

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HCT-00-CR-SC-404-2019

UGANDA **PROSECUTOR**

Versus

KYEGANWA EMMANUEL **ACCUSED**

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

The accused person **Kyeganwa Emmanuel** is indicted with the offence of Aggravated Robbery contrary to sections 285 and 286 (2) of the **Penal Code Act**.

It is alleged in the particulars of offence in this indictment that the accused person on the 4th day of November 2018 at Bongole zone, Ndejje in Makindye Division of Kampala district robbed **Juuko Adam** of cash worth Seven Hundred and Forty Thousand Shillings (Ugx 740,000/=) and that immediately before during or after the time of the robbery threatened to use a deadly weapon to wit a panga.

At his arraignment, the accused person pleaded ‘Not Guilty’ thereby bringing all the elements of the offence into issue.

The brief facts for the prosecution are that at about 2.00 am in the night of the 3rd day of November 2018 **Juuko Adam, PW 2**, and his pregnant wife, **Nakawuma Hasifa, PW 1** were sleeping in their single roomed house which is located in Bongole zone of Ndejje, Makindye division in Kampala district. That PW 1 got up to ease herself when she saw a shadow, through the curtain covering the door glass, moving outside. There was a security light on at the opposite neighbours

house which lit up their door area. She looked through the curtain and saw two men, each carrying a panga, moving outside. She watched them for a while and woke up her husband. He also looked through the door and saw the men.

That they broke into her house and started making a sharpening noise with their pangas and told the PW 1 and PW 2 to go under the cover of their blankets. One stood guard while the other searched the house. One of the men occasionally placed a panga on the neck of PW 2 and all the while they demanded for money.

They found the six hundred thousand shillings (600,000/-) PW 1 had prepared for use when she went to hospital to give birth. They also found money that PW 2 was keeping for the introduction ceremony of his sister and took it all. It was five hundred thousand shillings (500,000/-). The two men had a torch which one of them used as he searched for the money. Both PW 1 and PW 2 were able to peep through the blanket while the second man was searching. Just before they left the house the assailants switched on the light.

PW 1 and PW 2 described the men as one being tall and the other short. The shorter man was the accused. They both stated the accused was wearing a light coloured T-shirt. Both state that they were extremely frightened by the event. PW 1 stated because of the fright and following the event she did not feel the movement of the baby in her womb for four days.

The very next morning the accused was arrested by **PW 3 Juma Tamsuza** the LC I Chairman of Bongole who was patrolling the village. The accused was found taking shelter somewhere within Bongole village and taken to the LC I office. Although the accused had on dry cloths, he was carrying a bag which he had put wet clothes. PW 3 stated that the accused was not a resident of the area. On arrest the accused said he had a house in the area but when the chairman visited it with the accused, he could not open the door and yet the accused had been arrested with a big bunch of keys.

When PW 1 and PW 2 saw the accused at the office of the LC I Chairman, they immediately recognised him as one of their assailants.

The accused person, **Kyeganwa Emmanuel**, denied committing the offence. He testified as DW 1 and the only witness for the defence.

He stated that on the night of the robbery, he was in his home sleeping. That he lived with his sister in Bongole in Ndejje Village. It was his evidence that he knew PW 3 the chairman Bongole who owned a house near the very house where DW 1 lived. That in the month of October 2018 the accused had wanted to join the LDU and needed a recommendation from the Chairman. The chairman told the accused that he should pay ten thousand shillings (10,000/-) for the recommendation. That the chairman asked the accused for the money several times. The accused did not have the money but promised to look for a job where he would earn the money and pay.

That the accused failed pay the money. The chairman got aggressive and promised to have the accused arrested and imprisoned. The chairman then connived with PW 1 and PW 2 to frame the accused. That on the 4th of November 2018 the accused was coming from church at 9.30 am when he was arrested. He was taken first to the LC I office then to the Police where he was tortured severely. PW 3 told the Police to charge the accused with robbery. Later the chairman came to the police with the accused person's bag. There was nothing incriminating in the bag as it had an identity card, diary, phone charger and ATM card.

At the police the Officer in Charge also retained the accused person's bunch of keys. They took the keys and together with other officers went to conduct a search at the house of the accused. That property including cloths and a jerry-can were picked and put in the police car and brought to the police station. The accused was therefore never arrested with clothes in a bag.

Determination

It is trite law that in criminal cases such as this the burden of proof rests with the prosecution which must prove all elements of the offence to a standard beyond reasonable doubt (see **Okethi Okale Vs Republic [1965] 1 E.A. 555 at 559**).

The offence of aggravated robbery is provided for in Section 285 and 286 (2) of **The Penal Code Act** and the essential elements of the offence are:

1. theft of property;
2. use of a deadly weapon
3. the participation of the accused person.

The first element is theft which is complete when something is taken from another, without a claim of right, with the intention of permanently depriving the owner of the thing taken (see S.254 of **the Penal Code Act**).

The victims in this matter stated that they lost cash. PW 1 said she lost cash UgX 600,000/- (six hundred thousand shillings). She had been saving this money for use in hospital when she gave birth. At the time of the robbery she was heavily pregnant and expected to give birth at any time. PW 2 stated that he had UgX 500,000/- (five hundred thousand shillings) which he was keeping, on behalf of his birth family, for the upcoming introduction of their sister. This money was taken from both victims and has never been recovered.

There was no evidence or submission to dispute the allegations of the complainants regarding property. I am satisfied that both complainants were permanently deprived of money which has never been recovered.

The element of theft is therefore proved.

The next elements are use of violence; and the use of a deadly weapon.

It was the testimony of both PW 1 and PW 2 that two assailants broke into their house. They both had a pangas and made a sharpening noise with the weapons. One of them placed a panga on the neck of PW 2. The witnesses were very frightened by the experience. In fact their assailants stated it was good they had been cooperative victims, otherwise the attackers would have harmed them.

A deadly weapon is defined in subsection (2) of Section 286 of **the Penal Code Act**, as any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death.

A panga properly falls within the description of a panga. It is a weapon which if used offensively can cause death. In Uganda the courts have indeed found that a panga is deadly weapon within the meaning of S. 286 of **the Penal Code Act** (see **Walugembe Henry and Others Vs Ug SCCA 39/2003**). Both PW 1 and PW 2 stated that they were extremely frightened by the whole experience. It goes to show the effect that the sight of the panga had on them.

There was no evidence or submission disputing use of a deadly weapon. I therefore find that the use of a deadly weapon has been established and the third elements of the offence is proved.

The last element is participation.

The accused in this case set up an alibi. He stated at the time the robbery is alleged to have been committed, he was asleep in his house. Besides, PW 3, the LC I chairman of Bongley, who arrested the accused had developed a grudge against him.

Where an accused person set up a defence of alibi he does not there by assume the duty of proving his alibi. The onus rests with the Prosecution to adduce evidence to the required standard placing him at the scene of crime. (See **Bogere Moses & Anor Vs Uganda S.C.C.A 1/1997**).

In this case the prosecution relies on PW 1 and PW 2. Both state that they clearly identified the accused. This court notes that the identification was made at night and the witnesses had never seen their assailants before. The court is therefore under a solemn duty to closely scrutinise the identification evidence as guided in the case of **Abdalla Nabulere & Other vs Uganda Criminal Appeal No. 9 of 1978**,

Where the case against an accused depends wholly or substantially on the correctness 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 the accused in reliance 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. The judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.

To avert the stated danger the court will look at the circumstances under which the identification in this case was made to test its quality.

PW 1 stated she had gotten up for a short call when she noticed the movement shadows outside their house. She got up and looked through the curtain. She states that there was a light from a bright electric bulb at the neighbour's house. This light was about 10 meters away. PW 1 also said she took her time studying the persons outside before they finally broke into the house. That when they entered they lit torches and spent more than 40 minutes in the house searching for money. That their room was about 3 metres X 4 metres. Lastly they switched on a bulb as they exited the house.

The defence contested this evidence submitting that the evidence was contradictory because in her police statement she stated that when she saw the men through the curtain she went to call her husband.

This court notes that in taking evidence it relies on the evidence given on oath and tested by cross examination and not police statements. It was also argued that there should have been an identification parade carried out. The opportunity to carry out such a parade was lost as it was the LCs who arrested the accused and asked the victims whether he was their attacker. The police could not therefore carry out an identification in such a situation.

The question would be whether in view of the above queries the identification can be faulted especially in view of the alibi and the alleged grudge?

Where a grudge is raised then the court should take extra caution. It may be a motive to mislead court to convict an otherwise innocent person.

For the above reason the court must ensure that the possibility of a mistaken identity is greatly diminished. I warn myself as I warned the assessors. With particular regard to the grudge, I note that the question of grudge was never put to PW 3 the chairman. It would appear the grudge is a figment of the accused person's imagination and I reject it.

I have considered the circumstances in which the identification was made. The fact that there was ample light to see and observe both outside and inside the house is relevant. The witnesses watched their assailants at close proximity throughout. Besides the incident appears to have lasted at least 40 minutes.

In the result the possibility of mistake is greatly diminished in this case. The accused was properly identified and placed at the scene of crime. That shattered his allegation of alibi. He therefore participated in the commission of this offence.

In agreement with both assessors, and as all elements of the offence have been proved against the accused persons, I hereby find, **KYEGANWA EMMANUEL** guilty of the offence of Aggravated Robbery contrary to Section 285 and 286 (2) of the Penal Code and accordingly convict him.

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MICHAEL ELUBU

JUDGE

17.7.22