

**UGANDA** ..... **PROSECUTOR**

**1. SENYONDO IBRAHIM**

**2. NIWAGIRA NICHOLAS** :::::::::::::: **ACCUSED**

## JUDGMENT

The brief facts for the prosecution are that at about 1:00 am between the 1<sup>st</sup> and 2<sup>nd</sup> of December 2018, PW 1, Oumo Kokas who lived near Church Road in Kira

Municipality, left his home in a Silver Grey Toyota Fielder. With him in the car was his girlfriend, PW 2 Ainebyona Faith. He was driving her back to her home in Mulawa Nsasa in Kira Municipality. PW 1 slowed down to go over a hump on Church road. He was holding his phone as he drove. At that point someone emerged from the dark, put his hand through the car window and grabbed his phone.

PW 1 stopped and opened the car door leaving the headlights on. He was immediately hit on the head and fell down. That was when others joined the person who had grabbed the phone and started kicking and beating him. His wallet and several other items were taken and never recovered.

Ainebyona started screaming and shouting. She saw that one of the assailants was holding a brick in his hand with which he hit PW 1. Another came round to her side of the car and started slapping her. He ordered her to keep quiet. She was dragged out and ordered to sit on the ground and phone taken.

PW 6 Sekitto John run a grocery shop near the scene. He had called PW 5 Nuwamanya Frank, a boda boda rider, to come and drive him home. Nuwamanya came to the shop and waited outside for the PW 6. It was while he was waiting that he heard PW 2's scream. PW 5 immediately responded and run to the car which was parked less than 30 metres away.

At the scene, he found the assailants hitting Oumo whom he immediately tried to rescue. One the attackers grabbed him and they started fighting ending up at the front of the car. The headlights remained on all this time. And it was when they got to the front of the car that he clearly saw the person he was fighting with. This person was identified as A1.

Sekito also run to the scene and saw PW 5 fighting with one of the attackers in front of the car. Because of the light from the headlights he could clearly see the person fighting PW 5 as A1. Just then PW 5 was hit hard in the chest and he fell. And then something was thrown at PW 6 just missing his head. He also saw one person holding

what looked like a gun. At that point PW 6 turned to fled the scene. It was then that the attackers also run off into the bush.

Sekitto called the Defence Secretary who called the police. It was found that Oumo was severely injured with blood oozing from his head. The police rushed him to hospital where on examination he was found to have a fracture on the right front of the skull. The hospital immediately placed him in the intensive care unit. He also suffered permanent damage to his hearing and developed tinnitus. His condition drove him into depression and he became suicidal.

The next morning the two accused persons were arrested by the secretary for local defence in the company of PW 6.

An identification parade was conducted where PW 5 picked A1 out of the line-up.

As a result, the accused persons were subsequently charged with this offence.

In their defence testimonies, both accused persons denied participating in the commission of this offence.

A1, Senyondo Ibrahim, said that he lived in Sonde found in Mukono district and was at the time working in Kisasi at a construction site. On the 1<sup>st</sup> of December 2018 he had left Kisasi late getting to Kira at about 9.00 pm. It was too late for him to continue to Sonde. That he branched off to the home of Semango Michael, a friend who shared accommodation with A 2. That A1 spent with both A2 and Semango. They went to sleep at about 10.00 pm and did not leave the room till morning.

That the next day was a Sunday and Semango went off to pray. A1 and A2 went to Sekitto's shop where they bought chapatti and juice for breakfast and returned to their room.

At about 9.00 am PW 6 in the company of PW5 came and arrested him. He was taken to Kira Divisional Police Station where an identification parade was carried out. That PW 5 picked him out because he was present at the time of his arrest.

A2, Niwagira Nicholas, stated that he lived with Semango Michael. At the time A2 was working at a construction site in Kabalagala. That when he returned at about 9.30 pm on the 1<sup>st</sup> of December 2018 he found A1 there. Semango was also at home. They went to bed and slept till morning. Semango went to church very early that morning. He added that he went to Sekitto's shop with A1 to buy breakfast before returning to their room.

Shortly thereafter PW 6 came with the defence secretary and arrested both A1 and A2. They were in the company of PW 5. That an identification parade was mounted at the Police and PW 5 picked out A1.

In criminal cases the burden of proof lies on the prosecution (see **Okethi Okale V R 1965 E.A 555**). That burden will not shift to the accused person except in certain statutory cases not applicable here. The prosecution must also be required to prove each essential element of the offence to a standard beyond a reasonable doubt.

The essential elements of the offence of Aggravated Robbery are:

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

(See **Walakira Abbass & 2 Others vs. Uganda S.C. Cr. Appeal No. 25 of 2005**).

i) Theft

PW 1 Oumo Kokas stated that after his phone was grabbed and taken he came out of the car. It was then that a wallet in which he had a driving permit, 2 ATM cards, cash worth 180,000 thousand shillings, fuel and financial cards were taken from him. At the same time his girlfriend's phone, a Techno worth 650,000/- was also taken. None of these items has ever been recovered.

No evidence to the contrary has been adduced.

The question here is whether the above 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. This definition also captures the elements of theft as defined in Section 254 of **the Penal Code Act**.

In light of any circumstances to the contrary, it is the finding of this court that the element of theft has been proved beyond any reasonable doubt.

ii) The use of a deadly weapon

The victim was hit with something on the head as he stepped out of the car. It was such a hard blow that it cracked and depressed his skull. He lost consciousness and had no recollection of how he got to hospital.

PW 2 testified that the perpetrators continued to kick and beat PW 1 when he was on the ground. He was bleeding profusely from the side of his head. He had to be carried and helped into the car after the police came. When he was taken to Lifelink hospital his condition was found to be critical. He was therefore transferred to Nakasero hospital. On examination it was established that a part of his skull was fractured and a bit had to be removed. PW 1 was kept in the intensive care unit of hospital for several days. He stated that he has lost permanently lost hearing in his right ear.

PW 2 saw one of the men use something like a brick to hit the PW 1.

In such cases, where the weapon was not recovered and produced in court, 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**). Considering the description given by PW 2 and the resulting damage inflicted but also taking into account the medical report I am satisfied that a weapon in the nature of a brick was used.

Subsection (2) of Section 286 (3) of **the Penal Code**, as amended, defines a “deadly weapon” to include an instrument which when used for offensive purposes is capable of causing death or grievous harm.

The nature of the injury suffered by the victim is clearly grievous in nature. He suffered permanent damage and lost hearing in one ear.

In these circumstances this court holds and finds that a deadly weapon was used in this case. In the result the second element has been proved beyond reasonable doubt.

### 3) Participation

The accused persons denied committing this offence and set up alibis.

Both **Senyondo Ibrahim** and **Niwagira Nicholas, A1** and **A2** respectively, stated that on the night of the robbery they were in their room where they spent the whole night.

By setting up an alibi, the accused persons 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**).

The prosecution relies principally on PW 5 and PW 6.

PW 5 Nuwamanya Frank stated that in 2018, he was boda boda rider in Kyaliwajala in Wakiso district. At about 1:00 am on the night of the 1<sup>st</sup> December or the morning of 2<sup>nd</sup> December 2018, he went to pick PW 6, Sekitto John, from Church road in Kira Municipality. As he waited for his passenger, Nuwamanya heard a woman make an alarm from the direction of a car with full lights on. He rushed to the scene.

There, PW 5 found a man on the ground being beaten. He also saw another three men all dressed in black shirts. PW 5 got hold of one of the assailants and started fighting him and making an alarm. They held onto each other tightly but fell to the ground. The two continued fighting up to the front of the car where they were caught in the full glare of the headlights. The witness estimates that he fought the man for 20 minutes. As they struggled one person hit him with a stone in the chest and he collapsed. This injured PW 5, and just then, the assailants ran away.

PW 5 recognised the man he was fighting as A1.

Meanwhile PW 6, Sekitto, had also heard the alarm and run from his shop to the scene which was about 30 meters away. He saw Oumo Kokas, PW 1, on the ground as he got close to the car and recognised him as a regular customer. At that time PW 5 was fighting with A1 in the beam of the light at the front of the car. There was a man who standing at the back of the car who threw something at PW 6. That frightened PW 6 prompting him to flee the scene. It was his evidence that he spent about 5 minutes at the scene before he fled.

From the above it is clear that the prosecution is relying solely on identification evidence to establish the participation of the accused persons. I am alive to the need for caution. I also take note of the relevance of the holding in **Abdalla Nabulere and Other 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 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.

It is a paramount consideration here to test and ensure that any evidence made in identification is free from the possibility of error.

The evidence is that PW 5 saw and identified A1. He stated that he got hold of A1 and wrestled him. Certainly wrestling requires body contact and immediate proximity. The witness said he fought A1 for at least 20 minutes including in the vivid glow of the headlights.

PW 2 Ainebyona and PW 6 Sekitto both said that they saw PW 5 wrestle one of the assailants. PW 5 was cross examined extensively on the allegation that he identified A1 but he was steadfast and did not waver in his testimony throughout. He did not strike me as a person telling lies and besides no motive to tell lies about the accused persons was established. PW 2 also stated that when she was still at the scene, she heard PW 5 state that he had been beaten by the assailants.

Turning next Sekitto's identification, when tested against the guidelines in Nabulere's case also eliminate the possibility of mistake. The accused was under his observation for more than 5 minutes in a full beam of the car headlights.

It was submitted that the conditions were not conducive for a proper identification to have been made. That the incident happened at night and both witnesses were seeing the perpetrator for the time. It would mean they were mistaken. It is also stated that PW 5 exaggerated how long he wrestled the person alleged to be A1. It should however be noted that PW 6 got to the scene after PW 5. He also fled leaving PW 5 behind.

The prosecution also relied on an identification parade. It was evidence of PW 3 Detective Inspector of Police Oboth Joseph, that he conducted an identification parade on the 5<sup>th</sup> of January 2019. PW 5 picked A1 out of the line parade line up. In their submission, the defence stated that this witness had been present on the day the accused persons were arrested from their room by PW 6. Both accused persons also stated PW 5 was in the company of PW 6 and village defence secretary on the day of their arrest.

PW 5 and PW 6 deny this. It was stated that PW 5 was injured in the scuffle and taken by PW 6 to Angelina clinic in Namugongo where he spent a night. The next day, PW 6 sent a boda to pick PW 5 and take him home. That it was around that same time, when PW 5 was at his home that, PW 6 went to arrest the accused persons.

Both PW 5 and PW 6 deny this allegation. I did not believe the version of the accused persons.

It was the contention for the defendant that the parade flouted the regulations guiding the conduct of identification parades, set out in **Ssentale v Uganda [1968] EA 365**. Part of the procedure requires that the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.

PW 5 said the people in the parade were all of different build, height and different tones of skin complexion.

While the rule may have been infringed, it is also important to look at the purpose for which an identification is made. It is a confirmatory test to see whether a witness who asserts he can identify the perpetrator would pick him or her out of several people. In this case, in view of this irregularity, I will not disregard the entire exercise altogether. However, I will not attach as much weight as I should have to its outcome. This is because despite the stated flaw, the parade substantively followed the guidelines for conducting an identification parade.

Gauging from their appearance as they stood in the dock, A1 and A2 have very similar skin complexion, height and body structure. In spite of this both PW 5 and PW 6 insisted, even in the face of a thorough cross examination, that it was A1 that they identified at the scene. There was no motive however to show that PW 5 or PW 6 had any established ground for lying against A1. As I have already stated I did not detect anything from the manner of their testimony to indicate that they may have been lying.

As stated the accused persons both raised an alibi right from the time of arrest. It is trite as stated by the defence, that an alibi raised at the earliest opportunity, has more credence than one raised at the time when the accused is called upon to make a defence.

In this case however, that should be carefully weighed against the quality of identification made.

At this point I note that in all the evidence adduced by the prosecution, there was nothing pointing to the participation of A2, Niwagira Nicholas.

In the case of A2 I find that the conditions here were conducive for a proper and correct identification. Both PW 5 and PW 6 were consistent and struck me not only truthful but also unmistakable. There was a consistency between their evidence and that of PW 2. When closely examined it is clear that there was no possibility of error in these circumstances. It is my view that A1 was clearly identified at the scene of crime. PW 5 also pointed at A1 during the identification parade.

For that reason, his alibi cannot stand and shall be disregarded.

In the result it is the finding of this court that the prosecution has proved to a standard beyond reasonable doubt, that Senyondo Ibrahim participated in the commission of this offence.

The assessors advised this court to find the accused persons not guilty. However, in view of the reasons stated here I disagree.

In the result, this court finds **Senyondo Ibrahim guilty** of the Offence of Aggravated Robbery Contrary to sections 285 and 286 (2) of **the Penal Code Act** and hereby *convicts* him.

**Niwagira Nicholas** is hereby acquitted.

Dated at Kampala this 17<sup>th</sup> day of August 2023.

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**Michael Elubu**

**Judge**

**17.8.2023**