THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-SC-CS-NO.310 OF 2018
UGANDA :: PROSECUTION
VERSUS
AINAMANI NICHOLAS::::::::::::::::::ACCUSED

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The accused person is charged with the offence of aggravated robbery contrary to section 285 and 286(2) (1) (b) of the Penal Code Act.

The prosecution alleges that the accused person on the 19th day of August 2017 at Mpala Katabi Town Council in Wakiso District robbed a one Kibira Victor of money to the tune of eight hundred and sixty thousand shillings (867,000/=) and at or immediately before or after the said robbery used deadly weapons to wit one assault rifle, two pistols and a knife on the said Kibira Victor.

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: Woolmington Vs DPP 1935 AC 322**

The standard of proof is beyond reasonable doubt. The accused persons should only be convicted on the strength of the prosecution case and not on the weakness of their defense.

To constitute an offence of aggravated robbery the following ingredients must be proved.

1. That there was theft of property.
2. That there was use of violence or threat to use violence.
3. That the assailants used or threatened to use a deadly weapon or caused death or grievous harm to the victim
4. Participation of the accused person.

The prosecution led 7 witnesses.

Representation

The accused person was represented by Counsel Mashipwe Samson while Ainebyona Happiness was for the prosecution. Both parties filed their written submissions which I have duly considered.

Consideration

That there was theft of property

Theft occurs when a person fraudulently and with intent to deprive the owner of a thing capable of being stolen takes that thing from the owner without a claim of right. **See: Section 254(1) of the Penal Code Act.**

To prove this ingredient, the prosecution relied on the evidence of PW1 the victim who told court that the accused person beat him up, stole shs. 170,000/= from his wallet, took his ATM, National Identity Card, a phone and its line pin code wherein they started demanding money from his friends and relatives. It was also the evidence of PW2 that he sent PW1 150,000/= which was taken by the accused person. PW1 further told court that he was also sent shs. 250,000/= on his line which was taken by the accused person.

From the above evidence, the prosecution does not show any record of alleged money transactions between PW1 and the persons he claimed sent him money while allegedly being held captive.

Defense counsel tendered in a record of proceedings of other co accused who were acquitted which showed PW1 had stated that A1 had got from his pockets shs. 210,000/=, that shs. 120,000/= was withdrawn from his phone account. That A1 got 270,000/= sent by Sangu Fred and shs. 150,000/= sent by Hassan.

The testimony of PW1 is contradictory with regard to money and it is not clear as to how much money was taken from PW1. His testimony before this court and when before Hon: Justice Kwesiga Wilson raises questions as to the credibility of his evidence. Section 154(c) of the Evidence Act provides that the credibility of a witness may be impeached by proof of former statements inconsistent with any part of his or her evidence which is liable to be contradicted.

In this case, the contradictions and inconsistencies as to how much was taken from PW1 cannot be ignored they go to the root of the case and must be resolved in favor of the accused person. The prosecution has therefore failed to prove theft beyond reasonable doubt.

That there was use of violence or threat to use violence. Or That the assailants used or threatened to use a deadly weapon or caused death or grievous harm to the victim

PW1 testified that he was seated in the car when the accused persons emerged from the back of the car armed with pistols. That they threatened to kill him. It was also his evidence that the accused persons and others put a rope around his neck, subdued him and drove off to Bugonga. He also testified that he was injected with a substance that made him unconscious. This evidence is corroborated by PW7 who told court that the victim had healing abrasions around his neck, wrist joints and classified the injuries as grievous harm. In my view this is sufficient to prove grievous harm and I find that this ground was proved beyond reasonable doubt.

Participation

It is incumbent on the prosecution to adduce evidence that proves beyond reasonable doubt, not only to place the accused person at the crime scene, but also to show that he participated in the commission of the offence.

It is up to the prosecution to disprove the defense of the accused persons by adducing evidence that shows that, despite the defense, the offence was committed and was committed by the accused persons. **See: Sekitoleko Vs Uganda [1967] EA 531,**

PW1 testified that the alleged offence took place in the night and that he used the dash board light to identify the accused person which raises the question of whether there was proper identification of the accused person.

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 …….

"the judge should then examine closely the circumstances in which the identification came to be made, 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."

The conditions under which PW1 identified the accused shows that he was surprised when the attackers emerged from the back of the seat where they were covered under some clothes. The circumstances were a mixture of surprise, fear and darkness. He did not realize that apart from the accused there were other people in the car until the car had driven off and he was being strangled from the behind seat in darkness.

Evidence relating to identification must be carefully scrutinized and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from any possibility of error. In this particular case, the light coming from the dash board was not sufficient enough to enable PW1 clearly identify the accused person

I will now deal with accused person's defense. He stated that at the time the offences were allegedly committed, he was in custody, he denied participation. This is essentially a defense of alibi.

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

Where the prosecution adduces evidence showing that the accused person was at the scene of crime, and the defense not only denies it, but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable. See: **Bogere Moses v Uganda, Criminal Appeal No.1 of 1997 (S.C), (unreported)**

The accused testified that he was arrested on the 27th July 2017 and transferred to Jinja at Nalufenya Police Station. He stated that he spent three months and was only produced in court on the 15th November, 2017. He cannot be said to have committed the said offence when he was in

custody. His evidence with regard to his date of arrest was not challenged by the prosecution. The prosecution offered no clear explanation even through the investigating officer with regard to why the charge sheet indicated that the offences were committed on 19th August,2017 and yet the accused was already in custody by that time.

The law on failure to challenge evidence on an essential point such as this was clearly stated in **James Sawoabiri & Another v Uganda S.C. Criminal Appeal No. 5 of 1990** the Supreme Court held that;

"An omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue."

In view of the above position of the law, the evidence of the accused in his defence is unassailable to the extent that the prosecution failed to squarely place him at the crime scene as the perpetrator of the offence.

It should be therefore noted that where an accused person pleads an alibi as a defense, the prosecution must do more than merely place him or her on the scene of the crime. They must disapprove or otherwise discredit the defense of alibi. The mere putting the accused on the scene of the crime is not enough. **See: Matete Sam v Uganda Supreme Court Criminal Appeal No. 53 of 2001)**

In the instance case all that is available is the contested evidence of identification by PW1 which I have found not to be reliable to safely convict on. The defense of alibi and the lack of credibility of evidence of identification absolves the accused person of the offence as charged.

He is accordingly acquitted of the offence of aggravated robbery and should be set free unless being held on other lawful charges.

I so order

JUDGE

20/09/2023