

UGANDA / JUDGMENT

Uganda v Walukaga (Criminal Session Case 140 of 2023) [2024] UGHC 664 (10 June 2024)

[2024] UGHC 664

COURT

High Court of Uganda

BEFORE

Bukirwa, J

CASE / FILE NUMBER

Criminal Session Case 140 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT JINJA CRIMINAL SESSION CASE NO. 140 OF 2023

UGANDA ::::::::::::::::::::::::::::::::::

VERSUS

WALUKAGA MATHIAS::

BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

JUDGMENT

Walukaga Mathias herein later referred to as the accused persons was indicted with 2 (two) Counts of Aggravated Robbery contrary to Sections 285 and 286 (2) of the Penal Code Act Cap 120. However, in a Ruling dated 18th April 2024, a prima facie case was made out against the accused person for only one count of Aggravated Robbery.

The particulars of the offence are that the accused person, Walukaga Mathias, on the 4th day of June 2021 at Buwenge Mpya Zone in Kamuli District stole cash UGX. \$495,000/\$ = (Four hundred ninety-five thousand shillings), the property of Balondemu Edgar and at the time of the theft used deadly weapons to wit stones and sticks on the said Balondemu Edgar.

Background

The background of the case is that on the fateful night of 4th June 2021 the victims, that is, Mitango Pius (PW1) and Balondemu Edgar (PW2) were coming back from a burial at Buwaiswa at around 10:00 pm in a Caribu Vehicle Reg. No. UAH 395Z, that as they approached Buwenge Mpya near K-Club they found some boys aged \$10 - 13\$ years seated in the middle of the road while the other boys aged above 18 stood along the road. That the victims slowed down the car when they saw the boys to inquire from them as to what the problem was. That instead, the said youth came to the car on both sides, turned off the car ignition which stopped the car upon which they started slapping and boxing the victims while demanding for money. It is further alleged that they smashed the windscreen, the back window and fog light of the car while the other boys slapped the victims. That they search both the victims and car and took money

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and all the items in the car including a flash drive. The victims were both able to run away from the scene and sought refuge.

The accused persons were arrested together with three namely; Isabirye Jimmy alias Tom, Wambi Yasin and KAbale Mashid and were all accordingly charged with the said counts of Aggravated Robbery. The other accused persons were acquitted by this court having found that they had no case to answer and it was only the accused person Mathias Walukagga, who was put to his defence for one charge of Aggravated Robbery in Count 2.

Representation

Learned State Attorney David Mugamba represented the State while Counsel Ivan Bamwidhiwa was represented the accused person.

The Prosecution called a total of six (6) witnesses namely, Mitango Pius (PW1), Balondemu Edgar (PW2), Detective Constable Waisswa Saidi (PW3), Buwoya John (PW4), Waira Stephen (PW5) and Wakwesa Stephen (PW6). The accused on the other hand gave his sworn evidence and was the only witness for the defence.

Burden of proof

The prosecution has the duty to prove all the ingredients of the offence the accused person is charged with. This is because the law presumes an accused person innocent until he pleads guilty or is proved guilty based on the evidence adduced by the prosecution. See Woolimington vs DPP 1935 AC 322.

The standard of proof is beyond reasonable doubt. The accused person should only be convicted on the strength of the prosecution's case and not on the weakness of the defence.

Consideration by Court

The offence of Aggravated Robbery is provided for under Section 285 and 286 of the Penal Code Act,

Section 285 of the Penal Code Act defines Robbery states;

"*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."

Whereas Section 286 (2) of the Penal Code 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.*"

The ingredients of the offence of aggravated robbery, as set out by sections 285 and 286 of the Penal Code Act above, are as follows;

- a. That there was theft of property.
- b. That at or immediately before or immediately after the time of stealing there was use or threatened use of violence to the complainant or the property in order to retain the thing stolen or prevent or overcome resistance.
- c. That at the time of or immediately before or immediately after the time of robbery the offender is in possession of a deadly weapon or causes death or grievous harm to any person.
- d. That the accused participated in the theft of the thing that was stolen.

It is trite law that all the above ingredients ought to be proved beyond reasonable doubt.

Therefore, failure to prove one of the ingredients is fatal to the prosecution. See *Walakira Abas and others vs Uganda*; Supreme court criminal appeal no. 25 of 2002.

I will now consider the prosecution's evidence in proof of the ingredients of the offence of aggravated robbery.

Whether there was theft of property \$1.\$

Theft is defined under section 254(1) of the Penal Code Act as follows;

"A person who fraudulently and without claim of right takes anything capable" of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to *steal that thing.*"

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In this case, it is alleged that on the 4th day of June 2021 at Buwenge Mpya, cash amounting to UGX. 495,000/= (Four hundred ninety-five thousand shillings) the property of Balonemu Edgar was stolen from him.

To prove this ingredient, the prosecution relied on the evidence of PW2 Balondemu Edgar who testified that on the day of the incident he had in his possession cash amounting to UGX. \$1,500,000/\$ = (One million five hundred thousand shillings) in an envelope. That he had given PW1 Pius Mitango Ugx. \$1,000,000/=\$ of the UGX. 1,500,000/= and was left with UGX. 500,000/=. That on the way to the burial, he bought a drink that cost him UGX. \$5,000/=\$ and remained with only UGX. \$450,000/\$ =. This evidence was corroborated by PW1 who confirmed that PW2 had given him UGX. 1,000,000/\$ =. PW2 further testified that three youth came to the side of the car where he was seated and slapped him in the face upon which he lost consciousness for a few minutes. That the boys searched him and took UGX. \$495,000/\$ = which he was left with. The defence did not discredit this evidence during cross examination.

I have evaluated the above evidence in respect of the alleged theft, in all theft cases, the offence is sufficiently proved upon proof of the fraudulent taking or conversion of any item that is capable of being stolen. I therefore find that PW2's money was taken without his consent and it was taken fraudulently. The prosecution has proved this ingredient beyond reasonable doubt.

\$2.\$ Whether there was use or threatened use of violence

The prosecution evidence in this respect was that the victims were physically assaulted and that PW2 sustained dangerous harm on his body.

Violence is defined in Black's Law Dictionary to mean unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury.

PW2 told court how he was also slapped upon which he lost consciousness for a few minutes. It was further his evidence that the boys also smashed the windscreen and the back window of the car in which he travelled. Pictures of the damaged car were admitted as PEX 2.

PW5 Waira Stephen the medical personnel confirmed that PW2 was assaulted and the cause of the injury was a blunt object. He classified the injury as dangerous harm. Police Form 3 on which the medical examination for Balondemu Edgar was recorded as admitted as PEX.8. He testified that the

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victim was in severe pain, looked sick and experienced multiple body tenderness, swelling around both eyes and oozing of blood from the eyes. That his clothes were soiled and torn and his injuries were classified as dangerous harm.

The medical report in my view corroborates PW2's testimony specifically that he was violently assaulted. The prosecution's evidence analysed as a whole including the testimonies given and the exhibits produced in court are indicative of the fact that there was both threatened and actual use of violence against the victim. I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

\$3.\$ Whether the accused persons were in possession of a deadly weapon

A deadly weapon is any instrument made or adapted for stabbing or cutting and any imitation of such instrument, or any substance 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, or any substance intended to render the victim of the offence unconscious. See section 286(3)(a)(i) & (ii) of the Penal Code Act.

PW2 in his oral testimony told court that he did not see the boys with anything. However, PW1 in his evidence stated that he saw the attackers with sticks that had nails on them. PW3, Detective Constable Waiswa Saidi who visited the scene three days after the incident told court that he was able to find stones at the scene and also in a nearby corridor where Balondemu (PW2) had run to seek refuge from the attackers. It was further revealed by PW3 that the stones were used to hit the back door of the car, the glass near the back door, the windscreen of the car and the fog lights. However, during cross examination, PW3 told court that he went to the scene three days after the incident which raises the probability of the scene having been tampered with in the days following the incident.

PW5 the medical personnel in his evidence told court that the cause of the injuries sustained by the victims was due to a blunt object. However, none of the victims stated whether any blunt object was used to attack them other than being slapped and boxed. PW1 stated that the assailant had sticks that had nails on them which caused him fear and consequently he run for his life.

From the evidence adduced, it is evident that the attackers were carrying sticks with nails on them, they smashed the windscreen and destroyed the glass of the window using stones as per the scene of crime and sticks. According to PF 3,

the object used to cause harm and dangerous harm on to PW1 and PW2 specifically was a blunt object which was not specified. Nonetheless, stones used in destroying the car were produced in evidence as PEX3.

Counsel for the state in his submissions stated that from the definition of a deadly weapon, it gives a wider interpretation of a deadly weapon to include but not limited to any instrument when used for any offensive purposes is likely to cause death. It is no doubt that the stones, long sticks and nails fit in within the definition of deadly weapons if used for offensive purposes like in the present case.

In the case of **Wasajja v Uganda** (1975) EA 181 where a deadly weapon was defined as follows:

"The vital consideration is that the weapon must be shown to be deadly in the *sense of "capable of causing death."*

I concur with the prosecution submission that stones are without doubt an instrument and, when used for offensive purposes, would most likely cause death. Under the provision, the mere possession of a deadly weapon at the time of or immediately before or immediately after the time of robbery is enough as an ingredient of the offence.

What remains in issue is whether the accused was in possession of the deadly weapon as required by this ingredient of the offence. It was PW2's testimony that he saw the accused person at the crime scene holding nothing. This clearly demonstrates that the accused person had no deadly weapon in his hands in this case having been either a stone or sticks with nails on them that were used to attack the victims. I therefore find that the prosecution has not proved this ingredient against the accused person beyond reasonable doubt.

\$4.\$ Whether the accused person participated in the commission of aggravated robbery

In determining the issue of participation, the court must examine all the evidence closely bearing in mind the established general rule that an accused person does not have to prove his innocence. And that by putting forward a defence of alibi or any other, an accused person does not thereby assume the burden of proving the defence except in a few exceptional cases provided for by Law.

It is upon the prosecution to disprove the defence of the accused person by adducing evidence that proves the commission of the offence by the accused person despite his or her defence. See *Sekitoleko vs. Uganda* [1967] EA 531.

PW2, the victim herein, told court that it was about 10:00 om when they were attacked by a gang of boys. His evidence is that on that fateful night, three boys came to the side of the car where he was seated and that one of the boys slapped him in the face upon which he lost consciousness for a few minutes. That he then opened the car and run into a corridor near a wholesale shop neighbouring a bar called K Club. He further testified that there was lighting at the scene from the street lights and also from the car lights. That he was able to identify one of his attackers as Mathias Walukagga, the accused person herein, who stood about 1.5 metres from the car and was known to him in the community. He told court that the accused was holding nothing in his hands and could not remember what he did to him.

PW6 stated in his evidence that on 5th June 2024 he went to conduct an operation in respect of robberies that had happened in Buwenge Mpya under CRB 558/2021 and CRB 591/2021. That together with his team, they managed to arrest over 8 people including Isabirye, Hassan, Walukagga, Sula, Wambi and other people whose names he could not recall whom they had found smoking marijuana upon which they were taken to Kamuli Police Station. PW6 could not identify the accused persons in court and further testified that they did not find any stolen property in the possession of any of the accused persons.

The accused Mathias Walukagga gave sworn evidence and completely denied the commission of the offence of Aggravated Robbery. He further stated that on the 4th day of June 2021, he had gone to attend the burial of his employee Guster in Buguwa. It was further his testimony that on 5th June, 2021, he returned to the deceased's home in Buwenge Mpya at about 6:00pm and that at about 8:00pm while he was going to his mother's home at Namalembe he was intercepted by police car around county club in the area between Namalembe and Buwenge Mpya. That the police beat him up and later took him to Kamuli CPS where he was charged with the offence of Public Nuisance but was later arraigned that PW2 Balondemu Edgar did not see him at the scene and as such this could be a case of mistaken identity. Thus, the accused person raised the defence of alibi and total denial of having committed the offence.

By setting up the defence of alibi, the accused does not assume the burden of proving the alibi. The duty lies on the prosecution to disprove the defence of alibi and place the accused at the scene of crime as the perpetrator of the offence. See *Festo Androa Asenua vs. Uganda*, SC Criminal Appeal No. 1 of 1998.

To disprove the defence of alibi raised by the accused, the prosecution relied on the evidence of PW2 who testified that he identified the accused at the scene of the crime. In this case, both PW1 and PW2 testified that the alleged offence took place in the night at about 10:00pm which then raises the question of

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whether there was proper identification of the accused person herein by PW2. The prosecution submitted that all the principles as regards identification of the accused were clearly met. However counsel for the accused person prayed that the accused be acquitted.

The established principles with regard to identification evidence were laid down in the case of *Abdallah Nabulere & Anor vs. Uganda* Criminal Appeal No. 9 of 1978. The court had this to say:

"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need for 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, particularly, the length of 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 the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger."

PW2's evidence is that the robbery took 5 to 10 minutes and that with the help of street lights and the car lights, he was able to identify the accused person at the scene. The Scene of Crime Officer, PW3, also corroborated the fact that there were street lights at the scene of crime. Further to the

above, PW2 stated in his evidence that he was able to identify the accused person considering that he stood 1.5 metres away from where he was and that he personally knew him before the incident for a period of about one year having been village mates. It is the prosecution's submission that the error of mistaken identity as raised by the accused in his defence is next to zero.

It is no doubt that the robbery took place at night at about 10:00pm. PW2 told court that he was slapped by the assailants and lost consciousness for a few minutes and that his sight became unclear as a result. He further testified that upon regaining his eyesight, he opened the door of the car and run away. During re-examination by the State, he clearly told court that he was able to identify the accused person after the slap. The evidence leaves court with doubt as to whether PW2 the victim was in position to clearly identify the accused person notwithstanding that he was known to him before the incident. He further told court that upon regaining his eyesight, he had to run out of the car which meant his attackers were still there. The question is at what point at the time was he in position to clearly identify the accused under such circumstances of the time.

The prosecution did not adduce evidence to corroborate this particular piece of evidence adduced by PW2. Although the police conducted a search as testified by PW6, no stolen property was recovered from the accused person.

In Bogere Moses vs. Uganda [1998] UGSC 22 court stated that;

"By any standards, the conditions described in the evidence in this case were not quite conducive for easy identification of the attackers. We would not wish to give the impression that frightened victims of attack cannot identify their attackers nor that if one, in the panic of the moment fails to identify his attacker initially, he cannot recognise him in the safety of hiding. What we wish to highlight, however, is that such are factors that must be taken into consideration in evaluating the evidence in order to determine if conditions *were easy or difficult for identification.*"

This court has the duty to evaluate all the evidence as presented to it to erase any form of mistaken identity."

In the same case of **Bogere Moses vs. Uganda [1998] UGSC 22** it was stated that:

"This court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye witnesses in criminal cases. 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 the possibility of mistaken identity. The court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing the court must consider the evidence as a whole, namely the evidence if any of the factors favouring correct *identification together with those rendering it difficult.*"

PW2's further evidence was that he saw the accused standing about 1.5 metres away, that he did not say anything to him, that he was holding nothing and that he could not remember if the accused did anything to him.

Apart from PW2 the victim herein stating that he saw him at the scene, no further evidence has been adduced to prove that he actually saw the accused participating in the commission of the offence. There was need for the prosecution to look for other evidence which was supportive of the identification evidence as it would be a danger to this court to convict on the basis of unsupported identification evidence. Further to the above, this court

could not trace the statement that was made at police by PW2 to enable the court evaluate the evidence as a whole.

Be that as it may, there was no identification parade conducted by the police to rule out any possibility of mistaken identity at the very least. It has been stated that the objective of an identification parade is to test the ability of a witness to pick out from a group, the person, if present, whom the witness has seen previously on a specific occasion. Where identification of an accused person is an issue at his trial, an identification parade should have been held to confirm that the witness saw the accused at the scene of crime. See *Mulindwa Samuel vs. Uganda Criminal Appeal No. 41 of 2000 (SC)*.

The evidence presented by PW2 is that he knew the accused for about a year having seen him in bars and moving about with friends in the community. There is no concrete evidence as to whether both PW2 and the accused physically knew each other and as such, PW2 would not mistakenly identify the accused person. What has been presented is that PW2 used to see the accused person in the community. In my view as already observed above, there is a high possibility of mistaken identity and an identification parade would have ruled out that possibility.

The Senior State Attorney submitted on the doctrine of common intention stating that it is the position of the law that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.

The law governing common intention is laid down in section 20 of the Penal Code Act. The Supreme Court in *Criminal Appeal No. 33/2014 Ssekitooleko Yudah Tadeo & 2 others vs. Uganda* cited the case of *Charles Komwiswa vs. Uganda* [1979] HCB 86 where it was stated that;

"Where several persons are proved to have combined together for the same illegal purposes, any act done by one of them in pursuance of the original concrete plan and with reference to a common object in the contemplation of law, is an act of the whole, each party is the agent of the others in carrying out the object of the conspiracy he renders himself a principal offender."

No evidence has been adduced by the prosecution implicating the accused person with others that are before this court to prove that for illegal purposes, they formed an intention to do an unlawful act. The accused herein disassociated himself from the offence and provided an alibi which the

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prosecution failed to challenge. There is no corroborative evidence against the accused to having formed an intention with others to participate in the robbery of the complainant herein. Accordingly the doctrine of common intention does not apply in the present case and it fails forthwith.

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However, it should also be noted that mere proximity to or presence of an accused at the scene of crime or knowledge of the crime, without more, is not sufficient to constitute aiding and abetting. The guilt of a person who knowingly aids and abets the commission of an offence must be determined solely upon the facts which demonstrate the role that he played in the commission of the offence and does not depend upon the degree of another person's guilt. Common intention may be inferred from the conduct, presence and actions of the accused or from the failure of the accused to disassociate himself from the commission of the offence. (See Uganda vs. Maida Robert and two others HC Criminal Session Case No. 720 of 2002).

The accused person herein disassociated himself from the offence and the prosecution has completely failed to prove how he participated in the commission of this offence considering that PW2's evidence creates doubt as to whether he was in a position to identify the accused herein at the scene nor the role played by the accused person in the commission of the offence at the scene.

Further to the above, the arresting officer, PW6 in his evidence stated in court that he was summoned by his superior to conduct an operation in respect of the rampant robberies in the Buwenge Mpya area. That when he arrived at Buwenge Mpya, he found a gathering of people who were smoking marijuana and that the suspect was in that gathering. It was his testimony that he managed to arrest eight people including the accused person. That he could not recall some of the people he had arrested. He further confirmed to court that during the course of his duties as the arresting officer, he had never met the complainants. In cross examination, PW6 confirmed that the gathering was of over 30 people and that he did not find any stolen property in the possession of the people that he arrested.

Clearly, this evidence demonstrates the uncoordinated evidence of the prosecution. No evidence was led to show how the accused was traced and arrested based on the identification of PW2 at the scene of crime. Instead, the evidence adduced through PW6 is of an arresting officer who arrested several people from a gathering that were suspected to be offenders. He conceded to not remembering some of the people that he arrested.

Regarding the standard of proof, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt. See: Woolmington vs.

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DPP [1935] AC 462. However, this does not mean proof beyond shadow of doubt. If there is a strong doubt as to the guilt of the accused, it should be resolved in the favour of the accused person. Therefore, the accused person must not be convicted because they have put a weak defence but rather that the prosecution's case strongly incriminates him and that there is no other reasonable hypothesis than the fact that the accused person committed the alleged crime.

I have analysed the evidence adduced by both the prosecution and the defence. It is my finding that the prosecution has not ably discharged its burden of proving the participation of the accused person in the commission of the offence of Aggravated Robbery. I am in agreement with the joint opinion of the assessors that the accused person should be acquitted and I therefore find that the accused person is not guilty of the offence of Aggravated Robbery in Count 2 and I hereby order for his immediate release.

I so order.

FARIDAH ŠHAMILAH BUKIRWA NTAMBI JUDGE

Judgment delivered on 10th June 2024.

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Prepared on 14 October 2026 · Esheria