THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

HCT-CR-CS-NO.739 OF 2020

UGANDA PROSECUTION

VERSUS

ARINAITWE IVAN alias DELEBWE ACCUSED

JUDGEMENT

BEFORE HON: JUSTICE ISAAC MUWATA

The accused person is indicted with two counts of Aggravated Robbery contrary to section 285 and 286(2) of the Penal Code Act.

On the first count, it is alleged that the accused person and others at large on the 27th day of January 2020 at Lubatu Kabawanda Kiteezi Village in Wakiso District at gun point robbed DDUMBA ANDREW of 400,000/=,100 dollars, a laptop, iPhone, shoes, and a laptop bag all valued at 7,230,000/=.

On the second count, the prosecution alleges that the accused and others at large on the 27th day of January 2020 at Lubatu Kabawanda Kiteezi Village in Wakiso District at gun point robbed Nakisaka Mildred of her two mobile phones, Necklaces, Kitchen Knives, a pair of scissors, rings all valued in a sum 4,197,500/=

In criminal cases, the burden of proof rests with the prosecution to prove the offences beyond reasonable doubt. This burden of proof does not shift to the accused person to prove himself innocent. If there is any doubt, it must be resolved in favor of the accused person.

The following ingredients must be proved beyond reasonable doubt.

1. **That theft occurred.**

2. **That there was use of actual violence at, before, or after the theft or that the accused caused grievous harm to the victim or that there was use of a deadly weapon.**
3. **That the accused participated in the commission of the offence.**

The prosecution called four witnesses to prove its case.

That theft occurred.

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 theft, the prosecution relied on the evidence of PW2 the victim who stated that his laptop,100USD, Shs. 500,000/= and 2 phones were stolen. This is also corroborated by the evidence of PW4 the investigating officer who testified that the victim had lost mobile phones, a laptop, money, and some jewelry. I find that the prosecution proved that theft occurred.

That there was use or threat of use of violence at, before, or after the theft or that the accused caused grievous harm to the victim or that there was use of a deadly weapon

The prosecution relied on the evidence of PW2 who testified that the assailants threatened him with violence when they entered his house. He described how he was hit on the head and how the assailants strangled his three-year-old child. The use of violence is corroborated by the evidence of PW3 Muyige Ismail a medical officer who examined the victim on PF3 and confirmed that the victim had sustained injuries as a result of being hit with a blunt object. The injuries were classified as harm.

The medical officer's remarks in Exhibit P1 are that PW2 may have been assaulted and that a blunt object must have been used to inflict the injuries. The medical report therefore corroborates the testimony of PW2 that that violence was involved and I find that the prosecution has proved this. Although, the victim's injuries do not correspond to the definition of grievous harm as stipulated in section 2(f) of the Penal Code. I find that they are consistent with violence.

PW2 testified that the assailants who attacked him were armed with a pistol, a pistol is a deadly weapon but the same was neither recovered nor exhibited during the hearing. The doctors report states that the injuries sustained by the victim were as a result of use of a blunt but PW3 was not able to establish the blunt object that was used to inflict the said injuries. I therefore find that there was no proof of use or possession of a deadly weapon.

Be that as it may, any situation referred to in section 286(2) of the Penal Code Act is sufficient can stand alone as an ingredient for the offense of aggravated robbery and may be proved. In this case, I find that use of violence was proved.

That the accused participated in the commission of the offence.

Lastly, the prosecution must prove the participation of all the accused persons beyond reasonable doubt. The prosecution must adduce cogent evidence placing the accused persons at the crime scene as active participants.

PW1 the area LC1 Chairman told court that he knew the accused as a resident of the area and that he participated in the arrest of the accused on account of how he had been described by the victim. His evidence was to the effect that the accused had been identified by the victim as the person who had robbed them by what he was wearing on the night.

PW2 the victim testified that on the night of 27th January 2020, he was attacked by five people covered with masks and one armed with a pistol. He testified that his wife was able to identify the accused using light in the bedroom.

PW4 the Investigating officer testified that the accused was allegedly identified by a one Nakisaka who claimed to have known the accused by what he worn on the night of the alleged robbery.

PW4 on the other hand testified that the the clothes allegedly worn by the accused as described by the wife to PW2 the victim were also recovered from the accused's home.

In his defense, the accused denied the allegations and called his witnesses.

DW1 testified that he was picked up by the secretary defense and taken to the victim's place wherein he was accused of having been part of the assailants who had participated in the said robbery.

Furthermore, DW1 attributed the allegations against him to a grudge between him and the complainant over land matters. He denied knowledge of the clothes allegedly recovered from his place.

DW2 the wife to the accused stated that the accused was picked from his place and thereafter their home searched by the chairman and he was taken to police where he was charged. She told court that she was aware of the misunderstandings between the accused and the victim.

DW3 the mother to the victim stated in her evidence that her son is being persecuted because of a land dispute.

From the prosecution evidence, it is evident that the question of identification must be closely examined to rule out any possibility of a mistaken identity.

The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger or possibility of mistaken identity in such cases. This is particularly important where there are factors which present difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with greatest care and where possible look for corroborating or other supportive evidence. If after warning itself and scrutinizing the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity. **See: John Katuramu versus Uganda Criminal Appeal No. 2 of 1998**

The test of correct identification was set out in **Abdala Nabulere & another versus Uganda,** 1979 HCB 77, as follows;

"**The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced, the poorer the quality the greater the danger."**

Applying the above test, PW2 testified that the assailants were wearing masks therefore making identification extremely difficult. Although PW2 stated that there was light coming from the bulb he was still not able to identify the accused since they were covered in masks.

PW2 clearly stated that the accused was identified by his wife with the aid of the PW1 the area LC1 and the defense secretary. The wife to PW2 from whom it is stated that identified the accused was not called to testify. This

evidence of identification is largely hearsay and violates the provisions of section 59 of the Evidence Act which requires that oral evidence must, in all cases whatever be direct, that is to say, it refers to a fact that could be seen and it must be evidence of a witness who says he saw it. The prosecution did not call the wife of PW2 to confirm this evidence of correct identification.

Furthermore, the evidence of PW1 is that he was informed by people gathered at the victim's home that one of the culprits was dressed in a faded jean trouser and an orange hut. It was his evidence that he suspected the accused since he had always worn like that.

It was also evidence of PW2 that they recovered the said faded pair of jeans and an orange head gear from the accused place after conducting a search at the accused's place with the police.

The accused disputed the evidence of PW1 with regard to the items allegedly recovered from the search and stated that nothing was recovered from his place. His testimony was buttressed by DW2 who also stated that nothing had been recovered from their home. To support this, the defense tendered in a search certificated marked as Exhibit D 1 to show that no item was recovered from his place.

The exhibit record marked as Exhibit P2 tendered in by the prosecution indicates recovery of some items from the accused. In total contrast, the search certificate marked as D2 tendered in by the defense indicates that no item was recovered. This creates a huge contradiction that the court cannot ignore. It also raises question on the propriety of the search conducted.

The law relating to conducting a search is provided for under section 27 of the Police Act. It sets out the procedure for conducting a search or seizure by police officers. Among the things required is that the officer concerned must have reasonable grounds for believing that anything necessary for the

purpose of an investigation of an offence may be found in any place within his jurisdiction, secondly he must be of the opinion that such a thing cannot be got without undue delay otherwise than by making search

Thirdly, he should record in writing the grounds of his belief, specify in such writing, as far as possible, the things for which the search is to be made. He must conduct the search, if practicable, in person. If it is not practicable for him to make the search in person, and there is no other person competent to make the search at the time, he/she must record in writing the reasons for not making the search himself and authorize any officer subordinate to him or her not below the rank of corporal to make the search and he/she shall deliver to that officer an order in writing after specifying in writing the place to be searched, thereupon search for that thing in that place.

Section 27(3) of the Police Act further states that copies of the record above shall immediately be sent to the nearest magistrate empowered to take cognizance of the offence and to the owner or occupier of the place searched.

Section 27(5) Police Act requires the presence of the occupant or some other person in his or her behalf or where possible a local leader should be present during the search.

Section 27(6) Police Act further provides that no police officer shall search any premises unless he or she is in possession of a search warrant issued under the Magistrates Courts Act or is carrying a warrant card in such a form as shall be prescribed by the Inspector general.

From the above provisions relating to searches, there must be a search warrant for search to be carried out. My analysis of the prosecution evidence indicates that there was no search warrant, secondly, there was no evidence of search certificate to justify the exhibits allegedly recovered.

The search was informed by PW1's suspicion of the accused on which basis he took it upon himself to recover the alleged exhibits. This conclusion is supported by the evidence PW4 the investigating officer who indeed confirms that they recovered the alleged exhibits from PW1 who's the LC1 Chairperson who had in turn had allegedly recovered them from the accused's home. It is my finding that PW1 had no power to conduct a search.

There was failure on the part of the prosecution to show the chain of custody of the exhibits from the point of recovery which raises questions as to whether the proper procedure was followed. There was no record submitted to the Magistrate as required by section 27(3) of the Police Act of what had been allegedly recovered. The whole conduct of the search was flawed in my opinion.

The purpose of a certificate of search in a search is to authentic in writing what has been searched and recovered by the officer conducting officer in the presence of all parties. It is therefore prudent that whenever a search is carried out, a search certificate must be signed by all the parties present to confirm what may have been recovered.

Where an accused person disputes a search and the items allegedly recovered and produces evidence to that effect, and that evidence is not rebutted in cross examination by the prosecution as is the case here, then the court must be cautious or warn itself of the danger of relying on such exhibits without corroboration.

The prosecution and defense evidence with regard to recovery of exhibits contradicts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence states. It can also be said that two pieces of evidence contradict one another when they are inconsistent

on material facts. It is thus important for the court to carefully consider whether the contradiction goes to the root of the case.

Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions maybe be ignored.

It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues before court that the accused is entitled to benefit there from. In the instant case a find that the contradiction in exhibit evident relates to a material fact and is substantial to the extent that it goes to the root of the case.

Lastly, the accused also attributed his troubles to a grudge between him and PW1 who conducted the search that led to his eventual arrest. He relied on the evidence of DW2 and DW3 to support this assertion. In **Ntambi Francis V Uganda Court of Appeal No.19 of 1998 (Unreported**), it was held that that with regard to the defense of a grudge, the court has to take into account the existence of the grudge when considering whether or not the prosecution witnesses have told the truth. Where there is evidence of a grudge, the court must warn itself of the possibility that witnesses may fabricate evidence against the accused.

The evidence of poor identification and failure to properly conduct a search on the accused persons creates doubt in the prosecution case. The circumstantial evidence of the exhibits allegedly recovered and sought to be relied on is of a weak nature and cannot be relied upon. There is no corroboration of any material fact for this court to safely rely. The hearsay evidence of PW1 cannot be sustained. Lastly the evidence of a grudge between one of the prosecution witnesses (PW1) and the accused raises serious doubts which must be resolved in favor of the accused.

Accordingly, I find that the prosecution has not proved participation of the accused in the alleged offence beyond the required standard. He is hereby acquitted on each count as charged and should be set free unless being held on other lawful charges.

I so find.

JUDGE

27/03/2024