THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT IGANGA

HIGH COURT CRIMINAL SESSION CASE NO 0043 OF 2011

UGANDA………………………………………………………………PROSECUTOR

VERSUS

KASAJA ABBY & Ors……………………………………………………ACCUSED

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The two accused persons, Kasaja Abby, Nalugoda Pius and others still at large are indicted for aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act. It is alleged that accused persons, Kasaja Abby, Nalugoda Pius and others still at large, on the 14th day of May 2009 at Idudi Trading Centre in Iganga District robbed Walusansa Alan of 130,000/= (one hundred thirty thousand shillings) and at or immediately before or immediately after the time of the said robbery threatened to use deadly weapons, to wit, pangas, knives, angle bars and clubs on the said Walusansa Alan.

The brief facts of the case as outlined by the prosecution are that about 12 (twelve) youths led by A1 Kasajja Abbey broke fuel seals of a trailer in Idudi trading centre but their attempt to steal the fuel was foiled by the driver of the trailer and the residents. Shortly after, the group dispersed and came back armed with pangas, knives, angle bars and clubs. The complainant, Walusansa Alan, was returning from a film show hall where he had delivered chapatti when three men asked him where Dogali, who had been among the group that broke the fuel seals from a trailer, was. The Complainant directed the three men to the film hall where he had seen Dogali. On reaching his place of work where he roasts chicken, the Complainant was attacked by A1 Kasajja and his group of youths who included A2 Nalugoda Pius. A1 Kasajja Abby was armed with a sharp panga while others had an iron bar and a club. The group was saying that they would kill the

victim/complainant because he revealed the whereabouts of Dogali. The group started beating the Complainant as a mob. A1 Kasajja Abby kept on waving the panga over the complainant's head threatening to cut off his head if he made an alarm. A1 Kasajja Abby then searched the Complainant's pockets and removed one hundred and thirty thousand shillings (130,000/=). The Complainant managed to escape from them to a nearby police post where he reported a case of robbery. The Police ran to the scene of crime where they had running battles with the group who were resisting arrest, which forced the Police to fire in the air to disperse them. The next day the authorities of the area organized a joint operation with Police where some of the group members were arrested.

The prosecution amended the initial indictment which included the names of nine other accused by removing the nine others and leaving only the two accused, namely A1 Kasajja Abby and A2 Nalugodi Pius before the two could take the plea.

Upon arraignment, each of the two accused persons pleaded not guilty to the charge. Thus, all the ingredients of the offence of aggravated robbery are in issue. The prosecution assumes the burden of proof of all ingredients of the said offence.

The burden of proof of a criminal offence rests on the prosecution and remains so throughout the trial. The duty is therefore on the prosecution to discharge the burden of proof, beyond reasonable doubt. It was stated in **Miller V Minister of Pensions [1947] 2 ALL E R 372 – 373** that beyond reasonable doubt does not mean beyond a shadow of doubt or absolute certainty. If the evidence against a person is so strong as to leave only a remote possibility in his favour then the case has been proved beyond reasonable doubt. It is also trite law, as was held in **Sekitoleko V Uganda [1967] EA 531**, that the conviction of the accused ought to be on the strength of the prosecution case but not on the weaknesses of the defence case. At the conclusion of the trial, any doubt that remains is resolved in favour of the accused.

The ingredients of the offence of aggravated robbery, as set out by sections 285 and 286 of the Penal Code Act, are as follows:-

a) That there was theft of property.

b) That at or immediately before or immediately after the time of stealing there was use or threatened use of violence to the complainant or the property in order to retain the thing stolen or prevent or overcome resistance.
c) That at the time of or immediately before or immediately after the time of robbery the offender is in possession of a deadly weapon or causes death or grievous harm to any person.
d) That the accused participated in the theft of the thing that was stolen.

In order to discharge the burden of proving the case beyond reasonable doubt, the prosecution produced four witnesses, namely Walusansa Allan (PW1); Magumba Sadat (PW2); Seargent Omoyo Victor (PW3); and Assistant Inspector of Police Habib Kibunduka (PW4).

On their part each of the accused, namely A1 Kasajja Abby and A2 Nalugoda Pius, made sworn statements.

It may be mentioned that this offence, according to the indictment, is alleged to have been committed on the 14th day of May 2009. This therefore means that the accused persons are charged under the amended provisions of the Penal Code Act, that is, the Penal Code (Amendment) Act No. 8 of 2007. It appears however that the submissions of both Counsel on this matter, especially in as far as outlining the ingredients of aggravated robbery are concerned are based on the old provisions of the Penal Code Act which were repealed the said amendment. This court has based its interpretations of the law on the amended provisions of the Penal Code Act since the offence was committed after the enactment of the said provisions.

Whether there was theft of property:

Section 254(1) of the Penal Code Act provides that any person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

The prosecution case is based on the evidence of Walusansa Alan PW1 who testified that on 14th May 2009 at about 8.30 pm he was attacked by Kasajja Abby, Nalugoda Pius among others who assaulted him. During the assault Kasajja picked Uganda Shillings 130,000/= (one hundred and

thirty thousand) from his pockets. Prosecution also relies on the evidence of Magumba Sadat PW2 who testified that he saw Kasajja Abby picking money from PW1's pocket.

The defence case is that the issue of theft is a concoction by PW1 seeking unjust enrichment. The Defence Counsel contended that the complainant who was roasting chicken as a business could not have realized that much money from the business that night.

The evidence of Magumba Sadat PW2 corroborated PW1's evidence of money being taken from his pockets by those who assailed him. His evidence was direct, just like that of PW1, in that each saw the money being picked from PW1's pocket. In **Sula Kasiira V Uganda SCCA No. 20/1993**, the Supreme Court stated that the carrying away of the goods of the complainant without his consent, or their removal, however short the distance may be, from one position to another upon the owner's premises, is sufficient asportation (carrying away). There is direct evidence of PW1 and PW2 that the money was taken for the pockets of PW1 the complainant. I would on this aspect not agree with the Assessors that there was no proper evidence that Kasajja took the money.

As regards the non recovery of the stolen money, it was held by the Supreme Court in **Hitler Ojasi V Uganda Criminal Appeal No. 1/1986** as follows:-

> *"There are of course many examples of theft where no goods have been recovered…but the lack of such evidence did not unsettle the verdict in that case."*

From the evidence of PW1 and PW2 the consent of PW1 was not sought or obtained, in the taking and asportation of the money in issue. Those who took the money had no claim of right to it. The non recovery of the money would not unsettle this conclusion. I would therefore not agree with the Assessors that the ingredient of theft has not been proved. The ingredient of theft has clearly been proved by the prosecution beyond reasonable doubt.

Whether there was use or threatened use of violence:

Violence has no technical meaning. It simply means use of force in a violent manner, that is, physical force used so as to injure, damage or destroy; or extreme roughness of action or explosively powerful force or energy. So robbery with violence means robbery where force is used against people or property.

Both Counsel did not address this issue in their submissions. However this court considered the matter as contested and advised the Assessors to do the same. The question to address is whether the assailants were violent towards the complainant.

PW1 testified that the night he was assaulted, a panga was used to cut him. PW3 and PW4 testified that they saw PW1 being assaulted with a panga. PW1, PW2 and PW4 described the panga as being very sharp and shiny with a curved pointed end. PW1 and PW2 testified that the panga had a black handle. It was the testimony of PW1, PW2 and PW4 that the assailants who were in the group were wielding other weapons, namely a panga, a metal bar and a club in the course of assaulting PW1 who was also bitten with human teeth. The said weapons, which were stated to have been recovered from A1's place, were admitted in evidence as exhibit exhibits **P4** (panga)**, P5** (metal bar), and **P6** club), while the exhibit list was admitted as exhibit **P7**. PW3 also corroborated this in his testimony that on that day he was on duty at Idudi police post when PW1 came to complain about a robbery against him, and he was bleeding by the left hand and the forehead. This is corroborated by the medical report which was admitted as agreed evidence as exhibit **P1**, which indicates that PW1 suffered injuries classified as harm which included a human bite and bruises on the hand, upper limb, chest, back, and lower limb.

The Doctor's remark's in exhibit **P1** are that PW1 may have been assaulted by a mob and that a blunt object must have been used to inflict the injuries. It is also indicated in exhibit **P1** that PW1 the complainant had a human bite and a bruise. On this aspect, I would agree with the Assessors that Walusansa had no wounds to show that he was cut with a panga. The nature of injuries indicated in exhibit **P1** show that he was hit with a blunt object and bitten with human teeth. The medical report in my view corroborates a piece of PW1's testimony that that he was hit with a club and bitten. This still makes it ascertainable that violence was involved when stealing his money. The prosecution evidence analysed as a whole is indicative of the fact that there was both threatened and actual use of violence. These testimonies are proof of the actual use of violence in the course of the perpetration of theft. On that respect too I would differ from the Assessors.

I am satisfied that the prosecution has proved this ingredient beyond reasonable doubt.

Whether the accused persons were in possession of a deadly weapon:

Both Counsel submitted at length on the ingredient of use of a deadly weapon, in this case, whether a panga was used or not. As explained above both Counsel were submitting on the pre 2007 definition of aggravated robbery which refers to ***use or threatened use of a deadly weapon*** as an ingredient of the offence of aggravated robbery. In the amended provisions which apply to the accused persons in this case, the provisions do not refer to use or threatened use of a deadly weapon, but to ***possession of a deadly weapon*** or causing of death or grievous harm to any person at the time of or immediately before or immediately after the time of robbery. In my opinion, each situation named in this ingredient is independent, and any one situation can stand on its own as an ingredient. In the circumstances of this case, it is possession of a deadly weapon(s) which is in issue.

A deadly weapon is any instrument made or adapted for stabbing or cutting and any imitation of such instrument, or any substance 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 harm, or any substance intended to render the victim of the offence unconscious. See section 286(3)(a)(i) &(ii) of the Penal Code Act.

PW1, PW2 and PW4 testified that they saw Kasajja Abby with a panga on the night of 14th May 2009. PW1, PW2, and PW4 identified the panga as being very sharp and shiny with a curved pointed end. PW1 and PW2 said the panga had a black handle. PW2 testified that Nalugodi Pius had a club which he used to beat Alan Walusansa. PW1, PW2 and PW4 further testified that the assailants who were in the group were wielding other weapons, namely a panga, a metal bar and a club in the course of assaulting PW1. It is also the prosecution evidence that PW1 was also bitten with human teeth. The said weapons were admitted in evidence as exhibits **P4** (panga)**, P5** (metal bar), and **P6** club), while the exhibit list was admitted as exhibit **P7**. PW1 testified that the panga was the one that was recovered by PW2 from Abby Kasajja's house.

The defence denies that there was a deadly weapon in form of a panga, contending that the bruises inflicted on on Walusansa as per exhibit **P1** were not caused by a panga. They contend the panga was not used hence why it was clean and glittering. The defence also denied that the recovered items, namely a panga, a metal bar, a club were recovered from A1's house. It was A1's testimony that he does not live in a grass thatched house where the items were said to have

been recovered by the prosecution. He testified that he lives in his father's Boy's Quarters which he shares with his younger brother.

It is evident from the testimonies of PW1, PW2 and PW4 who were eye witnesses that that Kasajja had a panga. The panga was admitted in evidence as exhibit **P4**. PW2 testified that Nalugoda Pius had a club. They also mentioned other weapons which the assailants were in possession of, namely exhibit **P5** a metal bar, and exhibit **P6** a club.

A panga is without doubt an instrument made and adapted for cutting, and, when used for offensive purposes, would most likely cause death. The question of proof of whether the panga was actually used to cut PW1 or not, which both Counsel dwelt upon on their submissions is not the key question in as far as this particular ingredient of the offence is concerned. The question here is rather whether the assailants were in possession of a deadly weapon. In the amended provisions of the Penal Code Act, the mere possession of a deadly weapon at the time of or immediately before or immediately after the time of robbery is enough as an ingredient of the offence. One does not have to use the deadly weapon on this ingredient, though that can be relevant when proving the other ingredient of use or threatened use of violence. It must be mentioned of course that the ingredient of being in possession of a deadly weapon is just one of the ingredients which must be proved together with all the others, namely theft, use or threatened use of violence, and participation of the accused in the crime, in order to prove the guilt of the accused.

A club, which Nalugoda was stated by the prosecution to have been wielding is also a deadly weapon in that if it is used for offensive purposes it can cause death. In this case there is evidence the assailants being in possession of deadly weapons some of which were actually used and others not. A metal bar would also fall in the category of deadly weapons for it is likely to cause death when used for offensive purposes. The prosecution adduced ample evidence to show that the assailants, in the course of stealing from and assaulting PW1, were in possession of a panga, a club, and a metal bar all of which are deadly weapons. In any case proof of possession of one deadly weapon is enough in as far as proving this ingredient of the offence is concerned. The evidence of PW1 that A1 Kasajja Abby had a panga during the assault and theft is amply corroborated by the direct evidence of two other eye witnesses PW2 and PW4.

PW2 further gave direct evidence that when an operation was mounted to arrest the suspects, he was in the group that went with the LC 1 Chairman and they invaded the place where the two accused and the others used to sleep and recovered a panga, a club and a metal. The witness clearly described the weapons and identified them in court before they were admitted in evidence as exhibits. PW3 in his testimony reveals that PW2 handed over the exhibits to him. PW3 was then a Police Constable at Idudi police post, and he marked the items and made an exhibits list using carbon paper to make two copies. PW3 also properly identified the exhibits he had labeled before court. The evidence of PW4 that the panga and club were brought by a private person called Sadat (PW2) after recovering them from A1's house and taken to Idudi police post by PW3 further corroborates the evidence of PW2 and PW3. Defence Counsel did not cross examine PW2 on this vital evidence. The chain of evidence was not broken as claimed by the Defence Counsel, for PW2 who recovered them from A1'as house handed them over to PW3 who marked them on the exhibit list which was admitted in evidence and marked **P7.**

A1 denied that the house where the items were recovered is his. PW2 however, who knew both accused as fellow residents of Idudi testified that the two accused and others used to sleep in the Boys Quarters on Bugiri road opposite the mosque. In cross examination, PW2 testified that A2 Nalugoda was sleeping in the same Boys Quarters with Abby and the others. PW2 was an impressive witness who never wavered as he gave direct evidence that he not only witnessed the theft and the violence but also actually recovered the weapons used from A1's house the following day. The recovery of the weapons from the place where the accused persons used to sleep is strong incriminating evidence which connects them with the weapons they were seen brandishing the previous day. It, together with exhibit **P1** strongly corroborates the evidence of PW1, PW2 and PW4 that the accused persons were in possession of a panga, and a club during the process of stealing from and assaulting PW1. On this aspect I would not agree with the Assessors that there was first need to get fingerprints on the weapons to prove that the accused persons were in possession of the same on the night of the robbery. There is ample direct evidence that they were in possession of deadly weapons.

Thus it is my conclusion that the prosecution has proved beyond reasonable doubt that at the time of or immediately before or immediately after the time of robbery the offenders were in possession of deadly weapons.

Whether the accused persons participated in the commission of aggravated robbery:

Theft may have occurred with violence, and the assailants may have been in possession of deadly weapons. Was the offence committed by the accused persons? PW1 stated that he saw Kasajja A1, Nalugoda A2, and others attack him, that Kasajja took U. Shs 130,000/= from his pocket, and that Kassajja at that time held a sharp panga. PW1 testified that Abby Kasajja cut him with a panga on the hand and on the elbow, and that he sustained a bite injury on the upper arm. PW2 testified that he saw Kasajja and Nalugoda attacking PW1, and that he saw Kasajja with a sharp panga and Nalugoda with a club. PW4 testified that he saw Kasajja with a sharp panga. PW2 also testified that he recovered a sharp panga with a curved pointed end and black handle similar to that previously seen with Kasajja and handed it over to PW3. PW1, PW2 and PW4 testified that there was bright electric light at the crime scene. PW1 testified that he came into close contact with his attackers and witnessed the robbery at close range. PW3 testified that he was 30 metres away from the accused. The incident took place at night at around 8.30 pm.

DW1 (A1) Kasajja Abby admitted being at the scene of crime where Walusansa Alan was assaulted. He however stated that his participation was only to separate Abdalla Mutega and Walusansa who were fighting when Abdalla tried to transfer Walusansa's chicken from his sigiri (charcoal stove) to another sigiri. A1 therefore raised the defence of total denial. DW2 (A2) Nalugoda Pius testified that he was not in Idudi at the time the alleged offence took place. It was his testimony that on 14th May 2009 when the alleged offence is claimed to have taken place, he was in Iganga playing music at Success Tenors. It was his testimony that he had been away from idudi for two weeks by the time the incident happened. Thus A2 Nalugoda Pius raised the defence of alibi and total denial.

Regarding the alibi raised by A2 Nalugoda Pius, the law is that an accused who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer. The general rule is that the prosecution must stand or fail by the evidence they have given. The prosecution is under a duty to negate the alibi by adducing evidence which places the accused squarely at the scene of crime. Where the prosecution adduces evidence showing that the accused was at the scene of crime, and the defence not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, both versions should be evaluated judiciously and reasons should be given why one and not the other is accepted. It is a misdirection to accept

one version and then hold that because of that acceptance *per se* the other version is unsustainable.

I have considered the lighting conditions, and the familiarity of the prosecution witnesses with the accused persons. PW1, PW2, and PW4 offered direct evidence as to the participation of A1 Kasajja Abby and A2 Nalugoda Pius. There is credible evidence that there was bright electric light on 14th May 2009 at the scene of crime. Both A1 and A2 were identified by three eye witnesses, namely PW1, PW2 and PW3. All the three witnesses knew the two accused very well as residents of Idudi. PW1 testified that he grew up in the same area with the two accused. The two accused also confirmed in their respective testimonies that they are residents of Idudi. PW1 himself came into very close contact with his attackers and gave direct evidence about the attack. These were favourable conditions for proper identification of both accused at the scene of crime, as laid out in the Supreme Court decision of **Isaya Bikumu V Uganda Criminal Appeal No. 24 of 1989.** The prosecution witnesses could not have been mistaken and their identification of the two accused were was faultless. I accept the evidence as being free from the possibility of error.

The prosecution evidence on proper identification of the two accused regarding their participation in the crime would have an effect on the alibi raised by A2 Nalugodi Pius in that it places him squarely at the scene of crime. It was held by the Supreme Court in **Alfred Bombo V Uganda SCCA No. 28 of 1994** that once an accused person has been positively identified during the commission of a crime, then his claim that he was elsewhere must fail. Thus, the prosecution evidence has destroyed the alibi placing A2 Nalugodi Pius at the scene of crime.

The law is that in a case where an accused person gives untruthful evidence is no different from the one in which he gives no evidence at all. In either case, the burden remains on the prosecution to prove his guilt. However, if, upon proved facts, two inferences may be drawn about the accused person's conduct or state of mind, his untruthfulness is a factor which court can properly take into account as strengthening the inference of guilt. The strength it adds depends on all the circumstances and especially whether there are reasons other than guilt that might account for his untruthfulness. In this case I find no reason as to why A2 would lie to court that he was elsewhere other than at the scene of crime if it were not to confuse court about his guilt. The alibi must be false and it is rejected.

It is evident from the prosecution evidence, particularly that of PW1 and PW2 that both the accused were involved in the assault of PW1, and that Nalugoda was present when Kasajja picked the money from the pocket of PW1. The question to determine is whether in the circumstances, the two were joint offenders. Section 20 of the Penal Code Act provides that 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. Also see **Lt. Misango V Uganda Court of Appeal Criminal Appeal No. 52 of 2001.**

For the doctrine of common intention to operate against the suspects on the same indictment or a suspect on trial alone but said to have committed an offence with another, it is not necessary for the prosecution to prove that they agreed or entered into a pact to commit the offence. Common intention may be inferred from their joint conduct, present together at the scene of crime and their actions generally, including the accused person's failure to disassociate themselves from the crime. If court is satisfied that the accused persons played an active role in the robbery, it would not matter that those they are said to have committed it with them are unknown or not mentioned in the indictment. It was stated in **Dafasi Magayi & Others V Uganda [1965] EA 667, at p.670** that

> *"The inference from the actions of all the accused persons taking part in this unmerciful beating, is irresistible – not only did none of the accused persons disassociate himself from the assault but they each prosecuted it with vigour."*

In **R V John s/o Njiwa Samwedi [1962] EA 552** it was held at p.554 that:-

> *"If two people together steal, and one of them employs violence,…with a weapon, particularly if such a weapon is carried openly by one of the thieves, there would be grounds for holding that violence was, at lowest, contemplated, and therefore agreed to by the other thief as well."*

It is the prosecution evidence, as per the testimonies of PW1, PW2 PW3 and PW4 that the two accused were actively engaged in assaulting PW1. A2 Nalugodi was present and participating when A1 Kasajja picked the money from PW1's pockets. He did not stop him or disassociate

himself from the action of the latter. They each complemented the action of or the role played by the other. It is clearly manifest that the criminal purpose was prosecuted by the two and their group in concert. It does not matter who of the two might have picked the money from PW1's pocket. Their joint actions, leading to that ultimate deed, were pushed as a common purpose to achieve the robbery. The robbery of PW1's money was a probable consequence of such unlawful act.

Regarding the law on inconsistencies and contradictions, it is the case that only grave inconsistencies that are not explained satisfactorily that will usually result in the evidence of a witness being rejected but minor inconsistencies will not have that effect unless they point to deliberate untruthfulness. This court has considered the testimony of PW1 that Tigawalana had a club, yet PW2 said it was Nalugodi who had a club. The complainant explained that because of the time lag he has forgotten some things. Defence Counsel pointed out a contradiction that while PW3 stated that he is the one who received the panga from Sadat PW2 and accordingly transmitted it to the Police, PW4 told court that the weapons in question were delivered at Police by Sadat himself. In my view this was a minor contradiction not going to the root of the case. What came out clearly from the evidence of PW2 and PW3 who handled the weapons is that it is PW2 who recovered the weapons from A1's house and handed them over to PW3 who marked them and listed them on an exhibit list. If this was contradicted by PW4 that Sadat brought them to Police it could be because PW4 was not directly involved in the weapon. The contradiction was therefore treated as minor. Defence Counsel also pointed out the discrepancy that while some prosecution witnesses said that the weapons were recovered from a grass thatched house others said it was from A1's house. All the prosecution witnesses stated the weapons were recovered from A1's house which PW2 described as Boys Quarters and he knew the house. PW2 was never led to state whether the house was grass thatched or otherwise, there is no way court could establish the contradiction within the prosecution witnesses in as far as describing the house is concerned. This factor of PW2 knowing A1's house was supported by the evidence of A1 (DW1). It is only PW4 who described the house as a grass thatched house, but this does not discredit the evidence of PW2 about recovering the weapons from A1's house. I found no deliberate untruthfulness on the part of the prosecution witnesses. PW1 and PW2 said they had no problem with the two accused. The accused persons have not shown any motive for the

prosecution witness to tell lies against the accused persons. On that basis I find no reason to reject their evidence.

In the premises, based on the adduced evidence, I will differ from the Assessors' joint opinion. It is my finding that the two accused persons participated in committing of the crime they are indicted for. The prosecution has proved this ingredient of the crime beyond reasonable doubt.

In the circumstances, for the reasons detailed above, differ from the Assessors' joint opinion. I find that the prosecution has proved beyond reasonable doubt, as against the two accused, each and every ingredient of the offence of aggravated robbery.

I convict each of the two accused of the offence of aggravated robbery as indicted.

PERCY NIGHT TUHAISE

JUDGE.

04/07/2012.