his shop they proceeded to the home of Iga where the door of Mr. Iga was kicked and he fell inside with it. While he was there he was told to collect some of the compacts which were in the house which he did. From that place he was ordered to carry the things up to a point where one of the robbers told him to say his last prayers as that was the end of his life. But when he put the bag down one of the robbers told him in kiswahili: "kimbiya" meaning "run". From that point he proceeded to the home of Salongo Zuli. He informed him of what had happened to him. He spent a night at that man's home but the following morning he went back to his village where he found villagers looking for him thinking that robbers had killed him the previous night. Eventually a county chief came and took him to the police where the accused was accused of having murdered Girigori because the accused's wife who was Girigori's daughter had deserted him.

Before I proceed to deal with the position of the accused person in respect of whom this judgment is relevant I find it at this stage convenient to deal with the position of A2 Fred Suna. Although this accused's name appears in the indictment and on the file cover, according to the records this fellow was not committed for trial by this court. During the course of the hearing of this case the learned counsel for the state Mr. Mugambe Kiiza pointed out that this accused could have died. This suggestion was confirmed by the evidence of Kibuka (PW7) who testified on oath that Fred Suna had in fact died. Since this Fred Suna was never committed for trial, and he is said to be dead, this court can conveniently conclude that his name was improperly included in these

proceedings and for the sake of putting the record straight Fred Suna's name is to be struck off from these proceedings. So I order. But should be surface somewhere at a later stage, the state shall be free to proceed with him in a separate case as he has not been acquitted in this nontinul

I now turn to the actual issues in this case. With due respect, I would like to express my agreement with the defence counsel Mr. Segirinya when he said in his brief submission that it is not in dispute or in doubt that robbery was committed on the night of 15/4/85 at Kasango Trading Centre by a gang of armed robbers to the prejudice of the complainant Goret Nanono. According to the evidence given in this court by both sides, it is also my finding that the present accused did in fact participate in that robbery. The pertinent question which this court must answer however, is whether the accused was freely participating in that robbery. In other words can the defence of compulsion raised by the accused be sustained. It is trite law that the burden of proving the guilt of an accused person lies upon the prosecution throughout and it never shifts to the accused: *Woolmington v DPP* (1935)AC 462. This principle of the law has been interpreted to mean that where a defence has been raised by the accused the prosecution has the duty to negative such defence and the accused does not bear the burden of proving such defence: *Chan Kanov R* (1955) AC 206 (see also: *Introduction to Criminal Law* by Cross and Jones 6th Edition at page 63) apart from the defence of insanity which the accused must prove.

In the instant case the defence relied on the provisions of section 16 of the Penal Code which reads as follows: .

> ^{\$H\$}A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence."

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As stated above it is the duty of prosecution to negative this defence by calling evidence to the contrary. In deciding whether this defence is available to an accused person the court must go by the evidence as adduced in court. In the present case the salient facts as may be gathered from the evidence of the accused which was given on oath and that of Kibuka (PW7) together with that of Nanono herself, (the complainant) are that the accused and Kibuka at whose home the robbery was committed are not only great friends but they are also brothers-in-law; the accused having married Kibuka's sister called Annet. When the robbery was taking place at the home of Mr. Kibuka the accused was fully aware that 300,000/= belonging to him had been kept in that home as he had been informed by PM7 that very evening of the presence of that money. According to the evidence of Nanono the accused and herself are the ones who searched for that money in the house and when it had been found the accused handed the money to the other members of the gang. When he was giving this money to the gang he used the words "sirs here is the money which I \$\\quad\$. told you about" or words to that effect. Again according to the evidence of Nanono when the accused arrived with the other robbers he called her husband's name 4 times

and said something like: "give these men money otherwise they will kill me". According to her evidence and that of the accused it was the accused $\text{\textit{who}}$, was collecting the goods in the house and after the goods had been put in the bag the accused was made to carry them out. The other robbers apparently were not participating in all these activities. The 2 gentlemen assessors who assisted me in this case were of the view that these acts of the accused could not be said to have been acts of a person who was acting freely. $\text{\textit{I}}$ agree with them (assessors) on that point. It is also to be remembered that the accused being a friend of the family and brother-in-law of the complainant's husband could not have freely and prominently participated in the robbery in the way he did.

Under normal circumstances, he would have kept out of sight to avoid any future identification. It must also be said that apart from accused's 300,000/= robbed from the home of Mr. Kibuka, the accused had on his person 1600/= which was robbed from him at the bar and 15,000/= robbed from his home on the same night and by the same gang.

As it was again pointed out by the gentlemen assessors, it would have been a very strange thing for the accused to have participated freely in the robbery in which his own property was also robbed. The prosecution has not been in a position to prove by evidence that the accused was not grabbed at gun point and assaulted by robbers while at the bar. When leaving Nanono's home the accused told Nanono "maama Basi these men are going to kill me" which means the accused was certain that his life was in a real danger of destruction. The accused in his detailed evidence narrated as to how he was released by his captors after he had been made to say his last prayer, and how he returned to the village only to find the villagers worried that he had been killed the previous night, I do not think that if this man had robbed the villagers the previous night he would have returned to the same village the following day. I agree with the defence counsel's submission that none of the stolen property was traced to the accused.

The accused impressed me as a person who told the truth. He was quite steady in his evidence and he was not shaken by the cross-examination nor was his evidence challenged by any of the prosecution witnesses. Nanono's opinion that the accused did not appear to be acting under compulsion was not supported by any material fact. Considering all the circumstances of this case I must hold that defence has successfully proved that the accused acted under compulsion within the meaning of section 16 of the Penal Code. Prosecution has failed to establish the contrary. The accused cannot be held criminally

This case must be clearly distinguished from the case of: *Ezira Kyabanomaizi and others v R* (1962)EA 309\$ in that in the present case the accused himself was a victim of robbery unlike in the above case.

In full agreement with the opinion of the two gentlemen assessors I find the accused person Moses Lubega not guilty as charged and I do acquit him of the offence of aggravated robbery. The accused is to be set free unless he is being held in custody for some other lawful purposes.

C. M. KATO JUDGE. \$29/11/89.\$

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