

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

CRIMINAL SESSION CASE NO. 27 OF 2013

(Arising from Mwanga II Court Criminal Case No. 506 of 2012)

UGANDA :::PROSECUTION

VERSUS

1. KIWANUKA BADIRU
2. KAUMA HUSSEIN
3. MUTESASIRA BADIRU
MUZULU alias SOLDER } ::::::::::::::::::::::::::::::: **ACCUSED PERSONS**

JUDGMENT BY HON MR. JUSTICE JOSEPH MURANGIRA

1. Introduction:

1.1 The three (3) accused persons are represented by Mr. Senkeezi Stephen from M/S Senkeezi, Saali Advocates & Consultants. Whereas, the prosecution is represented by Mr. Bwiiso Charles Bogere, Senior State Attorney working with the Directorate of Public Prosecutions.

1.2 The Assessors in this case were:-

1. Ms. Muhairwe Judith.
2. Wasibi Joseph.

The two Assessors attended Court throughout the entire trial of the accused persons. The said Assessors gave a joint opinion in this case.

2. Facts of the case

The three accused persons are jointly charged with aggravated robbery Contrary to Sections 285 and 286 (2) of the Penal Code Act.

It is stated in the indictment that on 8/6/2012 at Mutundwe, Kirinya Bigero in Wakiso District, the three accused persons armed with a panga and stones robbed Ug. Shs. 60,000,000/=, 110,000/= (one hundred and ten thousand Tanzanian Shillings), 2200/= (two thousand and, two hundred Kenyan Shillings), house hold items: 1 TV set, 1 radio Panasonic by make, a computer Dell by make, DVD player, 3 mobile phones: Nokia 1600, Nokia CZ and Techno valued at one million, nine hundred thousand shillings; and a motor vehicle log book of registration No. UAK 971V G Touring, the property of Mugarura John.

Each accused person pleaded not guilty to the indictment.

3. The Indictment

The ingredients of the offence of aggravated robbery are:-

- i. Theft.
- ii. Possession, use of deadly weapon or use of violence.
- iii. Participation of each accused person in the commission of the charged.

4. Burden of Proof

It is a cardinal principle in Criminal law in Uganda that in all Criminal Cases, except of a few statutory offences, the prosecution bears the burden to prove each ingredient of the offence charged against each accused person.

The standard proof is proof beyond reasonable doubt. The burden of proof never shifts to the accused to prove his/her innocence. The burden of proof in Criminal cases always rests on the prosecution. See the case of **WOOLMINGTON –VS- DPP [1935] ac 462.**

In this instant case, the prosecution has the burden to prove all the ingredients of prove all the ingredients of the offence of aggravated robbery as charged against each accused person beyond reasonable doubt.

5. The prosecution Case

- 5.1 In order to prove its case against the accused to the required Standard, the prosecution adduced evidence through five (5) witnesses:-
1. Ayebare Josephine, PW1.
 2. Sebuggwawo Paul, PW2
 3. Mugarura John, PW3, the complainant.
 4. D/WC Nandia Jennifer, PW4, the investigating Officer, and
 5. D/AIP Musenero Rose, PW5, who record a charge and Caution Statement from A1, Kiwanuka Badiru.

5.2 The prosecution also adduced evidence by exhibiting on Court record the following exhibits:-

- 1) The sketch plan of the scene of crime – ExhP1.
- 2) Charge and Caution Statement of Kiwanuka Badiru, ExhP2.
- 3) The English translation of Kiwanuka Badiru Charge and Caution Statement, Exh P2 (a).

6. The defence case.

- 6.1 In defence, each accused person gave evidence not on oath, and as such each accused person was not cross-examined by Counsel for the prosecution. None of the accused person called any other witnesses to testify on their behalf.

6.2 The defence relied on the following exhibits:-

- 1) Statement of Mugarura John (owner of the stolen property) Exh. D1.
- 2) Photocopy of the receipt of the motorcycle No. 1604, Exh.D2.
- 3) Photocopy of the receipt of motorcycle – No. 16046, Exh.D3.
- 4) The Carbon copy of the Luganda version of the Charge and Caution Statement of Kiwanuka Badiru, Exh.D4.

7. Resolution of this case by Court.

7.1 At the close of the defence case, Counsel for the prosecution Mr. Bwiso Charles Bogere made his submissions, by evaluating the entire evidence on record, cited the law, all in support of the charge of aggravated robbery against each accused person. He prayed that each accused person be found guilty and be convicted as charged.

7.2 In reply, Counsel for the accused persons Mr. Senkezi Stephen does not agree with the submissions by Counsel for the prosecution. He, too, evaluated the evidence on record, considered the ingredients of the offence the defence, he appraised the defence evidence and submitted that the prosecution failed to prove any single ingredient of the offence charged. He further submitted that each accused person be not found guilty and accordingly be acquitted of the charged offence.

7.3 In their joint opinion, the Assessors analysed and evaluated all the evidence on record, and in their opinion they found that the prosecution proved its case against each accused person. They advised Court to find each accused person guilty and convict each accused person as charged.

7.4 Consideration of the case by Court.

My duty as trial judge in this case is to assess whether the prosecution discharged its duty of burden of proof. I have also to evaluate the entire evidence on Court, then apply relevant law to the evidence on Court record to establish whether each accused person committed the charged person committed the charged offence or not. I shall consider each ingredient of the offence of the offence charged.

7.4.1 On the ingredient of theft.

Counsel for the prosecution Mr. Bwiso Charles Bogere submitted that the prosecution witnesses proved that the items set out in the indictment were the properties that were removed from their original position and taken away from

Mugarura's (PW3) house. And that the ingredients of the offence of theft were proved by the prosecution beyond reasonable doubt.

In reply, Counsel for the accused submitted that the prosecution failed to adduce evidence to prove ownership of the items alleged stolen. That the properties were in the prosecution evidence as mere allegations. The prosecution never gave any explanations why the three phones were left at home of PW3. That the alleged phones did not exist. That on the alleged theft of Shs. 60,000,000/= (Sixty million Shillings); that on first information of the alleged robbery, PW3 who was at the time abroad on a business trip never inquired about the said money. That the prosecution evidence on that aspect was mere allegations, conjuncture for the theft. That there is a doubt in the prosecution's cases and that that doubt ought to be resolved in favour of the accused persons.

To prove this ingredient of theft, the prosecution must prove the ingredients of theft:-

- i. That the properties were capable of being stolen. That is the properties stated in the indictment had value.**
- ii. The properties were moved from one place to another which is called as partition.**
- iii. That the people who took them away had no claim of right over the said properties.**
- iv. The accused persons in the dock are the ones who participated in the stealing of the alleged items.**

From the evidence on record, PW3, Mugarura John, the complainant, gave evidence that the following properties were stolen from his house at Mutudwe, Natete in Wakiso District in a robbery:- Ug. Shs. 60,000,000/=, 110,000/= (Tanzania Shillings), 2,200/= (Kenya Shillings) TV set, one radio Panasonic, a computer Dell, DVD player, 3 mobile phones (Nokia 1600, Nokia CZ and Techo), and a log book of motor vehicle Reg. No. UAQ 971 V a Touring, all

valued at Ug. Shs. 65,000,000/=. PW1, Ayebare Josephine is the one who witnessed the robbery. PW2, PW4 and PW5 corroborated the evidence of PW3 and PW1 that there was a robbery at PW3's residence on the 8th June 2012; at Mutundwe.

From the evidence on Court record as analysed hereinabove:-

The mentioned properties were indeed removed from their original position and taken away from John Mugarura's (PW3) house. The people who took the said properties did not have any claim of right. And these properties were capable of being stolen. These properties were converted to their own use by the people who took them. The intention of taking these said properties by the people was to deprive the original owner and indeed Mr. John Mugarura was deprived of those properties because, they were not recovered.

Wherefore, I am in agreement with Counsel for the prosecution and the opinion of the Assessors, and I hold that the prosecution proved this 1st ingredient of theft beyond reasonable doubt.

On the 2nd ingredient of the charged offence; that is, use of the deadly weapon or use of violence. Counsel for the prosecution in his submissions, analysed the evidence on record as a whole and submitted that the prosecution proved this second ingredient of the charged offence beyond reasonable doubt.

In reply, Counsel for the accused persons submitted that the prosecution failed to adduce evidence to prove this 2nd ingredient of the charged offence. In his submissions, Counsel for the defence agreed that a panga and stones are deadly weapons as per their definition in Section 286 (3) of the Penal Code Act, Cap.120, which reads:

“In subsection (2) “deadly weapon” includes any instrument made or adopted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is imply to cause death.”

Counsel for the defence/accused agreed that the prosecution at first charged the accused persons with the offence of house breaking and theft, that this shows that the ingredient of a deadly weapon was just a frame up. That there was no particular description of the deadly weapon. That none of the panga and the stones were exhibited in Court. That the use of violence by the assailants was never proved by the prosecution. That the alleged rope that was used to the PW1 was never exhibited in Court. That, therefore, the prosecution failed to prove this 2nd ingredient of the offence charged.

In their joint opinion, the Assessors evaluated and analysed, the evidence on Court record and in their considered opinion found that the prosecution proved this 2nd ingredient of the charged offence beyond reasonable doubt.

The offence of aggravated robbery was committed during the day. PW1 was able to see the assailants in possession of a panga and stones. According to PW1, the assailants used a panga to assault her. The panga as per Section 286 (3) of the Penal Code Act (Supra) is an instrument that is meant or used for stabbing or cutting. PW1 in her evidence stated that the assailants who also threatened to kill her were using that said panga. PW1 also prove to the satisfaction of the Court that the assailants were armed with stones. As per Section 286 (3) of the Penal Code Act (Supra), the stone is described as a deadly weapon and a stone is capable of causing death or threats if used on a human being.

From the evidence of PW1, the assailants tied her hands “kandoa” from behind, on her back; they also tied her legs using a rope. They blindfolded her face using a towel. They also dragged her into a bathroom, while threatening that they were going to kill her. The assailants used the two stones they had in their possession

to hit PW3's bedroom door open. They broke into the bedroom of PW3 and stole all the items as given in evidence by PW3 and PW1. The reason for their violence is because the assailants wanted to secure the stolen property before the robbery during and immediately after the robbery. Because of their violence, PW1 was threatened and she could not make an alarm.

I agree with the submissions by Counsel for the prosecution that since the panga and the stones were not recovered, the prosecution could not exhibit any of them in Court. The assailants, according to the evidence of PW1 went away with the panga and the stones. The assailants had all the time to themselves, and as such they could not abandon the said items at the scene of crime.

In cross examination and in defence, the prosecution evidence on this issue of the use of a deadly weapon or/and use violence in the course of the robbery was never challenged by the defence.

In the end result, and in agreement with Counsel for the prosecution and the Assessors, I hold that the prosecution proved this 2nd ingredient of the charged offence beyond reasonable doubt.

I now turn to consider the 3rd ingredient of the charged offence that is, participation of each accused person in the commission of the charged offence. Counsel for the prosecution in his submissions evaluated the entire evidence on the Court record in relation this 3rd ingredient of the charged offence. In his submissions, he connected each accused person to the robbery of the complainant's properties. He prayed to Court that each accused person be found guilty and convicted as charged.

In reply, Counsel for the defence submitted that none of the prosecution witnesses put the accused at the scene of crime. He seriously criticized the prosecution witnesses' evidence. That each accused person gave credible evidence. He

submitted that the prosecution failed to prove any ingredient of the offence of aggravated robbery against each accused person. He prayed that each accused person be found not guilty of the charged offence and be acquitted accordingly.

The two Assessors gave a joint opinion. In their joint Opinion, the assessors evaluated the entire evidence on Court record against each accused. The Assessors advised Court to convict each accused person of the charged offence.

According to PW1, she gave evidence that the three (3) accused persons attacked their residence during the day time. That the time of the day was between 3:00 – 3:30p.m. when the three accused persons entered their residence. That she properly saw the accused persons. Counsel for the defence in his submissions argued that according to circumstances as was described by PW1, that PW1 could not have identified the assailants.

This contention brings in the issue of whether PW1 properly identified the accused persons. In the case of **Bogere Moses & Another –vs- Uganda SCCA No. 1 of 1999 and Abudala Nabubere and others –vs- Uganda [1979] HCB 77**, examined the circumstances in which proper identification came to be made. That the factors are:- the length of time the witnesses took to see or observe the accused, the distance that was between the witness and the accused, the source or nature of light, and familiarity of the witness and the accused.

In this instant case, the offence was committed during the day. It was broad day light between 3:00 – 330pm. PW1 gave evidence that the robbery took about thirty (30) minutes while the accused persons were in the house. PW1 was able to see them as they were too close to her. The factors for proper identification of the accused existed at the scene accused existed at the scene of crime. Certainly, PW1 identified the robbers.

Further, PW1 narrated visibly what each of these accused persons did within the house. PW1 in her evidence stated that A3 was one eyed man, and saw that he was the one commanding the other accused persons. That A3 was armed with a panga. That A1 and A2 were both armed with stones. That A3 ordered A1 and A2 to tie her using a rope.

Again, according to the prosecution evidence on record, after the arrest of A1, PW1 identified him as one of the robbers who had attacked her in their residence. At the Police, PW1 identified each accused person after their arrest. That during the robbery A1 was calling A2 – Kalevu and that she also heard the name soldier. From the evidence on record, subsequently, Kalevu and soldier were arrested and PW1 identified each of them as the people who participated in the robbery. PW1 also identified A1 as person with a scar on his forehead.

In cross-examination by the defence Counsel, PW1 never contradicted herself. Her evidence remained unchallenged in cross-examination. The defence evidence as it was narrated never caused any doubt in her evidence. I saw PW1 testify, she was confident, she was unshaken, she was consistent in her testimony. Therefore, PW1 was a very truthful witness. PW1's evidence was corroborated by the evidence of PW2, PW3, PW4 and PW5.

According to PW2, in his evidence he stated that he participated in the arrest of A1. That on arrest A1, A1 pleaded to him that he was ready to cooperate. That when A1 was taken to the police at Natete, he revealed how they carried out the robbery. That A1 led the police to the home of PW3 where robbed the property of PW3. That at the scene of crime PW1 was able to identify A1 as one of the robbers who attacked her at their residence. He further gave evidence that A1 revealed to him and PW3 that out of the money they robbed from the house of PW3, that A1 only got 13 (thirteen) million and that he used Shs. 2,500,000/= (two million, five hundred thousand shillings) to buy two motorcycles. From the

evidence of PW2 which was not challenged in cross-examination and in defence, A1 put himself at the scene of crime.

It is the evidence of the prosecution that during the investigation; A1 continued revealing his participation in the robbery and also revealed the names of his associates: Kaleva (A2) and soldier (A3).

For A2, after the motorcycles were impounded as a close friend to A1, he went to rescue one of his colleagues at Natete Police Station. That is when he was arrested. On his arrest, PW1 went to the Police and identified him at the said Police Station.

According to the evidence of PW2 and PW4, when A3 was subsequently arrested, PW1 was called and she identified him as the person she had seen during the robbery with one eye and had a panga.

It is important to note that the three (3) accused persons are jointly charged. And as such they are joint offenders. And accordingly to Section 19 (2) of the Penal Code Act, each accused person is a principal offender. Again, according to the prosecution evidence on record, the three accused persons before; during and after the robbery they had a common purpose to commit the said offence. See Section 20 of the Penal Code Act. The three accused persons formed a common intention and this was to steal the properties of PW3, Mugarura John; indeed robbed and deprived PW3 of his hard earned money and property.

I evaluated the evidence of each accused person. Each accused person when they were called to give their respective defence, they gave evidence not on oath. In their narrative defence, I could tell that each accused person was giving uncoordinated story which was full of lies. And for the fact that they were put at the scene of crime by the prosecution witnesses, their respective defences hold no water at all.

In his Charge and Caution Statement, which was admitted on Court record without any challenge, A1 revealed to PW5 that out of Shs 60,000,000/= (sixty million shillings), he got Shs. 13,000,000/= (thirteen million shillings). He revealed to PW5 how they robbed the property of PW3. It should also be noted that according to PW1, during the robbery the accused never disguised themselves. PW1 was able to see them properly. PW5 in her testimony properly explained how she received a Charge and Caution Statement from A1. Her explanation about the queries that were raised by Counsel for the defence during cross-examination was satisfactory enough to me. I hold her as a truthful witness. In the premises, and in agreement with Counsel for the prosecution and the two Assessors, I hold that the prosecution proved the participation of each accused person in the robbery of PW3's properties beyond reasonable doubt.

8. Conclusion.

In closing, considering all the prosecution and defence evidence, the submissions by both Counsel for the parties, the Assessors' joint opinion, and my own consideration of the case on all the three ingredients of the offence of aggravated robbery, I am satisfied that the prosecution proved this charged offence against each accused person beyond reasonable doubt.

Therefore, each accused person is found guilty of the charged offence and each is convicted as charged.

Dated at Kampala this 8th day of December, 2015.

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JOSEPH MURANGIRA
JUDGE.