

UGANDA / JUDGMENT

Uganda v Tagaba and 2 Others (HCT-00-CR-SC 644 of 2018) [2022] UGHCCRD 137 (9 May 2022)

[2022] UGHCCRD 137

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

HCT-00-CR-SC 644 of 2018

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT
KAMPALA HCT-00-CR-SC-0644-2018****UGANDA PROSECUTOR****VERSUS**

1. **TAGABA SWALIKI**
2. **KATO REMMY ACCUSED**
3. **KASULE JOHN FREDERICK**

BEFORE: THE MR. JUSTICE MICHAEL ELUBU**JUDGEMENT**

The accused persons **TAGABA SWALIKI**, **KATO REMMY** and **KASULE JOHN FREDERICK** were indicted with the offence of Aggravated Robbery contrary to sections 285 and 286 (2) of the **Penal Code Act**.

The particulars of offence in this indictment state that the accused persons with others at large on the 13th day of April 2018 at Kireka 'B' village, Kira Municipality in Wakiso district robbed **DAMBA BRUHANE** of cash two hundred and twenty thousand (Shs 220,000/=), a Dell Laptop, wrist watch, shoes, silver necklace all valued at 2,270,000/= and immediately before during or after the said robbery caused grievous harm to the said Damba Bruhane.

All the accused persons pleaded not guilty at the arraignment thereby bringing the elements of the offence into issue. The prosecution called 4 witnesses while the accused persons all opted to keep quiet when put to their defence.

The brief facts for the prosecution are that the victim Damba Bruhan is a produce dealer. On the 13th day of April 2018 he returned from Kamuli at about 3.00 am. He was travelling on a lorry used to carry produce. He got off at Kireka near the DFCU bank. He used a corridor next to the bank to cross towards his home. As he walked through that corridor, he was accosted by three men he identified as the assailants. He was assaulted severely and punched in the mouth losing a tooth. The victim was carrying a Dell laptop in a laptop bag which were both taken. His wrist watch, shoes, silver necklace and cash Shs 220,000 were also stolen.

Damba was medically examined and the report tendered as PE 1.

Damba testified that he was able to identify the perpetrators and reported to the police who tracked down and arrested the accused persons who were then charged with this offence.

It is trite law that in criminal cases such as this the burden of proof rests with the prosecution which must prove all elements of the offence to a standard beyond reasonable doubt (see **Okethi Okale Vs Republic** [1965] 1 E. A. 555 at 559).

The offence of aggravated robbery is provided for in Section 285 and 286 (2) of **The Penal Code Act**. The sections state:

Section 285

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 286 (2)

Notwithstanding subsection (1) (b), where at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death.

The essential elements of the offence of Aggravated robbery are:

- 1. theft of property;
- 2. use of; or threat to use violence;
- 3. causing of grievous harm;
- 4. the participation of the accused.

The first element is theft which is complete when something is taken from another, without a claim of right, with the intention of permanently depriving the owner of the thing taken (see S.254 of the Penal Code Act).

It is the evidence of Damba - PW 1 that he had several items on him when he was accosted. He was carrying a laptop in a lap top bag strapped to his back. They removed his shoes and the necklace that he was wearing. Inside his pocket was 220,000/-. All these items were taken.

There was no evidence to dispute the allegations of the complainant regarding his property. I am satisfied that these items belonged to Damba and were taken from him permanently thereby proving theft.

The next elements are use of violence; and the causing of grievous harm which I have dealt with jointly.

It was the testimony of PW 1 that as he walked through the corridor next to DFCU bank on his way home on the 13th of April 2018, he was attacked by several people. That one punched him on the head from the back, as he turned to see who had hit him, another blow was landed on his mouth. That he fell down on his bag trying to stop people taking it, they continued to hit him. One used a hammer to hit his foot at the back of the heel. That he started bleeding and realised that he had lost a tooth. After the assailants had left with his property, he was taken to Quality Care clinic for treatment.

On the 20th of April 2018, the victim was examined Senior Medical Clinical officer who filled in Police Form 3A. It was found that PW 1 had bruising on the forehead, mouth and knee and nose. He lost his upper left canine tooth. The injuries appeared to have been caused by blunt objects using external force. Because the loss of the tooth was deemed to be a permanent disfigurement, the injury was described as grievous harm.

The Penal Code describes any harm which amounts to permanent disfigurement as grievous harm.

On the other hand, according to the 8th Edition of **Black's Law Dictionary**, violence is the use of physical force unlawfully exercised with intent to harm.

Here the victim lost his tooth and states both his eye and leg were left very swollen. He showed the court a scar at the back of the heel where he was hit. He has a gap in the mouth where he lost the tooth.

There has been no evidence adduced to dispute or discredit the evidence of this attack and injuries suffered. In the result I find that the victim suffered the unlawful use of brutal physical force leading to permanent loss of a tooth. For those reasons the second and third element of the offence is proved.

The last element is participation.

The victim was the prosecution's sole witness respecting identification. It is his evidence that when he alighted from the vehicle at 3.00 am he walked through the corridor next to the DFCU bank in Kireka. It was in this corridor that he was attacked. That as he walked, he met two people, A1 Swaliq and A2 Kato. They asked him where he was coming from, however before he could answer, A3 Kasule hit him on the head from behind. Then as the victim turned to look at A3, Swaliq (A1) hit him in the mouth. He states that there was light from the bank that lit the corridor and by that light he identified his assailants.

Looking at PE 4, the sketch plan drawn by PW 2, the scene of crime is marked as XXX, a point just after the corridor but before the railway line.

This court has noted that PW 1 was a single identifying witness.

Subject to certain well known exceptions any fact including identification, may be proved by a single witness.

The court is alive to the danger that such a witness may be honest but mistaken and also persuasive. I warn myself, as I warned the assessors, of this danger.

When commenting on reliance on a single identifying witness, The East African Court of Appeal in **Roria V R 1967 E. A. 583** held that that danger is, of course, is greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

It is for this reason that the court must examine the circumstances for the quality of the identification to eliminate the possibility of mistake by examining the light conditions, the length of time the subject was under observation, the familiarity of the witness with the subject and the distance from which identification was done (See **Abdalla Nabulere and Ors V Ug Cr App 1/1978**).

Turning back to the instant case, the victim Damba states that he knew A1 as he had been seeing him in the area for more than two years before he was attacked. In the case of A2 and A3, he saw them for the first time on the fateful day.

He also testified that there was electric light at either corner of the bank and it was this light that enabled him identify the assailants. The fact that he was closely assaulted also indicates that the assailants were close enough to make bodily contact.

In her submissions, counsel for the accused person attacked this evidence stating that the robbery, as indicated on the sketch map, had occurred near the railway and not in the corridor. That there was no light near the railway and it was therefore not possible that Damba identified his assailants. This evidence in my view does not challenge the question of light. There was nothing to dispute the fact that the light from the bank would illuminate the spot where the robbery occurred.

Secondly, it was submitted that the victim did not identify his assailants but only named persons whose names were given to him by others immediately after the attack. That it was Bashir his friend, who when he learnt that the victim was attacked in the corridor near the bank said it must have been Swaliq, Kato and Kasule who attacked Damba.

The evidence on record is that the victim stated that he properly identified his assailants. That he also described them to a friend called Bashir shortly after the attack. From the descriptions Bashir stated their names but it was only after the description made by the victim. PW 1 also stated that he went along with the police to arrest A2 and A3. It was after visiting their hideout three times in one day that they eventually arrested accused persons. They were found at the back of a video hall and it was he who pointed them out to the officers.

In the circumstances it was not therefore the case, as submitted, that there were discrepancies in the evidence that raised doubt in the identification.

For those reasons I find that all three accused persons were properly placed at the scene of crime by the identification made by the victim.

In agreement with the assessors, and as all elements of the offence have been proved against the accused persons, I hereby find that,

- 1. **TAGABA SWALIKI,**
- 2. **KATO REMMY and**
- 3. **KASULE JOHN FREDERICK**

guilty of the offence of Aggravated Robbery contrary to Section 285 and 286 (2) of the Penal Code and accordingly convict them.

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MICHAEL ELUBU

JUDGE

9.5.22

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