

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CRIMINAL SESSION CASE NO.0166 OF 2012

UGANDA ::: PROSECUTION

VERSUS

1. ARYAMPA JACKSON
2. KIIZA VICENT
3. SABIITI JACKSON
4. ARIHO JUSTUS
5. BYAMUKAMA SAM alias GUBAZA
6. RUGIREHE MEDADI
7. IRUMBA FRANK
8. TUGUMISIRIZE LIVINGSTONE
9. TURYAMUBONA ALFRED ::: ACCUSED

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

- [1] A total of 9 accused persons; **Aryampa Jackson(A1), Kiiza Vincent(A2), Sabiiti Jackson(A3), Ariho Justus(A4), Byamukma Sam alias Gubaza(A5), Rugirehe Medadi(A6), Irumba Franklin(A7), Tugumisisrize Livingstone(A8) and Turyamubona Alfred(A9)** were all charged with 6 counts of **Aggravated Robbery C/ss 285 and 286(1)(b) & (2) P.C.A** in count 1, **Attempted Murder C/s 204 P.C.A** in count II, **Indecent assault C/s 128(1) P.C.A** in count III, **Arson C/s 327(a) P.C.A** in count IV, **Malicious damage to property C/s 335(1) P.C.A** in count V, and **Criminal trespass C/s 302(a) P.C.A** in count VI.
- [2] **In Count I**, it is alleged that on 1/4/2012 at Katikara Trading Centre in Kibaale District, the **9 accused persons** with others still at large, stole 20 old iron sheets, 40 bags of dry cassava, 10 bags of sorghum, 40 bags of maize, 35 bags of beans, 30 saucepans, 20 metallic plates, 15 other plates, 12 cups, 18 hoes, 9 jerry cans, 4 spraying pumps, 3 jerry cans of agriculture chemicals, 2 bicycles, 2 beds, 2 mattresses, blankets, clothes and 4 tables among other household items valued at shs.50,000,000/=; the property of **Rev. Rwamaraki Elisa**, and at the time of or immediately

before or after the said robbery, used a deadly weapon to wit; a panga, which they used to cause Grievous Bodily harm to a one **Rwamaraki Ruth**.

[3] **In other Counts**, it is alleged that on the same day and at the same place as in Count I, the **9 accused persons** and others still at large, attempted to cause the death of **Rwamaraki Ruth** (Count II), unlawfully and indecently assaulted **Rwamaraki Ruth**(Count III), wilfully and unlawfully set fire to a dwelling house of **Rev. Rwamaraki Elisa** (Count IV), wilfully and unlawfully destroyed crops/plants valued at 27,112,700/= the property of **Rev.Rwamaraki Elisa** (Count V), and with intent to commit an offence entered upon the property in possession of **Rev. Rwamaraki Elisa**.

[4] All the accused persons pleaded not guilty to the alleged offences.

The background of this case is as follows:

On the 16/3/12, the Kisiita sub-county council sat and resolved that a market that had extended to the road, Katikara, be enlarged/extended for purposes of meeting the needs of the day. The implementing team comprised of the sub-county chief, the investment chairperson, **Ariho Justus** (A4) and the various L.CI chairpersons of the area. It had happened that the shifting of the market from its location and expanding it meant relocating it on land that the complainant **Rev. Rwamaraki** had a claim. At the implementing level of the council resolution, other people who included a one **Iddi Willy**, **Irumba Frank**(A7), **Sabiiti Jackson**(A3) who was the chairman L.CI Katikara East, **Tugumisirize Livingstone**(A8), **Akileo Benaga**, **Turyamubona Alfred**(A9), and a one **Medard** who was L.CII chairman and others got themselves sucked in the exercise. They convened at the scene at around 8:00am. Most of them, if not all of them, were potential beneficiaries of the implementation of the resolution as the exercise involved allocation and giving out of areas/portions of land for establishment of stalls of the market.

[5] As a result, the potential beneficiaries of the exercise were all armed with tools for the exercise to wit; spears for digging the holes for erection of the stalls, pangas for cutting the poles and poles for construction of the stalls etc.

[6] As expected, when the implementation exercise of establishing and expanding the market commenced on the morning of 1/4/12, it aroused the attention of **Rev. Rwamaraki** and his daughter **Ruth Rwamaraki**, who appeared at the scene. They protested and resisted the exercise. As a result of their protests and resistance, chaos and fighting ensued.

[7] It is the prosecution case that the participants in the exercise were very many, both as on lookers and beneficiaries who included the accused

persons and others still at large. They were being led by **Aryampa Jackson**(A1) who was the L.C.III chairman of the area, Kisiita Sub-county. They descended on the complainant's Kibanja which was about 35-40 acres and razed down his crops which included bananas, oranges, pineapples, cassava etc to pave way for the market.

- [8] In the meantime, the complaint's daughter **Ruth Rwamaraki** on seeing what the accused persons and group had done, she went to Katikara Police to report and seek help. She also rang the DPC who advised her to photograph the event. It is then that she returned to the scene.
- [9] On sighting the complainant and his daughter, the accused persons and group confronted them, grabbed them and threw both of them down. The complainant managed to flee the scene and run away. In the course of the chaos that had ensued, **A1** ordered, threatening that **Ruth Rwamaraki** be killed as she had become a stumbling block. It is then that **Byamukama Sam** alias **Gubaza** (A5) sought for a sharp panga aimed it at her neck, she raised her hand up and in the process, the panga caught her hand/fingers severing off one of the fingers.
- [10] Upon his accomplishment, A5 aimed at a woman, **Hope Kamukama** who had picked **Ruth Rwamaraki's** camera that was capturing the event and her phone and was fleeing the scene. A5 caught up with her, forcefully removed the camera and the phone from her. None of them have ever been recovered.
- [11] In the meantime, the rest of the accused persons tied **Ruth Rwamaraki** with ropes as A1 undressed her with threats that she be raped. She was rescued by her auntie being assisted by a one **Julius** who untied her, wrapped her with a piece of cloth and took her to a nearby clinic for medical attention.
- [12] Thereafter, the accused persons and group conducting themselves in mob action, set ablaze the complainant's grass thatched house and demolished his other iron roofed house down. The iron sheets, sack of beans and dried cassava, bags of sorghum, sauce pans, hoes and all other items, household properties were removed/taken and loaded on a truck that ferried them to an unknown destination. Upon securing his freedom from the scene, the complainant (PW₁) fled to Kampala.
- [13] In their respective sworn statements, the accused persons denied the prosecution allegations, that none of the complainant's properties were destroyed and insisted that the establishment of the market went on normally.

- [14] As regards the Grievous harm occasioned to the complainant's daughter **Ruth Rwamaraki**, they insisted that it was a one **Okumu** who cut her finger as she struggled with him over a panga.
- [15] For **Kiiza Vicent** (A2) and **Byamukama Sam** alias **Gubaza** in particular denied the prosecution allegations and raised alibi defences stating that they were never at the scene.
- [16] In the course of the trial **Rugirehe Medard**(A6), **Irumba Frank**(A7), **Tugumisirize Livingstone**(A8) and **Turyamubona Alfred**(A9) were found to have had no case to answer and were acquitted accordingly. Though **A9** was reported to had passed on, there had been however, no evidence presented to that effect.
- [17] In all criminal cases, save where the statute is to the contrary, the prosecution has the burden of proving the case against the accused person beyond reasonable doubt. The burden does not shift to the accused person and the accused person is only convicted on the strength of the prosecution case and not on the weaknesses of his defence; **SSEKITOLEKO Vs UGANDA [1967] EA 531**. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt, the standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent (See **MILLER Vs MINISTER OF PENSIONS [1947] 2 ALL ER 372**).

1st COUNT: AGGRAVATED ROBBERY

- [18] In a charge of Aggravated robbery, the prosecution has the burden of proving the following elements beyond reasonable doubt;
- i) Theft of property belonging to the victim/complainant.
 - ii) Use of violence or threat of use of violence during the theft.
 - iii) Possession of a deadly weapon during the theft.
 - iv) Participation of the accused in the commission of the offence.

1st Ingredient of the offence; theft:

- [19] According to **Section 254 P.C.A**, theft is committed when a person fraudulently and without claim of right takes anything capable of being stolen. In the instant case, it is the evidence of the complainant **Rev. Rwamaraki Elisa** (PW₁) and his daughter **Ruth Rwamaraki** (PW₂) that on the morning of 1/4/2012, while in his commercial house on the upper side of his land at Katikara, they were awakened by the noise and alarms. They went to the scene and found many people who included the accused

persons, armed with spears, pangas, hoes etc razing down the crops on **PW₁'s** Kibanja so as to turn it or establish on it a market. When they protested, they were rounded up and his grass thatched house was torched and the other iron roofed house was demolished. All the properties namely; 20 iron sheets, 40 bags of dried cassava, 10 bags of sorghum, 18 hoes, sacks of beans and household properties like sauce pans were all taken.

- [20] Both **PW₁** and **PW₂'s** evidence was supported by that of **Turyahebwa Herbert(PW₄)** a resident of Katikara village, who on the morning of 1/4/2012 was on his way for prayers and was able to see very many people who included **A1, A2, A3, A4, and A5** armed with pangas, hoes and spears removing properties to wit; sacks of maize, cassava, beans and iron sheets and sauce pans from the complainant's house. The stolen properties were loaded on a vehicle that was parked around. **Kamukama Hope(PW₅)**, a neighbor to the complainant, her evidence was also to the same effect.
- [21] Their evidence was corroborated by that of **Superintendent of Police Ofwokuna John(PW₃)**, the Kibaale District Police Commander (DPC) by then. **PW₃** went to the scene upon receipt of a "phone call from the Regional Police Command (RPC) who required him to run to the scene and find out what could have happened to the family of **Rev. Rwamaraki**. Among other things, he found when one house of **Rev. Rwamaraki** had been burnt down. The stated stolen properties were removed from another iron roofed house that had been knocked down.
- [22] The accused persons denied any knowledge of or participation in the theft of the alleged properties. They however, save for **A2** and **A5**, admitted being at the scene and the event of establishment of a market thereon.
- [23] **Counsel Kasangaki** who represented all the accused persons submitted that the accused persons and others gathered at the scene to allocate or be allocated plots for market stalls at Katikara Trading Centre. A fracas ensued in which it is claimed the property of **PW₁** were destroyed and/or lost. That this was a public event which was called by leaders of Kisiita sub-county Local Government to implement the former's council resolution. That the public nature of the happening on 1/4/2012 and the resultant events arising out of the commotion involving the invited public does not support the claim that any property lost on 1/4/12 was stolen with aggravation.

Secondly, that neither the complainant (**PW₁**) nor his daughter (**PW₂**) were at the scene at the time the alleged properties were taken. That it would require the presence of **PW₁** and **PW₂** for the theft of the alleged properties to be proved.

- [24] **State Attorney Kokundakwe Arthur** for the prosecution on his part submitted conceding that the theft occurred during the absence of both **PW₁** and **PW₂** but that when they returned to the scene, they found when their properties had been taken away. That however, nevertheless, **PW₄** who is a neighbor to the complainants and **PW₅**, found and saw people who included the accused persons removing properties from the house of **Rev. Rwamaraki** and loading them on the vehicle that had been parked nearby.
- [25] It is true, neither **PW₁** nor **PW₂** were present at the time the alleged complainant's properties were removed and ferried away from his house. However, **PW₄** and **PW₅** were eye witnesses who found and saw people who included the accused persons removing properties from the house of the complainant and load them on the vehicle that had been parked nearby. The removal and taking away of the complainant's properties from his house during the fracas that ensued at the time of establishment of a market at the disputed land amounted to theft since the destination of the properties was and remained unknown and was without the knowledge and consent of the owner, the complainant. The implementation of the council resolution for the expansion of the market did not entail or include and for that matter call for theft of the complainant's bags/sacks of food, iron sheets and other household properties.
- [26] The evidence of **PW₁** and **PW₂** regarding the existence of the stolen properties was not challenged at all by the defence. The same applies to the removal of the properties from the complainant's house. **PW₄** and **PW₅** were eye witnesses. They appeared truthful and reliable. Their evidence was not challenged by the defence. Both **PW₁** and **PW₂** needed not to be present in order for the theft to occur. I find that the ingredient of the offence, theft, was proved by the prosecution beyond reasonable doubt.

2nd Ingredient of the offence; Use or threat of use of violence.

- [27] It is the evidence of both **PW₁** and **PW₂** that when they appeared at the scene, they were confronted by the accused persons and group. The accused persons grabbed and threw them down with threats of harming and or killing them. **PW₁** managed to flee from them but **PW₂** faced their wrath. She was hacked with a panga and as a result, she lost a finger. She was tied with ropes as she was undressed with threats to rape her.
- [28] The above evidence of both **PW₁** and **PW₂** is proof of violence that accompanied the theft. It is further supported and corroborated by P.F.3.A (**P.Exh.I**) that was admitted during the preliminary hearing under **Section 66 T.I.A** where **Ruth Rwamaraki** (**PW₂**) was medically examined and was found to had lost her 2nd finger of the right hand which was classified as

“grievous harm”. Both **PW₄** and **PW₅** also testified to that effect. The defence again did not challenge this evidence apart from the claim that **PW₂**’s finger was cut by a one **Okumu**. It is a conceded fact by the defence that during the fracas that occurred at the time, **PW₂** lost a finger.

[29] From the foregoing, I do find that there was use of violence during and after the theft. This ingredient of the offence has been accordingly proved beyond reasonable doubt.

3rd Ingredient of the offence; Possession of a deadly weapon.

[30] It is the evidence of the prosecution witnesses that the accused persons were armed with tools to wit; pangas and spears etc that they had come with to clear the land and establish the market by erecting stalls.

[31] The defence also admit this aspect of the case though, to them, the tools were never used to commit any offence. However, this court found that the tools were used to commit offences as for example, a panga was used to severe off **PW₂**’s finger. I find that they were used during the **commission** of the offence for purposes of warding off the complainants from defending their properties, irrespective of whether it is **A5** or **Okumu** who severed off her finger. Pangas and spears are deadly weapons within the meaning of **Section 286 (3) P.C.A** because they are instruments both made or adapted for stabbing or cutting and when used for offensive purposes, are capable of causing death or grievous harm.

[32] In the instant case, I am satisfied that the offenders were in possession of deadly weapons which were used during, before and after theft of the complainant’s property and it resulted in **grievous harm** being occasioned to **PW₂** hence the offence of aggravated robbery having been proved beyond reasonable doubt.

4th Ingredient of the offence; Participation of the accused persons.

[33] The offence was committed during broad day light from around 8:00am-4:00pm. Both the complainant **Rev. Rwamaraki Elisa** (**PW₁**) and his daughter **Ruth Rwamaraki** (**PW₂**) saw and identified the accused persons **A1, A2, A3, A4, A5** and others and they described various roles each played during the commission of the offence and what weapon each of them held at a particular time though, this is not to say that one held one particular weapon throughout without dropping it and pick or hold a different one.

[34] Definitely, not everyone who was present attacked the complainant and his daughter but the active participants in the commission of the offence were clearly seen and identified by the complainant, his daughter and

other witnesses. They knew the accused persons very well because they were their leaders, for example **A1** was the area L.C.III chairperson, **A3** was the area L.C.I chairperson while the rest were their village mates of Katikara village. For **A5** in particular, the complainant had been litigating with him in courts of law, a fact that was alluded to by **A5** himself in his defence. They therefore knew each other very well to the extent that there would be no possibility of any mistaken identity occurring during the identification of the accused persons during the commission of the offences that took place during broad day light.

[35] The evidence of both **PW₁** and **PW₂** is supported by the evidence of **PW₄** and **PW₅**, the eye witnesses who also positively saw and identified the accused persons and others commit the offence. It is further corroborated by the evidence of **Superintendent of Police Ofwokuna John** (**PW₃**) the then Kibaale D.P.C who visited the scene at around 10:00am. It is his evidence that the conflict regards the Katikara market, the genesis of the offence had ever been discussed by the District security committee of which he is a member.

As a result, and since most of them were even leaders, it follows therefore that he knew them very well. It was his further evidence that he saw all the accused persons including **A5** at the scene. He took photos of the scene which were exhibited in court as **P.Exh.12**. **A1** labored to distance himself from the scene but then admitted that one of the photos that formed **P.Exh.12** reflected him. He added that the photo reflecting him was from elsewhere. Be it as it may, during the cross examination of **PW₃** it was not put to him by the defence that the photo that reflected **A1** at the scene was captured from elsewhere or that it was not taken from the scene.

[36] The prosecution witnesses and the defence itself placed the accused persons at the scene of the crime. Both **Kasapuli Denis** (**A1/DW2**) and **Kiise Polycapo** (**A1/DW3**) and **A3** himself placed **A3** and **A4** and others at the scene. None of the accused persons save for **A2** and **A5** materially denied being at the scene.

[37] For **A2** and **A5**, they pleaded alibi. It is trite that by setting up an alibi, an accused does not assume the burden of proving its truthfulness so as to raise a doubt in the prosecution case; **CPL.WASSWA & ANOR Vs UGANDA, S.C.CRIM. APPEAL No.49/99**.

[38] One of the ways of disproving an alibi is to investigate its genuineness; **ANDROA ASENUA & ANOR Vs UGANDA (Cr. Appeal No.1 of 1998) [1998] UG SC 23. In RVs SUKHA & ORS [1939]6 EACA 145**, the court of Appeal for East Africa observed that;

“If a person is accused of anything and his defence

is an alibi, he should bring forward that alibi as soon as he can because firstly, if he does not bring it forward until months after words there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

[39] As regards **A2** in the instant case, he claimed that on the fateful day of 1/4/12, he was not at the alleged scene. He was at his home of about 50 acres from the scene. On the other hand, all the 5 prosecution witnesses testified that **A2** was at the scene and that he participated in the commission of the offence. During cross examination of each of the prosecution witnesses however, nowhere is it found that the defence put to any of them the possibility of **A2** being not at the scene. As a result, I find that **A2's** alibi is a mere afterthought. It was not brought forward at the earliest possible moment to give the prosecution an opportunity of inquiring into it. As a result, I find the prosecution witnesses very credible that **A2** was among the accused persons at the scene who participated in the commission of the offence.

[40] As regards **Byamukama Sam** alias **Gubaza** (A5), he denied the allegation that he is the one who cut **Ruth Rwamaraki's** (PW₂) finger. That he was not at the scene. That he was about 300 metres away from the scene where he was constructing the late Katende wife's house. The rest of the accused persons appeared to support his position.

[41] Similarly to **A2**, **Byamukama Gubeza**, it is apparent that he also did not bring forward his defence of alibi at the earliest possible moment to give the prosecution an opportunity of inquiring into it. To prove that **A5's** defence was a mere afterthought, the prosecution applied to have his statement to police exhibited to counter his just raised defence of alibi. The statement was exhibited as **P.Exh.13**. **A5** accepted all the contents of his statement denying the allegations of his participation in the commission of the alleged offences as true and correct save for a paragraph regarding his appearance at the scene. That particular paragraph is as follows;

“So it was on Sunday 1/4/2012 all the councilors of the sub county (parish councilors), the chairman L.C.III Mr. Aryampa Jackson, L.C.I Katikara market plus the traders whom we had wanted to allocate some plots, went to Katikara market in the morning hours.

When we reached there, people begun general clearing of the bush.”

The above excerpt of **A5's** statement is clear. He admitted going to scene together with **A1**, the councilor and other traders who were going to benefit from the allocation of plots for market stalls. So, the claim by the defence, in particular **A2** in support of **A5** that **A5** never came at scene is false. **A5's** alibi was never put to any of the prosecution witnesses during the trial. As a result of the foregoing, I reject **A5's** defence of alibi. It is also a mere afterthought.

- [42] I find the evidence of the prosecution witnesses **PW₁**, **PW₂**, **PW₃**, **PW₃** and **PW₅** credible. The claim that **A5** is being framed up by the complainant because of his previous litigation which he had in courts of law cannot hold because if it were so, then the D.P.C (**PW₃**), a public servant in the area would not have placed him at the scene.
- [43] In conclusion, I find that the prosecution evidence placed **A1**, **A2**, **A3**, **A4** and **A5** at the scene of the crime and has proved beyond reasonable doubt their participation in the commission of the offence.

COUNTS IV & V ARSON AND MALICIOUS DAMAGE TO PROPERTY

- [44] Under **Section 327 (a) P.C.A**, **Arson** is committed by any person who wilfully and lawfully sets fire to any building or structure whether completed or not. The essential ingredients of the offence per case law are as follows;
- 1.Setting fire to a dwelling house/structures
 - 2.The fire is set unlawfully and intentionally
 - 3.The accused's participation in the commission of the offence; **UGANDA Vs ASOBASI OLOKI-AMBA H.C.CRIM. SESSION CASE No. 025 OF 2018 (ADJUMANI)**
- [45] As regards the offence of **Malicious damage** under **Section 335(1) P.C.A**, the offence is committed by any person who wilfully and unlawfully destroys and damages any property belonging to another.
- [46] It is the prosecution evidence; **PW₁**, **PW₂**, **PW₃**, **PW₄** and **PW₅** that the identified accused persons together with others in mob action descended on the complainant's land/kibanja and raized down his crops to wit banana trees, cassava, maize and fruit crops like oranges, jackfruit and avocados. Thereafter, the accused persons and others still at large descended on the complainant's dwelling houses, knocked them down but in particular, set fire to the grass thatched one.

- [47] Most importantly, **Sp. Ofwokuna John**(PW₃), the then Kibaale District Police Commander visited the scene and took photographs of the scene. The photos were exhibited as **P.Exh.12**. In his explanation, one grass thatched house was burnt and the other iron roofed house was knocked down and the iron sheets thereon removed. Beans, cassava, bananas and other crops had also been razed down. The assailants were violent.
- [48] Though PW₃ stated that he went to the scene at around 10:00am, A1 conceded that the D.P.C(PW₃) went to the scene later at 4:00pm and took photos of the scene. He only appeared to object the photo that reflected him, claiming that it was not taken from the scene. Otherwise, none of the accused persons contested the photos (**P.Exh.12**). I find it immaterial whether the D.P.C went to the scene at 10:00am or 4:00pm. What is material is that he took photos of the scene irrespective of time.
- [49] This court has closely looked and examined each of the photos that form **P.Exh.12**. The 1st photo clearly shows razed down plants of bananas. The 2nd one exhibits razed down clusters of cassava and banana trees, the 4th one depicts of a burnt house/hut and the 6th photo shows a demolished/knocked down house.
- [50] Though the accused persons denied the existence of any house of the complainant in the disputed area/scene of the crime, none of the defence challenged the depiction of these photographs. It is immaterial whether actually the demolished houses were one or two but what is a fact is that there is evidence that a house/hut was set ablaze and another knocked down. It would appear that what other witnesses were referring to as the 2nd house was a mere iron roofed structure at the scene. The discrepancies therefore relating to how many houses were demolished is inconsequential and does not go to the root of the case of either arson or malicious damage to property. In any case, as per the particulars of the offence of malicious damage, the house was never included.
- [51] Also, the failure by each of the witnesses to name similarly each of the razed down crops, is found to be minor and this court is entitled to ignore such inconsistencies; **UGANDA Vs G.W. SIMBWA CRIM.APPEAL No.37/95(C.A)**.
- [52] Lastly, the failure by the prosecution to have a valuer appear at the scene and carry out an assessment and valuation of the damaged properties, though preferable for purposes of court in determining the appropriate compensation was not fatal to the charge of malicious damage as council for the defence wants this court to approach the matter, because for example, it was not practically possible for the complainant to return to the scene as he had fled for his life to Kampala. Secondly, how does one

value a burnt house and set ablaze crops! The failure to value the destroyed properties does not weaken the prosecution evidence of the eye witnesses who saw the destruction as orchestrated by the accused persons and group.

[53] As regards the defence of claim of right by the accused persons over the crime scene portion of land as put by the defence council, it is my view that **Section 7 P.C.A** does not come to the aid of the defence.

Section 7 P.C.A provides thus;

“A person is not criminally responsible of an offence relating to property if the act done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.”

[54] In the instant case, according to the Kisiita sub county council minutes (**D.E.xh.I**),Min.11/KSC/3/2012,

“KATIKARA MARKET ISSUE

-The sub county chief reported that Katikara, one of the major sources of revenue both to the sub county and community needed expansion as traders were operating in the road during the market days...

-The sub county chairperson explained that he had been reliably informed that there was enough sub county land below the market in Katikara which would cater for all the needs...

-Hon. Byamugisha suggested that for clarity there was need to form a committee to identify the land in question and make sure that all people get stalls...

-Council gave powers to the sub county technical staff to undertake virement or allocation to ensure that the issue is done in time...”

Clearly, the above proposals and resolutions of the sub county did not in any way confer to any individual any right over the scene portion of land. What one can say is that the accused persons were potential beneficiaries of the exercise of the allocation of the market stalls but none of them had attained any right over the scene portion of land to entitle him an honest claim of right. The accused persons could not be seen to constitute themselves Kisiita sub county to the extent that they could personally litigate over this disputed portion of land as they claim.

[55] From the foregoing, it follows therefore that the authority of **BYEKWASO MAYANJA Vs UGANDA [1991] HCB 15** cannot apply to the instant case. “Honest claim cannot be used to cover for the wrongful and unjustified

acts of the accused persons in this case. There is no evidence that the sub county council offered the accused persons the disputed portion of land for their personal use or gain. What the accused persons did was an exhibition of what I may call, total impunity, something which ought to be in the past in the history of Uganda.

[56] In the circumstances, I find that the accused person's acts of setting ablaze the complainant's house/hut, knocking down another and razing down his crops were wilful and therefore intentional and were without any justification or excuse and therefore unlawful. The actions were malicious in that the accused persons were fully aware that the setting ablaze of the complainant's house(s) and razing down his crops was likely to cause wrongful loss to him. The malice was actuated by the accused person's individual potential benefit and greed in the exercise of allocation of the market stalls.

[57] In conclusion, I find that the prosecution has proved the offences of Arson and Malicious damage to property against the accused persons; **A1, A2, A3, A4, and A5.**

COUNT VI: CRIMINAL TRESPASS

[58] **Criminal trespass C/s 302 (a) P.C.A** as an offence involves entering upon property or land in possession of another with intent to commit an offence or intimidate, insult or annoy any other person. The words "in possession of another refer, to actual possession". The intent of the offenders is to be gathered from the circumstances of the case. The intent referred to in **Section 302 P.C.A** is to commit an offence or intimidate meaning to put to fear by show of force or threat or violence or to insult meaning to assail with scornful abuse or offensive disrespect; **KATUSIIME EDWARD Vs UGANDA H.C.CRIM APPEAL No. 10/2013 E.A 428**

[59] In the instant case, I agree with the learned State Attorney's submission that the prosecution led evidence to prove entry upon the land in possession of the complainant. The complainant (PW₁) testified that he was the lawful owner of the land where he had dwelling houses and various seasonal and annual crops to wit; cassava, bananas, and fruits etc. Actually during cross examination, **A1** who was the L.C.III chairperson Kisiita sub county stated thus;

"The sub county does not therefore have any documentary proof of ownership of this portion of land where the market was constructed. Rwamaraki has mere allocation documents of land."

The above conceding statement of A1 speaks for itself. The complainant is a recognized allocatee of the scene portion of land of which he was in occupation and utilization as shown by the dwelling houses and crops that were set ablaze, destroyed and razed down.

- [60] The intent to commit an offence or to intimidate the complainant was clearly proved by the prosecution through the evidence of PW1-PW5 which was to the effect that upon the accused's entry on the land, they committed several heinous wrongs/offences to wit; robbery, grievous harm, arson etc. Actually, the acts of the accused persons who included persons of leadership responsibilities amounted to attempts to land grabbing or land grabbing at that.
- [61] In conclusion, I find that the prosecution has proved against **A1, A2, A3, A4** and **A5** the offence of criminal trespass.
- [62] As regards count II of **Attempted murder** and count III of **indecent Assaults**, these were part and parcel and formed the violence that was orchestrated by the accused persons during the commission of the offences of **Aggravated Robbery** in count I, **Arson** in count IV, **Malicious damage** in count V, and **Criminal trespass** in count VI.
- [63] For the count of **Attempted murder**, it was an agreed fact that the daughter of the complainant **Ruth Rwamaraki** lost her finger as a result of the violence that was metted out upon her and her father, the complainant. The victim **Ruth Rwamaraki** (PW₂) contended that it was **A5** who severed off her finger which the defence conceded that the finger got off during a scuffle between her and a one **Okumu** as they struggled for a panga, a matter that was allegedly reported at police vide **SD REF.NO.KAT/05/01/04/2012**; unlawful wounding by **Ruth Rwamaraki** against **Okumu**. PW₂ denied the defence claims and insisted that it is **A5** who raised a panga and cut her hand, severing off one of the fingers. She contended that the defence claim that it is **Okumu** who severed off her finger was a design by **A5** to totally cover himself against his heinous acts of severing off her finger since **Okumu** left the area and his whereabouts are unknown.
- [64] The fact however remains that **Okumu** was part of the mob that included the accused persons who participated in the commission of the offences at the scene. Nevertheless, as correctly put by the counsel for the defence, it was imperative upon the prosecution to produce the officer who was on duty at the police station on that fateful day to appear in court as a witness and clarify on the accused person's claims regarding the alleged reports

by PW₂ and Okumu about the incident that resulted into the severing off of PW₂'s fingers.

Amidst this unresolved controversy as to whether PW₂'s finger was severed by A5 or Okumu while struggling for a panga with her, a case of **Attempted murder** cannot stand.

[65] As regards the offence of **indecent assault**, it is evident that PW₂ was undressed with threats of raping her because she had become a stumbling block towards the accused person's achievement of their goal, forceful takeover of the complainant's land. The act was intended to merely intimidate and humiliate PW₂ into submission to their desire and give up the family claims over the scene portion of land but not that they intended to do sexual assault upon her in the open ground and during broad day light.

[66] I conclude by finding that the 2 counts, **count II** and **count VI** have not been sufficiently proved by the prosecution and as a result, the accused persons have not been found guilty of the 2 counts and are acquitted on the same accordingly.

Application of the doctrine of common intention

[67] Under **Section 20 PCA**, it is provided;

“where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence.”

In **KISEGERWA & ANOR Vs UGANDA CRIM. APPEAL No.6 OF 1978(C.A)**, the doctrine was elaborated as follows;

“In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime, a common intention to pursue a specific unlawful purpose which led to the commission of the offence... an unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault.”

[68] **Counsel Kasangaki** for the defence submitted that the presence of the accused persons at the scene was not after a prior arrangement to commit a crime. That their presence at the scene is explainable by a lawful intention of starting a market. That therefore, the principle of **common intention** does not apply to the instant case since **common intention** to commit a crime can only be inferred if the accused persons have agreed or formed a joint mind to implement an unlawful act and if it is found that the consequences of implementing of an unlawful act include crimes, they are liable for those crimes. That therefore, a congregation to expand a market in keeping with council resolutions and in a manner guided by the local leaders of the local communities as allocating individuals is not implementation of an **unlawful** plan or agenda. He relied on the authorities of **AUGUSTINO ORETE & ORS Vs UGANDA [1966] E.A 430** and **UGANDA Vs RTD MAJOR GUMA GUMISIRIZA & 9 ORS H.C.C.CRIM.CASE NO. 138/2011**.

[69] In the instant case, as clearly stated by the D.P.C (PW3), the genesis of the instant offences in the present charge sheet is a land wrangle over where the accused persons wanted to establish a market. The conflict regarding the Katikara market had ever been a subject of the District security committee. The scene of crime portion of land had dwelling houses and various crops of the complainant. The Kisiita subcounty council minutes and resolutions (**D.Exh.I**) were silent on naming or describing where the expanded market was to be established. It is my view however, that the accused persons knew beforehand that the complainant **Rev. Rwamaraki** was going to be the victim of the implementation of the establishment of the expanded market since the identified portion had his developments thereon. Besides, as **A1** clearly conceded during cross examination, **Rev. Rwamaraki** had been allocated that land which is proof that the accused persons shared common intention of how they were to accomplish the mission of establishing the market. They were to accomplish the mission by committing the alleged offences.

[70] In **WANJIRU WAMIRO Vs R [1955]22 E.ACA 521 at p.52**, court observed that,

“It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence.”

There are cases where even the persons convicted on the doctrine of common intention despite the fact that he did not participate in the assault; **ANDREA MUTEBI & ANOR Vs UGANDA CR.APP. No. 144/75 EACA**. The foregoing authority clearly shows that the unlawful common

intention can develop in the course of events though it might not have been present from the start. In view of the foregoing, even if **counsel Kasangaki's** point of view was to be given any weight, it is clear that the unlawful common intention developed in the course of implementation of the council resolution.

- [71] From the above discourse, it follows therefore that since the accused persons knew and were well aware of what was to entail the establishment of the expanded market i.e destruction of crops and houses of the complainant, I find that the accused persons and others still at large shared a common intention to pursue a specific unlawful purpose of forceful establishment of the market by destruction of the complainant's crops and burning and demolition of his houses. As a result, this led to commission of various offences; robbery, arson, malicious damage to property etc.
- [72] The common intention in the instant case clearly manifested from the presence and actions of the accused persons at the scene where none of them including those who held positions of leadership attempted to disassociate themselves from the wrongful acts. If the sole purpose of the accused persons was to implement a council resolution to establish and expand the market as counsel Kasangaki claims, in the event that they found crops and dwelling houses at the scene, coupled with the opposition from the complainant's family, one would have expected the accused persons to reasonably halt the exercise until the dispute, if any, is handled civilly. They ought to have approached the matter with civility for purposes of avoiding the nasty consequences that ensued from their actions.
- [73] It follows therefore, the fact that they forcefully implemented the expansion of the market by destruction of crops and burning and demolition of houses that culminated in commission of criminal offences, the **doctrine of common intention** applies to them.
- [74] As a consequence, in disagreement with the gentlemen assessors, I find each of the accused persons; **A1, A2, A3, A4, A5** liable and guilty of **Count I of Aggravated Robbery C/ss 285 and 286(1)(b),2(a) P.C.A, Count IV of Arson C/s 327(a) P.C.A, Count V of Malicious damage to property C/s 335(1) P.C.A and Criminal Trespass C/s 302(a) P.C.A** and they are all convicted accordingly.

Dated at Masindi this 15th day of September, 2021.

Byaruhanga Jesse Rugyema
JUDGE.