

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT IGANGA**  
**CRIMINAL SESSION CASE NO. 420 OF 2010**

**UGANDA.....PROSECUTOR**  
**OR**

**VERSUS**

**A1. WAISWA HENRY**  
**A2. BAKAKI PATRICK**  
**A3. MUZAFARU**  
**MWOGENZA.....ACCUSED**

**BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN**

**JUDGMENT**

WAISWA HENRY, BAKAKI PATRICK and MUZAFARU MWOGENZA hereinafter referred to as the accused persons, were indicted for Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act.

The case for the prosecution is that the 3 accused persons and others still at large, on the 9<sup>th</sup> day of August, 2009, at Nakabale village in Mayuge District, robbed Ndeyawo Ramathan of cash Shs.260,000/-, two radios (Aztec and Makula), one bicycle, two pairs of bed sheets, one blanket, one bag, one Nokia mobile phone, a pair of open shoes and various items of ladies clothing all valued at Shs.700,000/-. And that at the time of the said robbery the accused were armed with deadly weapons to wit pangas and clubs.

All the accused denied the charge.

The prosecution case was based on the evidence of 8 witnesses. The three Police Form 24 in respect of the medical examination of the accused persons were admitted in evidence under Section 66 of the T.I.A as Exhibit P<sub>1</sub>A, P<sub>1</sub>B and P<sub>1</sub>C.

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The ages of the accused persons ranged between 18-19 years. All were found to be of normal mental status.

To prove Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act, the prosecution has to prove the following elements of the offences:

- (1) There was theft of property.
- (2) Use of actual violence at, before or after the theft or that the accused caused grievous harm to the complainant.
- (3) The assailants were armed with a deadly weapon before, during or after the theft.
- (4) The accused participated in the robbery.

In determining the above issues, court has to bear in mind the established principles of the law that ***“the burden of proof is on the prosecution to prove all the elements of the offence beyond all reasonable doubt. The burden never shifts save in a few cases provided for by the law. Even where the accused sets up a defence, it is still upon the prosecution to prove that nonetheless, the offence was committed”***. - Refer to **Uganda Vs. R.O 973 Lt. Samuel Kasujja & 2 Others Criminal case 08/92.**

Court has to take into account both the evidence of the prosecution and of the defence to determine whether the prosecution has discharged its burden on all the ingredients.

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To prove theft, the prosecution relied upon the evidence of PW2 Ndeyawo Ramanfani and PW3 Kulingira Scovia his wife. The two testified that during the night in question between 1am -2pm, while they were sleeping in their house, they were attacked by people wielding pangas and sticks.

5 They were forced out of the house, repeatedly assaulted with the pangas and sticks. The attackers demanded for and took Shs.260,000/- from the complainant's house. They also took other property that included a bicycle, clothing, bed sheets, a Nokia phone, two radios, a black bag and five chicken, blanket and bed sheets.

10

PW3, PW4 and PW6 all confirm the stolen items like those described by the complainants were recovered later on from the homes of the accused persons.

15 As pointed out by the prosecution, 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 - **Section 254 (1) of the Penal Code Act.**

20 The defence agreed that the ingredient of theft was proved beyond all reasonable doubt. Court therefore finds that the prosecution discharged its burden on the first ingredient.

As to the question of use of violence or the threat thereto and use of a  
25 deadly weapon, the evidence of PW2 and PW3 was that in the course of the robbery the assailants were armed with pangas and sticks and that they actually used the said weapons to assault the adult members of the household. While no medical evidence was adduced to support the use of violence, the complainants told court that they treated themselves with  
30 hot water and tablets.

PW3 added that when her co-wife managed to escape from the ordeal, the attackers threatened to kill those who had remained. The evidence of the prosecution in respect of these ingredients was not disputed.

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Under Section 286 (2) of the Penal Code Act, a deadly weapon includes –

- (a) (i) ***“an instrument made or adapted for shooting or cutting, and any imitation of such instrument”.***

10 There is no doubt that pangas are a deadly weapons as they are made for cutting and can be adapted for stabbing – See **Wasajja Vs. Uganda [1957]1 EA 181 (CAK)**. And in **Mudasi Vrs. Uganda [1999]1 EA 193 (SCU)** - a club was held to be a deadly weapon.

15 The defence in the present case conceded that there was both use of violence and of deadly weapons against the complainants.

There is therefore sufficient undisputed evidence for court to find as a fact that there was use of violence and of deadly weapons at the time of the  
20 commission of the offence.

What remains to determine is whether all the accused persons or anyone of them participated in the attack against the complainant.

25 None of the witnesses to the robbery in the present case i.e. PW2 and PW3 ever identified the assailants. Both witnesses testified that they could not recognize their assailants as they had smeared flour on their faces.

Without the assailants being identified, the prosecution can only rely on  
30 some other evidence connecting the accused persons to the offence –

**Tomas Omukono Vs. Uganda Criminal 04/77 and Roria Vrs. Republic [1967] EA 583.**

5 The prosecution insists in the present case that that other evidence is evidence of recent possession.

PW2 told court that 3 weeks after the robbery, he found one called Tenywa wearing the pair of open shoes that were stolen from his house. The witness followed Tenywa to his house, and asked him about the shoes  
10 Tenywa said the shoes were his.

PW2 informed police and Tenywa was arrested and he told police that he had purchased the shoes from a hawker. It is however worth noting that Tenywa and A1 Waiswa are twin brothers. Eventually the accused were  
15 arrested by the police in the presence of PW2 and the LC chairperson of the village.

The accused were arrested from their homes which are not far from each other. After their arrest, they directed the police to where the stolen  
20 properties were in their houses. The black bag with clothes was found at A1's house. His wife produced the bag in the presence of LC.1 Defence Secretary and police. Bed sheets - white and brown with flowers, one radio Azlec and bicycle were found in A2's house. The blue bed sheets with white flowers and Makula radio were found in A3's house.

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PW2 identified all the properties as those stolen from his house. The items were recovered while the accused were at police but in the presence of a Police Officer and the Defence Secretary. The evidence is confirmed by  
30 PW4, PW5 DCP Mukwana, PW6 Special Police Constable Wagongoba Wilson.

PW7 Oburu Alex a Police Officer who in 2009 was at Bwonda Police post testified that, when Tenywa was arrested he revealed that he had got the items from the accused. And the accused admitted that the properties were in their homes. The items were exhibited and exhibit slip was  
5 tendered as Exhibit P3.

PW8 No. 18602 Sgt. Munyana Margaret received the exhibits on 17.09.09 marked as CRB. 814/09 on Exhibit slip P4 and the stolen items were exhibited in court as Exhibits P5<sub>1-14</sub> in the order that they appear on the  
10 Exhibit slip.

Case Law is to the effect that, ***“In the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduced adequate evidence to show that the accused was found in  
15 possession of goods recently stolen or taken as a result of robbery, the accused must offer some credible explanation of how she or her came to be in possession of the goods. Otherwise, the evidence of the recent possession of the goods would justify his or her conviction - Izongoza William Vs. Uganda S.C Criminal  
20 Appeal 06/98.***

As to whether the explanation could reasonably be true, an accused will discharge the onus on a balance of probabilities. If he does so, then an innocent possibility exists that negatives the presumption to be drawn  
25 from other circumstantial evidence. - **Wavamuno Vs. Uganda [2001]2 EA 608 (SCU)** where the following cases were followed: **Mudasi Vs. Uganda Criminal Appeal 03/98 (SCU)**, **Moses Vs. Uganda Criminal Appeal 01/97** and **Mtalemwa Vs. Republic [1990-97]1 EA 384.**

In the present case, all the 3 accused persons vehemently denied being involved in the robbery or that the property was found in their homes or that they ever directed police to where the property was to be found in their homes. They claimed that, since the property was recovered after  
5 they had been taken to police, they were merely implicated in the robbery.

Counsel for the accused submitted that, there is doubt in the circumstances as to whether the property exhibited was recovered from the accused's homes. That the property could have been gotten from  
10 elsewhere and exhibited as an afterthought.

As to the statements the accused are said to have made at police admitting that they were involved in the robbery, counsel argued that they could not be relied upon as they were never exhibited.

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Considering the evidence of the prosecution and the defence as a whole, court finds that the accused's denial as to any involvement in the robbery and the claim that they were implicated as an afterthought is belied by the strong evidence of the prosecution that was not contradicted. PW7 told  
20 court that it is the accused persons who upon arrest directed the police as to where they could find the property. And indeed it is not disputed that PW2, PW6 and PW4 found the property in the accused's home.

The first person to give an inkling to police as to where the property was  
25 Tenywa whom PW2 found wearing his open shoes.

The credibility of the witnesses for the prosecution was not impeached.  
***"All questions for the purpose of impeaching the credibility of the witness must be put to him/her while in the witness box; otherwise they cannot carry weight with the court"*** - Uganda Vs.  
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**Adonia Zoreka & No.7770 D.C Kikwemba.** The prosecution witnesses remained firm in cross examination and there is no reason to think that they were telling lies.

- 5 The items had been stolen 3 weeks from the time they were recovered, how could they all be found with the same accused who lived in the same vicinity intact unless the accused were involved in the robbery?

The accused failed to give the explanation required of them by law as to  
10 how the properties ended up in their homes.

The finding of the properties in the accused's homes without any explanation as to how they ended up there is very strong other evidence connecting the accused to the robbery. Court is accordingly satisfied and  
15 finds that the prosecution proved the ingredient of participation of the accused beyond all reasonable doubt. Their defence is rejected as lies.

Although there were other people involved in the robbery who were never arrested, each of the accused persons is deemed to have committed the  
20 offence under the doctrine of common intention - **Section 20 of the Penal Code Act, Andrea Abonyo & Others Vs. Republic [1962]1 EA 542 (CAN); Opoya Vs. Uganda [1967]1 EA 752 (CAK) and Isingoma Vs. Uganda [1986-89]1 EA 155 (SCU).** The intention of the accused persons can be inferred from their actions - **Birikadde Vs. Uganda**  
25 **[1986] HCB 6.**

In agreement with the opinion of both assessors, I find that the prosecution proved the guilt of the 3 accused persons beyond all reasonable doubt. I therefore find each and every one of them guilty of



the offence of Aggravated Robbery c/s 285 and 286 (2) of the Penal Code Act and I convict them as charged.

5 **Flavia Senoga Anglin**

**JUDGE**

**01/10/13**

01.10.13:

All accused present

10 Katami Lydia for State present

Ngobi Balidawa holding brief for Muzuusa Stephen for accused present

Both assessors present

Counsel for State: Matter is for Judgment.

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Court: Judgment delivered in open court.

All 3 accused persons found guilty as charged and are convicted accordingly.

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**Flavia Senoga Anglin**

**JUDGE**

**01/10/13**

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Counsel for State:

The offence with which the accused have been convicted carries a maximum sentence of death. The offence requires that a deterrent sentence be given. For the reason we pray that such sentence be given.

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Counsel for accused:

We have 4 factors in mitigation.

Accused are 1<sup>st</sup> offenders with no past criminal records.

- They deserve leniency.
- The age of the accused persons, they are young people within their useful years. They need more treatment than punishment. We pray  
5 court considers that factor while sentencing them.
- The time spent on remand. They have been in prison for about 5 years having been arrested in September 2005. This factor should be taken into account.
- We are mindful that the offence carries a maximum sentence of  
10 death. However court has the discretion to consider a lesser sentence considering the circumstances of the case. We pray court exercises that discretion.

15 A1: I pray for leniency as I have overstayed on remand so that I can go home. I have learnt from my prison experience and I am remorseful.

A2: I also pray for leniency so that I can go home and start a fresh. I have learnt a lesson for the time spent in prison.

20 A3: I pray for leniency because of the period spent on remand. I have learnt from my experience and I am sorry.

Court: Sentence at 2pm. Accused further remanded till then.

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**Flavia Senoga Anglin**  
**JUDGE**  
**01/10/13**

30 Later at 2.35pm:  
Accused present

Katami Lydia for State present

Balidawa Ngobi for the accused present

Both assessors present

5 Counsel for State: Matter is for sentence.

Court: **SENTENCE**

The accused persons are sentenced to a caution and directed to pay compensation to the victims of the offence.

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Reasons for sentence:

The offence though a grave one was committed at a time when the accused were all young persons aged between 18-19 years of age. They appear from the evidence available to have had subordinate role in the  
15 commission of the offence. They are all 1<sup>st</sup> offenders with no previous criminal record.

Fortunately, no serious injury or harm was occasioned to the victims of the offence. According to their evidence they did not find it necessary to go to  
20 hospital for any treatment.

While they suffered loss of property, the property was recovered and should be returned to them.

- The Shs.260,000/- which was never recovered will be paid as  
25 compensation by the accused persons to the victims of the offence.
- The accused have been on remand for 4 years.

Since the purposes of sentencing is rehabilitation and reintegration of the offender into society, it would not be achieved in the circumstances of this  
30 case by continued incarceration of the accused persons.

They all appear remorseful and prayed for mercy. Justice indeed must be tempered with mercy. They are accordingly cautioned and ordered to pay compensation of the Shs.260,000/- to the victims of the offence.

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The 4 years they have spent on remand will suffice to meet the ends of justice. However, they are advised to learn to work and not expect to get riches through acts such as have brought them to this court.

10 Right of Appeal against conviction and sentence explained to the accused persons.

15 **Flavia Senoga Anglin**  
**JUDGE**  
**01/10/13**