THE REPUBLIC OF UGANDA

IN THE HIGH COURT UGANDA AT JINJA

CRIMINAL SESSION NO.129 OF 2021

UGANDA::PROSECUTION

VERSUS

KAWANGUZI ISMA & 3 0THERS :::::::::::::::::::::::::::::::::::ACCUSED

BEFORE; HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI

RULING ON A PRIMA FACIE CASE

Kawanguzi Isma (A1), Balyejusa Musa (A2), Muganza Jamali (A3), and Mukisa John (A4) herein referred to as the accused persons were indicted with the offence of Aggravated robbery contrary to section 285 and 286(2) of the Penal Code Act. It is alleged that the accused persons on the 4th day of November 2020 at Kyabazinga roundabout, Bugembe Town Council in Jinja District robbed Ssengooba Sharif of three mobile phones and cash worth UGX 405,700/=, all items valued at One Million Six Hundred Eighty-Five Thousand shillings (1,685,000/=) and at or immediately before or immediately after the time of the said robbery used a deadly weapon to wit a panga on the said Ssengooba Sharif.

At plea taking, all the accused persons pleaded not guilty to the indictment.

Representation

The prosecution was represented by Shallote Kamusiime, a State Attorney in the Office of the Director of Public Prosecutions. The accused was represented by Counsel Daniel Mudhumbusi on State brief. At the close of the prosecution's case, Counsel Daniel prayed that Court makes a ruling on whether the prosecution has made out a prima facie case against the accused persons.

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Burden and Standard of proof

The burden of proof in criminal matters rests squarely on the prosecution and does not shift to the accused unless it is exempted by statute. The standard of proof is high; the prosecution must prove all the essential ingredients of the offence beyond reasonable doubt.

Consequently, the prosecution had the burden to prove the following ingredients for the offence of Aggravated Robbery:

1) That there was theft of some property.

(2) That there was violence in the course of the theft.

(3) That there was actual use of a deadly weapon or threat to use it.

(4) The accused took part in the commission of the offence.

The prosecution led the evidence of three witnesses; Kanabiro Robert a Clinical Medical Officer who examined both the victim and the accused persons, Detective Sergeant Oyait Francis Fulton the arresting officer and Detective Sergeant Bakibisemu Hudson, the investigating officer and on court record, the prosecution's witnesses were recorded as PW1, PW2 and PW3 respectively. The complainant/ victim, Mr. Ssengooba Sharif did not turn up to testify in Court even when witness summons were taken out.

The Law

At the close of the prosecution's case, **Section 73 of the Trial on Indictment Act (TIA) Cap 23** as amended, requires this Court to determine whether or not the evidence adduced by the prosecution has established a prima facie case against the accused person. It is only when a prima facie case has been made out against the accused that he/she should be put to his or her defence.

Section 73(1) of the TIA provides that; - "*When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is no sufficient evidence that the accused or any one of several accused committed the offence, shall, after hearing the advocates for the prosecution and for the defence, record a finding of not guilty*".

Prima facie case.

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By law it is expected of the prosecution that, at the close of their case, they have made out a *prima facie* case, one on the face of it, is convincing enough to require that the accused person to be put on his defence. Justice Stephen Mubiru in the case of **Uganda Vs Obur Ronald & 3ors Criminal Appeal No. 0007 of 2019 (HC)** stated that: - "*A prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence* ***(See Rananlal T. Bhatt v R. [1957] EA 332).*** *The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.*

According to **A Guide to Criminal Procedure in Uganda" B.J. Odoki 3rd Edition at page 120,** it is stated that in order for the court to dismiss the charge at the close of the prosecution case, court must be satisfied that: -

a. There has been no evidence to prove an essential element of the alleged offence, or
b. The evidence adduced by the prosecution has been so discredited as a result of cross examination or, is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

The Evidence

The accused persons in this case were charged with the offence of Aggravated Robbery. Aggravated Robbery is defined under section 286(2) of the Penal Code Act (PCA) as the use or threatened use by the offender of a deadly weapon in the course of robbery perpetrated by him. In the case of **Oryem Richard & Another Vs Uganda Criminal Appeal No. 2 of 2002 (SC),** the Supreme Court laid down the ingredients as mentioned above, for the offence of aggravated robbery that have to be proved by the prosecution.

Therefore, for the accused to be required to defend himself, the prosecution must have led evidence of such a quality or standard on each of the above essential ingredients to prove the offence of Aggravated Robbery.

(1) That there was theft of some property.

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Section 254 (1) of the PCA defines the offence of theft as: - *"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."*

Section 254 (2) (a) of the PCA further states that as: - *A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with an intent permanently to deprive the general or special owner of the thing of it."*

In the case of **Uganda v Asea (Criminal Session 1234 of 2016) [2019] UGHCCRD 6 (7 February 2019)** Justice Stephen Mubiru in the case of Aggravated Robbery stated that: - *'The first element, taking of property belonging to another, requires proof of what amounts in law to an asportation (that is carrying away) of the property of another without his or her consent."*

In the case of **Sula Kasiira v Uganda (Criminal Appeal No. 20 of 1993) [1994] UGSC 8 (16 October 1994)** the Supreme Court in regards to what amounts to theft held that:

"For a restatement of the law on taking or carrying away as an element of theft, the learned trial Judge referred to paragraph 1484 in Vol. 10 of Halsbury's Laws of England, 3rd Edition, which reads as follows:

"1484 Asportation. There must be what amounts in law to an asportation (that is carrying away) of the goods of the prosecutor without his consent; but for this purpose, provided there is some severance, the least removal of the goods from the place where they were is sufficient, although they are not entirely carried off. The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation, and so is a removal or partial removal from one part of the owner's person to another. There must, however, be a complete detachment of the goods if attached. In cases where asportation cannot be proved, but where the prisoner intended to steal and did some act in furtherance of that object, he may be convicted of attempting to steal. The offence of larceny is complete when the goods have been taken with a felonious intention, although the prisoner may have returned them and his possession continued for an instant only"

The Supreme Court further stated that the law as restated therein, represents the

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legal position in Uganda regarding the act of taking or carrying away as an element of the crime of theft.

To prove theft, the prosecution relied on the evidence of PW2 and PW3. PW2 Detective Sergeant Onyait Francis Fulton, testified that while at Bugembe Police Station, he was summoned by the O/C ASP Twinamasika Damascus to his office and where he met the complainant in this case, Mr. Ssengooba Sharif. Sharif had lodged a complaint with the Police on 4th November 2020 that he had been attacked by four men wielding a panga and that he had been robbed of three phones and cash amounting to approximately UGX 405,700.

PW3 Detective Sergeant Bakibisemu Hudson also testified that he interviewed Sengooba Sharif on the 6th November 2020 in a case of robbery of three mobile phones and cash of UGX 405,700/=. That he was informed by Sengooba that the mobile phones and cash items were robbed from him on 4th November 2020 by four men, whose faces were familiar to him and that the robbery occurred at Kyabazinga roundabout in Bugembe.

PW3 further informed Court during the interview, Ssengooba Sharif told him that although he could not identify the names of the suspects, he was able to identify Kawanguzi Isma since he had dreadlocks and that it was Kawanguzi who threatened Ssengooba Sharif to give him everything he had otherwise his life would be at risk. When asked what type of phones had been stolen from Ssengooba Sharif, PW3 stated that it was two Infinix phones and a Nokia phone that had been stolen. PW3 was also asked if the Police had tried to track the phones to which he responded that he was not aware if the same had been done by the Police.

Section 58 of the Evidence Act Cap 6 provides that: "*All facts, except the contents of documents, may be proved by oral evidence.*"

Section 59 of the Evidence Act Cap 6 provides that: - *"Oral evidence must, in all cases whatever, be direct; that is to say it must be the evidence of a witness who says he or she saw it, heard it, perceived it or touched it.*

In the case of **Uganda v Kisembo (Criminal Session 203 of 2014) [2019] UGHCCRD 7 (8 February 2019), Justice Stephen Mubiru *stated that:* -** *According to section 59 of The Evidence Act, oral evidence must in all cases whatever, be direct. That is to say, it must be based on direct personal knowledge or experience. Testimony based on what a witness has heard from another person rather than on direct personal knowledge or experience is referred to as hearsay evidence, in other words, evidence of those who relate, not what they know themselves, but what they have heard from others. A statement made out of court*

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that is offered in court as evidence to prove the truth of the matter asserted is generally inadmissible as hearsay. This is because statements made out of court normally are not made under oath, a judge cannot personally observe the demeanour of someone who makes such a statement outside the courtroom, and an opposing party cannot cross-examine such a person. Such statements hinder the ability of the court to probe the testimony for inaccuracies caused by ambiguity, insincerity, faulty perception, or erroneous memory. Thus, statements made out of court are perceived as untrustworthy.

From the evidence adduced, the prosecution relied on the evidence of PW2 and PW3. This was evidence that they received from Ssengooba Sharif, the complainant.

It is on record that Ssengooba Sharif, the complainant in this case, was issued with witness summons and an arrest warrant to come and testify in this case. However, he did not turn up. As such, without the complainant's testimony on record, the statements that were made by the complainant to PW2 and PW3 out of court cannot be relied on as the truth and are treated as hearsay. I therefore find that no sufficient evidence has been adduced to prove the ingredient of theft against the accused persons.

(2) That there was violence in the course of the theft.

PW3 in his statement stated that he was informed by Sharif Ssengooba that Balyejusa Musa boxed him and he fell in the trench and that it was Mukisa John and Muganza Jamal who attacked him in the trench and took his phones and money away. That he visited the crime scene with Ssengooba Sharif who showed him the real point where he had fallen in the trench.

PW1 Kanabiro Robert, a Clinical Medical Officer, testified that the victim Ssengooba Sharif was presented to him on 6th November 2020 for medical examination. That Ssengooba informed him that he had been boxed by four known men on the 4th November 2020 at 7:20pm in Bugembe. That on general examination, Sengooba was in fair condition. That on examination of the areas complained of, he observed that Ssengooba Sharif had a scratch mark at the back of his right thumb which measured 10mm long, 2mm wide and 0.1mm deep. That Sengooba suffered mild pain on the left upper gum. That he had mild tenderness on the right knee and that all the three injuries were two days old. PW1 further observed that the injuries were typical of having been inflicted by a hard blunt object.

From the evidence adduced, the prosecution relied on the testimonies of PW1 and PW3 to prove the ingredient of violence in the offence of Aggravated Robbery.

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Although the evidence PW1 evidence is expert evidence, there is no direct evidence to corroborate the same in the absence of the victim's testimony on record.

This Court has relied on the authority of Uganda **v Kisembo (supra)** to discount the evidence of PW3 evidence as hearsay evidence since this is evidence that PW3 obtained from Ssengooba Sharif during the recording of his statement and during investigations which remains uncorroborated in the absence of Sengooba's testimony.

From the evidence adduced by the prosecution, I therefore find that no sufficient evidence has been adduced to prove the ingredient of violence against the accused persons.

(3) Whether the accused was armed with a deadly weapon before, during or after the theft.

In the case of **Uganda v Waiswa Henry and 2 others Criminal Session case no. 420 of 2010**, citing Section 286 (2) of the Penal Code Act, a defined a deadly weapon to include: –

> *"an instrument made or adapted for shooting or cutting, and any imitation of such instrument"*

To prove the use or threat to use a deadly weapon, the prosecution relied on the evidence of PW1. PW1 testified that Ssengooba's injuries were caused by a hard blunt object. In cross examination, when PW1 was asked what could have caused the scratch marks on the back of the victim's right thumb he responded that it could have been caused by a blunt hard object like a finger nail. He was further asked if Sharif Ssengooba had any other wounds likely to have been caused by a panga. PW1 said yes and in explanation of how a panga forms a hard blunt object, he explained that had panga has a sharp side and 2 blunt sides, the handle and the unsharpened side.

From the evidence adduced prosecution has failed to prove the use of a deadly weapon and also the sharp blunt object that caused the victim's injuries was not exhibited.

Both PW2 and PW3 the arresting and investigating officers respectively, did not exhibit to court any weapon on which this charge was based. In both testimonies, no weapon is mentioned.

The oral testimony of PW1 in court and also in PEX5, (Police Form 3, the medical examination of Sengooba) indicated that the victim's injuries were caused by a hard

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blunt object. However, no explanation was provided as to the specific blunt object that could have caused the said injuries. It was only during cross examination when PWI was asked if any of the victim's wounds were likely to have been caused by panga that he responded in the affirmative. I believe that this response was an afterthought.

Therefore, I find that the prosecution failed to adduce sufficient evidence to prove that the accused persons were armed with deadly weapons.

Whether the accused participated in the robbery?

The established principles with regard to identification evidence were laid down in the case of **Abdallah Nabulere & Anor Vs Uganda_Criminal Appeal No. 9 of 1978, the court observed that** *"the judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence".*

PW2 in his testimony testified that when he interviewed Ssengooba Sharif and asked him if he knew the men who attacked him, he informed him that he could remember their faces. That the OC then instructed PW2 to go to Sawuliyako market together with the complainant and other officers to effect arrest of the attackers. That they went to Sawuliyako because Ssengooba Sharif told them that is where the accused persons were staying. That when he arrived with Ssengooba Sharif and 6 police officers they were directed to a small house by Ssengooba Sharif who identified the four accused persons. However, they were more than 4 men and the rest ran away. That he handcuffed the 4 men and before they could leave the market one of the police officer was attacked by the relatives of the accused persons. That the accused persons were taken to Bugembe Police Station and later transferred to Jinja Police Station since it was a capital offence.

From the evidence adduced, the prosecution relied on the testimony of PW2 testimony which this Court has treated as hearsay evidence. **See Uganda Vs. Kisembo (supra).** This was evidence that they received from Ssengooba Sharif during the arrest of the accused persons but not during the commission of the crime. That with the lack of evidence to prove that the accused persons participated in the crime, then the prosecution has not proved this ingredient.

Therefore, in conclusion, I find that since no sufficient evidence has been adduced by the prosecution placing the accused persons at the scene of the crime. The victim having failed to come to court to give his oral testimony in this matter makes it

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unjustifiable to put the accused persons on their defence based on hearsay evidence which is inadmissible.

I therefore find that the prosecution has failed to adduce sufficient to put the accused persons on their defence. I accordingly find the accused persons not guilty of the offence of Aggravated Robbery. I accordingly discharge them of the offence of Aggravated Robbery under Section 73(1) of the Trial of Indictment Act Cap 23 as amended. The accused persons are hereby set free forthwith.

I so order.

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HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
JUDGE
Ruling delivered in open Court on 28th September, 2023.