

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CR-SC- 0080-2011**

**UGANDA.....PROSECUTOR  
VERSUS  
MULABI MOSES.....ACCUSED**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

The accused person in this case is indicted of aggravated robbery. In this case the ingredients to be proved are three;

1. That there was theft.
2. That a deadly weapon was used.
3. That accused was involved.

The burden of proof is always upon the prosecution to prove the case beyond reasonable doubt. To resolve the ingredients above, court will resolve them basing on the issues as below.

**1. Whether there was theft:**

There is evidence on record through PW.1 and PW.2 that on the night of 10<sup>th</sup> September 2010, robbers attacked them at night; and stole property including a T.V, Deck, saucepans, clothes and money (shillings three million). The property was never recovered.

PW.3 also told court that the suspect, with others carrying properties suspected of being stolen. Evidence above proves that a theft occurred.

**2. Whether a deadly weapon was used.**

According to PW.1, and PW.2 the weapon used was a panga. Unfortunately apart from their testimony in court, no other independent evidence is on record to show that the weapons (pangas) were used. The evidence as above is not sufficient to prove beyond doubt that a panga (deadly weapon) was used in the process of the theft.

**3. Whether the accused person participated in the theft.**

The evidence of the prosecution through PW.1 and PW.2 the state claims that accused was properly identified as the culprit. It is alleged in the evidence that the accused and others had torches, which they used to flash at them and so, they could identify them properly. It was the evidence of PW.1, that she identified accused and pointed him out to PW.2.

PW.3 claimed that he saw the accused carrying a T.V, using light of the robbers which flashed on the windscreen of the vehicle of the witness, which reflected and he was able to see the accused.

In defence, accused denied any role in the theft and placed a cross on the defence of alibi.

**Counsel Jude Wamimbi** argued in submission for the defence that the participation of the accused person in this crime was very doubtful. He pointed out that the fact that the attackers found the victims (PW.1 and PW.2) asleep, and then they claim they woke up and saw the stolen items piled by the doorway, makes their ability to identify the suspect very doubtful. He raised the possibility of mistaken identity.

The evidence on record when reviewed, shows that **PW.1 Madina** aged 10 years, saw the accused. There was no electricity, that night but there was a lamp. Accused persons also had torches. When she saw accused in the morning he identified him as the culprit.

**PW.2 Nambozo** was sleeping all of a sudden she woke up and realised there were thieves in the house. She made an alarm, they told her to keep quiet or else they would be killed. They ordered her off the bed they had torches. She was not able to identify the culprits. They tied her face with a towel, and wanted to rape her but then gave it up. In the morning the child told her, she had identified the accused to her the following morning when accused was passing by their home.

This evidence is all that there is, of the identifying witnesses corroborated by **PW.3 Swaibu** who claims he saw accused later on carrying a T.V.

In *Abdulla Bin Wendo and Another v. R*, it was held that the evidence of a single identifying witness must be tested with great care. In such cases where the conditions favouring correct identification were difficult. What is needed is other evidence whether it be circumstantial or direct, pointing to the guilt; from which a

Judge or jury can reasonably conclude that the evidence of identification, although based on testimony of a single witness, can safely be accepted as free from the possibility of error.

I have carefully cautioned myself of the above dangers. The evidence reviewed above of PW.1 and PW.2 is now to be tested against the evidence of PW.3.

There is a problem with description of the events by PW.1 and PW.2 especially regarding the environment of identification. PW.1 who was about 7 years at time of incident claims to have been able to identify the assailant in the same conditions as PW.2 who claimed she couldn't (yet older). The lighting conditions in the house, the fact they (PW.1 and PW.2) were asleep, and woke up during attack, the fact that they were afraid and PW.2 (37 years) could not even contain the fear, but PW.1 of 7 years, claims she was able to positively identify accused in those grim circumstances is greatly doubtful. It was very difficult so to do.

PW.3's claim that he saw people using the reflected light of the car screen is unbelievable. The torch if at all flashed on window screen of the car would have caused a dimming effect not a lighting effect on his face to be able to see. It was at night. He was hiding far off in fear as he claimed that the area he was in was a dangerous place. It was very difficult for him under those circumstances to identify accused.

I agree with the views of defence counsel, and opinion of the assessors on prosecution's failure to prove this ingredient. There was a high possibility of mistaken identity in this matter. There was no link of the accused to any of the stolen properties. The evidence of the cap was never produced. The sum total of

all this is that there was not enough evidence on record from prosecution to prove beyond doubt the participation of the accused in the alleged crime. His alibi is not destroyed at the end of the trial. I am of the opinion that this ingredient is not proved.

In the final result, the prosecution has failed to prove that accused **Moses Mulabi**, on 10<sup>th</sup> September 2011 at Kiruru Zone in Mbale District robbed **Nambozo Stella**. I do not find him guilty as charged and I hereby acquit him of the charge. He should be set free immediately unless held on other charges.

**Henry I. Kawesa**

**JUDGE**

**14.01.2014**