

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HCT-11-CSC-NO. 31 OF 2011

KAB-00-CR-CSC-AA NO. 82/2010

CRB 1754/2009

UGANDA ::PROSECUTOR

VERSUS

A1 NSAASIBWOHA EDWARD(A1)

A2 KAPIPA JUSTUS (A2):::ACCUSED

**BEFORE HON. MR. JUSTICE J.W. KWESIGA JUDGMENT**

NSASIBWOHA EDWARD and KAPIPA JUSTUS are jointly indicted for **Aggravated Robbery** contrary **to Section 285 and 286 (2) of the** Penal Code Act. It is alleged that on 18<sup>th</sup> June, 2009, at Nyarubira area, Buranga Parish in Kabale District the Accused persons robbed PAULINE RUGANGURE of her money, Shs. 800,000/= and at or immediately before or immediately after the said robbery used a deadly weapon to wit, a knife on the said Pauline Rugangure.

The Accused persons pleaded not guilty and the prosecution remained with the duty to prove the case as a whole. Every Accused person, unless he or she pleads guilty is presumed to be innocent until the charges against him are proved beyond reasonable doubt. See **Article 28 (3) (a) of the Constitution of The Republic of Uganda, Woolimington Vs D.P.P (1935) AC 462 and Bogere Moses Vs Uganda Criminal Appeal No. 1 of 1997 (SCU)**. The Accused person has no duty to prove his innocence. Once there is doubt as to whether the Accused person committed the offence or not that doubt must be resolved in favour of the Accused person. See: **Israel Epuku S/O Achitu (934) EACA 166.**

In discharging its duty, the prosecution must prove each and every essential element of the offence with which the Accused person is charged. In aggravated Robbery, the state has to prove the following:-

- (i) That there was theft or Robbery.
- (ii) That there was use of or threat to use a deadly weapon at or immediately before or

immediately after the said Robber alternatively, that there was use of Actual violence against the victim.

(iii) That the Accused person participated in the said Robbery.

To prove theft, the Prosecution relied on PW 1 Pauline Rugangura the complainant, she said she knows the two Accused persons, they go to the same church with her. That on 18<sup>th</sup> June, 2009 while coming from the garden she met the Accused who grabbed her put her down and robbed her. That A1 cut her with a knife, A2 searched her pockets and took Shs. 800,000/= she made alarm and two guards from the neighbourhood came to rescue her. The guards called her son PW 3 who found her at the scene bleeding and took her to Kabale Hospital. Next day she reported to Police and told Police names of her attackers as NSAASIBWOHA and KAPIPA.

PW 2 MUSINGUZI ANGELO, testified that on 18<sup>th</sup> June, 2009 he was guarding a telephone mast at Katuna at about 6:00 p.m, he was with Richard and found SAASIBWOHA (A1) on top of the old woman cutting her dress. Nsasibwoha turned to beat them, PW 2 got a stick to beat up NSasibwoha and he ran away and escaped. The Victim told him she had recognized the second attacker who also ran away like Nsasibwoha. PW 2 came to the scene when it was approaching 7:00 p.m. PW 3 Mwebesa Jackson said he was called by Richard that his mother had been attacked he arrived at the scene, the mother (PW 1) was in pains. He took her to hospital, she told him she had recognized Nsasibwoha and Kapipa. PW 3 never found them at the scene. PW 5 was the arresting officer to whom A2 Kapipa was identified by PW 3 the son of the victim.

PW 6 was the Police officer whose role was just formal. He interrogated the suspects who denied. He arranged for medical examination under Police Form 24. The Suspects were found mentally normal without any injuries. PW 7 Dr. Tumuhimbise examined Paulina Rugangura under Police Form 3. She had small face wounds on the face that he classified as harm. (See PE III)

In Defence, each of the Accused denied. A1 Nsasibwoha states that he knows the complainant but never saw her that day. He spent the whole day at home. They go to the

same church and had no grudge. He had never seen PW 2 Musinguzi Agelo. He admits Kapipa sis his relative but never met on the day in question. A2 Kapipa denied participation. He said he kept at his home from 4:00 p.m until next day. He had no grudge with the complainant.

The Defence challenged the evidence of identification. The Defence contention is that the naming of A1 and A2 in PW 1 evidence is an after thought. Her Police statement was admitted as Defence exhibit DE 1 in the Police statement she stated she was attacked by four boys and among them she identified SAASI. Others hide their faces with their caps and her clothes. PW 2 Musinguzi told court that he found Nsasibwoha on top of the victim while assaulting her. Therefore Nsasibwoha was identified at the scene by both PW 1 and PW 2. The first report to the Police disclosed Nsasibwoha and three others unknown persons. Kapipa was well known to the complainant if she had recognized him she would have included him in the Police statement. PW 2 mention of Kapipa as being a person who had ran away on seeing him and Richard is speculation and un reliable and does not corroborate the victim's evidence on identification of Kapipa (A2). PW 6 Kabagambe (D/AIP) told court that the complainant made two Police statement and in the statements she mentioned different suspects. In her first statement she mentioned Saasi (A1) the complainant stated she had Shs. 800,000/= on her belonging partly to her and partly to the village savings society for whom she kept the money. This money was stolen when she was attacked and injured. From the evidence above, it is proved that the Assailants inflicted bodily violence and injured the victim in course of stealing the money she had. There was threat to use a knife to cut her. She sustained injuries classified as bodily harm (see medical evidence PE III) I am satisfied that the Prosecution has proved beyond reasonable doubt that theft took place and there was threat to use a deadly weapon, a knife, against the victim and at the same time there was actual violence used against the victim who sustained bodily injuries. Therefore this was aggravated robbery.

The prosecution relied on evidence of the victim, PW 1 and Musinguzi PW 2 to prove participation. I have partly delt with the evidence connecting Kapipa A2 to the offence. I have expressed my doubt in this evidence. It appears this evidence is an afterthought. It does

not matter that the complainant knew him before and that they did not have a grudge to explain why she told court that she saw A2 when the rest of the evidence shows the contrary. I accept the defence contention that if she had seen him she would have disclosed his name at the first opportunity. The fact that she did not mention his name creates doubt which I must resolve in favour of the Accused person. As far as the case against A1 Nsasibwoha, there is consistent evidence of identification. I have considered his defence of ALIBI that he was at his home and never came to scene of crime. It is trite that once an Accused person raises the defence of ALIBI, he bears no burden to prove it. It is the duty of the prosecution to disprove it by adducing evidence that puts the Accused

person at the scene of crime at the time the offence was committed. See decisions in the following cases:- **Uganda Vs Sebyala (1963) EA 206 - Sekitoleko Vs Uganda (1967) EA 53.**

In the instant case the Accused was identified by the victim as they struggled over her money. She stated there was light at about 6:00 p.m when she was attacked. The evidence of PW 1 as a whole was supported by PW 2 Musinguzi who told court that he found Nsasibwoha on top of the old woman struggling with her and that when he intervened Nsasibwoha attempted to hit him and later ran away. This set up gave PW 1 and PW 2 sufficient opportunity to identify the culprit. The victim has been consistent on her evidence of identification from the time she reported the matter to Police and in her testimony in court.

In as far as identification of Nsasibwoha is concerned. The two Accused persons have independent criminal liability and the state evidence must prove each case to the required standard. I agree with the joint opinion and advice of the Assessors that the prosecution evidence proved participation of A1 Nsasibwoha Edward and not A2 Kapipa Justus. In the circumstances **A2 Kapipa Justus** is **hereby Acquitted** and A1 Nsasibwoha Edward is hereby found guilty of **Aggravated Robbery** contrary to **Sections 285 and 286 (2) of the Penal Code** and he is convicted accordingly.

#### **J.W. KWESIGA JUDGE SENTENCING**

**STATE SUBMISSIONS:** No previous record of offence. He is a first offender. He is found guilty of a serious offence, where maximum sentence is death. Robbery is rampant in this

area. We pray that you give him a long custodial sentence. I invite court under 286 (4) of Penal Code Act and S. 26 TIA to make an order for compensation against the victim of this Robbery for Shs. 800,000/=.

DEFENCE SUBMISSIONS: Mr. Murumba: Convict is 40 years old. He is a family man with children, he has been on remand for three years and four months. He is remorseful. I pray that he is given a sentence that enables him to reform and be able to come back to his family and possibly pay compensation.

Accused: I pray, I have four children. I pray that I be released.

### SENTENCE

Court: I have considered the fact that the convict is a first offender, he has been on remand for 3 years and 4 months. The offence committed attracts a maximum sentence of death, however I will discount this for the reasons given above. Robbery is rampant in this area and I have considered that the victim was an old woman aged about 60 years and she was mercilessly treated and deprived of her money. The convict deserves a deterrent sentence that will hopefully, deter other people with similar tendencies to avoid such lawless methods of acquiring wealth or property. In the circumstances I do hereby sentence the Accused person to **fourteen (14) years Imprisonment.**

**J.W. KWESIGA**

**JUDGE 29-10-2012 In the presence of :**

Mr. Murumba Wilfred for the Accused on State brief. Mr. Arinaitwe Rajab, Resident State Attorney for State. Ms Ampeire Evelyne - Court Clerk.