Uganda Law Reports

Civil Revision No. 9 of 1952.

Muhamadi Waswa - Petitioner
Versus
Asumani Kikungwe - Respondent

Before Edwards, C.J.

English law of equity applied to contract between two Africans resembling a mortgage - Native Courts Ordinance, 1940, sections 11(a), 12.

Held: (i) Transactions resembling a mortgage were not known to native law and custom in Teso 50 years ago and therefore the Native Court had no jurisdiction under the Native Courts Ordinance, 1940 to hear the case. Judgment of District Commission of Teso not upset on this ground.)

Application by mortgagor to revise District Commissioner's Order on Appeal from a Native Court judgment. Order modified to allow six months for Petitioner to pay before respondent gets possession. In default of payment in six months, mortgage sale to take place with leave to respondent to bid in.

ORDER
12th February, 1952

The petitioner (hereinafter referred to as M.W.) borrowed a sum of Shs. 2,500 from respondent (hereinafter referred to as A.K.). On 5th June, 1950, M.W. signed a document agreeing, that, if he failed to pay this sum by 31st December 1950, A.K. could take his house of galvanized sheets situated at Mile 7 1 /2 at the village of Amusi. No interest was to be paid on the loan. By a further document on 31st January, 1951, M.W. promised to pay a total sum of Shs. 2,700, by the end of March 1951 and, in default, A.K. could "take" the house. Default having taken place, proceedings were taken in the District Native Court, Kikungwe, from which appeal was taken to the District Commissioner of Teso, who gave judgment on 14th December, 1951. M.W. now applies to the High Court for revision of the District Commissioner's judgment under section 26, Native Courts Ordinance, 1940 . I have carefully perused the judgment and see no reasons to vary the sums which he has ordered M.W. to pay to A.K. vis. "To pay Shs. 2,700 immediately or A.K. may take possession of Waswa's house." In addition, Waswa will pay to A.K. "Interest Shs. 108 calculated" at 6 percent per annum on Shs. 2,700 from 13-4-51 to 14-12-51. Traveling expenses "Shs. 104/25. Total Shs. 212/25. " I am, however, concerned at the order for A.K. immediately to take possession of M.W.'s house. The two documents comprise what, in English law, would be called a "mortgage". Were such transactions known to native law and custom in Teso, say, fifty years ago? I doubt it. Under section 11(a) of Native Courts Ordinance, 1940, a Native Court shall administer and enforce only (a) the native law and custom prevailing in the area of jurisdiction of the Court, etc. So far as I know, not Native Court has been authorized under section 12 of the Native Courts Ordinance, 1940, to administer or enforce any Ordinance dealing with mortgages. So that it is at least doubtful whether the District Native Court, Kikungwe had jurisdiction to give effect to this particular transaction. However, I do not intend myself to upset the order of the District Commissioner on that ground. But, if people like A.K. bring such matters before a court

constituted under the 1940 Ordinance, and, if people like himself and the petitioner create a mortgage, which is so eminently a concept of English law, they cannot complain if the English law of equity comes in to alleviate the harshness of the terms of the written agreement. Under English law a mortgagor is usually allowed a period of six months from date of default to redeem. I, accordingly, confirm the amounts as found by the District Commissioner and I direct that this sum be paid in full on or before 14th June, 1952. (The six months will run from 14th December, 1951, the date of the District Commissioner's judgment.) In default of payment in full by 14th June, 1952, the mortgage property will be sold by public auction under the supervision of the District Commissioner or one of his assistants.

I shall grant A.K. leave to bid at the auction. If the sale proceeds exceed the debt, with interest and expenses of sale, the balance will be held by the District Commissioner for a period for three months from date of sale to enable any person other than the parties to this suit to establish his claim to ownership of the house in question; so that, if successful, he can participate in any surplus; if no claim is made within three months from the date of sale the surplus will be paid over to M.W. If the sale proceeds do not reach the amount of the debt plus interest and costs of sale, A.K. will be at liberty to take out execution for the balance against any other property of M.W.

SMOLEN v. LUBOWA

[Court of Appeal at Kampala (Law, Ag. P., Mustafa, Ag. V.-P., and Musoke, J.A.) 16 June and 18 July 1975.]

(101/75)
Civil Appeal 16 or 1975.
(Appeal from the High Court of Uganda - Ssekandi, Ag.J.)

Master and servant - Vicarious liability - Course of employment - Driver driving vehicle he was employed to drive - Prima facie in course of employment.

An accident was caused by the negligence of the driver of a vehicle owned by the appellant. The driver was employed be the appellant and the accident happened near midnight.

The appellant contended that the driver was not acting within the scope of his employment. The facts are set out in the judgment of LAW, Ag.P.

HELD: (i) where a driver is driving a car he was employed to drive a prima facie case is made out that he was acting within the scope of his employment (Nakalema v. Michelistanos (1) followed);

(ii) on the facts the appellant had failed to discharge the burden of disproving that the driver was acting within the scope of his employment.

Appeal dismissed.

Cases referred to:
(1) Nakalema v. Michelistanos (1956), 22 E.A.C.A. 172.
(2) Selle v. Associated Motor Boat Co., (1968) E.A. 123.
J. Kateera (instructed by Hunter & Greig, Kampala) for the appellant.

H.M.B. Kayondo and P.J. Kaddu for the respondent.

Mr. Kateera for the appellant challenged these findings. He submitted that there was nothing in the evidence on record to show that at the time of the accident the driver Magala was acting within the scope of his employment, or doing anything for the benefit of his master. Having regard to the fact that the accident occurred over seven hours after normal working hours, Mr. Kateera submitted that Magala must have been engaged on his own business, and not on "a mere deviation" from his normal duties, as found by the judge.

In a case such as this, where the plaintiff has pleaded and proved that at the time of the accident the driver was driving the car which he was employed to drive, a prima facie case has been established that he was acting within the scope of his employment, and the burden of proving the opposite shifts to the employer, see Nakalema v. Michelistanos (1956), 22 E.A.C.A. 172. Can it be said that the appellant discharged the burden which lay on him in this case, of establishing that the driver Magala was not acting in the scope of his employment at the time of the accident? The appellant's evidence was remarkably imprecise. He defined Magala's duties as "collecting materials, persons, etc.". He said the vehicle was used for a "number of combinations of jobs". He did not say what Magala's duties were on the day preceding the accident, or whether Magala brought the car back at the end of the day's work and then took it away without permission, or whether he had taken it as usual for the purposes of his work and not come back with it at 5 p.m. when his duties were supposed to cease. For all that is known, Magala's duties may have taken him a long way out of town that day, and his return may have been delayed for a number of reasons, including mechanical breakdown. Certainly the reasonable possibility has not been excluded, in my view, that when the accident happened, the driver was still doing his employer's work. That was what the judge held, and as the appellant in my opinion failed to discharge the burden of proving the opposite, then I think with respect that the judge came to a correct conclusion, from which I see no reason to differ. For these reasons, I would dismiss this appeal, with costs. As the other members of the court agree, it is so ordered.

MUSTAFA, Ag. V.-P.: I agree with the judgment prepared by LAW, Ag. P.

Magala was employed by the appellant to drive the car which was involved in an accident with another car in which the late Kalyango died. It was not in dispute that Magala was an employee if the appellant. The appellant had contended that Magala, at the time of the accident, was not acting within the scope of his authority or in the course of his employment. In was on the appellant to discharge that onus, once it had been established, as it was here, that Magala was employed by the appellant to drive the car. The testimony of the appellant was extremely vague, and in my view, he failed to discharge the onus of establishing that, at the material time, Magala was not acting in the onus of his employment.

I concur in the order proposed.

MUSOKE, J.A.: I agree with the judgment of LAW, Ag. P. and have nothing useful to add.

Appeal dismissed.

WASAJA v. UGANDA

[Court of Appeal at Kampala (Law, Ag. P., Mustafa, Ag. V.-P., and Musoke, J.A.) 11 and 18 June 1975.]

(86/75)
Criminal Appeal 19 or 1975.
(Appeal from the High Court of Uganda - Ssekandi, Ag.J.)

Criminal Law - Robbery - Threatening to use a deadly weapon - Threat implicit in brandishing a gun - Penal Code, s. 273(2)(U.).

Criminal Law - Robbery - Deadly weapon - Prosecution must prove the weapon to be lethal - Penal Code, s.234(2)(U.).

Evidence - Identification - Single witness - Whether correct direction given.

Criminal Practice and Procedure - Prosecutor - Absent for part of trial - Irregularity only - No prejudice to accused.

Criminal Practice and Procedure - Sentence - Robbery - Equivalent to life sentence - Excessive.

The appellant was charged with robbery and with threatening to use a deadly weapon, which offence carries a mandatory death sentence. He was convicted in the High Court of robbery involving the use or threatened use of violence other than by a deadly weapon, and sentenced to 15 years' imprisonment and 24 strokes.

On the appeal the State argued that the appellant should have been convicted of the capital offence and the appellant that he should not have been convicted on the identification of a single witness, that the state prosecutor was absent for part of the trial, and that the sentence was excessive.

HELD: (i) where a demand is made at gun-point there is a threat to use the gun implicit in the act of brandishing it at the victim;
(ii) it had not been proved that the gun was a deadly weapon, that is, capable of causing death;
(iii) the appellant was therefore correctly convicted of the lesser offence;
(iv) the judge had correctly directed himself and the assessors concerning the identification of the appellant;
(v) although the prosecutor was absent for part of the trial his absence was only an irregularity which had caused no prejudice to the appellant nor any failure of justice (R. v. Kiza Bayanga (1) followed):
(vi) the sentence was virtually equivalent to a life sentence with the maximum strokes and was excessive.

Appeal against conviction dismissed. Sentence reduced.

Case referred to:
(1) R. v. Kiza Bayanga (1938), 5 E.A.C.A. 56
J.J. Obol-Ochola for the appellant.
F. Lulume (Principal State Attorney) for the respondent.

18 June 1975. The considered judgment of the court was read by LAW, Ag. P.: The appellant John Wasaja was charged with the offence of robbery under ss. 272 and

273(2) of the Penal Code, the particulars of offence reciting that he and others on 8 June 1973, at Buganga Village, robbed Justine Kasenene of textile materials worth Shs. 20,000/-, and at or immediately after the time of the said robbery threatened to use deadly weapons against the said Kasenene. Robbery involving the use of deadly weapons, or the threat to use such weapons, carries a mandatory death sentence, under s. 273(2) aforesaid. Robbery involving the use or threatened use of actual violence, carries a maximum sentence of life imprisonment, under s. 273(1)(b) of the Penal Code. The trial judge, in the case the subject of this appeal, did not convict under s. 273(2), apparently because he was not satisfied that the appellant had threatened to use the pistol wielded by him in the course of the robbery; he convicted under s. 273(1)(b) and sentenced the appellant to 15 years imprisonment and 24 strokes of corporal punishment. The State does not agree with the judge's interpretation of s. 273(2). The State claims that it could have appealed against what was in effect an acquittal, but did not do so in time. Instead it applied by notice of motion for this court itself to interpret s. 273(2), and this we have agreed to do, on the clear understanding that the application is not to be taken as an alternative method of appealing.

The judge refused to convict of aggravated robbery because, on the facts as found by him, there was no threat to use a deadly weapon. He found as facts that when the appellant robbed the complainant, he was holding a sten gun, but no actual threat to use it was made beyond one of his companions saying that if you run away, I will shoot. It is not clear why the judge thought that, in these circumstances, there was no threat. In our view, if a robber steals good by demanding them at gun-point, there is a sufficient threat to use the gun implicit in the act of brandishing at the victim, an act which at the same time constitutes the violence requisite for robbery. On the other hand to constitute aggravated robbery, the court must be satisfied that the weapon used was a lethal, or deadly, weapon. A toy pistol, or a damaged gun, not capable of being fired, is not a lethal weapon. That may be what the judge had in mind when he said that the threat must be something amounting to a discharge or similar use of the weapon. In so saying, we thing he went too far. Of course it is for the prosecution to prove all the ingredients of the charge, including that the weapon used to threaten was a deadly weapon. It may be that the judge was not satisfied on this point. In our view, once it is proved that a weapon is a deadly weapon, then using it to intimidate the victim of a robbery by pointing it at him is a sufficient threat within the meaning of s. 273(2) aforesaid. The vital consideration is that the weapon must be shown to be deadly in the sense of "capable of causing death". As we have indicated, toy pistols, broken guns incapable of discharging bullets, or guns without ammunition, or imitation guns are not, and cannot be, deadly weapons. There was no evidence in this case that the gun held by the appellant was a deadly weapon. For all we know it may have been a harmless imitation. We are accordingly of the view that the judge was right in refusing to convict of the aggravated form of robbery although possibly for the wrong reasons. If a gun is fired in the course of a robbery, a court will have no difficulty in holding that it is a deadly weapon; if it is not fired, but merely its use is threatened, as in this case, a finding based on evidence that the gun was a deadly weapon is essential before its threatened use can constitute aggravated robbery under s. 273(2).

We now come to the appeal itself. The complainant deposed that on 8 June 1973, he was transporting piece goods in his car, when he was stopped by three men in a Mercedes car, who appeared to be policemen. One of these men, the appellant,

had what the complainant described as a sterling gun. The appellant held this gun; one of the other men said "If anyone runs away he will be shot" or words to that effect. Under the effect of that threat, goods to the value of Shs. 20,000/- were transferred from the complainant's car to the other vehicle and taken away by the robbers. The complainant made an immediate report to the police. Later in the same month he saw the appellant by chance in Kampala, and with the help of a passing army officer was able to arrest him and take him to the police station. The appellant made a detailed "charge and caution statement, denying the offence and stating that he was elsewhere at the time. At the trial, the appellant was identified both by the complainant and by one Akileo who was present at the robbery. The judge considered Akileo's evidence of identity unreliable, because of some irregularity at an identification parade, but he and the assessors were convinced by the complainant's evidence in this respect. The appellant gave evidence on oath, repeating his alibi but retracting that part of his "charge and caution" statement (which was admitted in evidence without challenge) in which he said that he dealt in textiles. He called his wife as a witness to support his alibi.

The judge directed himself and the assessors most carefully and correctly to the danger inherent in convicting on the evidence of a single eye-witness. Both he and the assessors were satisfied beyond all reasonable doubt that the appellant had been correctly identified. The judge had in mind the possibility of an honest mistake having been made, and adverted to the desirability for corroboration which he found in the appellant's belated retraction of the damaging part of his police statement in which he admitted being a dealer in textiles. The judge and assessors did not believe the evidenced relating to the alibi, and so far as the judgment is concerned, we can see no reason to think that the judge was wrong in finding the appellant guilty and convicting him.

There are however two other matters which must be dealt with. The first concerns procedure, the second sentence. The procedural point is of considerable importance. State attorney was not present when the trial opened, although it had been specially fixed for 2.15 p.m. The court waited till 3 p.m. and then decided to start in the absence of the state attorney. The plea was taken, the preliminary hearing at which formal evidence was agreed by the defense was held, and the complainant gave his evidence and was cross-examined, all in the absence of the state attorney but in the presence of the appellant and his advocate. The judge adopted this course reluctantly, but felt constrained to act as he did so as not to waste valuable judicial time, and because the appellant had been awaiting trial on remand in custody for nearly two years, and to avoid inconvenience to witnesses.

It was submitted to us that this procedure was irregular, and reliance was placed on s. 69 of the Trial on Indictments Decree 1971 for the proposition that a prosecutor must be present at all stages of a trial in the High Court. The section reads:

"When the assessors have been chosen, the advocate for the prosecution shall open the case against the accused person and shall call witnesses and adduce evidence in support of the indictment."

The section does not say in terms that a prosecuting advocate must be present at all stages of a trial, but it certainly presupposed that a prosecutor will be present. What then is the position when there is no prosecutor for part of the

trial, as happened here? There is an old authority of this court in which this question came up for consideration, that the case of T. v. Kiza Bayanga (1938), 5 E.A.C.A. 56. After noting that no contention was made of any prejudice to the accused person having been occasioned by the absence of a prosecutor, WHITLEY, C.J. who delivered the judgment of the court, went on to say:

"Obviously it is preferable that there should be a prosecuting officer to conduct the case wherever possible but occasions do arise when none are available and we should in the absence of definite authority be reluctant to hold that on such occasions when witnesses are assembled, possibly from long distances, it would be illegal to proceed with the case without a prosecutor."

We respectfully agree. The vital question, in our opinion, is whether the absence of a prosecutor caused any prejudice to the accused person or possible failure of justice. Mr. Obol-Ochola for the appellant, who also represented him at the trial, could not contend that any prejudice was occasioned. He informed us from the Bar, and we accept this, that the judge after putting a few formal questions to establish the complainant's name, age and address allowed him to tell his own story in his own words. The judge did not in any way assume the character of a prosecutor. The complainant gave his evidence in the presence of the appellant and his advocate and was cross-examined at length. We are satisfied that there was not prejudice or failure of justice in this case, and that although there was an irregularity in the proceedings this irregularity did not in fact occasion a failure of justice and is curable under s. 137 of the Trial on Indictments Decree.

The second matter which has caused us concern is the sentence of 15 years imprisonment, 24 strokes of corporal punishment, 5 years police supervision and an order to pay Shs. 20,000/- compensation. This last order is mandatory under s. 273(3) of the Penal Code. The maximum sentence of imprisonment is life, which we take to be equivalent to a sentence of 18-20 years. The maximum sentence of corporal punishment is 24 strokes. The appellant has two previous convictions, so trivial as to be irrelevant. He used no physical violence in the robbery, only the constructive violence of threatening to use a gun which may or may not have been a lethal weapon. The complainant was so unimpressed by this threat that he refused to help move his property from his car to the robbery car; the robbers had to do this themselves. The appellant had been in custody nearly two years before trial. Adding to this the 15 years of his sentence, he has almost received a life sentence of imprisonment as well as a maximum sentence of corporal punishment. We think in all the circumstances that the sentence is excessive. We allow the appeal against sentence to the extent of substituting 10 years of 15 years' imprisonment, and 12 strokes of corporal punishment for 24. The appeal against conviction is dismissed.

Order accordingly.