

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**HCT-00-CR-SC-147-2022**

**UGANDA**

.....

**PROSECUTOR**

*Versus*

**1. MUGERWA AMIRI**

**a.k.a HABAS**

.....

**ACCUSED**

**2. KAKOOZA UMARU**

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

**JUDGEMENT**

The accused persons, **1. Mugerwa Amiri aka Habas** and **2. Kakooza Umaru**, are indicted with the offence of Aggravated Robbery contrary to sections 285 and 286 (2) of the **Penal Code Act**.

It is alleged that the accused persons and others at large on the 15<sup>th</sup> of June 2021 at Entebbe Road junction traffic lights on Kampala road in KCCA robbed **Mutabaazi Richard** of one hundred and ninety seven million shillings and immediately before or immediately after the said robbery caused grievous harm on the said Mutabazi Richard using weapons to wit iron bars and knives.

The accused persons pleaded 'Not Guilty' at his arraignment. That brought all the elements of the offence into issue.

The case for the prosecution is that at PW 1, Towongo Richard and PW 2, Mutubazi Richard, both worked for a Loms forex bureau. The company dealt in the exchange of foreign currency.

On the 15<sup>th</sup> of June 2021, the two were sent to go to Bank of Africa on Jinja Road to exchange \$55,000 (fifty-five thousand United States dollars) into Uganda Shillings. They were riding a Motor cycle.

After getting the Uganda currency, they set off for Loms Forex bureau. PW 1 was riding the bike while PW 2, as a passenger, was carrying the bag which contained the money.

When the two got to the Entebbe road junction on Kampala road, the lights turned red and they stopped. Suddenly they were surrounded by men who arrived on boda bodas who started assaulting them. Both PW 1 and PW 2 state the men had irons and knives.

That the assailants started punching and beating them. Both got off the bike but had punches rained on them. PW 2 stated that he lay on the bag and held on tightly. Several people tried to pull the bag away but PW 2 would not let go. That prompted further and severe beating. He still did not, at any point, let go of the bag.

In the meantime, boda boda parked at a nearby stage rushed to the rescue. It is stated that they apprehended both A1, Amiri Mugerwa aka Habasi and A2, Kakooza Umaru at the scene as part of the gang. The two were handed over to the police and arrested.

It was established that the money was intact.

PW 1 and PW 2 were medically examined and the reports exhibited.

The accused persons were charged with this offence.

The accused persons both denied this offence

**Mugerwa Amiri – A1-** stated that on the 15<sup>th</sup> of June 2021 he was at meat parkers in industrial area. He had however just suffered an accident and still had the injuries. That that he lived in Namasuba and wanted to travel back home but did not have enough money to pay for a boda boda.

That he got on a boda which dropped him off at the traffic lights at the Entebbe Road junction on Kampala road. As he crossed the road, to go a pick another boda to take him to Namasuba, he was arrested by a boda boda and handed over to a police officer.

He was taken first to a nearby police station near the lights and then transferred to the Central Police Station. That he was severely tortured for the length of time he spent at the station. Eventually, A 1 was taken to the court where he was jointly charged with A 2.

A 2, Kakooza Umaru, also denied committing this offence. It was his evidence that he was a boda boda rider in Kawempe. That on the 15<sup>th</sup> of June 2021, he picked a passenger whom he dropped at Radio One. That thereafter, he turned to return to Kawempe. However at the traffic lights at the Entebbe Road junction, a lady stopped him. As he negotiated with her, a mob of other boda boda from a nearby stage swarmed and attacked him for picking a passenger from their stage. They started beating him and handed him to the Police near the traffic lights. That he was thereafter transferred to Central Police Station.

It is alleged by A 2 that he was severely tortured at the police. Eventually the officers took him to court where he was surprised to learn that he was charged jointly with A1.

## **Determination**

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**).

The offence of aggravated robbery is provided for in Section 285 and 286 (2) of **The Penal Code Act** and the essential elements of the offence are:

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

### **1. Theft of property;**

The first element, which is theft, 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**).

The item in contention in this case is money which was in a bag carried by PW 2, Mutabaazi. He stated that when he was attacked he fell on the bag which he held on tightly and did not let go of at any point during the incident.

That the assailants tried to remove the bag but it did not leave Mutabaazi's possession at any stage.

At one stage during his evidence, Mutabaazi said that the bag was ripped open and money pulled out. This version is dispelled by PW 3, Banja Moses, a director of Loms Forex. He told the court, that Mutabaazi returned the bag to the forex bureau shortly after the incident and all the money was there. None of it was lost.

There were inconsistencies in the Mutabaazi's narration, but he largely maintained that he did not let go of the bag.

At one stage he stated there was money in his socks which was taken. However he said that it was part of the money picked from the bank which he had divided putting a portion in his socks and the rest in the bag. This version of the story, he admitted, only arose in court, and is not part of what he narrated to the Police. It is also unlikely because, as PW 3 stated, no money was lost in the incident.

To prove theft, the prosecution must show that the money was taken from PW 2. Taking is what is sometimes referred to as asportation. This question was dealt with in **Sula Kasiira SCCA 20 of 1993 (unreported)** where the court stated,

For a restatement of the law on taking or carrying away as an element of theft, the learned trial Judge referred to paragraph 1484 in Vol. 10 of Halsbury's Laws of England, 3rd Edition, which reads as follows:

“1484 Asportation. There must be what amounts in law to an asportation (that is carrying away) of the goods of the prosecutor without his consent; but for this purpose, provided there is some severance, the least removal of the goods from the place where they were is sufficient, although they are not entirely carried off. The removal, however short the distance may be, from one position to another upon the owner's premises is sufficient asportation, and so is a removal or partial removal from one part of the owner's person to another. There must, however, be a complete detachment of the goods if attached. In cases where asportation cannot be proved, but where the prisoner intended to steal and did some act in furtherance of that object, he may be convicted of attempting to steal. The offence of larceny is complete when the goods have been taken with a felonious intention, although the prisoner may have returned them and his possession continued for an instant only “.

In this instant case, the money did not leave Mutabaazi possession. Even the attempted forceful dispossession of the bag from him was futile. Therefore, at no point whatsoever was the bag removed, even partially, from the possession of PW 2.

The defence submitted that this fact was acknowledged by the police, because the offence named on PE 2, the medical examination report of Towongo – PW 1, by the police officers, is attempted theft. That it was acknowledged right from the scene of crime that, that no money was taken. These facts would mean that there was no asportation, or taking, of the money at any stage. The point is corroborated by PW 3 who stated that they got all the money that was exchanged.

In light of the above, I find that the first element of the offence, theft, has not been proved.

## **2. The use of violence; and the use of a deadly weapon.**

It was the testimony of both PW 1 and PW 2 that the assailants were carrying iron bars and knives. That on top of that, they were very badly assaulted throughout the incident.

The medical examination of PW 2 shows that fracture and tenderness of the bone in right upper arm (right humerus). That he also had pain in the right side of his chest).

It is the evidence of both that A1 and A2 were the ones beating them by punching. They also state it was the same accused persons who holding the iron bars and knives.

The submission of the defence is that how were the assailants able to punch if their hands were full holding a knife and an iron bar. That why would a person who is holding an iron bar or knife in his hand use a punch instead. Lastly it is

said the assailants were arrested immediately and at the scene. How then was it that the weapons were not recovered and produced in Court.

PW 2 made an allegation of a stab wound on his arm. There was no evidence of a cut wound or stabbing showed on PE 3.

Under section 286 (2) of **the Penal Code Act** a deadly weapon is described partly as including an instrument which when used for offensive purposes is capable of causing grievous harm.

In circumstances, the evidence to support the contention that the assailants had iron bars and knives has not been borne out.

Violence on the other hand, is described as the use of physical force unlawfully exercised with intent to harm (see: 8<sup>th</sup> Edition of **Black's Law Dictionary**).

Therefore, while there is evidence of violence, there was no evidence of a deadly weapon used.

Under Section 2 (f) of **the Penal Code Act** grievous harm is defined to include any harm which extends to permanent disfigurement, or to any permanent or serious injury.

The testimony of PW 1 and PW 2 is that they were severely assaulted. Both witnesses were medically examined less than 24 hours after the incident. The medical clinical officer described the injuries suffered as grievous harm in the case of PW 2.

Therefore while possession of a deadly weapons was not proved, the injury suffered by PW 2 was classified as grievous harm.

I find that the victim suffered grievous harm in the course of the theft and the second element has been proved.

### 3. The participation of the accused person.

Both accused persons denied committing the offence. As stated earlier they do not bear the burden of proving their innocence. The onus is on the prosecution to establish to a standard beyond reasonable doubt that the accused persons committed this offence.

PW 1 stated he did not identify who hit him but saw both A1 and A2 apprehended at the scene. He was not certain if they were the ones who hit him and by extension part of the gang.

PW 2, said he saw A1 and A2 hit him. That they were armed with iron bars and knives. He also said there were very many people around the lights because traffic had been halted. PW 2 estimated that there may have been up to 100 people at the scene. This number may be exaggerated but I deduced his evidence to be that there were many people.

A 1 told the court, that when he was in detention at the CPS, the police brought him out of his cells and showed him to PW 2. That they told him that A1 was the one who attacked him.

In light of the foregoing it is clear that the identification allegedly made by PW 2 was in difficult circumstances. It was a state of extreme violence on him and confusion. This court is also alive to the contradictions in his testimony. Those contradictions compel this court to conclude that the identification of the perpetrators by PW 1 and PW 2 required additional evidence to stand.

PW 1 and PW 2 state that as they were attacked, boda boda riders apprehended their assailants and handed them to a police officer who was also at the scene.

The law is that where identification is made in difficult conditions, such as at night, the evidence must be examined closely, and cautiously, to avoid mistaken identity (see **Roria V R 1967 E.A. 583**). Indeed, such a mistaken witness may be



very persuasive and sincerely believe the mistaken identification they have made to be correct. I therefore warn myself as I warned the assessors of this danger.

In such circumstances, the court should examine any evidence of identification scrupulously.

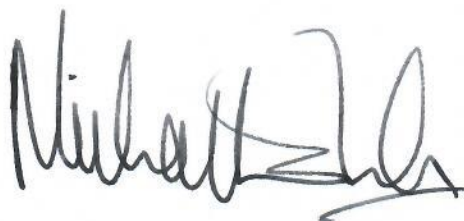
In this case the evidence of arrest is absolutely essential. It is what would lend credence to the assertions made by PW 2, that he saw the two accused persons assault him. If the people assaulted were the very ones arrested by the boda and police, then it proves his assertions that he made a proper identification.

As it stands the prosecution did not produce both the boda and the police officer. The contradictions in Mutabaazi's evidence raise the question whether he is not mistaken in his identification. There is also no proper reason furnished regarding the absence of these very crucial prosecution witnesses.

Taken as a whole however, I am not satisfied that the circumstances under which the identification was made enabled the victim to make a correct identification. The circumstances set out above raise questions as to whether the right people were apprehended.

In their joint opinion, the assessors advised this court to find that the accused persons not guilty of the commission of this crime.

Now therefore, and in agreement with the assessors, I hereby find, 1. **Mugerwa Amiri aka Habas** and 2. **Kakooza Umaru, *Not Guilty*** of the offence of Aggravated Robbery contrary to Section 285 and 286 (2) of the Penal Code and accordingly *Acquit* them.



.....  
**MICHAEL ELUBU**

**JUDGE**

**10.4.2024**