

THE REPUBLIC OF UGANDA.
IN THE HIGH COURT OF UGANDA,
HCT-00-CR-SC-0635/2020

UGANDA=====PROSECTOR

VERSUS

A1. A1. LUBEGA SHAKUR ALIAS MUTEWETA

A2. KAJUBI SULAIMAN ALIAS SULA

A3. MUGERWA NURDIN ALIAS SODA

A4. ISIKO NASSER ALIAS MAKONKO

A5. AMUTUHIRE ANTHONY===== ACCUSED

BEFORE HON LADY JUSTICE MARGARET MUTONYI. JHC.

RULING.

Introduction.

Lubega Shakur alias Muteweta, Kajubi Sulaiman alias Sula, Mugerwa Noordine alias Soda, Isiko Nasser alias Makonko and Amutuhire Anthony herein after referred to as the accused persons were indicted with aggravated robbery contrary to **sections 285 and 286 (2) of the Penal Code Act** Laws of Uganda.

The particulars of the offence were that the accused persons and others still at large on the 11th day of October 2019 along Badongo Road, Salaama Parish, Makindye Division, robbed Kimbugwe Nicholas of Uganda shillings 5,000,000/= (five million), USD 6800 (six thousand eight hundred USD) a mobile phone (Techno Spark) valued at Ugx.360.000/= (three hundred sixty thousand), a bag containing a laptop (lenovo), 3 flash discs, brown umbrella, National ID, ATM card, keys, black suit and socks and during the said robbery they used a deadly weapon to wit a concrete stone.

When the accused were arraigned before court, A1, A3, A4 and A5 pleaded not guilty to the charge thereby putting all the essential ingredients of the offence in issue since the law presumes them innocent.

A2 was convicted under plea bargain and is serving sentence.

Legal representation.

The prosecution was represented by Ms Caroline Tabaro from the office of the DPP while the accused were represented by Counsel Zimbe Zephaniah on state brief. They both did not file submissions and left it to court to make a decision.

- 5 Mr. Muhwezi Ben and MS Nabuwufu Jackie assisted court as assessors.

Legal Principles.

The burden of proof in criminal cases rests squarely on the prosecution and does not shift to the accused unless it is exempted by statute.

- 10 The standard of proof is high; the prosecution must prove all the essential ingredients of the offence beyond reasonable doubt.

The prosecution had the burden to prove the following ingredients to the expected standard of proof:

1. That there was theft of valuable property.
2. That there was use of actual violence at, before or immediately after the theft or that the accused caused grievous harm to the complainant.
- 15 3. Or that the assailants were armed with a deadly weapon before or during the theft and or threatened to use it.
4. That the accused participated in the robbery.

- 20 The prosecution relied on 6 witnesses in support of their case, to wit; - PW1, Nicholas Kimbugwe, the victim, PW2, Hamis Ssugga, a resident of the area and informer, PW3 Ssozi Muhammed, PW4, Dr. Bwire Faizo the medical doctor who examined both the victim and the accused persons, PW5, Detective Corporal Walembe Erick, the Investigating officer and PW6 Kajubi Sulaiman (A2) already convicted.

THE EVIDENCE

In the course of the hearing, both the prosecution, the defense counsel and the accused persons entered a memorandum of agreed facts under **Section 66 of the TIA** where PF24 for the accused persons were admitted in evidence. Consequently, the documents were admitted in evidence and marked as follows; - PF24 for Lubega

Shakur as PEX3, PF24 for Mugerwa Noordin as PEX4, PF24 for Amutuhire Anthony alias Maso as PEX5 and Isiko Nasser as PEX6.

PF3A for the victim and PF24A for A2 had been earlier on admitted in evidence and marked as PE1 and PE2 respectively.

- 5 Dr. Bwire Faizo the medical doctor who examined both the victim and the accused persons became PW4.

PW1 **Nicholas Kimbugwe**, the victim testified at length but the relevant part was that he did not know the accused persons in the dock.

- 10 On the fateful date, the 11th of October 2019, after running a few errands around town, he returned home at around 10:00 pm. He had a journey to make and therefore packed his items to wit a suit and his bag which contained a laptop, hard disc, flash discs, a techno spark 3 phone and some money to the tune of 6,800 dollars and 5.8 /=million Uganda shillings and other documents.

- 15 While on his way, to the stage, he was hit him from behind and he lost consciousness only to wake up in hospital. The area was dark and he did not even get to see who hit him.

He did not recover anything and neither was he present when the suspects were arrested. He did not know under what circumstances they were arrested.

- 20 PW2 **Hamis Ssugga** told court that he works with the security team in his area of residence, Badongo Zone Salaama Kyamula in Makindye Division where the crime was committed.

That he knows A1 who is commonly known as Muteweta whom he used to see around their village. That he had even arrested him before and taken him to police.

- 25 On 11th October 2019 while he was coming from watching a match at 11:00 pm, he got a boda boda to take him home and that was when he met a man running from infront of him and shortly after, he met a man who had been beaten and was bleeding. He called the defence secretary of the area one Muhamod Sozi and also went and informed the nearby LDU Commander and some officers of the incident.

That together, they called the OC of Salaama Police station who asked him for the person he had seen. He then informed him that the person he saw running was Muteweta whom he bypassed on the boda boda running to the opposite direction from where the victim had fallen. That they then put the victim on the boda boda to take him to hospital but as they approached the main road, they found a patrol car arriving and accordingly handed him over to the patrol officers who took him to the hospital. The victim was bleeding and unable to speak because he was hit badly.

He noted that he managed to recognize Muteweta A1 because the boda boda he was on had full lights and A1 was the only person on the road.

In cross-examination, the witness emphasised that he saw A1 very clearly and that he was running away with a polythene bag. He did not have anything else other than the black polythene bag.

PW3 Sozi Mohammad informed court that he is the defence secretary of Badongo Zone Salaama Kyamula in Makindye Division. That he knew A1 who is commonly known as Muteweta Lubega Shakur and another whom he could not see in court. That A1 was a resident of his village where he had stayed for a long time and also that it was not the first time he was being arrested. He did not know the co accused.

With regards to the incident, he stated that it was at about 11:00 pm when he received a phone call from one of his security alerts Ssugga Hamis who informed him that while on his way home, he found Muteweta running and shortly after to the opposite direction, he found a person lying down beaten and bleeding. That on getting this information he got a boda boda and went to the scene.

That when he reached the scene they tried to lift the victim up but he was badly off. He called the OC Salaama and some LDU officers in the area who were around. That together, they tried to get a motor cycle to transport the victim but, while they were approaching the main road, they saw the patrol car approaching and they accordingly handed over the victim to them.

That one of the residents whose names he does not remember then informed him that the people who had robbed the victim had entered one of the kiosks. They

then entered inside the said kiosk and there they found the very people who had been disturbing them in the village. That therein, was Muteweta who was putting on a red t-shirt and a one Muzafalu. That they were the only people there and both of them were arrested. They then took them to Salaama police station with the OC station and he left them in police custody that night.

He noted that whereas almost all the people had run to the scene, the two suspects stayed in the kiosk. That they did not find them with anything.

In cross-examination, PW3 told court that they had arrested A1 before on allegations of theft.

He also confirmed to court that he did not know anything about the other accused persons in the dock.

PW5, Detective Corporal Walemba Erick told court that he is a police officer attached to Buyende police station. He stated that he knew all the accused persons in the dock as Lubega Shakur aka Muteweta, Mugerwa Noordin alias Soda, Amutuhirwe Anthony alias Maso and Isiko Nasser alias Makonko.

About the incident, he told court that he was the investigating officer in the case. That on the 16th of October 2019, he was attached to katwe police station where he took over inquiries of an aggravated robbery case reported by the OC Salaama police station one ASP Nangumya Ian who had responded to the scene of aggravated robbery where one Kimbugwe Nicholas the victim herein was hit by a concrete stone.

That at the time he took over inquiries, one Shakur had been arrested and was in police custody. That he had been arrested by the said OC Nangumya Ian after receiving information from the locals.

That when he interviewed the witness who identified Shakur, he told him that he had suspected Shakur because he was a known criminal on the village and having seen him coming from the direction of the scene, he concluded that he must have done something to the victim. That however, he did not see A1 commit the act.

That the victim was still getting treatment and when he gained consciousness, he also interviewed him, but he informed him that he was unable to identify the person who hit him.

The investigating officer clearly informed court that,

- 5 ***“My lord no one saw Shakur hitting the victim but because of his character and the way he was coming from the direction of the scene he was suspected. After gathering all that I took the file for further guidance to the office of the DPP.”.***

All the other co accused were arrested because locals suspected them to be thieves in the area.

- 10 PW6, Kajubi Sulaiman the convict in this case serving a ten-year sentence, told court that he did not know the accused persons before court as the people he robbed with. That Noordin Mugerwa is his young brother and never participated in the crime. That the people with whom he committed the crime were released while at the police station.

- 15 He went on to mention the people he was with at the commission of the offence as Ssenyonga Herbert, Black and Meddie.

- He informed court that the people he robbed with were also arrested and he immediately informed the investigating officer PW5 but they were released after they paid money to PW5 but since he did not have money he was charged with
20 people he never robbed with.

The Law.

At the close of the prosecution case, ***Section 73 of The Trial on Indictment Act (TIA)***, requires this court to determine whether or not the evidence adduced has established a prima facie case against the accused.

- 25 It is only when a prima facie case has been made out against the accused that he should be put to his defense.

Section 73(2) of the TIA provides; *“where at the close of the prosecution case a prima facie case has not been made out, the accused would be entitled to an acquittal.”*

A prima facie case was defined in a land mark case of **Rananlal T Bhatt VR [1957] E.A 332** that has been followed in a plethora of cases in Uganda as:

“One where a reasonable tribunal properly directing its mind on the law and evidence would convict the accused if no evidence or explanation was set up by the defense”.

In other words, the evidence adduced by the prosecution at this stage should be sufficient to require the accused to offer an explanation or else he runs the risk of being convicted.

The learned Judge in the case of Bhatt went on to state that *‘a prima facie case could not be established by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence. The prosecution though, at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and defence.*

In the case of **Uganda versus Alfred Ateu [1974] HCB 179**, considerations that justify a finding that no prima facie case was made out against the accused were stated as follows:

- 1) *When there has been no evidence to prove an essential ingredient in the alleged offence*
- 2) *When the evidence adduced by the prosecution has been so discredited as a result of cross examination, or is so manifestly unreliable that no reasonable court could rely on it.*

It is important to note, that for the accused person to be put on defence, court must be ready to convict if he offers no explanation on the credible, admissible and high quality evidence in support of each ingredient of the offence but not to shift the burden of proof to the accused as any conviction must be based on the strength of the prosecution.

Resolution

Suffices to note that at this stage, the court is expected to evaluate the prosecution evidence and determine whether it is sufficient, credible and capable of proving all the ingredients of the offence of aggravated robbery and whether such evidence
5 has not been discredited during cross examination or that it is manifestly unreliable that no reasonable tribunal or court can safely convict on it.

With regards to the 1st ingredient of theft of valuable property, PW1, the victim's evidence was to the effect that when he was waylaid and hit to the extent of losing consciousness, he had a suit and his bag which contained a laptop, hard disc, flash
10 discs, a techno spark 3 phone valued at Uganda 360.000/= and some money to a tune of 6,800 dollars and 5.8 million Uganda shillings and other documents. He never recovered anything.

Whatever was robbed was valuable and A2 pleaded guilty to this theft.

The first ingredient was proved beyond reasonable doubt

15 With regards to the 2nd and 3rd ingredients, PW1 told court that while walking to the stage, he felt something very heavy hit him and he lost consciousness. He later woke up in the hospital in a bad state. That he was in pain and drenched in blood.

PF3A that was admitted in evidence and marked as PE1 on which the victim was examined by Doctor Bwire Faizo indicates the victim was injured.

20 PW2, PW3 and PW4 the first witnesses to respond to the scene of crime stated clearly the state in which they found the victim. He was bleeding and had lost consciousness. They had to rush him to hospital.

All these prove that violence was involved during the robbery as the victim was seriously attacked by the assailants who left him unconscious. A dangerous
25 weapon was used to his person that left him bleeding.

There is therefore no doubt that indeed the victim's assailants were armed with a deadly weapon which indeed they utilized to disable him by knocking him unconscious and successfully robbed him of his property.

This leaves this court with the last ingredient of participation.

In criminal law ,mens rea is the mental state of the crime committed and the legal determination of a crime may depend upon both the mental state and actus reus ,the action of the accused that constitute a crime. This can be proved through direct or circumstantial evidence.

In the case before court, the prosecution had to adduce evidence proving that the four accused persons together with A2 who pleaded guilty formed a common intention to rob and went out to rob the victim.

The prosecution evidence in this case does not in any way show that the joinder of the accused persons was done based on any facts.

None of the witnesses lined up by prosecution were present when the robbery happened.

The victim PW1 repeatedly emphasized that he did not recognize his assailants as it was dark and they knocked him unconscious.

PW2 who caused the arrest of A1 told court that he saw him running from the scene of crime but did not see him attack the victim. He saw him with a black polythene bag and yet the complainant did not mention any black polythene bag. He talked of a laptop bag.

According to him, he suspected A1 because he was a suspected thief in the area.

Basing on his suspicion A1 was arrested. That same night two suspects were arrested in a kiosk but were not found with anything yet it was shortly after the robbery. The person who allegedly referred those searching for thieves that night that they are in a kiosk was not even identified or called as a witness.

According to PW5 the investigating officer's testimony, he did not even carry out any investigations much as he claimed he investigated.

He merely relied on the information given by people from the local area.

The case took a new twist when A2 /PW6 who is a convict testified to the effect that he mentioned the people he was with in his police statement but they were released after paying money to PW5.

5 From the testimony of PW5 D/CPL Walemba Erick now at Buyende police Station he did not carry out any independent investigations at all. He kept on telling court that the locals informed him the accused were known criminals without adducing evidence of past criminal record.

10 When A2/PW6 Kajubi Sulaiman informed court that he informed PW5 that the people who were with him were arrested over another case and were in the police cells, but they paid him money and they were released, court did not treat his evidence with suspicion because this is a man who was remorseful for his criminal conduct, pleaded guilty and is serving his sentence. He has nothing to benefit by telling lies about PW5 the investigating officer.

15 The complainant lost a lot of money to wit 6800 US dollars, 5,000,000/= Million Uganda shillings and other valuable properties like a lap top and a mobile phone.

The investigating officer did not even attempt to track the victim's phone.

After arresting two men at the Kiosk with nothing yet allegedly they saw the robbers enter the kiosk, what informed his decision to charge all the accused in the dock apart from A2 who did not deny right from the police?

20 As a trained police officer, a detective for that matter, how could he rely on mere suspicion and not charge the people A2 confessed he robbed with?

Why did he not investigate them?

25 The temptation to believe that part of the money the released thieves had robbed was used to bribe their way out is very high and to fill the gap, he put innocent people on the charge sheet.

PW5 also told this court that despite all the effort made to trace the victim's property, nothing was ever found which statement is a lie because he did not carry out any investigations.

Innocent people apart from A2 have been in custody for over three years only for PW5 to come and inform court that:

5 ***“My lord no one saw Shakur hitting the victim but because of his character and the way he was coming from the direction of the scene he was suspected. After gathering all that I took the file for further guidance to the office of the DPP.”***

All the other co accused were arrested because locals suspected them to be thieves in the area.”

10 Apart from A3 who is a brother to A2 the person who pleaded guilty to this charge does not know A1, A4 and A5. They found themselves on the same charge sheet yet they don't know each other.

15 Surprisingly even the witnesses from Badongo village like PW1, Nicholus Kimbugwe, and PW2 Hamis Ssugga who claimed used to work with the security team of Badongo village, PW3 Sozi Mohammod did not know the accused persons apart from A1 Lubega Shakur Muteweta who's only ground for arrest was that he was a suspected thief.

What was the basis of PW5's action to include the 4 accused on the charge sheet when the local people who recorded the statement did not know the accused persons? This further confirms the evidence of PW6 who knew the people he robbed with.

20 As usual, he attempted to come out clean by transferring the blame to the office of the DPP because he informed court, he referred the matter to the office of the DPP for further guidance.

25 This case presents a classic example of many files that are never properly investigated, charges are sanctioned by learned state attorneys without perusing through the file because no responsible State Attorney would have sanctioned this file and committed the 4 accused persons for trial based on mere suspicion as it has turned out to be.

This case is an abuse of committal proceedings provided for under section 168 of the Magistrates Courts Act which committal proceedings is just but a formality

because the magistrate who commits merely explains the committal papers to the accused.

In my humble view, the current law on committal proceedings is an abuse of the criminal justice system and archaic. It should not just be a matter of the State Attorney preparing a document called committal papers with a summary of the case just to be read and explained to the accused. It should be at this stage that an accused is assigned an advocate on state brief to enable disclosure of the evidence against this accused person which should really establish a prima facie case before committing the person for trial before the High Court.

The summary of the case should bring out the evidence the prosecution has in support of each and every ingredient of the offence in preparation of prosecution of the case before the High Court.

This process is abused by some prosecutors as some are committed with no evidence at all reflected in the summary of the case.

In my view, it does not matter whether they are many or few. No single person should be committed for trial with no sufficient evidence in support of all ingredients of the offence charged. Hasty sanctioning puts an end to investigations and victims of crime end up with a counterfeit justice.

This court has from time and again held that the office of the Director of Public Prosecutions should never be used to cause a miscarriage of justice as its constitutional mandate is very clear under **Article 120 (5) of the Constitution of the Republic of Uganda** where it provides that;

“In exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process”.

The functions of sanctioning charges and committing accused persons for trial is usually delegated to officers in the field at different offices of the Directorate of Public Prosecutions under Article 120 (4) (a) who are lawyers by profession and expected to know the law pertaining to criminal Justice.

Before sanctioning the charges against any suspect, the learned State Attorney must be satisfied that the evidence on record proves all the essential ingredients of the offence for they are aware that to establish a prima facie case, all the essential ingredients of the offence must be proved.

- 5 Where they don't have evidence, to prove a serious offence, they should opt for a lesser cognate offence like attempted robbery instead of robbery or attempted defilement or indecent assault instead of the capital offence.

Where the evidence is not sufficient, they have every right to refer the matter for more inquiries.

- 10 The office of the DPP is protected under Article 120 (6) in that:

"In the exercise of the functions conferred on him or her by this article, the Directorate of Public Prosecutions shall not be subject to the direction or control of any person or authority".

- 15 This should enable the State Attorneys to exercise fairness while executing their work without acting in haste. There is nothing as frustrating to the complainant as learning later that the police never actually investigated their case.

- 20 The office of the Directorate of Public Prosecutions should be mindful of the Ugandan criminal justice system which revolves around the police which is very ill equipped in most cases for the task, the courts of law which are pro incarceration of suspects much as the law presumes them innocent and the Uganda Prison service which is full of remand prisoners and over congested as a result.

- 25 It should be mindful of our delayed criminal trials where suspects especially those committed for trial before the High court spend more than three years without trial like in the instant case where the accused have been on pre-trial remand since 21/11/2019 and the fact that Uganda does not have a robust Legal aid policy Suspects are assigned lawyers on state brief at the time of hearing their cases ,long after they have suffered injustice for those who were unfairly charged without proper investigations and on mere suspicion.

The office of the Directorate of Public Prosecutions should be reminded that it is a very important stake holder in the administration of criminal justice whereby the constitutional right to Liberty of Ugandan citizens should be at the centre of every criminal investigation and prosecution and should not be violated by officers who are charged with the duty to guide and direct prosecutions in this country.

Sanctioning an indictment without sufficient evidence where by a suspect is remanded certainly amounts to an intentional tort of false imprisonment because the State Attorney who has the police file under his or her custody knows the truth but chooses to act contrary to the principles of justice. The prosecution in such circumstances is turned into persecution and has to be condemned by the courts of law.

It is trite law that once an essential element of the offence is not proved, it cannot be said that a prima facie has been established. Proof of participation is a very vital ingredient in proof of a crime as any error in this regard certainly leads to unjustified incarceration which can never be adequately compensated in any way.

This is an absurd case where A1 Lubega Shakur alias Muteweta was charged on mere suspicion with no single incriminating piece of evidence while A3, A4 and A5 are victims of reckless, unprofessional, incompetent and unjust works of D/ASP TWISHIME ALLAN RUKEMA who preferred the charges and the State Attorney of Makindye at that time who prepared committal proceedings clearly indicating that they were charged based on suspicion as they were known thieves in the village yet without any previous record whatsoever.

The prosecuting state Attorney in this case must have been embarrassed by her own witnesses. It would be proper for the state Attorneys who sanction and commit to be the ones to prosecute their own cases and face the embarrassment.

In a quest for justice for the complainant, the prosecutor herein prayed that PW5 be compelled to arrest the people A2 mentioned as his accomplices in the crime yet they had been released from police custody by the said A5.

The responsibility to cause the arrest of the suspects rests with the DPP. It may however be a difficult task which will not add value to the administration of justice as of now.

To deter the police especially PW5 who is still a detective from compromising cases, it is directed that PW5 D/CPL Walemba Erick should be investigated by establishing whether or not Ssenyonga Herbert, Black and Meddie who were clearly mentioned in the statement of A2 Kajubi Sulaiman were arrested and detained at Katwe Police station around 11th October 2019 or there about and were released by D/CPL Walemba Eric at that time without charging them.

If it be true, the office of the DPP can decide on what course of action it can take against him.

With all the above said, this court finds that there is neither direct nor circumstantial evidence connecting the accused persons to the crime in this case at all.

In the result I find that no prima facie case has been made out against A1, A3, A4 and A5 warranting them to be invited to defend themselves.

I hereby acquit all accused persons of the offence of aggravated robbery contrary to section 285 and 286(2) of The Penal Code Act.

They should be set free immediately unless held over other lawful charges.

I so direct

Dated at Kampala this 17th day of April 2023

Hon Lady Justice Margaret Mutonyi JHC

JUDGE.