

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0016 OF 2012

UGANDA **PROSECUTOR**

VERSUS

ABDU MUKASA **ACCUSED**

BEFORE: Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The accused person, Abdu Mukasa alias Abdu Mukiza, was indicted for aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. It was the prosecution case that on or about 8th May 2011 at about 11.00 pm at Nakulabye Zone 4 in Kampala district the accused and 2 other men still at large robbed a one Richard Kimera of Ushs. 45,000/= and a flash torch as the latter returned home, and in the course of the said robbery injured him with a hammer. The accused person denied the charges against him and gave unsworn evidence in which he denied participation in the robbery in question, and sought to attribute the present trial to a grudge the complainant had against him over a mutual lady friend. A preliminary hearing that preceded trial yielded no agreed facts or documents. At the trial the State was represented by Ms. Daisy Nabasitu while the accused person was represented by Mr. Fredrick Mbaziira.

It is well settled law that the burden of proof in criminal proceedings lies squarely with the Prosecution and generally, the defences available to an accused person notwithstanding, that burden does not shift to the accused at any stage of the proceedings. The prosecution is required to prove all the ingredients of the alleged offence, as well as the accused's participation therein beyond reasonable doubt. See **Woolmington vs. DPP (1993) AC 462** and **Okale vs. Republic (1965) EA 55**. The ingredients of aggravated robbery include, first, the incidence of theft; secondly, the use or threat of violence in the course of the theft, and finally, actual use or threat to use a deadly weapon immediately before or immediately after the said theft. See **Oryem Richard & Another vs Uganda Criminal Appeal No. 2 of 2002 (SC)**.

The standard of proof required of the prosecution does not entail proof to absolute certainty. The prosecution's evidence should be of such standard as leaves no other logical explanation to be derived from the facts save that the accused committed the crime, thereby rebutting such accused

person's presumption of innocence. If a trial judge has no doubt as to the accused's guilt, or if his/ her only doubts are *unreasonable* doubts, then the prosecution has discharged its burden of proof. It does not mean that no doubt exists as to the accused's guilt; it only means that the court entertains no *reasonable* doubt given the evidence adduced before it.

It is trite law that in the event of reasonable doubt, such doubt shall be decided in favour of the accused and a verdict of acquittal returned. Further, inconsistencies or contradictions in the prosecution evidence which are major and go to the root of the case must be resolved in favour of the accused. However, where the inconsistencies or contradictions are minor they should be ignored if they do not affect the main substance of the prosecution's case; save where there is a perception that they were deliberate untruths. See **Alfred Tajar vs Uganda EACA Criminal Appeal No. 167 of 1969** and **Sarapio Tinkamalirwe vs. Uganda Supr. Court Criminal Appeal No. 27 of 1989.**

With regard to the ingredient of theft in this case, PW1, the victim, testified that he was on the date in question robbed of Ushs.45,000/= and a flash torch. PW3, the investigating officer, purported to support PW1's evidence on the stolen items. In his oral evidence PW3 attested to PW1 reporting a robbery complaint in respect of a torch and Ushs. 45,000/=. This was a departure from an earlier statement PW3 had recorded in which he stated the stolen monies to have been Ushs. 47,000/=. PW3 attributed this disparity in his evidence to an oversight. His recorded statement was not presented by either party for admission on the court record. On the other hand, the accused denied having stolen anything from the deceased as alleged or at all. In submissions it was argued for the defence that no evidence had been adduced that proved that the victim of the alleged robbery was, in fact, in possession of the items he claimed to have been stolen from him; and neither were any of the allegedly stolen items recovered.

The legal definition of theft is set out in section 254(1) of the Penal Code Act. This legal provision is reproduced for ease of reference:

“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.”

In the case of **Sula Kasiira v Uganda Criminal Appeal No.20 Of 1993** (SC) the following legal position from **Halsbury's Laws of England, Vol. 10, 3rd Edition, paragraph 1484** was cited with approval with regard to the act of taking or carrying away as an element of theft:

“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. ... 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." (emphasis mine)

From the 2 definitions above, it would appear to me that non-proof of ownership or possession would not negate the offence of theft. Under section 254(1) of the Penal Code Act the offence of theft is sufficiently proved upon proof of the fraudulent taking or conversion of any item that is capable of being stolen. What amounts to fraudulent taking or conversion is explicitly defined in section 254(2) of the same Act. In fact, possession only appears to be a pre-requisite for proof of theft under the definition of 'special owner' stipulated in section 254(2). Nonetheless, in the case of **Omorio David & Another vs. Uganda Criminal Appeal No. 20 of 2011** (SC) it was held:

"We think that 'possession' as contained in the definition of 'special owner' does not mean lawful possession. A person can steal property from a person who is not in lawful possession of it."

I might add that the provisions of section 254(1) of the Penal Code Act do not negate proof of the offence of theft by a complainant that is neither in possession nor ownership of the stolen item but can attest to the stealing of such item by a person with no claim of right thereto.

Be that as it may, in **Sula Kasiira v Uganda** (supra) the act of 'taking away' was equated to asportation, while fraudulent intent was equated to felonious intention. For present purposes therefore, I would define the ingredients of theft as the taking or asportation of an item; the item that was taken should have been capable of being stolen; and such asportation should have been done fraudulently or with felonious intent. In the present case PW1 did attest to the asportation of his money and torch. These items are certainly capable of being stolen. It was his evidence that the items were stolen under circumstances that denote a felonious intent, to wit, grabbed from him without his consent. However, his evidence on this material ingredient was not corroborated by any other witness. PW3 simply recounted what he had been told by PW1.

It is fairly well recognised that though corroboration of evidence is not essential in law, in practice it is always looked for. See **Katumba James vs. Uganda Criminal Appeal No. 45 of 1999** (SC), **Remegius Kiwanuka vs. Uganda Criminal Appeal No. 41 of 1995** (SC), and **Chila & Another vs. R (1967) EA 722**. Particularly so given the numerous inconsistencies observed in the prosecution evidence hence the more reason for corroboration to ascertain the truth of witnesses' testimonies. I shall cite the inconsistencies observed.

On the issue of theft, there was no consistency on the amount of money allegedly stolen from PW1, with PW3 contradicting an earlier statement he had recorded. Secondly, PW1 and PW3 contradicted each other as to whether the former's statement was read back to him in English or Luganda. The latter insisted he read it back in Luganda, while PW1 categorically stated that it was read back to him in English so he was unable to comprehend some aspects of it. To

compound matters, PW3 did also testify that when he recorded the accused person's statement he (accused) told him that the complainant (PW1) had robbed him and then turned around and arrested him. According to PW3 the accused further stated that when he was robbed he went home to pick a hammer and return to the scene of the alleged robbery to hit whoever had robbed him. PW3 did not explain why he did not pursue this allegation further, but simply relied on the version of events given him by PW1. This omission by PW3 is material given that, in his oral evidence, the accused person simply attributed the present indictment to a grudge against him by PW1, the alleged robbery victim whom PW3 so readily believed.

Learned state counsel did refer this court to the case of Alfred Tajar vs Uganda (supra) as authoritative direction on how courts should handle minor contradictions. She classified the disparity over the sums of money that was allegedly stolen as a minor contradiction, and invited this court to ignore it. Further, Ms. Nabasitu referred this court to the case of Hilter Ojasi vs. Uganda Criminal Appeal No. 1 of 1986 (SC) in support of her argument that non-recovery of stolen goods was not prejudicial to a prosecution case. In that case it was held:

“The learned judge was anxious at the lack of exhibits produced which had been stolen; and indeed this worried the assessors. But there are of course many examples of theft where no goods have been recovered. His advice on the straightforward production of evidence was salutary; but the lack of such evidence did not unsettle the verdict in this case.”

I would agree with the principle advanced in the case of Hilter Ojasi vs. Uganda (supra) that non-recovery of allegedly stolen goods would not, in itself, negate the offence of theft. However, such goods must have been duly proved to have been stolen before recourse can be made to this principle. Items that are duly proven to have been stolen but having been so proved are never recovered would not negate the fact of theft. The same cannot be said of items that have not been proven to have been stolen neither have they been recovered or produced in court. Indeed in Hilter Ojasi vs. Uganda (supra) the finding of aggravated robbery was not unsettled because the offence of theft was deemed to have been duly proved. Secondly, while I might consider the issue of the exact monies allegedly stolen to have been reconciled by PW3, I do not consider the improper recording of PW1's police statement or the non-investigation of claims made by the accused person in his own statement to have been immaterial discrepancies. Undoubtedly, PW1's statement, made immediately after the alleged robbery incident, would have been material in shedding light on the veracity of his claims. Similarly, the investigation of the accused person's allegations would have ruled out the possibility of the present indictment having been a calculated set-up.

In my considered judgment, the cumulative effect of the unrecovered, allegedly stolen goods; the uncorroborated prosecution evidence on the present ingredient, as well as the inconsistencies in the evidence of 2 vital witnesses render the prosecution case weak and unreliable. It is fairly well established law that in assessing the evidence in order to arrive at a verdict, a trial judge can

take into account the fact that an accused person did not give evidence on oath but this right must be exercised with caution and must not be used to bolster up a weak prosecution case or be taken as an admission of guilt on the part of the accused. See **Lubogo v Uganda (1967) EA 440**. Accordingly, this court is mindful not to use the fact that the truthfulness of the accused person's evidence was not tested by cross examination to bolster an apparently weak prosecution case.

I find that the prosecution has not discharged the onus on it to prove the offence of theft in this case beyond reasonable doubt. In the result, I would depart from the joint opinion of the assessors, and hereby acquit the accused person, Abdu Mukasa alias Mukiza of the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act.

Monica K. Mugenyi

Judge

3rd May, 2013

Judgment delivered in open court in the presence of:

Ms. D. Nabasitu for the State.

Mr. F. Mbaziira for the defence.

Monica K. Mugenyi

Judge

3rd May, 2013