

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION CASE NO. 0456 OF 2018
(ARISING FROM CR. CASE NO. NAK/040/2017)

5 **UGANDA ----- PROSECUTOR**

VERSUS

MUWANGA SIMON

KAMANZI EMMA AND ANOTHER ----- ACCUSED

10 **BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN**

JUDGMENT

The Accused persons Muwanga Simon, Kamanzi Emma and another were indicted on three counts.

15 **Count 1:** Aggravated robbery contrary to Section 285 and 286 (2) of the Penal Code Act.

20 The case for the Prosecution is that on 19.09.2017, at Kito, Kirinya Zone, in Wakiso District, the Accused person robbed one Salome Mwebe of cash approximately Shs. 100,000/-, and an ATM card for Barclays Bank and immediately before or after the said robbery were in possession of deadly weapons.

Count 2: Attempted murder contrary to Section 201 (a) of the Penal Code Act.

25 The case of the Prosecution is that the three Accused persons on 19.09.17, at Kirinya Zone in Wakiso District, attempted to unlawfully cause the death of Salome Mwebe.

Count 3: Attempted murder contrary to Section 204 (a) of the Penal Code Act.

30 The Prosecution contends that the three Accused persons on 19.09.017, at Kito, Kirinya Zone in Wakiso District attempted to unlawfully cause the death of Harriet Nakibuule.

The two Accused persons denied all the three charges and gave Defenses of alibi. However, by the time of the trial, A3 had entered into a plea bargain and sentenced. He was serving sentence.

- 5 The Prosecution then called six witnesses to prove its case against the two remaining Accused persons A1 and A2.

The medical examination, reports of the Complainants together with photos taken of them and the medical examination reports of the two Accused persons were
10 admitted in evidence as Exhibits P_{1A}, P_{1B}, P₂, P_{3A} and P_{3B} respectively, under S.66 Trial on Indictment Act.

In determining this case, I bear in mind the established principles of law that the burden of proof is upon the Prosecution to prove the guilt of the Accused person(s)
15 beyond all reasonable doubt.

The burden never shifts to the Defence except in a few exceptional cases provided for by law.

- 20 The Prosecution is enjoined to prove all the ingredients of the various offences to the required standard.

Where there is more than one Accused person as in the present case, the participation of each and every one of them has to be proved.

25 When the Accused raises a probable Defence, the duty still remains on the Prosecution to prove that, despite the Defence, the offences were committed and that the Accused persons committed them or participated in the commission. – Refer to **Woolmington vs. Director of Public Prosecutions (1935) AC 462**,
30 **Lubogo vs. Uganda [1965] EA 559** and **Miller vs. Minister of Pensions [1947] 2ALL ER 373**.

An accused has no burden to prove his/her innocence.

- 35 Also refer to S.101 Evidence Act, which provides that ***“He who alleges must prove”***.

It is trite law that an accused person is deemed innocent till he/she pleads guilty or is proven guilty.

- 40 While it has been established by case law that ***“the standard of proof required is not proof to absolute certainty, nonetheless, the Prosecution evidence should be of such standard as leaves no logical explanation to be derived from the facts, except that the Accused committed the offence”***. – See **Woolmington vs.**

Director of Public Prosecutions (Supra) and Miller vs. Minister of Pensions (Supra)

This court is also mindful of its duty to evaluate all the evidence on record, both for the Prosecution and for the Defence, to be able to determine as to **whether the offences for which the Accused persons were indicted have been proved to the required standard.**

For the charge of aggravated robbery in Count I to be sustained against the Accused persons, the following ingredients of the offence have to be proved: -

- 1) Theft
- 2) Use of force, violence or threat to use force or violence at the time the theft occurred.
- 3) Use of a deadly weapon or that there was grievous harm or death occasioned to the victim.
- 4) That it was the Accused persons who committed the offences or participated in the commission thereof.
- 5) Where there is more than one Accused person, as in the present case, that there was a common intention to execute an unlawful purpose.

The Prosecution in the present case relied upon the evidence of 6 witnesses to try and prove its case.

Theft:

The case for the Prosecution is that on the date in question, PW1 Nakibuule Harriet was the home of PW2 Salome Mwebe where she was working.

At about 11am, there was a knock at the gate and PW1 went and opened it. She found three people outside and one of them asked for PW2.

The three entered the house and one of them stabbed PW1 and when she fell down, the assailants went upstairs.

PW2 had not gone to work that day as her baby was ill. She recalled PW1 informing her that there were people who had come but PW1 did not respond when PW2 asked her who the people were.

When PW2 got out of the bedroom to see what was happening, she saw three people standing there. They held her and stabbed her on both shoulders. Pleading with the assailants not to be killed, PW2 got her bag and wallet and gave Shs. 100,000/- to one of the assailants plus her ATM card and pin number. The assailants then fled the scene.

Counsel for the Accused did not make any submissions in respect to this ingredient on indication that it was not contested.

This court therefore finds that the ingredient was proved to the required standard.

The next ingredient to determine is **use of force or violence**.

Both PW1 and PW2 testified that they were stabbed by the assailants. PW2 fell down but managed to get up when the assailants went upstairs. She then collapsed at the neighbor's gate, where she was found and taken to hospital.

The violence meted out against the two Complainants is confirmed by their medical examination reports – Exhibits P_{1A} and P_{1B} and P₂ – where both PW1 and PW2 were found with stab injuries consistent with the use of force.

The injuries sustained by PW1 and PW2 were also confirmed by PW3, whose sister assisted PW2, when she found her lying down with stab wounds.

Violence has been defined as “*force exerted so as to injure or abuse*” – Webster Collegiate Dictionary.

It is not disputed that PW1 and PW2 were stabbed and sustained injuries described in their medical examination reports – Exhibits P_{1A} and P₂.

This court therefore finds that there was use of violence at the time of the commission of the offence.

The next ingredient to determine is **Use of a deadly weapon or that the assailant caused grievous harm to the victim**.

Both PW1 and PW2 testified that they were stabbed by the assailants who were armed with knives.

PW1 described the knives used to stab them and identified them before court. One had a wooden handle, and the other was silver – P_{ID1(a)} and P_{ID1(b)}.

Although the knives were never exhibited by the Prosecution, the Medical examination reports of PW1 and PW2 indicate that they were injured by sharp edged objects (Knife).

PW1 sustained injuries that were classified as grievous harm, while those sustained by PW2 were classified as harm.

A “**deadly weapon**” is defined to include “**any instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument**”.

It is therefore the finding of this court that the Prosecution proved to the required standard that, the perpetrators used deadly weapons to occasion the injuries sustained by the PW1 and PW2.

Case law has also established that *“there is no burden on the Prosecution to prove the nature of the weapon used in inflicting the harm...”* - See the case of **Uganda vs. Komakech Tony alias Mono and 2 Others HC SC No. 0131/2014** by Justice Mubiru.

Although the case concerned murder, I found the principle applicable to the circumstances of the present case.

What is left for court to determine is **whether it is the Accused persons who committed the robbery or participated in the commission thereof and whether there was a common intention to execute an unlawful purpose.**

However, since it is apparent that when robbery occurred, the victims were injured in the process, for which the two Accused are charged on counts 2 and 3; the issue of participation will be determined on all three counts, after dealing with the ingredients of the second and third counts.

The second and third counts both being attempted murder will be dealt with together.

Counts 2 and 3: Attempted Murder

To sustain a charge of attempted murder contrary to Section 204 (a) of the Penal Code Act, the following ingredients of the offence have to be proved by the Prosecution: -

- 1) Unlawful intention to cause death.
- 2) Overt act manifesting that intention.
- 3) That the Accused committed the offence or participated in its commission.
- 4) Where there is more than one Accused person, that there was a common intention to execute an unlawful purpose.

The first two ingredients will be dealt with together.

“Attempted murder” has been defined as *“the failed or aborted attempt to murder another person. It consists of both action and intention. A person must take a direct step towards killing and must have the specific intent to kill that person”*

There must be an overt act manifesting the intention and **“direct act”** has been defined as *“an act directed toward another person that indicates an intent to kill*

or harm and that justifies self Defence”. – Refer to **Marriam – Webster Legal Dictionary**.

In the present case, PW1 and PW2 were attacked and robbed. Immediately before or during the course of the said robbery, they were repeatedly stabbed as evidenced by Exhibits P_{1A} and P_{1B} and P₂.

Stabbing anyone with an instrument capable of causing death as happened in the present case, is sufficient to prove intent to kill.

The overt acts were manifesting the intention were the attacks on the home and the repeated stabbing of the victims.

The multiple stab wounds sustained by the victims provide sufficient evidence for the court to infer that the assailants intended not only to injure the victims but also to cause death.

Indeed, the injuries sustained by PW2 were classified as grievous harm.

The wounds were deliberately inflicted and could have resulted into death.

The fact that the assailants intended to cause serious physical injury to the victims, did not negate the intent to cause death.

This is corroborated by the evidence of PW2 who was told by one of the assailants that he had been sent to kill her.

It has been established by case law that **“one may harbor at the same time, both an intent to cause serious physical injury and an intent to cause death”**. – Refer to **People vs. McDavis 97 AD 2/302**.

The first two ingredients of the offence of attempted murder on both Count 2 and 3 were never disputed by the Defence.

In agreement with the submissions of Counsel for the State, this Court finds that they were proved to the required standard.

What is left for this court to determine is **whether the two Accused persons committed the offences on all three counts or participated in the commission thereof. And whether there was a common intention to execute an unlawful purpose.**

As earlier indicated in this judgment, the Prosecution evidence indicates that PW2’s home was and attacked by three people A1, A2 and A3 and one of them knocked on the gate and PW1 opened.

One of them asked if PW2 was around.

That when they entered the house, A3 got a knife out of his pocket and stabbed PW1 and that A1 and A2 also participated. When she fell down, the Accused went upstairs and that is when PW2 got up and left the house and fell at the neighbor's gate.

The witness identified A1 and A2 as having been part of the three people who assaulted her with knives.

The evidence of PW1 was corroborated by PW2, who stated that after PW1 called and informed her about people who had come to the house and she got out of her bed room; she saw three people who included A1 and A2 standing there. That the third person she saw, was not in court.

The people held her and stabbed her on both shoulders. But that when A3 held her, the two Accused A1 and A2 ran out of the house and disappeared.

The victim identified A3 as one Ibra, who together with his mother and brother used to assist her with some work.

That when PW2 pleaded with A3 not to kill her, he told her that her workmate had sent him to kill her, he did not say who the workmate was.

At that point, PW2 got her bag, got out her wallet and gave A3 Shs. 100,000/- and her ATM card and provided him with its pin number.

A3 then ran down the stairs. PW2 followed him and found him at the gate of her house also making an alarm as if he had come to the rescue.

But when he saw PW2 come out of the house, A3 also ran away and disappeared.

When A1 and A2 were arrested, PW2 identified them at the parade, although she had seen them for the first time at her home.

That PW1 also identified A2 at the parade.

According to PW3, a neighbor to PW2, on the date in question, when she accompanied her sister to school, she found two men seated near the gate of PW2. She identified the two men as A1 and A2.

When she got back home, she heard an alarm and she ran out of the house with her sister to see what was happening.

Her sister found PW2 lying down with stab wounds and assisted her. Another neighbor called Police.

5 The next day, when PW3 went out to buy newspapers and while at the Taxi stage, she saw A2 and recognized him as one of the young men she had seen at PW2's gate.

She then informed the guard that A2 had been one of the people who had attacked and robbed PW2.

10 The guard called Police. Police Officers came on a motorcycle (boda-boda) and chased the taxi up to Bukasa, where upon A2 was arrested and taken to Police.

A1 had been arrested on the same date the robbery happened.

15 PW4 Anguani Patrick was a Watchman at the home neighboring that of PW2.

He testified that, on the date in question, he heard an alarm and ran out to see what was happening.

20 That when he got to the wall fence, he saw two men emerge from PW2's gate and they ran away. A1 was one of the men.

PW4 then followed the two men up to an unfinished house where the two men took different ways. A2 took the upper route. A1 took the lower route.

25 A1 entered the unfished house and PW4 followed him there. A1 hid under the stairs of the building. PW4 then sought help from two Police men who were passing by. Together they arrested A1 and took him back to the scene of crime.

30 At the scene, he found many people gathered there. He noticed blood in the kitchen and in the compound.

35 A1 was then taken to Police at Kirinya, but he was not found with any weapon and there were no blood stains on him.

The witness came to know A2 the following day, when he was identified as one of the assailants by PW3. They followed him with Police and arrested him. A2 was working as a taxi conductor.

40 PW5 No. 38680 SSgt Kasule Richard is a Police Officer, who at the time of the incident was attached to Kirinya Police Station.

He recalls that on the date in question, he had been deployed at a Police booth, not far from the scene of crime. He received a call from a resident of the area and a neighbor to the Complainant informing him about the robbery.

- 5 PW5 together with his colleague one Kambizi responded and took a motorcycle to the scene, and on the way met A1 running to an unfinished house.

10 Upon checking the house, they found A1 under the stairs, arrested him and took him back to the scene. The other two Accused had disappeared. There was blood at the scene.

As many people had gathered, the witness sought reinforcement from Kirinya Police Station and later took the Accused there.

- 15 A2 was arrested two days later when he was cited at a taxi stage. That he PW5 and PW4 followed the taxi up to Bukasa and A2 was arrested. The driver of the taxi was directed to drive to Kirinya Police Station and the taxi and A2 were handed over to OC CID for further investigations.

- 20 PW6, DAIP Omono Christopher, is also a Police Officer who at the time of the alleged offences was attached to Kirinya Police Station as OC. CID.

He recorded the charge and caution statement of A1 and A2 on 20.11.17 and 21.11.17 respectively.

- 25 In their statements, the two Accused person said that they were asked by A3(Convict) to accompany him to Kito, where he was going to demand for his money from someone who owed him.

- 30 When they got there, A3 (Convict) knocked on the gate and it was opened by PW1. The third Accused asked whether the owner (PW2) was around, and they all entered the house.

- 35 When they got to the sitting room, A3 grabbed PW1 by the neck, kicked her and then began stabbing her. He then directed the two Accused to run upstairs and stop PW2 from making noise. That when they got upstairs, and the lady emerged from the bedroom, she continued making an alarm.

- 40 The two Accused (A1 and A2) then ran downstairs, ran out of the house and were chased by a man.

While A2 took the upper direction, A1 took the lower direction.

A2 went and hid under the Stairs of the unfinished house and A2 claims that he ran up to Namboole and boarded a vehicle to Bukasa.

5 A1 was arrested from the unfinished house by Policemen and the mob that had gathered beat him. – Refer to medical report Exhibit P₃ that indicates he had injuries.

A1 was rescued by Police and taken to Kirinya Police Station.

10 A2 was arrested on 21.09.2017, at Bukasa, while in a taxi.

According to this witness, the two Accused persons insisted that it was Shakur (A3) who stabbed the two Complainants.

15 Refer to Exhibits P₄ and P₅.

Exhibit P₄ was made by A1 but it was retracted at the trial. It was admitted as an Exhibit after a trial within a trial was held and the objection to exhibiting the statement was overruled.

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The statement of A2 – Exhibit P₅ was admitted without any objection being raised by A2.

The Prosecution then closed its case after several adjournments, having failed to trace the intended last witness.

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As already indicated in this judgment, the two Accused persons denied having committed the offence and raised defenses of alibi. They both called one witness.

30 In his sworn evidence, A1 denied knowing anything about the charges on all three counts. He stated that he was arrested on 19.09.17 by people not in uniform as he was in the market at Kireka working near the road.

That he was beaten by the men who claimed that he had no license to operate from where they found him.

35

He was then put on a vehicle and taken to Kirinya Police. At about 7pm, he was transferred to Kiira Police Station.

40 On 29.09.17, he was taken to court and was remanded without knowing which offence he had committed. While the charges were read to him, he was not allowed to explain.

A1 wondered why A3 was not in court, although he is at Luzira where he found him.

A3 also gave sworn evidence where he stated that at the time of his arrest he was a Taxi Conductor.

5 That on 21.09.17, when he was arrested, he was found in a vehicle with passengers. The vehicle was going to Bukasa, when it was stopped by men in plain clothes.

10 Taken to Policar, he was assaulted and asked if he knew A3 Shakur. That he denied knowing him asserting that from August, 2017, he had been working, and that he had evidence to show that he had been working. That is, the receipts for the vehicles given at the stage. That the receipts were taken from the vehicle which had been taken to Police.

15 After being put in Police cells, where he remained for two weeks before he was taken to Court, the Police asked him to sign on a piece of paper.

20 That when he told them he could not write, he was beaten. Eventually, he was required to put his thumb mark, which he did not knowing if he was admitting the charges or thumb marking Police bond documents.

A2 also denied knowing anything about all the charges contending that he never committed any offence.

25 The witness for the two Accused persons Kiguli Ibra Shakur had been their Co-Accused, until he pleaded guilty as earlier indicated in this judgment.

He testified that he committed the offences and was convicted on all three charges.

30 That while he knows the two Accused persons, that is A1 and A2, he got to know them at Luzira Prison.

35 On 01.11.17, when he was taken to Nakawa Court and charges were read to him, he was told that there were two other Accused on the same file. He was then remanded until 07.11.17.

40 On that date, when he returned to court, charges were read for A1 and A3 and that is when he got to know them and they got to know him. But that they did not want to talk to him as they alleged that they were arrested when Police was looking for him.

Emphasizing that he did not know the two Accused before he met them at court, the witness added that he knew the case and that is why he did not go for trial. He

asserted that he committed the offences with another person who was not in court and was not one of the two Accused before court.

That the person he committed the offences with was his brother Kibuuka Isma.

They were arrested together on 08.10.17, at Mubende, at their grandmother's home where they had run to, and brought to Kawempe Police Station.

When identification parade was conducted, his brother Kibuuka was not identified.

That he admitted committing all the offences on the three counts stating that he had a long knife which he used to stab PW1. When entering the premises, he had kept the knife in his jumper pocket.

He denied that it was his evidence that led to the arrest of A1 and A2. Saying that, while he made a statement at Police, he did not talk about the two Accused.

In determining the issue of participation of the two Accused in commission of the offences, I wish to remind myself of the requirement to examine all evidence carefully, bearing in mind the established general rule that ***“an accused person does not bear the burden to prove his innocence. And by putting forward a Defence like alibi or any other, an accused does not thereby assume the burden of proving the Defence except in a few exceptional cases provided for by law”***.

It is up to the prosecution to disprove the Defence of the accused persons by adducing evidence that shows that, despite the Defence, the offence was committed and was committed by the accused”. – See ***Sekitoleko vs. Uganda [1967] EA 531, Wamalwa & Another vs. Republic [1999] 2EA 358 (CAK) and Kato vs. Uganda [2002] IEA 101.***

The submissions of Counsel for the Defence and for the Prosecution will also be taken into consideration. The submissions raised such issues as alibi, identification, circumstantial evidence, evidence of Co-Accused, retracted charge and caution statements, interalia.

Upon giving the evidence of both the Prosecution and the Defence the best consideration, I can in the circumstances, I find that both A1 and A2 were identified by PW1, PW2 and PW3 and placed at the scene of crime.

This was confirmed by PW4, a Watchman at the home of PW2's neighbor, who saw two men emerge from PW2's gate and ran away when he went to answer the alarm. He followed the two to the unfinished house, where they took different

routes, and with the help of Police Officers managed to arrest A1. The evidence is corroborated by PW5.

5 A2 was identified the next day as one of the assailants and was also arrested in circumstances already set out in this judgment.

The evidence of the presence of the two Accused at the scene of crime is further confirmed by PW6, the Police Officer who recorded their charge and caution statements.

10 Though the caution statements were retracted by the two Accused persons, that of A1 was admitted after a trial within a trial was held and his objections overruled.

Thereafter, the statement of A2 was admitted in evidence without any objection.

15 The two statements indicate that the two Accused persons were at the scene at the invitation of third Accused who came as their witness; and the reason being that A3 requested them to accompany him to demand for his money. Being his friends, they agreed to do so and went with him to the scene of crime.

20 For all those reasons, I find that their alibis are disproved, and were an afterthought.

The proper procedures for recording the charge and caution statements were followed.

25 While Police statements are not made on oath and courts prefer the witness evidence which is tested by cross examination. - Refer to **Lawrence Mwayi and Others vs. Uganda Cri App. 162/2001** – where the case of **Chemonges Fred vs. Uganda SC. CR App 12/2001** was relied upon the credibility of the recording officer in the present was not impeached in cross-examination. He remained firm in his testimony.

30 However, despite the fact that the two Accused persons were placed at the scene of crime, the Prosecution evidence did not establish that they had a common intention to execute an unlawful purpose.

35 From the outset, they asserted that their (friend A3) turned Defence witness asked them to accompany him to the home of PW2 where he was going to demand for his money. And while an unlawful purpose developed in the course of events, that is A3 stabbed PW1 and PW2, and robbed PW1 of her money and ATM Card, it is clear from the evidence that A1 and A2 disassociated themselves from the actions of their Co- Accused by running away from the scene.

PW2 clearly stated she was stabbed by A3- that A1 and A2 ran down the stairs and out of the house.

PW5 upon arresting A1 on the same date found him with no blood stains on his shirt or weapon alleged to have been used in the crime.

While A3, the witness of the Accused, while he apparently told lie that the two were not at the scene, clearly stated that he is the one who committed the crimes complained of- robbery and the stabbing.

To be convicted of attempted murder, the Prosecution must show that the Accused specifically intended to commit the crime.

“A person is guilty of an attempt to commit a crime when he/she intends to commit that crime”.

And it has been established that *“if someone was involved in an act but without intent to commit a crime, they may not be convicted of the said crime.”*

While the two Accused accompanied A3 to the home of PW2, it was not with intent to commit any crime but to accompany A3 – they disassociated themselves from the offences committed in the process.

It is trite law that it is better for a hundred guilty persons to go free than for an innocent person to be convicted.

For all the reasons set out in this judgment, while this court finds that the offences were committed as set out in all three counts, the Prosecution failed to prove that the two Accused persons, although at the scene had a common intention to execute an unlawful purpose.

And in agreement with Assessors’ opinion though on different grounds, this court finds the two Accused persons not guilty as charged and they are accordingly acquitted on all three counts and should be set free forthwith unless otherwise held on other legal charges.

From the outset after their arrest, they asserted that their witness asked them to accompany him to the home of the Complainant to demand money owed to him which they did. But when they got there and he meted violence to the two victims, the two Accused persons ran away thereby disassociating themselves from the actions of their Co-Accused/witness.

Indeed, when they were arrested, the Co-Accused turned witness also vehemently told court that they did not participate in the offences.

They are accordingly found not guilty and are acquitted of the charges on 3 counts and should be set free unless otherwise held on other legal charges.

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FLAVIA SENOGA ANGLIN
JUDGE
12.02.2021