

**UGANDA**

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**PROSECUTOR**

**VERSUS**

**BEFORE: THE MR. JUSTICE MICHAEL ELUBU**

The accused persons, **Komaketch Samuel, Rwothomia Gilbert and Odong Samson** are indicted on one Count of Aggravated Robbery c/ss 285 and 286 (2) of the **Penal Code Act**. It is alleged that on the 1<sup>st</sup> day of February 2018, the accused persons with others at large on William Street in Central Division of Kampala District robbed one Kintu Tadeo of cash UgX 2,000,000/- (two million shillings) and immediately before during or immediately after the robbery used a deadly weapon to wit a knife on the said Tadeo Kintu.

The prosecution called three witnesses. The evidence is that between 10.00 am to 11.00 am on the 1<sup>st</sup> of February 2018 **Kintu Tadeo, PW 1**, who works with the Uganda National Action on Disability, went to The Equity Bank branch found near Nebbi Park

on William Street, Central Division in Kampala District. That he was driven there by the Organisation driver and dropped off near the Bank. He went into the bank and withdrew UgX 4,290,000. That he placed a bundle of UgX 2,000,000 in 20,000/- notes in each of the breast pockets of his Jacket/Blazer. Kintu left the bank and made his way back to where the driver had parked.

PW1 is physically disabled and walked with the aid of two crutches. He told the court that in his infancy he had been struck down with Polio which left him unable to walk without the aid of those crutches.

As Kintu was manoeuvring his way back to the parked car, he was surrounded by 6 or 7 men. That three were directly in front of him close enough to reach into his jacket. The others stood behind him. That one pulled a sword out of his trousers and told Kintu to keep quiet and not make an alarm or they would stab him. That the sword was shaped like a knife with a black handle and a sharp end. He became very frightened. Another assailant reached into his blazer pocket and removed one bundle of UgX 2,000,000/-. They tried to get the second bundle but because of the crutch they could not reach the money. PW 1 produced a copy of the Account Bank statement to show that he withdrew 4,290,000/- on that day.

The incident, in his estimation, took between 45 seconds to a minute.

PW 1 states that he was able to recognise Komaketch Samuel and Rwothomio Gilbert as part of the gang which surrounded him that day. It was A2 who told him not to make an alarm. Kintu stated that he concentrated on looking at A2's face as he was robbed. A4 blocked his exit. That he made an alarm and the group fled with the money which was never recovered. His alarm attracted one **Ocama Godfrey, PW 2** the area defence secretary who had witnessed what happened. Kintu then reported the matter to Police.

PW 2 on the other hand testified that he saw what happened from a distance. That he saw A4 **Rwothomia Gilbert** and A5 **Odong Samson** as part of a gang which surrounded the victim who then made an alarm saying he had been robbed. There was a commotion before the gang ran away. It was his evidence that he was standing just opposite where

they were and he had a clear line of sight from about 30 meters away. The victim told PW 2 that he had been robbed.

When PW1 reported the matter at the police station a police officer, PW 3, visited the scene of crime and drew a sketch map giving the layout of the area. That sketch plan was exhibited.

The accused persons were apprehended on diverse dates and detained at the Central Police Station in Kampala.

Originally, there were five accused persons charged. Two were acquitted on a no case to answer leaving these 3 accused persons.

A1 Komakech Samuel gave unsworn evidence and stated that he was 28 years old and a hawker dealing in second hand clothes. He ordinarily worked around Arua/Nebbi park. It was his evidence that when he was first arrested and detained, he thought the arrest was by KCCA officers because he was a hawker. It surprised him to learn later, that he had been charged with the offence of the robbery of someone's money. That he knows nothing about the charge.

Rwothomio Gilbert is A2. He stated that he was working as a loader and broker at Arua Park. He stated that on the 1<sup>st</sup> of February 2018 the victim, PW 1, came to Arua Park in a blue Prado vehicle. A2 got him a parking slot behind a lorry. That PW 2 told him wait there as he would return in 10 minutes. That as PW 1 returned, A2 saw about five people intercept him, squeezing him between vehicles. A2 run towards him shouting and telling the gang to let PW 1 go. Then they dispersed. That PW 1 asked A2 if he recognised the assailants and he said that he did. That the victim asked A2 if he could find a chairman in the area. A2 went to look for the Chairman but did not find him and returned to the scene. A2 advised that the matter be reported to the Secretary for defence who is PW 2. That PW 2 came to the scene. That it was at that stage that PW 2 turned on him and told the victim that A2 must have been involved and should pay back the money. The two, PW 1 and PW 2, then went to report the matter to the Police. A 2 chose follow closely behind. That when A2 got to the station to state he saw the culprits, the officer there

detained him instead. He was later released to go and help trace the culprits. That his release annoyed PW 2. After about a week he came to work and found PW 2 had arrested A3. A2 stated that A3 was one of the people he saw attack PW 1 and steal his money. However A1 was not involved in the crime. When he was arrested and also detained, he found A3 in the cells who continuously threatened him. That is why A2 has chosen to speak out against A3.

A2 added that the source of problems was a grudge that PW 2 bore against him. That PW 2 wanted to dominate the business for parking space and came to view A2 as an enemy. On one occasion PW 2 had an argument with A2 over parking. PW 2 was in the company of a security guard. That the guard hit A2 and broke his tooth. A2 reported the matter to the police who directed PW 2 to pay for the damaged tooth but he has not. That was why, Ocama - PW 2, bears a grudge.

A3 Odongo Samson stated that he was a hawker selling shoes at Namayiba bus stage. That he knows nothing about the charges. That on the 27<sup>th</sup> of January 2018 he had a toothache and went for treatment. Thereafter he stayed home for the next two weeks recovering. On his return to work, as he was selling shoes at Nile Coach bus terminal, he was picked by the 999 police patrol and taken to Central Police Station. After about a week KCCA officers came and asked him to pay 100,000/- for his release. He did not have the money and that is why he was charged with this offence. He was surprised to learn that he was surprised to learn the charge was robbery and not an offence related to hawking for which he was arrested.

It is trite law that the burden lies on the prosecution to prove the guilt of the accused persons by proof of all the ingredients of the charge of Aggravated Robbery. This burden will not shift to accused in whatever the circumstances. The standard of proof required is to discharge the burden beyond all reasonable doubt.

The offence of aggravated robbery is provided for in Section 285 and 286 (2) of **The Penal Code Act**. The sections state:

## Section 285

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 overcome resistance to its being stolen or retained commits the felony termed robbery.

## Section 286 (2)

Notwithstanding subsection (1) (b), where at the time of, or immediately before, or immediately after the time of the robbery, an offender uses or threatens to use a deadly weapon or causes death or grievous harm to any person, such offender and any other person jointly concerned in committing such robbery shall, on conviction by the High Court, be sentenced to death.

The essential elements of the offence of Aggravated robbery are:

1. theft of property;
2. use of; or threat to use violence;
3. use of a deadly weapon; and
4. the participation of the accused.

(See **Walakira Abbass & 2 O'rs Vs. Uganda S.C. Cr. Appeal No. 25 of 2005**).

### i) Theft

PW 1 testified that between 10.00 am and 11.00 am on the 1<sup>st</sup> day of February 2018 he went to the Arua Park Branch of Equity Bank where he withdrew a total of 4,290,000/- (Four million two hundred and ninety thousand shillings). Thereafter he came out of the bank and headed to the car where the driver was waiting for him. That along the way he was accosted and some of the money taken from him. That one of the assailants removed the money from the inner chest pocket of the blazer that PW 1 was wearing. The prosecution tendered a bank statement as PE 1. This document shows that on the 1<sup>st</sup> of February 2018, two withdrawals of cash were made from the account held by the Uganda

National Disability Action on Physical Disability. One withdrawal was for 750,000/- and the other 3,540,000/-. PW 1 told this Court he had divided the money into two bundles of about 2,000,000/- each. It was one of these bundles that was taken from him. The money has never been recovered to date.

The question here is whether this amounts to theft. **The Oxford Dictionary of Law** defines theft as the dishonest appropriation of property belonging to someone else with the intention of keeping it permanently.

The money in this case was taken and has never been recovered. There is no evidence on record that offers a contrary account to the money being taken from PW 1. It was the case that the money was grabbed and taken without any colour of right. In the circumstances this Court finds that the element of the theft of money has been proved to a standard beyond reasonable doubt.

ii) Violence and use of a deadly weapon

The victim told the Court that when he came out of the bank, several men surrounded him. That one of them warned him not to make an alarm or he would be stabbed. The man directly in front of him pulled a sword that looked like a knife out of his pocket. That it looked like a sharp knife with a black handle. PW 1 was in his words scared and frightened. This weapon was not recovered or exhibited.

When an exhibit used as a weapon cannot be produced in evidence it should be described as carefully and as exactly as possible by witnesses who saw it used (see **Charles Komiswa vs Uganda 1979 [HCB] 86**).

On the other hand, according to the 8<sup>th</sup> Edition of **Black's Law Dictionary**, violence is the use of physical force unlawfully exercised with intent to harm.

Section 286 (3) of **the Penal Code** defines a deadly weapon to be or includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death.

From the description given by PW 1 the weapon appears to be a knife capable of cutting or even stabbing. It is no wonder that the attackers warned him that if he made an alarm they would pierce him.

PW 1 has also told the Court that when he was threatened with stabbing and surrounded by the men, he became what he described as shocked, scared and frightened.

From his description, where he was confronted by a gang of 6 or 7 men, threatened with stabbing and shown a deadly weapon, which left him frightened, then this court has no doubt in its mind that constitutes violence during the commission of the offence. That the violence in this case was accompanied by threat to use a deadly weapon. There are no circumstances here that cast any doubt on this.

In the circumstances the elements of violence and the use of a deadly weapon have been proved.

#### iv) Participation

All the accused persons have denied any involvement in the commission of this offence. I will consider the case against each in turn.

A1 Komakech who stated that he was a hawker said when he was arrested he thought it was by the Kampala Capital City Authority officers. He was shocked to learn he had been charged with this offence. He denies committing the offence.

The prosecution is relying solely on identification evidence. This type of evidence calls for special scrutiny and caution before a court can rely on it, I warn myself of that danger. I also take note of the holding in **Abdalla Nabulere and Others vs Uganda Cr App No 9 of the 1978** where it was held that,

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.

The evidence here is that PW 1 stated he saw A1 very clearly. That he took keen interest in him because it was A2 who told him not to make an alarm. He concentrated on him. I have noted the evidence of PW 1 stating that he was frightened by the whole experience but also note that it was 10.00 to 11.00 am in broad daylight. He added that the assailant were so close to him he could not move. Even when he leaned back, it was because others stood behind. As he was against them he did not fall. The entire incident took between 45 sec and 1 minute.

Although the accused puts up the denial the conditions here favoured an accurate identification to be made. PW 1 had adequate time to observe A1 and he was extremely close to him. The fact that A1 is said to be the one who issued threats against PW 1 further etches his features in the memory of the PW1. It was also at 10.00 to 11.00 am, a time when the day has achieved its full brightness. These conditions diminished the likelihood of mistaken identification.

After thoroughly scrutinising all the above, it is the finding of this Court that A1 was properly identified and placed at the scene of crime. For that reason the denial put up by him cannot stand. This element of participation A1 has been proved beyond a reasonable doubt.

A2 set up a denial and stated PW 2 bore a grudge stemming from competition over parking spaces. Where evidence is said to be tainted by a grudge, then the Court must closely investigate for any merit. If found to be true, then the evidence must be approached and applied with caution. (See **Uganda vs Kizito Mutyaba UGHC 64/2004**). This evidence of a grudge was never specifically put to PW 2. He was asked



if he had ever arrested A 2 and stated no. PW 2 testified that on the 1<sup>st</sup> of February 2018 he was standing just opposite the spot where PW 1 was robbed. That he clearly saw A2 as one of the assailants. He said he had known A2 for more than 3 years at that point. As defence Secretary of the area, and as admitted by A2 who appeared to know A2 well, there is no question of mistaken identity of A2 by PW 2.

A2 said he helped PW 1 to find parking. This version was never put to the witness. Instead PW 1 said that A2 was one of the people who stood directly in front of him as he was robbed. PW 1 is disabled and on crutches. He was leaning on these and says one was squeezing his other pocket and prevented the removal of the second bundle. But it also demonstrates just how close the assailants had to come to him since by surrounding him he was immobilised.

The quality of the identification evidence is good enough to dispel any doubts about whether A 2 was properly identified. He was. For that reason I dismiss the allegations of grudge. In any event PW 1 had never met A 2 before to hold a grudge.

In the circumstances, I find that A2 was properly identified.

A3 set up an alibi. By setting up an alibi, he did not assume any duty of proving it. The onus remained on the Prosecution to prove to the required standard that the accused was at the scene of crime. (See: **Moses Bogere and Anor Vs Uganda S.C.C.A No. 001 of 1997**).

He said that he had a tooth ache and advised by a doctor to rest for two weeks from the 27<sup>th</sup> of January 2018. That he was therefore not at the scene.

It was PW 2 who said he saw A3 as one of the people surround PW 1 during the robbery. That PW 2 had known A3 for between two to five years. It is also true that a minute was ample time to recognise someone. In the circumstances since PW 2 was well acquainted with A3 the possibility of mistake is totally diminished.

Since A2 was properly identified and placed at the scene of crime, it negatives the alibi he raised.

In the circumstances all three accused persons were properly placed at the scene of crime and participated in the commission of this offence.

The assessors advised this court to find all the accused persons guilty but convict them of the lesser offence of Simple Robbery. For the reasons given I respectfully disagree. All elements in this case have been proved.

In the result therefore this court hereby finds:

1. **Komakech Samuel**
2. **Rwothomia Gilbert**
3. **Odong Samson**

guilty of the Offence of Aggravated Robbery Contrary to sections 285 and 286 (2) and hereby convicts them.

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**Michael Elubu**

**Judge**

**28.2.2022**