

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

HCT-04-CR-SC-15 OF 2013

UGANDA **PROSECUTOR**
VERSUS

A1 BAZILE FREDRICK

A2 CHEMONGESMARTI alias Mutya.....**ACCUSED**

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused were jointly charged of aggravated Robbery contrary to Section 285 and 286(2) of the PCA.

Accused denied the charge.

The prosecution has the burden to prove beyond reasonable doubt that;

1. There was theft.
2. There was use or threat to use a deadly weapon.
3. Grievous harm.
4. Participation

The evidence by the prosecution consisted of evidence of 5 witnesses and a set of 8 exhibits. The defence consisted of the testimonies of the accused alongside 4 witnesses.

Having reviewed the evidence on record, court finds as here below;

1. Theft

Theft is defined under Section 254(1) of the Penal Code Act as the fraudulent taking away of anything capable of being stolen without any claim of right.

Evidence on record by the prosecution of theft consists only in evidence of PW1. He claims that on 15th July 2012, at 7:30pm, he was way laid by accused who took from him 1.8 million, a watch and a Nokia phone. PW2, who claims he visited the scene only recovered a panga and two shirts(which were not exhibited in court). PW3, the GAL, received a request to analyze a set of exhibits submitted by **Detective Corporal Okurut**, including the alleged panga and 2 T-shirts recovered from accused's homes. PW4 was only told by PW1 of the alleged robbery and loss of the items stolen. PW5 visited the scene with PW2, where a blood stained panga was recovered while the T-shirt was found with accused putting them on.

From all the above evidence, there is no scintilla of proof of theft. None of the items were recovered. No evidence that complainant owned or possessed those items is on record. No evidence is on record to prove that a theft occurred, save the word of mouth by PW.1- the complainant. This leaves doubt. The ingredient is not proved.

2. Use of threat to use a deadly weapon

The prosecution in a case of aggravated robbery must prove that the assailant used or threatened to use "a deadly weapon"

See *Uganda V Okello (1992) HCB 68*.

The prosecution must lead evidence to prove that the weapon is a deadly weapon.

Wassaja v. Uganda (1975) EA 181.

In this case, there is only mention of the panga in the indictment. The next time it is mentioned is by PW2 and PW.5. All these were police officers who claim they recovered it from accused's house, long after the alleged crime. PW3 examined it to test if it would test positive for blood. In his evidence and report received as PE6, he found exhibit "A" had insufficient DNA to generate a profile hence had no remarks as to whether it related to accused or not.

This evidence does not pass the test in the *Wassaja* case (Supra). Prosecution has to lead evidence to link this panga to the accused, to show how lethal it was, and how it was used by the assailants to cause grievous harm on the victim. PW1 only says "they way laid me and cut me.."

The panga as an instrument used to cut is not mentioned. Apart from PW1's word, no other evidence is available. I find that this ingredient has not been proved.

3. Participation

The evidence of the prosecution claims that accused way laid the victim and robbed him. The only witness is the victim himself testifying as PW1. He is the one who reported and claimed he knew his assailants. It was 7:30pm and he claims there was moonlight.

Accused does not indicate any other mode of identification save the moonlight. According to him he became unconscious, until after 3 days.

The rest of the witnesses acted on information provided by PW1. **PW2 Detective AIP Watiwa** visited the scene on strength of PW1's report to police. He claimed the scene was near a pathway leading to the home of the complainant when they went to the home of the suspects, they recovered a blood stained panga and a white T-shirt stained with blood.

However, **PW5 Detective Corporal Okurut** with whom they carried out the visit, claimed that they searched one of the accused's houses (of **Chemonges**) and recovered a blood stained panga, then returned to the station from where they found accused putting on a T-shirt with blood stains.

PW4 Tamwenge's evidence was full of hearsay, comprising what PW1 told him about the robbery. PW3 gave the report from the government analytical laboratory regarding the submitted exhibits. This evidence is inconclusive. He noted that the blood stains on exhibit B (T-shirt of **Basile**) is from **Matira Mohamed**.

He then states there is no evidence that the blood is of **Basile Fredrick**.

The problem with all this evidence is firstly that court was not told how these exhibits were obtained. How did the police ensure that the blood stains on these clothes were not planted there?

Where did the T-shirt come from? PW2 says in the house of one of the suspects. PW5 says the panga was in **Chemonges's** house, T-shirt recovered from accused at police. PW3's findings on the panga were also inclusive since he did not conduct a DNA test on it. At the end of it all the evidence remains with gaps, and when the defence is considered this evidence of the prosecution crumbles.

Both A1 & A2 told court that complainant attacked A1 and inflicted harm on him.

DW3- the Chairman received the report, informed DW4 with whom all went to the scene. The Secretary LC1 wrote a forwarding letter to police but instead while at police **Detective Okurut** retained and detained A2 & A3. DW5 was with A1 and witnessed the fight.

DW6- Confirmed that the complainant PW1 had expressed a desire to disrupt A1's marriage on account of the love affair he had with his wife earlier on. (Proof of this is the photo exhibited as ID1 where complainant is seen with DW5 seated lovingly.

All explanations given in defence, point glaringly at the fact that these parties were engaged in a wrangle for D5's love. The evidence of the defence consistently shows that on 15 July 2011, the complainant **Matila** fought with **A1- Basile**. This explains the blood stains on the T- shirt and at the scene of crime.

The prosecution has a burden to destroy the alibi set up by the defence.

With only the evidence of PW1, under very difficult circumstances for identification, the prosecution miserably failed in this duty. Participation of the accused person was not proved.

All in all, I find that none of the ingredients of this offence have been proved. The charge has not been proved.

Both accused are not guilty of this charge. I dismiss the charge and do acquit them accordingly. I so order.

Henry I. Kawesa

JUDGE

26.09.2016