

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

CRIMINAL SESSION NO. 0129 OF 2017

(Arising from Criminal Case No. 068/2016; CRB 80/2016 Mbale)

UGANDA :: PROSECUTION

VERSUS

NDYABUTONO ARAJAB:: ACCUSED

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

- [1] The accused **Ndyabutono Arajab** stand indicted of the offence of **Aggravated robbery contrary to Sections 285 and 286(2) Penal Code Act**. It is alleged that between the night of 1st and 2nd June, 2016 at Bufukhula Upper village in the Mbale District, the accused and others still at large robbed **RA206875 Cpl. Shibuta Geoffrey** of his 32 inch flat screen television, 1 video coverage camera, 3 mobile phones, 2 laptops and clothes all valued at approximately UGX 4,200,000/- and during the said robbery used a deadly weapon to wit a panga on the said **RA206875 Cpl. Shibuta Geoffrey**. The accused denied the allegations and pleaded not guilty to the offence.
- [2] The Prosecution case is that during the night of 02nd June, 2016, **Cpl. Shibuta Geoffrey**, the complainant together with his wife **Nakilya Betty** were in bed sleeping when they were attacked by a panga wielding gang of thieves. They battled with the thieves until they all fled the house but they had ferried outside their flat television (LG brand), 2 laptops (Toshiba brand), a bag of clothes, 3 phones (one which was being by the complaint's wife Nakiryia Betty) and a video coverage camera which the thieves disappeared with on motorcycles that were awaiting them outside.
- [3] None of their items that were stolen were recovered save her phone described as FF₁FF₂FF₃ which was recovered by police from the accused's wife through phone tracking.

- [4] It is apparent that though there were electric lights on during the robbery, the thieves had masked themselves and identifying them, was in the circumstances difficult though the complainant claim to had identified the accused whom he said was unmasked while standing on the door way helping in ferrying the robbed items to outside the house.
- [5] In his defence, the accused denied the Prosecution allegations but admitted that his wife was found with the phone alleged to had been one of the items that were stolen from the complainant. He explained that he purchased the phone in question from a one “**King**” as known by nickname who found him at his boda boda Nylon III stage, Mbale Town in the presence of other boda boda operators at a price of shs. 14,000/-. He explained further that despite giving police the name of the vendor, “**King**”, he was arrested and charged with the instant offence. That when he was remanded in prison, he found the said “**King**” in prison and that when he learnt of his true names as **Wanjusi Benson**, he had to report this to the O. C Prison but when the said “**King**” was sent for, the said “**King**” denied knowing him. In short, the accused put up a defence of alibi, that at the time of the robbery, he was not at the scene of crime but at his home sleeping.
- [6] As in all criminal cases, it is the duty of the Prosecution to prove the case against the accused beyond any reasonable doubt. The burden or the duty does not shift; *WOOLMINGTON VS. THE DPP (1935) AC 463, UGANDA VS. KAMYA JOHNSON WAVAMUNO & ORS. H. C. CRIM. SESSION CASE NO. 437/1997*. In the instant case, in order to secure a conviction, therefore, the Prosecution has to prove inter alia, theft of property belonging to another, use or threat of use of violence against the victim, possession, use or threatened use of a deadly weapon during the commission of the theft and the accused’s participation in commission of the theft (*Sections 285 and 286 Penal Code Act*).
- [7] In the instant case, the Prosecution led evidence of the complainant **Shibuta Geoffrey (PW3)** and his wife **Nakilya Betty (PW1)** who both testified how they were attacked by panga wielding gang of thieves at their home at Bufukhula village, Busibo during the night of 02nd June, 2016 and how the thieves took off with their properties to wit; flat LG television, 2 Toshiba laptops, 3 phones, a video coverage camera and a bag of clothes. During the preliminary hearing, a medical examination report (PF3) of the complainant **Shibuta Geoffrey** revealed that he

sustained injuries on the thigh by a sharp broad edged object that pointed to a cut by a panga as described by the 2 witnesses. The PF3 was admitted under **Section 66 of the Trial on Indictment Act** as P. Exh. II.

- [8] The defence did not opt to challenge the above evidence. It follows therefore, the ingredients of the offence of robbery i.e. theft, use or threat of use of violence and possession, use or threatened use a deadly weapon to wit a panga (**Section 286(3) Penal Code Act**) were proved. The only substantive issue for court's determination is therefore, whether the accused person participated in the robbery.
- [9] To prove this ingredient of the offence, the Prosecution must prove that the accused participated in the commission of the offence. This is done by adducing direct or circumstantial evidence placing the accused at the scene of crime as perpetrator of the offence. Again, in this case, the Prosecution relied on the evidence of the complainant **Shibuta Geoffrey** (PW3) and his wife **Nakirya Betty** (PW1).
- [10] According to **Nakilya Betty**(PW1), during cross examination, she revealed that during the night of the attack, she did not recognize anybody because the thieves had masked themselves for disguise. **Shibuta Geoffrey** (PW3) on his part, claimed to have identified the accused whom he said had no mask on. That the accused stood on the doorway helping the masked assailants to ferry things outside the house.
- [11] As correctly put by the defence Counsel **Mr. Mooli Allan** during the submission, the assailants were not recognized at the time of the robbery because **Nakilya Betty** (PW1) stated that the assailants were masked. For her husband, PW3 to state that the accused was not masked is a contradiction which goes to the root of the identification and therefore that contradiction has to be resolved in favour of the accused. Besides, in a case of this nature, police ought to have carried out an identification parade so that in case it is true that **PW3** had recognized the accused, then, it is confirmed during an identification parade, properly carried out so that the victim surely identifies the assailant. No identification parade was carried out in this case and therefore, the Prosecution lost the opportunity of placing the accused at the scene of the crime. Besides, according to **D. C. Tabingwa** (PW4), the complainant's report to Busibo Police made on the fateful night, the complainant stated to have been attacked by 3 unidentified persons. The accused's name was not reported or given to police as one of the assailants.

[12] The only remaining linkage of the accused to the scene of the crime is his wife being found with the phone that was among the items stolen during the night of the robbery. It is the evidence of **D. C Tabingwa Ronald** (PW4) that when he commenced phone tracking, the MTN printout showed that **sim card 0772925415** in the names of the accused was used in the stolen phone in question on 09th June, 2016(**P. Exh. VI**). The accused does not deny this piece of evidence. In fact, in his defence, he stated that upon purchase of the phone in question, he placed in one of his sim cards and then handed it to his wife who never had a phone. This now becomes circumstantial evidence based on the doctrine of recent possession of stolen property.

[13] In **KASAIJA VS. UGANDA CRIM. APPEAL NO. 12 OF 1991, (SC)**, the doctrine of recent possession was well stated as follows:-

“The doctrine of recent possession, a species of circumstantial evidence, is that if an accused is in recent possession of stolen property, for which he has been unable to give unreasonable explanation, the presumption arises that he is either the thief or the receiver of the stolen goods, according to the circumstances.”

In **MBAZIIRA SIRAG & ANOR. VS. UGANDA [2007]1 HCB 1**, *“The fact that a person is in possession of goods after they are stolen raises a presumption of the fact that, that person was the thief or that that person received the goods knowing them to be stolen, unless there is credible explanation of innocent possession.”*

[14] In the instant case, it is not in dispute that the accused was found in possession of a recently stolen phone that was one of the items robbed from the complainants’ home during the night of 02nd June, 2016. The accused however accounted for the possession of the phone as follows:

a. It was towards the end of June 2016 while at his stage of boda boda Nylon III at around 02:00pm when a one **“King”** as known by nickname came hawking a phone and upon negotiations, he purchased it at shs. 14,000/-. That this was in the presence of his boda boda colleagues; **Abdallah** who first offered to buy it but failed, **Bogere “Vampire”** and **“Lubawu” Taulya Ephraim** who testified on his behalf as DW2.

b. That it was on his 3rd day in detention at police that he revealed to police the person who sold him the phone as **“King”** whom he only

knew by that nickname. Police did not buy his explanation and it proceeded to have him charged with the instant offence.

- c. That while in prison on remand, he found the said “**King**” in prison and had to report the discovery of “**King**” in prison. However, when the said “**King**” was sent for by the O.C Prison, he came and denied ever knowing the accused. However, during cross examination, it became apparent that the accused never revealed “**King**” as the person who sold him the phone. Besides, even the accused’s witness **Taulya** (DW2) never knew this guy “**King**”. He only learnt about him when the accused had been arrested and was in police cells.

[15] From the foregoing, I do find that the Prosecution has failed to place the accused at the scene of crime by virtue of being found with the stolen phone as there is unchallenged evidence that the accused purchased the phone from a stranger. The accused’s statement to police tendered by the Prosecution is to that effect (**P. Exh. VIII**). However, the fact that the accused purchased the phone from a stranger whom he claim to had known as “**King**” but deliberately refused to reveal him to police until after 3 days of detention is proof that he was concealing this stranger. The reason why the accused had to first conceal this stranger “**King**” must be because he knew that the phone “**King**” sold to him had been feloniously obtained. If it were not so, upon his arrest, the accused would have immediately revealed the stranger “**King**” as the one from whom he had bought the phone in question. Secondly, upon discovering this “**King**” in prison, the accused while on bail is expected to have gone to police and report the existence of “**King**” in prison but he never did so. Thirdly, the switching of sim cards in and out of the phone in question i.e. use of **0786090406** from 20th July, 2016 - 22nd July, 2016, **0775925415** on 09th June, 2016 and **0787712076** from 19th June, 2016 - 29th June, 2016 sim cards interchangeably at different intervals rendered the accused suspect. In my view, the above is sufficient evidence that the accused was not a mere innocent receiver of the stolen phone but knew that it has been feloniously obtained. It is important to note that in these days, purchase of a phone from a hawker, with no receipt or agreement, one has to do it at his own risk.

[16] Under **Section 87 Trial on Indictment Act**, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it. In the instant case, the accused was charged

with the offence ***Aggravated robbery contrary to Sections 285 and 286 Penal Code Act*** but the facts proved by the Prosecution reveal a case of ***Receiving stolen property contrary to Section 314(1) Penal Code Act***. For the accused to be convicted of the minor cognate offence, the offence must be both minor that is of less gravity and cognate that is, of the same kind, nature, genus, or species.

[17] I find the offence of ***Receiving stolen property contrary to Section 314(1) Penal Code Act*** being a minor cognate offence of ***Aggravated robbery contrary to Sections 285 and 286 Penal Code Act*** in that both involve the element of theft and the offence of Receiving stolen property carries a maximum sentence of 14 years while aggravated robbery carries a maximum sentence of death. In view of the above, I find the accused guilty of the minor offence of ***Receiving stolen property contrary to Section 314(1) Penal Code Act*** and he is convicted of that offence accordingly.

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

Byaruhanga Jesse Ruggyema
JUDGE