

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.59 OF 1999

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.

HON. LADY JUSTICE A. E. N. MPAGI - BAHIGEINE, JA.

HON. MR. JUSTICE J. P. BERKO, JA.

A1. SGT. MUSOKE WILLIAM}

A2. MAGANDA ALI} APPELLANTS

VERSUS

UGANDA RESPONDENT

(Appeal from conviction and sentence of the High Court at Jinja

(by Hon. P.K.K Onega, J).

in Criminal Session Case No. 224/96)

JUDGMENT OF THE COURT:

This is an appeal against convictions for aggravated robbery and murder. Both appellants were convicted on four counts of aggravated robbery. The first appellant alone was convicted of murder as well. They were sentenced to death.

The prosecution's case against them was that on the night of 7/1/95 a number of homes in Bunafu village in Iganga District were robbed by some thugs and a number of household items, and merchandise including drugs were stolen. The thugs murdered one Matovu Silveste who was beating a drum to warn the villages of the presence of the thugs. One of the victims, Nyiro Vincent, PW4 was made to carry the stolen properties and to follow the thugs from house to house. The thugs set PW4 free when they reached a spot where they shared the stolen properties. Four suspects including the appellants were arrested and charged. One escaped. One was acquitted and discharged.

The defence of the first appellant was that he was a soldier attached to the Magamaga Barracks. He was told by his commanding officer to go to Tororo for his Salary on 7/1/95. He was given Shs. 4,500/= for transport and was advised to take a vehicle to Iganga and a train from there to Tororo. He went to the armoury and signed for a gun and ammunitions. He, however, did not leave that night. Instead, he left the barracks at 6 a.m. on 8/1/95 and reached Iganga after 8 a.m. He boarded a bicycle that took him to Tororo. As he was walking towards the railway station he was stopped by a man in civilian clothes. The man had a gun. The man ordered him to put down his gun and move towards him. The man threatened that he would “finish” him if he disobeyed. When he tried to explain his mission to the man, the man fired one shot in the air. This was followed by a second shot that hit his left knee and a third one that injured his thigh. He fired seven shots in the air to defend himself as he did not know the identity of the civilian. During the exchange of gun fire between him and the civilian, the Iganga Police and the Military arrived at the scene. He surrendered himself and was arrested. He denied that he was carrying a bag. He also said he does not know Bunafu village. He denied having committed the offences charged.

The defence of the second appellant was to the effect that he was at Namwendwa Ingingo Bugabula village in Kamuli District on 7/1/95 where he had gone to attend the funeral of his sister’s child who had died on 4/1/95. He returned to Bunafu village on 8/1/95 at 1.30 p.m. He was arrested on 9/1/95. He said that he knew nothing about the offences. He said that the slippers allegedly found at the place where the stolen properties were shared did not belong to him.

The learned trial Judge preferred the prosecution’s case to that of the defence. He accordingly convicted them. The two grounds of appeal are:

- I. The learned trial judge erred in law in believing the contradictory, improbable and insufficient evidence of the prosecution witnesses, and
- II. The learned trial judge erred in disbelieving the alibis of the appellants.

The submission of Mr. Ssenkooba, learned counsel for the appellants, on the first ground was that the conditions were not conducive for proper identification. His reasons were that PW4 said that he could not recognise any of the assailant’s in his house, but he managed to recognise them at the home of Butalya with the aid of a tadoba light and torch light which the thugs were

flashing and passing from one person to other. According to counsel the source of light was not sufficient for correct identification. For the respondent, Ms. Damali Lwanga has submitted that the appellants were correctly identified by the prosecution witnesses. It is therefore necessary to examine closely the evidence of identification.

The first witness who identified the first appellant was PW1. He said that he was seated behind his house having supper when three men he did not know came and greeted him. He offered them seats but they refused to sit down. They said that they were in a hurry. They ordered him to enter in the house and give them money. It was then that he apparently realised he had problem on his hands. The three men manhandled him. They took his Shs. 7000, a wrist watch, and a small radio. One of the thugs who had a gun went out and shot in the air. The thugs locked him inside the shop and went away. He was later invited to the police station where he identified his small radio. He said that he could only recognise the first appellant that night. He could not recognise the two other men who were with him. He said that there was a faint moon light outside. He had a hurricane light in the house.

The second identifying witness of the first appellant was PW4. He said that he could not recognise any of the thugs in his house, but he managed to recognise the first appellant and Mutwalibu Katende who escaped. He said that the first appellant had a gun and was wearing an army uniform and an army cap. They first took him to Mutalya's house where they stole 120,000/= from a jimtex bag. They ordered him to take them to Batalya's house where they stole a bale of clothes. There was tadoba in Batalya's house. Besides the tadoba light, the thugs had a torch light which they were flashing around. The room where they were was small, measuring about 3x2 metres. He stayed in that room with them for less than one hour. He said that he recognised the appellants properly when they were putting the load on his head. He followed the thugs up to a spot in a bush where he was told to put down the luggage and untie it. When he untied the luggage he found in it batteries, biscuits and tablets. It was at this stage that he was allowed to go away. PW4 said that he first got to know the first appellant when the second appellant came to Iganga with him and introduced him as the one who stood surety for him when he, the 2nd appellant, was remanded in custody for allegedly killing his father. In our view the evidence of PW1 and PW4 is enough to connect the first appellant with the offence.

Their evidence is corroborated by the evidence of PW5 relating to his arrest and the properties found in the bag found in his possession at the time of his arrest. PW5 said that he was going to dig when he saw a soldier being carried on a bicycle. The soldier was telling the rider to hurry. The soldier had an army uniform without a cap. He ordered the rider to stop. The rider and the soldier got off the bicycle. They left the bicycle and started walking away. He told them to stop and fired a warning shot. The rider and the soldier began to run. He fired a second shot. The Iganga Police and the Military came and arrested the soldier and the rider. The soldier turned out to be the first appellant. At the time of arrest he was carrying a bag. The bag was found to contain some syrups, packets of cigarettes, one opener, some tins of tablets and injectable drugs. These items were some of the properties stolen from the home of PW3 the previous night.

The defence of the first appellant did not amount to an alibi. He said that he was asked by his commanding officer to go to Tororo on 7/1/95. He did not go on that day. He choose to go early the following morning. He was therefore in the Magamaga Barracks on the night of 7/1/95. He did not go on that day. He choose to go early the following morning. He was therefore in the Magamaga Barracks on the night of 7/1/95. The incident took place that night. Therefore he was in position to participate in the offences. He was seen at the scene of the robbery by both PW1 and PW4. The trial judge did not only believe the evidence of PW1 and PW4, but he found the defence of the first appellant remarkable and improbable. He claimed that PW5 shot him twice in the leg and thigh. PW5 was in civilian dress. The first appellant did not know who he was. Yet all that a soldier in uniform, armed with a gun and going on a lawful errand did in the face of the extreme provocation was to fire seven shots in the air. That story was too sweet to be true. If his account of the confrontation between him and PW5 were true one would have expected him to respond robustly. The judge was therefore right to reject that defence.

What the above evidence proves is that a number of houses in Bunafu village were broken into and various household properties and drugs were stolen from them in the night of 7/1/95. Less than twelve hours after the thefts the first appellant was found in possession of some of the stolen properties. The first appellant failed to give any acceptable explanation of how he came by them. He put forward an alibi which was not acceptable. On those facts it was open to the learned trial judge to find that he was guilty not merely of receiving the properties but of the robbery itself. In

the course of the robbery somebody was shot and killed. It matters not whether he was the one who fired the shot or not. But it so happened in this case that PW4 saw him actually shooting the deceased. We therefore find that there is enough evidence to connect the first appellant with the offences. In our view he was properly convicted. His appeal is accordingly dismissed.

We are, however, uncomfortable with the conviction of the second appellant. The only evidence connecting him with the offence is a pair of slippers alleged to have been found at the spot where the robbers shared their loot. The slippers were not produced in court. Though the second appellant was a local boy and all the victims claimed that they knew him very well, yet none of them recognised him. The mere fact that he was found in the company of the first appellant during the day is not sufficient to connect him with the activities of the first appellant during the previous night. We therefore think that it would not be safe to let the conviction stand. His appeal against conviction and sentence succeeds. The conviction is quashed and sentence set aside. He is to be released from custody forthwith unless otherwise lawfully held.

Dated at Kampala this 29th day of November, 2000

S.T. MANYINDO
DEPUTY CHIEF JUSTICE

A.E.N. MPAGI-BAHIGEINE
JUSTICE OF APPEAL

J. P. BERKO
JUSTICE OF APPEAL