

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

CRIMINAL SESSION NO. 0255 OF 2018

(Arising from Criminal Case No. 054/2018; CRB 1189/2018Mbale)

UGANDA :: PROSECUTION

VERSUS

A₁. MASABA NASAR
A₂. NABENDE SAULO } :: ACCUSED
A₃. MABERI AGGREY }

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] The 3 accused persons; **Masaba Nasar** (A₁), **Nabende Saulo** (A₂) and **Maberi Aggrey** (A₃) stand indicted with the offence of **Aggravated robbery contrary to Sections 285 and 286(2) Penal Code Act** in Count I and Doing grievous harm contrary to Section 219 Penal Code Act in Count II. It is alleged in **Count I** that on the 24th day of June, 2018 at Magezi Cell in the Mbale District, the 3 accused persons and others still at large robbed **Cheptoek Davis** of shs. 5,000/- (Five thousand shillings), Techno mobile phone Camon C6, Wallet containing National Identity card and other documents and during the said robbery used a deadly weapon to wit a panga on the said **Cheptoek Davis**. In **Count II**, it is alleged that on the same day, the same time and at the same place as in Count I, the 3 accused persons and others still at large unlawfully did grievous harm to **Chesania Nelson**.
- [2] The accused persons denied the Prosecution allegations and pleaded not guilty to the 2 counts.
- [3] The Prosecution case is that during the night of 22nd June, 2018 at around midnight, the 2 complainants/victims; **Cheptoek Davis** and his nephew **Chesania Nelson** were from their brother's (a one **Kuyeti Yoram**) place and when they opened the gate to enter their residence, they were confronted by thugs who were armed with pangas. The thugs attacked them and inflicted on them various cuts with pangas and during the

process, the thugs removed from **Cheptoek** his wallet containing 5,000/- , a copy of his National card, UGAFODE work identity card and an Insurance card together with his phone Camon C9. Thereafter the thugs fled.

- [4] It is the contention of the complainants/victims that because of the security electric lights and the bright moonlight that was available, they were able to identify the assailants and the others who fled and secondly, they had even known them before this incident since they hail from the same village.
- [5] The 2 complainants/victims helped themselves back to their brother's place who eventually drove them to General Clinic Mbale and then to police where the matter was reported. Police mounted an identification parade and the complainants/victims were able to identify the accused persons.
- [6] In their unsworn statements, A₁ and A₂ put up total denials of the allegations of the Prosecution and raised alibi. That they were in their respective homes at the time the robbery allegedly took place. A₃ also did the same claiming that he was at his home with his mother **Sophie Nambozo** at the time the robbery in question allegedly took place.
- [7] As in all Prosecution cases, it is the duty of the Prosecution to prove the case against the accused beyond reasonable doubt. The burden or the duty does not shift; *WOOLMINGTON VS. DPP (1935) AC 426* and *SEKITOLEKO VS. UGANDA (1967) E. A 53*.
- [8] In the case of *Aggravated robbery contrary to Sections 285 & 286(2)(3)(a)(4) Penal Code Act*, it is incumbent upon the Prosecution to prove each of the following ingredients of the offence:-
- i. Theft of property of the victim.
 - ii. Use of violence or threat of use of violence during theft.
 - iii. Possession of a deadly weapon during the theft.
 - iv. Participation of the accused during the theft.
- [9] In the case of **grievous harm**, the ingredients of the offence are contained in *Section 2(f) Penal Code Act* as; "*grievous harm means any harm which amounts to a main or dangerous harm or seriously or permanently injures health or which extend to permanent disfigurement*

or to any permanent or serious injury to any external or internal organ, membrane or sense.”

Then, secondly, that it is the accused who committed the offence.

- [10] As regards the first three ingredients of the offence in the count I of Aggravated robbery, the Prosecution led evidence of **Cheptoek Davis** (PW₁) who testified how he was attacked and mercilessly cut with a panga on the head and other parts of the body to wit, the hands/fingers, mouth and the nose. Court was able to observe the scars on the parts of the body where he sustained the injuries. It was a brutal attack. **DC Mulinde Abu** (PW₆) had the opportunity of taking photos of the victim while he was in hospital theatre and together with the PF3 in respect of the victim, were admitted in evidence during the preliminary hearing under **Section 66 Trial on Indictment Act** as P. Exh. III and II respectively.
- [11] As per the PF3 dated 25th June, 2018 (**P. Exh. II**), the victim **Cheptoek** (PW₁) sustained deep cut wounds on the scalp, lateral nostril and middle and ring finger which corroborate the evidence of PW₁.
- [12] It is the evidence of the victim (PW₁) that during the attack, he lost his wallet that contained shs. 5,000/-, his National Identity card, employee identity card and an Insurance card. This foregoing evidence was neither controverted nor contested by the defence.
- [13] A panga that was used is a deadly weapon within the meaning of **Section 286(a) Penal Code Act** as it is an instrument that is adapted for stabbing or cutting. The totality of the above is sufficient evidence beyond reasonable doubt that there was theft which was accompanied by violence and there was use of a deadly weapon.
- [14] As regards count II, whether grievous harm was occasioned to **Chesania Nelson** (PW₂), again, Prosecution relied on the evidence of the victim (PW₂) himself who stated that he was also cut with a panga on the forehead and was kicked around as he lay on the ground. PF3 (also P. Exh. II) was also admitted during the preliminary hearing under **Section 66 Trial on indictment Act** and it also referred to a deep cut wound on the scalp. It also amply corroborated PW₂'s evidence. It is my finding that a deep cut wound on the scalp amounts to "grievous harm" as it is a serious dangerous injury to the head membrane. In view of the fact that

the above was not corroborated, I find that this ingredient of the offence was amply proved beyond reasonable doubt.

- [15] The only substantive issue for court's determination now is whether the accused persons participated in the commission of the offences in count I and count II. Counsel for the accused persons **Mr. Mooli Allan** submitted that PW1 claimed to know the attackers by names but again conceded that he never revealed their names to police. The features of how the witnesses managed to identify the accused persons were also not revealed. When it came to the identification parade, no recording or photographs were taken to satisfy court that it was done in accordance with the law. He relied on the authority of **UGANDA VS. LANYOLE H. C. CRIM. SESSION CASE NO. 62/2016 (KITGUM)** wherein guidelines for a proper identification were laid and it is his contention that the guidelines given were violated in this case.

Lastly, that the Prosecution claimed that a pair of shorts which had blood stains were recovered but they were never tendered in evidence. According to him, it was illogical for a criminal to retain on the same cloth stained with blood after commission of an offence.

- [17] Counsel concluded that this court should cautiously take the evidence of identification to rule out a possibility of mistaken identity. In **ABUDALA NABULERE & 2 ORS. VS. UG. [1979] HCB 77** court observed that "*where the case against an accused depends wholly or substantially on the correctness of one or more identification of one or more identifications of the accused, which the defence disputes, the Judge should warn himself and the assessors of the special need for caution before convicting on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken.*"

- [18] In the instant case, it is the evidence of the complainants/victims; PW₁ and PW₂ that at the night of the attack, there was a bright moonlight and electric security light and this is what enabled them to identify the accused persons though later, they conceded that they did not know the accused persons by names but that they were able to identify them by appearance and this is what they reported to their brother PW₂ and police. That with their description of the accused persons, it matched that of the accused persons.

[19] It is my finding in this case that though the conditions for identification were good, there is still uneasiness as to whether the 2 complaints/victims really identified the attackers. This is so for the following reasons;

- a. The attack was instantaneous in that as the victims opened the gate, they were confronted by panga wielding thugs. There was therefore little or no time to identify the attackers though they claim to had known them even before the incident. They never knew them by names.
- b. It is the evidence of PW₁ that after the attack, he revealed to his brother **Kuyeti Yoram** (PW₃) how A₃ led a group of thugs who inflicted harm on them. His report was as if he had identified A₃ by name. However, his brother (PW₃) testified that both PW₁ and PW₂ described to him the assailants and he understood the assailants to be the accused persons. However, as correctly put by Counsel Mooli for the defence in his submissions, the features of how the witnesses managed to identify the accused persons were not revealed.
- c. Again, it is the evidence of the PW₁ that upon his report to police, he was able to name A₃ and describe A₁. **D.C Mulinde** (PW₆) on the other hand, testified during examination in chief and cross examination that the victims clearly stated that they identified the accused persons by appearance and not by names. It is therefore clear that PW₁ told court lies when he claimed to had been able to name A₃ as he later conceded during cross examination.
- d. There is confusion, contradictions and inconsistencies as regards what happened when the victims were under admission in the hospital. According to PW₁, police brought A₁ for him to identify whether he was one of the assailants and he was able to do it positively. For PW₂, it is A₃ who police brought to them at the hospital to see if they could identify him as one of the attackers. According to him (PW₂), they positively identified him and he, A₃ was still putting on his blood stained pair of shorts of army camouflage. **Kuyeti Yoram** (PW₃) on his part, insisted during his testimony and cross examination that it was A₁ who was arrested putting on the army camouflage pair of shorts which still had blood stains and was brought to the hospital for the victims to identify. **D. C Mulinde's** (PW₆) evidence is similar to that of PW₂ as regards A₃ as the one who was putting on an army uniform

camouflage. What is outstanding is that though this blood stained pair of shorts were recovered, the cloth was not tendered in evidence. According to PW6, it was forwarded to the Government Analytical Laboratories for analysis and examination but the results had never been brought.

- e. It is the evidence of **Anguria Timothy** (PW₅), the Defence Secretary of Magezi village where the robbery took place that during the night of the robbery A₂ he found lurking in the trees near the scene and arrested him. That A₂ was found bleeding over his hands. One however wonders how the assailant would remain lurking around the scene after hacking his victims the way it was done to the victims. His PF3 on record does not reveal any injury on any part of his body. Probably, his hands were merely soiled with blood but there is no independent evidence to support such a proposition.

[20] This court upon warning itself of the dangers of relying on the identification evidence of PW₁ and PW₂ and considering the totality of the above, it is my view that the 2 witnesses are not genuine in their evidence and to rely on their evidence can lead to a miscarriage of justice on the part of the accused persons. It follows therefore that the identification parade that was mounted or carried out by **D/AIP Mwalisi Alfred** (PW₄) was superficial and therefore unreliable. Besides, A₁ and A₃ or one of them, as A₃ stated in his defence was brought in the hospital for identification by the victims before the identification parade. That conduct rendered the identification parade in this case a moot.

[21] It is from the foregoing that I find that the Prosecution has not proved its case beyond reasonable doubt that the 3 accused persons participated in the alleged offences in count I and II by placing them at the scene of crime. Their alibis accordingly succeed. The accused persons are therefore found not guilty of count I and II and are accordingly acquitted and set free forthwith unless they have other lawful charges pending against any of them.

Dated at **Mbale** this **04th** day of **March, 2021**.

Byaruhanga Jesse Rugyema

JUDGE