THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CRIMINAL DIVISION)

HCT-CR-SC-0351 OF 2020

UGANDA::PROSECUTION

VERSUS

1. **WANYAMA IVAN**
2. **OJULONG ALIAS PETER**
3. **MAWANDA GEOFREY ALIAS KEFA**
4. **WASSWA ISRAEL:::ACCUSSED**

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The accused persons were indicted for the offence of aggravated robbery contrary to section 285 and 286(2) of the Penal Code Act. It is alleged that the accused persons on the 8th day of June 2018 at Christian Life Church in Kavule, Kawempe Division, Kampala District being armed with blunt objects robbed Mukula Sam of his itel mobile phone worth shs. 35,000/= (**Thirty-five thousand shillings**), and cash 500,000/= (**five hundred thousand shillings**) and immediately before or after caused grievous harm on the said Mukula Sam.

The accused pleaded not guilty to the indictment.

The prosecution presented four witnesses while the defense presented five.

The following elements of the offence have to be proved by the prosecution:

(1) **There was theft of property.**

(2) Use of actual violence at, before or after the theft or that the accused persons caused grievous harm to the complainant.

(3) The assailants were armed with a deadly weapon before, during or after the theft.

(4) The accused participated in the robbery.

In determining the above issues, court has to bear in mind the established principles of the law that "the burden of proof is on the prosecution to prove all the elements of the offence beyond reasonable doubt.

1. That there was theft of property.

As pointed out by both parties in their submissions, theft occurs when a person fraudulently and with intent to deprive the owner of a thing capable of being stolen takes that thing from the owner without a claim of right. **See: Section 254 (1) of the Penal Code Act.**

To prove theft, the prosecution relied on the evidence of PW1, and PW3. PW1 testified that he was having 500,000/= in his right hand pocket before A1 pulled his arm he was using to protect his pockets and broke it. He also told court that he had an itel phone worth 35,000/= and a national ID that were taken before he was put in the cells. It was his evidence that A1 took this money.

PW3 testified that he saw A1 picking a money pass from the complainants back pocket during the scuffle.

In rebuttal to the above evidence, the defense alluded the fact that there was no proof of how PW1 obtained this money he alleges was stolen and that there is no proof of ownership of the alleged phone.

I have evaluated the above evidence in respect of the alleged theft, since the telephone and the money pass which contained money were never accounted for, the only reasonable conclusion is that they were stolen. The direct evidence of PW1 is corroborated by PW3 who testified that he saw A1 picking a money pass from the victim’s pocket, although there is some disparity in denominations of the money contained in his pockets, I find the arguments of counsel for the accused in this regard are not convincing, since none of the accused persons contests the fact that the mentioned properties were stolen from the victim.

Its therefore defeating for the accused persons to argue that they were not at the crime scene and at the same time argue that the victim never possessed the stolen items. There is no doubt that the scuffle to access the victim's pockets by A1 pointed to the fact that there was something capable of being stolen over which A1 had no claim of right.

Counsel for the accused persons argued that there was no proof of ownership of the alleged phone and how PW1 came to have the money he alleges was stolen.

Under section 254(1) of the Penal Code Act, the offence of theft is sufficiently proved upon proof of the fraudulent taking or conversion of any item that is capable of being stolen.

What amounts to fraudulent taking or conversion is explicitly defined in section 254(2) of the same Act. In fact, only possession appears to be a pre-requisite for proof of theft under the definition of 'special owner' stipulated in section 254(2). Nonetheless, in the case of **Omorio David & Another vs. Uganda Criminal Appeal No. 20 of 2011** (SC) it was held:

"We think that 'possession' as contained in the definition of 'special owner' does not mean lawful possession. A person can steal property from a person who is not in lawful possession of it."

The provisions of section 254(1) of the Penal Code Act do not negate proof of the offence of theft by a complainant that is

neither in possession nor ownership of the stolen item but can attest to the stealing of such item by a person with no claim of right thereto. **See: Uganda Vs Abdu Mukasa HCSC No.0016 of 2012**

Therefore, in proving theft there is no legal requirement to prove ownership. Once asportation of the property takes place without the consent of the one in possession, then theft has occurred. **See: Sula Kasiira v Uganda Criminal Appeal No.20 Of 1993 (SC)**

In this case, PW1 gave direct evidence that he had on him shs. 500,000/=, and an itel phone worth 35,000/=, this was corroborated by the evidence of PW3.The defense only contested the ownership which as l have noted above is not a requirement in proving theft.

Furthermore, the requirement to call a one Nsubuga Haruna to testify was not necessary because the evidence act under section 133 is clear that subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact which implies that the prosecution was not under any obligation to call a one Nsubuga Haruna because it had the necessary witnesses to prove the offence.

I therefore find that the ingredient of theft has been proved.

2. **Use of actual violence at, before or after the theft or that the accused caused grievous harm to the complainant.**

The prosecution evidence in this respect was that the victim was physically assaulted and he sustained grievous harm on his body.

The evidence of PW1, was that during the scuffle he was hit in the stomach by something which felt like a blunt object, he also testified that A1 broke his arm using his knee, A2 jumped on his taken, A3 hit him and boxed him.

The violence meted out to the victim is confirmed by PW2 who found injuries on the right abdomen which were characterized as grievous harm and could have been caused by a blunt object. The injuries were therefore consistent with the use of force as demonstrated in Exhibit P1.

However, counsel for A1& A2 submitted that there was no proof that the victim sustained injuries or violence was used against him. He added that without any evidence of the use of a deadly weapon as required by section 282 of the Penal Code Act, there was no proof of use of force.

That the victim was assaulted is evident from the evidence of PW2. The injuries the victim sustained in the abdomen, the fractures and the intra-abdominal trauma as described in the Police Form 3(ExP1.) are consistent with use of force. I accordingly reject the argument of counsel for the A1&A2 that there was no use of violence and find that there was indeed use of violence at the time of the commission of the offence.

As submitted by counsel for A2 & A3 the accused, no deadly weapon was ever exhibited by the prosecution. The blunt object allegedly used to hit the victim was never produced in court. Nonetheless, I have already found that the injuries inflicted upon the victim resulted into grievous harm to the victim was a necessary ingredient to prove the alleged offence.

I find that the prosecution has proved to the required standard that, the perpetrators occasioned grievous harm to the victim.

The accused participated in the robbery

In determining the issue of participation, the court must examine all evidence closely, bearing in mind the established general rule that an accused person does not have to prove his innocence. And that by putting forward a defense like alibi or any other, an accused does not thereby assume the burden of proving the defense except in a few exceptional cases provided for by law.

It is up to the prosecution to disprove the defense of the accused persons by adducing evidence that shows that, despite the defense, the offence was committed and was committed by the accused persons**. See: Sekitoleko Vs Uganda [1967] EA 531,**

PW1 and PW3 testified that the alleged offence took place in the night, which raises the question of whether there was proper identification of the accused persons.

The established principles with regard to identification evidence were laid down in the case of **Abdallah Nabulere & Anor Vs Uganda_Criminal Appeal No. 9 of 1978**, The court had this to say .....

"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."

In the instant case, this incident took place over a long span of time, the altercation between A3 and PW1 and then later joined in by A1, A2 and A3 and A4 who pushed him in the cells. This long period enabled the victim to positively and correctly identify the accused persons.

PW1 and PW3 told court that they had known the accused persons for a period of one and half years. They knew A1 as a chapatti maker, A2 as a member of the church security team, A3 as an usher, and A4 as head of security. There is no possibility of mistaken identity since the accused persons were known to the witnesses and none of this was disputed.

It was also the evidence of PW1 and PW3 that there was sufficient light in the church compound, A1 also clearly told court that the church compound had light which would enable one to see what was happening. The evidence on record is therefore

strong enough to support the fact that the scene of crime had sufficient light clear enough to aid correct identification.

It is not in doubt that this incident took a relatively long time, it was not sudden, this in turn enabled the witnesses to have ample time to correctly observe and identify the role of each assailant

In their defense, A1, A3, A4 raised defenses of alibis.

By setting up the defense of alibi, the accused does not assume the burden of proving the alibi. The duty lies on the prosecution to disprove a defense of alibi and place the accused at the scene of crime as the perpetrator of the offence. **See: Festo Androa Asenua and another v. Uganda, S. C. Criminal Appeal No.1 of 1998**

To disprove the defense of alibi raised by A1, the prosecution relied on the evidence of PW1 and PW3 who clearly identified A1. The evidence of correct identification destroys A1's purported alibi. I have compared the alibi by the accused and the evidence by the prosecution and find that A1 was placed at the crime scene.

As for A3, his evidence that he was present at the crime scene in its self-destroys his defense of alibi. He admits being at the church and engaging with PW1. He also narrates the events relating to the scuffle with the victim.

A4 in his defense told court that he was with his pastor between 7:00pm and 2:00am and thereafter left with his pastor to Kololo.It was his testimony that he was never present at the crime scene.

To disprove the above assertion, the prosecution relied on the evidence of PW1 and PW3 who were eye witnesses. A2 also told court that he found A4 inside the police post seated with a one Rose who brought him food. A2 further told court in his testimony that A4 who told him to go call A1 for him.PW1 clearly identified him as the person who pushed him into the cells.

This evidence of eye witnesses as regards the identification was never challenged by A4, A4 also never challenged the evidence of A2 which placed him at the crime scene.

In the case of **R Vs Chemulon Wero Olango (1937) 4 EACA 46** as submitted by the state counsel the court had this to say about the defense of alibi;

"**The burden on the person setting up the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible as to have committed the imputed crime.**"

It also required that for the defense of alibi to be considered, it should be brought up or disclosed at the earliest opportunity.

In **R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145,** the former Court of Appeal for Eastern Africa held 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 afterwards 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".

In the instant case, A4 never raised this defense at the police, he only brings it out during his unsworn testimony. It is also hard to believe his story or version of events that he was with his pastor and yet PW1, PW2, and A2 squarely placed him at the crime scene.

In view of the above I find that the prosecution has discharged its burden of disproving the alibi raised by A1, A3 and A4 and rightly placed them at the crime scene.

As for A2, he admitted during his testimony that he was present at the crime scene.

It is thus my conclusion that each of the accused persons are liable both individually and collectively under the doctrine of common intention.

Section 20 of The Penal Code Act provides as follows;

"**When 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 a 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 order to render 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. **See: R vs-Tabulayenka s/o Kirya and Others [1943] 10 E.A.C.A. 51**

PW1 and PW3 told court that it was A1 who the money, A2 and A3 participated in the beating of the complainant as shown by the evidence on record, on the other hand A4 pushed the victim into the cells and was present when all this was happening but never disassociated himself from the offence that was being committed.

It is immaterial whether the original common intention was lawful so long as the unlawful purpose develops in course of events meaning that even if the accused person were trying to

enforce the arrest of PW1 as they alleged, an unlawful purpose ensued in the course of this arrest thereby occasioning grievous body harm and taking money and a phone belonging to the victim.

I have also considered the contradictions in the prosecution case and I find that they do not go to the root of the case. Issues with regard to whether the incident happened at the Umeme offices or near the church are not major, what is major is that there was correct identification of the accused persons.

Having considered the prosecution evidence in total, I find that the offence of aggravated robbery has been proved beyond reasonable doubt and hereby convict the accused persons as charged.

I so order

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JUDGE

1/06/2022