

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
HCT-00-CR-SC-619-2020

UGANDA

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PROSECUTOR

Versus

1. KATUMBA DEO

2. LUBEGA ALLAN

a.k.a. ANDY

.....

ACCUSED

3. SSEMPALA SIMON

PETER

BEFORE: THE MR. JUSTICE MICHAEL ELUBU

JUDGEMENT

The three accused persons in this matter are **Katumba Deo; Lubega Allan a.k.a Andy; and Ssempala Simon Peter**. They were indicted on two counts of the offence of Aggravated Robbery contrary to sections 285 and 286 (2) of the **Penal Code Act**. In a third count, **Lubega Andy**, faces one count of Rape contrary to Sections 123 and 124 of the **PCA**.

The particulars of offence in the first count are that the accused persons on the 14th day of December 2019 at Ndejje Central zone, Makindye Sabagabo Division in Wakiso district robbed Luyiga Yudaya of ten empty bags, jewellery, two mobile phones, curtains, shoes, US \$200 (two hundred United States Dollars), and that

immediately before, during or after the said robbery used a deadly weapon to wit a knife on the said Yudaya Luyiga.

In the second count, it is stated in the particulars of offence that the accused persons on the 14th day of December 2019 at Ndejje Central zone, Makindye Sabagabo Division in Wakiso district robbed N.A. of 850,000/- (Uganda Shillings eight hundred and fifty thousand Uganda Shillings), two mobile phones and that immediately before, during or after the said robbery used a deadly weapon to wit a knife on the said N.A.

The particulars of the offence in the third count are that Lubega Allan a.k.a Andy on the 14th day of December 2019 at Ndejje Central zone, Makindye Sabagabo Division in Wakiso district had unlawful sexual intercourse with N.A. without her consent.

At their arraignment, all the accused persons pleaded 'Not Guilty' which brought the elements of all the offences into issue. The prosecution called 6 witnesses to prove its case.

The brief facts for the prosecution are that on the 13th of December 2019, Nassunje Lilian, PW 3, went to visit her mother, Yudaya Luyiga, PW 2, who lived in Ndejje Aiden village, found in Makindye Sabagabo division in Wakiso District. Lillian spent much of the afternoon with her mother. A few other people were present at the time including her sister Shakira, some young children and A1, Katumba Deo.

A1 was a neighbour who spent a lot of his time in the home where he would help out with house work and the running of errands.

During her visit, PW 3 gave her mother 400,000/- in cash. The money was meant to pay for the door of a toilet which was then under construction. She also told PW 2 that she would send 100,000/- (one hundred thousand shillings) by mobile money for use to celebrate the birthday of one of the children.

PW 2 lived with a granddaughter, N.A. (PW 1) who worked in Makindye where she has a shop. PW 1 returned from work in the early evening and sat in her

grandmother's bedroom with PW 2 where they conversed up to 11.00 pm. PW 1 then retired to her own room but left both bedroom doors open.

At about 2.00 am, N.A. woke up to find a man standing over her bed going through her handbag. He had covered his head with a hood and held a knife and a small pink torch. He ordered PW 1 to get up and go her grandmother's bedroom.

There she found another man who asked PW 2, Yudaya, for the money that her daughter had brought earlier in the day. When she responded that she did not have the money, the man slapped her before he searched the room. One of them removed a net covering items on a table and used it to tie PW 2's hands. There were items kept in the room including watches and jewellery meant for sell. These were stuffed into bags along with the curtains which were pulled down.

They demanded for PW 2's phone and checked her mobile money balance. At that point one of them went to the corridor where he communicated with some unseen person saying there was no money on the phone.

PW 1 was taken first to the dining room, and then to her bedroom where, a man she identified as A 2, Lubega Andy, raped her twice. After spending about an hour in the house, the men left.

Meanwhile PW 4, a neighbour called Mulongo Frederick had come out of his house at about 2.00 am to harvest rain water. He heard people speaking near his house and peeped out through a hole in the wall. He saw the three accused persons standing about 2 metres away, sharing out money.

When the matter was first reported to police, the victims stated they suspected Katumba, because he had been present when the money was handed over. Later PW 4 revealed what he had seen all three sharing out money on the night of the robbery which led to their arrest.

N.A. was medically examined. It was established that she had no genital injuries, but had tenderness in her upper limbs. The medical report was tendered as a prosecution

exhibit. Photographs of the recreation of the scene were also exhibited with some showing the hole through which Mulongo Frederick said he saw the accused persons.

A piece of the bedsheet with suspected sperm stains was retrieved for forensic examination.

When it came to their defence, each accused testified.

A1, Katumba Deo, was DW 1. He stated that he spent part of the day at the complainant's home. That her daughter, PW 3, came to visit. That he was sent to purchase beer for her. He went to sleep in her car when he returned. That PW 3 gave him a lift to his home when she was leaving. The next day, Katumba states he left early for a burial. When he returned, the people at his home said the police had been there looking for him in relation to a robbery that happened at the complainant's home. He reached out to PW 2 and told her he was not involved. He was eventually arrested by PW 4, Mulongo.

A2, Lubega Allan, stated that he was picked up as he sat at a shop in Ndejje with A3, Simon. That PW 4 arrived with plain cloths policemen who placed them under arrest. At the time Mulongo is said to have gloated that the two could not equal him. A 2 denied committing the offence. It was his evidence that the arrest stemmed from a long standing grudge that Mulongo harboured against A 3 and himself. That one day they had intervened when Mulongo caused the arrest of a Congolese refugee. That Mulongo was so angry that and swore to take his revenge against them.

A3, Simon Sempala, testified as DW 3. He said one day after work he was sitting at a shop with A 2 when Mulongo, PW4, arrived with plain cloths policemen and arrested him. He was accused of robbing Hajjat Yudaya but he denies committing the offence. He attributes his arrest to a grudge with Mulongo that had arisen in November that year. That he and A 2 had intervened when Mulongo was harassing a Congolese refugee who allegedly rejected a counterfeit 50,000/- passed to him by

Mulongo. That PW 4 wanted the man beaten but when he and A 2 intervened he swore to take his revenge.

DW 4 and DW5 were the then Youth Chairman, Abbas Kanamwangi and the LC I Chairman, Kassim Kulabako Mutebi, respectively. They said that they learnt of the arrest of the accused persons by PW - Mulongo. That they met PW 4 over the allegations. It is stated that he told he was merely taking his revenge on A 2 and A3 for intervening when he had his own problems with a Congolese refugee. The two witnesses thereafter visited the scene of crime and found that there was no sign or evidence of a forced entry at the premises. That they also spoke to PW 2, the complainant who said she did not identify any of the assailants.

The stained bedsheet that was recovered from the scene was submitted for forensic DNA analysis. The results showed that none of the accused persons were the donors of the DNA in the male sperm stain found on the bedsheet. The report was tendered as defence exhibit.

It is trite law that in criminal cases such as this the burden of proof rests with the prosecution which must prove all the elements of the offence to a standard beyond reasonable doubt (see **Okethi Okale vs Republic [1965] 1 E.A. 555 at 559**). This burden never shifts. It is worth noting that if any doubt arises it is resolved in favour of the accused persons.

The offence of aggravated robbery is provided for in Section 285 and 286 (2) of **The Penal Code Act**. From these provisions it is clear that 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
4. the participation of the accused.

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**).

PW 2, Yudaya Luyiga testified that her daughter, PW 3, Lillian Nasunje, gave her money to pay for doors. In her testimony, PW 3, said she gave her mother 400,000/- (four hundred thousand shillings) to buy doors and another 100,000/- (one hundred thousand shillings) for upkeep. This is the money that was taken on the day of the robbery. That PW 2 also had two phones and several items that were meant for sale including watches and jewellery. That the assailants pulled down curtains that were hanging in the bedroom and the dining area of the house.

N.A. testified that she lost two phones and 260,000/- (two hundred and sixty thousand shillings). This money was kept in a savings box. She also stated that her grandmother, PW 2, had some dollars she kept in her beddings. Both witnesses state the property was all stuffed in the bags and taken. It has, todate, never been recovered.

It was submitted by the defence that there were no photographs of the scene of crime showing that the house was ransacked. That the photos would have established the theft.

It is true that there was no evidence of the state of the scene immediately after the theft. That however should not be the only means by which theft can be proved. The testimony of the witnesses, as long as the court considers it cogent can prove any fact. Facts may be proved by oral evidence (see section 58 of **The Evidence Act**).

My assessment of the evidence from both PW 1 and PW 2 is that their evidence of the taking of the articles mentioned was truthful. I find as a fact that the stated items have never been recovered. Both PW 1 and PW 2 were never discredited on this aspect and confirms the element of theft. The first ingredient of the offence is therefore proved.

2. use of or threat to use violence;

3. use of a deadly weapon

It was the evidence of PW 1 that she woke to find a man in her room. That he threatened her with a knife. Although she did not describe the knife in detail, it clearly frightened her.

It was also her evidence that she was taken to her room by one of the men who pointed a knife at her. He then spread her legs and raped her.

PW 2 was slapped when she answered that she had no money. They tied both her hands and legs with a net they found in the bedroom. PW 2 stated that she saw both men armed with knives.

PW 1 was medically examined on PF 3 and found to have tenderness in her upper body.

In subsection (2) of Section 286 of **the Penal Code Act**, a deadly weapon includes an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument 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.

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

In these circumstances I am satisfied that the victims saw the assailants armed with knives which were used to threaten and subdue them. A knife is a weapon which if used offensively can cause death. Both PW 1 and PW 2 stated they were frightened as they attacked by people who wielded knives. PW 1 said that she found her grandmother trembling when she was taken to PW 2's bedroom. There is nothing to dispel the fact that those weapons induced great fear in the witnesses.

Secondly, the court has considered the manner in which the victims were treated. PW 1 stated that she was raped. The medical examination found that she had tenderness in the upper part of her body. PW 2 had her hands and legs bound using a net. She was also slapped by one of the attackers.

It is clear there was the use of physical force against both victims. There was no evidence or submission disputing this evidence.

I therefore find that the second and third elements of the offence are proved beyond reasonable doubt.

4. The participation of the accused.

The last issue for consideration is whether these offences were committed by the accused persons.

Each of the them denies committing these offences.

A 1 states he was in his house where PW 3 had dropped him earlier in the evening. A 2 and A 3 also deny participating in the commission of these offences. They both add that the prosecution's key witness, PW 4, had a grudge against them and had sworn to take his revenge.

The prosecution is relying on PW1 and PW 4.

It was the evidence of PW 1, N.A., that in the course of the robbery, one of the assailants had taken her from her grandmother's bedroom to the dining room. He then ordered her back to her bedroom. She said he had short dreadlocked hair on the middle of his head and was wearing a dark jacket and faded jeans. She identified this person as A2. He had not disguised his himself in any way. It is her evidence that this person had a bright torch. That he is the one who took her from the dining room back to her bedroom put her on the bed before he pointed a knife at her. Thereafter

he raped her twice. In all PW 1 estimated the assailants to have taken more than one and a half hours in the house.

PW 4 said he saw all three accused persons through a hole in the wall of his building. He had come out at 2.00 am to set up his rain water harvesting system. It was then that he heard voices outside his wall. That he climbed on a platform and looked through the hole. He flashed a torch and saw the three accused persons talking and sharing money. That they were teasing A 2 that he was the only one who had gained out of the entire adventure because he had sexual intercourse.

From the above evidence, it is clear that the prosecution is relying on these two witnesses for identification.

Evidently, both people made identifications in difficult circumstances. It was night time. In the case PW 1 the identification was made in the house where the only source of light was torchlight. As for PW 4 he had to peep through a hole in the wall after 2:00 am. He states however, that the people he saw were familiar to him. He says there was also a security light on at the storied home of his neighbour.

It is the law that where identification is made in difficult conditions, as noted in the instant case, caution must be exercised and court should warn itself to examine such evidence closely to avoid a case of mistaken identity (see **Roria V R 1967 E.A. 583**). I warn myself now as I warned the assessors of this danger.

To avert the stated danger, the court will look at the circumstances under which the identification is made to test the quality of the identification evidence by scrutinising the light conditions; the familiarity of this witness with the accused; the length of time observing the incident; and the distance (see **Abdalla Nabulere and Ors V Ug Cr App 1/1978**).

PW 4 is said to have known all the men closely and even led the police officers for their arrest.

I have also taken into account the allegations made by A2 and A3 that PW 4 harboured a grudge against them.

The Supreme Court noted in **Haji Musa Sebirumbi vs Uganda SCCA 10 of 1989** that the trial Judge should give proper consideration to allegations of grudges, and ensure prosecution witnesses were not influenced by the grudges in question.

Certainly evidence of grudge if proved would lower the credibility of a witness as it may turn out to be a motivation to lie. It should be noted that PW 4 was not straight forward when cross examined on the alleged grudge. He admitted the matter involving the Congolese refugee was reported to police but refused to divulge any farther detail. He was asked if the accused persons made statements in the case but he evasively said he did not remember.

A 2 and A3 stated in their defence that indeed they made police statements in favour of the Congolese refugee. They said the accused told them he would not let the matter be. In fact, it is alleged that when PW 4 led police to arrest all three accused persons he gloated that they cannot manage him and he had now got them.

DW 4 and DW 5 stated that they spoke to PW 4 following the arrest, and indeed he said he did not see the accused persons but wanted to teach them a lesson for siding with the Congolese man against him. Both were local council leaders at the time. DW 4 was Youth councillor while DW 5 was the village Chairman.

Secondly, this court has noted PW 4 stated that the accused persons were all notorious in his area but could not remember reporting any matter involving A2 and A3. He said he once found A1 stealing a door but did not follow up the matter. He narrated this after he had been particularly prodded by defence in cross examination. He added that he needed at least two months to recall the exact details of other matters against the accused persons. His demeanour as a witness was hardly reassuring.

It was not clear how the PW 4 was able to look through the hole he allegedly used. It was high up in the wall and more than two feet above his head. It was alleged he used a platform but even this was not properly demonstrated in evidence.

This court will return to this evidence later.

In her evidence, PW 1 stated that she clearly identified A 2 as the person who raped her. It partly to confirm this that the police took the stained stripped bedsheet from her bed which was then submitted for analysis.

DW 6, Nabwowe Jane, a forensic analyst in Biology from the Government Analytical Laboratory in Wandegaya did the scientific examination of the bedsheet. According to her report one Detective Corporal Nalule Mary had retrieved a white bedsheet with blue and black stripes, stained with suspected semen, from the victims bed and submitted for forensic examination. She also extracted blood samples from each of the accused persons. There was also a sample obtained from the victim, N.A. DW 6 applied scientific method to extract DNA from the bedsheet by using what is called a P3 immunochromatographic test which specifically tests for a prostate antigen present in seminal fluid. She positively established the presence of semen on the bedsheet. She then extracted a DNA sample from the seminal fluid.

Secondly she also extracted DNA from the samples supplied by all three accused persons.

She analysed the DNA profiles using a tool called the Identifier Plus Kit and found that none of the accused persons was the donor of the DNA found on the bedsheet. It came from an unidentified male in the general population.

Regarding the use of DNA evidence, I have been guided by an article by Meintjies-van der Walt L and Dhliwayo P "**DNA Evidence as the Basis for Conviction**" *PER / PELJ* 2021(24) – DOI. In this scientific paper it was stated that Deoxyribonucleic acid (DNA) is the genetic material that is passed from parent to child. The DNA molecules found in the nucleus of a human cell are the same in all cells of the human

body. The DNA does not change during a person's lifetime. Except for identical twins each person's DNA is unique.

They add that DNA is a molecule composed of a chromosome that carries genetic information. Every person has a different sequence and every person could therefore be identified solely by the sequence of his or her base pairs.

As can be seen from that article, with the exception of identical twins, no two people can have the same DNA.

There was no contest here about the integrity of the movement of the sample from the scene of crime to the laboratory. I am also persuaded by the analyst who said all the samples she analysed yielded the DNA that she needed to make her examination.

It should be noted farther that the prosecution has the burden to prove the elements to a standard beyond reasonable doubt. It was noted in the case of **Okale** (supra) that,

it is the duty of the trial judge, both when he sums up to the assessors and when he gives judgment, to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence.

In this case the victim stated that she identified A2 as the perpetrator. From the results of the DNA evidence it clear that it was not the seminal fluid of A2 that was found on the bedsheet that was recovered from the scene of crime. In effect he was not the person who ravished PW 1.

This should be considered against the fact that it was not until after PW 4 had produced the suspects that PW 1 stated that she recognised her attacker. Originally the report to the police appears to have been that the attack was by unidentified persons.

Regarding identification, it was dark in the house. It is pertinent that PW 2 on her part said the men were disguised and she did not recognise any of them. Yet PW 1 said A2 was undisguised and had dreadlocks. This is a stark contradiction that has not been explained.

Just as guided in the case of **Sebirumbi**, this court has also given proper consideration to the grudge alleged to exist between the accused persons and PW 4. I have weighed evidence of that grudge in addition to his manner and demeanour in court.

Then there is also the added aspect of a lack of clarity as to how PW 4 was able to stand at the hole which is said to have been high on his side of the wall. The photographs tendered did not show the platform that he stood on. That question was also not put to PW 4 but to the SOCO. He was not the appropriate witness to answer this question. It would appear therefore that the contention he was lying because of the grudge is well founded.

I agree with the counsel for the defence who submitted that the suspicion on A 1, Katumba, was based on the fact that he had been at the home when PW 3 visited and handed over the money. They said he was the only adult and the rest were children. But there was another adult, a sister called Shakira. This Shakira had in fact asked to be given some money but she was turned down.

The totality of all the above is that it raises substantial doubt regarding the participation of these accused persons in the commission of this offence. This doubt will be resolved in their favour.

It is therefore my finding, that in regard to Counts 1 and 2, the prosecution has not proved, to the standard required, the participation of the accused persons in the commission of these offences.

The Next issue is to consider whether A2 participated in the commission of Count 3 - Rape contrary to section 123 and 124 of **the Penal Code Act**.

The commission of the offence in Count 3 happened in the course of the same transaction as Counts 1 and 2. In light of my finding that the accused persons did not participate in counts 1 and 2, I find that the prosecution has not proved participation of A 2 in Count 3.

The assessors advised this court to acquit the accused persons on all counts. In agreement with them, and I hereby find,

- 1. Katumba Deo,**
- 2. Lubega Allan a.k.a Andy and**
- 3. Ssempala Simon Peter**

not guilty of the two counts of Aggravated Robbery contrary to sections 285 and 286 (2) of the **Penal Code Act**.

Additionally, **Lubega Andy** is not guilty of Rape contrary to Sections 123 and 124 of the **PCA**.

Accordingly, they are all hereby acquitted.

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MICHAEL ELUBU

JUDGE

15.09.23