

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CRIMINAL SESSION NO. 219 OF 2019

UGANDA

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PROSECUTOR

VERSUS

TUMUSIIME BENSON ALIAS KIGUNDU **ACCUSED**

BEFORE: HON. LADY JUSTICE FLORENCE NAKACHWA

JUDGMENT

1. The accused was indicted for aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act, Cap 120. Section 285 provides that *"Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or to overcome resistance to it being stolen or retained commits the felony termed robbery."*

Section 286(2) provides thus: *"Notwithstanding subsection (1) (b), where at the time of or immediately before or immediately after the time of the robbery, an offender is in possession of a deadly weapon, or causes death or grievous harm to any person, the offender or any other person jointly concerned in committing the robbery shall, on conviction by the High Court, be liable to suffer death."*



2. It was the prosecution's case that on 21st January 2019 at Mpara Central Cell within Mpara Town Council in Kyegegwa District, the accused robbed Nyakato Juliana of Ug.shs. 20,000,000 (Uganda Shillings Twenty Million), Airtel line No. 0702092940, MTN line No. 0789730723, a bag and a tap machine for Centenary (Cente Agent), and at or immediately before or immediately after threatened to use a deadly weapon to wit, a knife, on the said Nyakato Juliana. The accused pleaded not guilty.
3. The prosecution called three witnesses to prove its case. Ngabirano Steven, the mobile money business owner testified as PW1, Nyakato Juliana, the victim who was running the mobile money business testified as PW2 and PW3 was Mwaka Joseph. The accused denied the indictment against him and he chose to keep quiet. He did not call any witnesses.
4. On 22nd February 2022, the assessors Kalimwenjuma Moses and Kasigazi Deogratious gave a joint opinion to court. In summary, based on the evidence before court, they advised the court not to convict the accused.
5. Article 28 (3) (a) of the Constitution of the Republic of Uganda, 1995 provides that every person charged with a criminal offence shall be presumed innocent until proved guilty unless that person pleads guilty. The burden to prove the guilt of the accused person is on the prosecution and remains with the prosecution throughout the trial. The standard of proof required in criminal cases was stated in **Bater v. Bater [1950] 2 All E.R. 458** at 459 as follows: 'In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have

said that, in proportion as the crime is enormous, so ought the proof to be clear.'

This case was followed in **Andrea Obonyo & Others v. R. [1962] E.A. 542;**

6. For the accused to be convicted of aggravated robbery, the prosecution must prove each of the following essential ingredients beyond reasonable doubt:
 - (a) theft of property belonging to the victim;
 - (b) use of violence or threat of use of violence during the theft;
 - (c) possession of a deadly weapon during the theft; and
 - (d) participation of the accused.

Issue 1: Whether there was theft of property belonging to the victim.

7. Section 254 of the Penal Code Act, Cap 120 provides that "a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing." Section 253(1) of the Penal Code Act provides that "every inanimate thing, which is the property of any person and which is movable, is capable of being stolen."
8. PW1 testified that he operates a mobile money business as well as agent banking. On 21st January 2019 at about 7:30 p.m. while he was attending another shop in Mpara Town Council in Kyegegwa District, his employee PW2 reported to him that she had been robbed of Ug. Shs. 20,000,000/= (twenty million Uganda shillings) and the equipment that she was using. The business PW2 was running was located in Mpara Town Council and the



distance between the two businesses was 100 meters. PW1 had given PW2 the money that very day to use it for business transactions.

9. PW1 said that the items stolen included a Centenary bank printer, Centenary agency tablet, two mobile lines both Airtel and MTN, one mobile money phone- small size, cash of Ug.shs. 17,782,000/=, MTN line had a float of Ug.shs.390,000/=, Airtel line which had a float of Ug.shs. 1,500,000/=, and the Centenary bank tablet with its line was carrying Ug.shs. 328,000/= which all totaled to Ug.shs. 20,000,000/=. The money on all the lines were blocked when he called the respective customer care services. A black laptop bag was also taken.
10. PW2 testified that she operates a mobile money and Centenary bank agent business belonging to PW1. On 21st January 2019, she closed the business and balanced off at 7:00 p.m. She had closed the front door, carried her bag, went to close the back door and then someone appeared behind her and ordered her to surrender her bag or he would stab her. The bag she was carrying was a black laptop bag. She tried to make an alarm but the assailant forcefully grabbed the bag and ran. They reported to Mpara police and the properties stolen included mobile phone with its lines of Airtel and MTN, Centenary bank tablet, Centenary bank printer and cash. The lines had money on them. All these items were in a black bag which was never recovered. She reported the matter to PW1 at about 7:30 p.m.
11. All the property described by both PW1 and PW2 were inanimate things belonging to PW1 and under the care of PW2. These items were forcefully taken away from PW2 without any claim of right and they have never been

recovered. Therefore these items were stolen. This ingredient has been proved.

Issue 2: Whether there was the use of violence or threat of use of violence during the theft.

12. PW2 testified that as she went to close the back door, someone appeared behind her and ordered her to surrender her bag or he would stab her. She tried to make an alarm but the assailant forcefully grabbed the bag and ran.
13. The threat to stab PW2 made by the assailant during the theft amounted to a threat to use violence. PW2's evidence was not discredited and remained unchallenged throughout the trial. Basing on her evidence, this ingredient has been proved.

Issue 3: Whether there was possession of a deadly weapon during the theft

14. Section 286 (3) of the Penal Code Act, Cap 120 provides that "in subsection (2) "deadly weapon" includes—
 - (a) (i) an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument; (ii) any substance, which when used for offensive purposes is capable of causing death or grievous harm or is capable of inducing fear in a person that it is likely to cause death or grievous bodily harm; and

(b) any substance intended to render the victim of the offence unconscious."

15. PW1's evidence was that PW2 told him that unknown people attacked her, showed her knives and ordered her to give them all that she had. It was PW2's evidence that the assailant threatened to stab her if she did not hand over the bag which he grabbed and ran away. PW2 did not give evidence about the assailant having a knife or showing her knives and the prosecution did not lead any other evidence to prove that the assailant possessed a deadly weapon during the attack. PW1's evidence about what PW2 told him is not enough considering that PW2 did not give evidence of the assailant having a deadly weapon.

As such, the prosecution failed to prove that the assailant had a deadly weapon when he committed the offence.

Issue 4: Whether the accused participated

16. PW1 testified that after making the report to police, on his way home PW1 received a phone call from PW3 who told him that he could be having information regarding the robbery. PW3 told PW1 that there is a man he had seen whom he knew and saw him running on a motorcycle with other unidentified people. When they both went to police, PW3 informed them that the person he was talking about was Tumusiime Benson, the accused. PW3 mentioned that he had seen the accused carrying unknown people running from Mpara Play Ground and those people were saying that the deal was over. When he mentioned that, the police officer moved and arrested the accused. In cross examination, PW1 testified that PW2 went to report at his shop at 7:30 p.m. and Mpara play ground was a public place where people

play football and it is near a market. Normally, there are boda boda motorcycles in that area. He confirmed that the accused was not known to him. The only information he had was from PW2 and PW3.

17. PW2 testified that she operates a mobile money and Centenary bank agent business belonging to PW1. On 21st January 2019, she closed the business and balanced accounts at 7:00 p.m. She had closed the front door, carried her bag and went to close the back door when someone appeared behind her and ordered her to surrender her bag or he would stab her. The bag she was carrying was a black laptop bag. She tried to make an alarm but the assailant forcefully grabbed the bag and ran. She made an alarm but it was not answered because the people operating in the front did not hear it. The assailant ran towards the farm which connects to Mpara playground. She tried running after him but she failed and she decided to report to PW1 at his shop which was still open. The distance between the two shops was 100 meters.

18. In cross examination it was PW2's evidence that the incident happened at around 7:00 p.m. and it was already dark. She did not see the person coming because she was closing, the person just appeared and she was concentrating on closing the door. It was possible that she was not able to see the person who attacked her because she was concentrating on closing the door and not because it was dark and she was attacked from behind. She was very scared when this person attacked her and no one responded to her alarm because they were all in front. She confirmed that she did not see the person who attacked her. The farm between where she was robbed and Mpara playground stretches down and connects to the playground.

19. Further that from the shop, the route that goes to the playground passes on the side of the farm. PW2 described the three features that the back of the shop had a road near the farm and the playground was ahead. The person who attacked her ran towards the path which connects to the playground which is about 46 meters. The farm behind the shop is for cattle rearing. She confirmed that the accused was not known to her and up to the time of testifying, she did not know who attacked her.
20. In re-examination, it was PW2's evidence that while it was getting dark, you could still see the light but she needed light to see properly. The person who attacked her ran towards the footpath that goes straight to the playground.
21. It was PW3's evidence that he is a bodaboda rider, at Mpara stage and a leader of Boda boda as defence of the sub-county. He knows the accused as a bodaboda rider at Mpara stage. They both used to stage at Mufwene Stage on the road going to Karwenyi and he had known the accused for a long time. On 21st January 2019 at 7:30 p.m. PW3 went to the market and bought sweet potatoes which were in a sack. He saw the accused's motorcycle UAE 439A parked near Mpara playground and he asked the man on the motorcycle to take him home but he refused saying that he was waiting for the accused. The accused was not around at the time but the man was on his motorcycle which was parked near Mpara playground. When the accused was given an empty paper for him to write the number plate, he wrote UEU 439A.
22. After refusing to take him, PW3 carried his sweet potatoes, moved in front to about 2.5 meters and waited for another motorcycle. After about five minutes, the accused came running and said that the deal was done. The accused was

carrying a black laptop bag on his shoulders. The man waiting for the accused asked is it true the deal is done and the accused answered yes, ride and we go. He was able to see them because the place has electricity. They rode going to Nsasi. PW3 failed to get a motorcycle and he got Kyakabare, a boy who fetches water and together, they carried the sweet potatoes on his bicycle. Upon reaching PW1's place, they heard an alarm of people looking for someone who had taken a bag. PW3 called PW1 and told him that the person who had taken your bag, come very fast and ran and it was Kigundu. He is the one who has taken your bag. The bag was a black laptop bag. He confirmed that the motorcycle UEU 439A in the photos in court was the one the accused was using.

23. In cross examination, PW3 testified that he did not identify the person on the accused's motorcycle. There were no other people at the stage where the accused's motorcycle was. He heard that the deal was done but he did not know which deal. When he reached the stage, they were saying that someone had stolen the bag and the bag was with the accused. He admitted that he did not understand what the deal was that the accused was talking about with the other person. It was the man waiting for Kigundu who was riding the motorcycle. He did not know the other person, he only knew the accused. The alarm was coming from the boda stage and it was PW1 and PW2 with other people alarming. PW1 was the one making the alarm and PW3 knows her as a mobile money handler.

24. When he called PW1, he informed him that if you are looking for your bag, I saw Kigundu with the bag jumping on the motorcycle. He admitted that he made a statement on a Tuesday and he told Police what happened, which is

the same thing he was telling court. He did not recall the police officer who recorded his statement. Counsel applied to tender in PW3's statement to show inconsistencies between what he was telling court and what he told police. On 15th February 2022, the court ruled that the statement was inadmissible because it was not proved that it was read back to PW3 and he confirmed that, what was recorded was true and correct, before he signed it.

25. PW2's evidence is that while she did not see who attacked her, the person ran towards the footpath that goes straight to Mpara playground with all the items stolen which were in a black laptop bag. It was PW3's evidence on the other hand that after the man on the accused's motorcycle refused to take him, he slightly went ahead to wait for another motorcycle in a distance of 2.5 metres. After about five minutes, the accused came running from Mpara playground and said that the deal was done. The accused was carrying a black laptop bag on his shoulders. The man on the motorcycle then inquired is the deal done and the accused answered "yes, ride and we go." They after rode going to Nsasi and PW3 was able to see them because there was electricity where they were standing.

26. In **Abdala Wendo v. R (1953), 20 E.A.C.A 166**, it was held that

"subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct,

pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

27. PW3 is the only witness who identified the accused. It was PW3's evidence that there was electricity where they were standing, he knew the accused before because they both used to work at Mufwene Stage on the road going to Karwenyi and he had known the accused for a long time. He saw the accused running to the person on his motorcycle and telling them that the deal was done in a distance of 2.5 metres. This means that the accused was in close proximity with PW3. All these are conditions that favoured proper identification of the accused, and eliminate any possibility of mistaken identity. The accused was properly identified by PW3.

28. In **Simon Musoke v. R [1958] E.A 715**, it was held that "in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.... The circumstances must be as such to produce moral certainty, as to the exclusion of every reasonable doubt."

29. In **Teper v. R [1952] A.C. 480 at page 489**, it was held that "it is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

30. PW2's evidence was that the person who attacked her ran towards the footpath that goes straight to Mpara playground with all the items stolen which were in a black laptop bag. She tried to run after him but she gave up and went to report to PW1. PW3's evidence was that he saw the accused's motorcycle parked near Mpara playground and he saw the accused running from the direction of Mpara play ground with a black laptop bag on his shoulders. He ran to the person who was on his motorcycle and told him "we go, the deal is done." This evidence remained unchallenged even after cross examination
31. The prosecution did not adduce evidence on the circumstances under which the accused was arrested. According to the prosecution counsel, the investigating officer who was supposed to testify got an accident and was hospitalized in Kasese. Prosecution closed its case after three witnesses testifying. PW1 and PW2 have testified that they did not know who stole the bag and items in it. Prosecution relied on the testimony of PW3 who also did not know the meaning of the phrase "the deal is done".
32. Without corroboration of the circumstantial evidence adduced, this court finds that the prosecution has not proved that the accused committed the offence charged beyond reasonable doubt. The assessors reached the same conclusion and advised not to convict the accused of aggravated robbery. I agree. The accused is accordingly acquitted and discharged.

This judgment is delivered this ^{12th}..... day of March, 2022.



FLORENCE NAKACHWA

JUDGE

In the presence of:

- (1) Ms Harriet Adubango, Chief State Attorney for the Prosecution;*
- (2) Ms Ruth Ongom holding brief for Mr. Acellam Collins, Defence Counsel on State Brief;*
- (3) Mr. Tumusiime Benson alias Kigundu, the Accused;*
- (4) Mr. Birungi Boniface, Court Clerk;*
- (5) Mr. Dembe Leonard, Interpreter.*