THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SESSION CASE NO.0098 OF 2019

UGANDA **PROSECUTION**

VERSUS

1. **KIMULI ALEX**
2. **MAKUMBI RONALD DONGO KING ALIAS CITY**
3. **KALWAZA IVAN** **ACCUSSED**

BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

The accused persons were charged with aggravated robbery contrary to section 285 and 286(2) of the Penal Code Act.

The prosecution alleges that the accused persons and others still at large on the 1st day of April 2018 at Nabweru South, Nansana Municipality in Wakiso District robbed Nakasi Shamim of her two mobile phones valued at shs. 300,000/-, a television set valued at 200,000/=, a set of hoofers valued at shs. 250,000/=, an iron box valued shs. 50,000/= and cash shs. 650,000/= and at, immediately before or after the said robbery threatened to use deadly weapons to wit pangas and knives on the said Nakasi Shamim.

At the hearing, the accused persons were represented by Counsel Sselwanga Geoffrey while State Attorney Ainebyona Happiness appeared for the respondent. They also filed their written submissions which I have considered.

The burden of proof in criminal cases is on the prosecution to prove its case beyond reasonable doubt and if there is any doubt it must be resolved in favor of the accused persons.

For the offence of aggravated robbery, the prosecution had to prove the following ingredients beyond reasonable doubt.

1. **That theft occurred**
2. **That there was use or threat of use of a deadly weapon during, immediately before or after the said robbery or that grievous harm was inflicted on the victim**
3. **That it is the accused persons who participated in the commission of the offence**

The prosecution called three witnesses in a bid to prove its case.

That theft occurred.

Theft occurs when a person fraudulently and with intent to deprive the owner of a thing capable of being stolen takes that thing from the owner without a claim of right. **See: Section 254 (1) of the Penal Code Act.**

To prove theft, the prosecution relied on the evidence of PW2 Nakasi Shamin (the victim) who told court that her two mobile phones, a television set, a flat iron and cash worth shs. 650,000/=were taken from her house. They also relied on the evidence of PW1 also testified that he recovered a television set belonging to PW2, the victim. A photograph of the television set that was allegedly recovered from the accused home was exhibited in court as PEx 02. With this evidence, I find that the evidence of PW1 is sufficient to prove that indeed theft occurred.

The second ingredient to be proved is the use or threat of use of a deadly weapon in the commission of the offence. A deadly weapon has been defined in the Penal Code Act to mean 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.

PW2 testified that she saw one of the assailants with a panga at the time they entered her house. PW1 Ssuka Ben also testified that they recovered 2 pangas from the home of A1. The photograph of the two pangas was admitted in evidence as PEx2.

A panga is no doubt a deadly weapon within the meaning of section 286(3)(a)(i) &(ii) of the Penal Code Act already referred to above and 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. See: **Uganda v Kasaja & Ors (High Court Criminal Session Case No 0043 of 2011) [2012] UGHCCRD 8 (4 July 2012)**

The evidence of PW1 corroborates that of PW2 who was an eye witness in proving that there was use or threat of use of a deadly weapon during the commission of the alleged offence. I find that the prosecution has proved that there was use of a deadly weapon.

Lastly, the prosecution must prove the participation of all the accused persons beyond reasonable doubt. The prosecution must adduce cogent evidence placing the accused persons at the crime scene as active participants.

PW2 the victim testified that she was familiar with A1 having known him for over four years although this was denied by A1. With regard to how she was able to identify A1, she stated that there was light in the room and had clearly identified him through the electric bulb in her room. She seemed sure of this to the extent that she told court that A1 had even asked her to cover herself as they took her property.

Furthermore, PW1 testified that he knew A1 prior to the incident, he also told court that they searched the home of A1 and recovered a television set. This was also confirmed by PW3 the investigating officer.

A1 denied the charges, he told court that he did not know the victim and that on the day the incident is said to have occurred he had gone on safari. He also denied the items allegedly recovered from his place insisting that nothing was recovered.

For A2, he denied the charges and stated that he had no knowledge of the events of 31/3/2018. A3 raised a similar defense and stated that he had no knowledge of the charges.

From prosecution evidence, there is only one single identifying witness who gave direct evidence implicating A1 as an active participant in the commission of the offence. The other evidence is circumstantial in nature and is to the effect that the stolen television set was allegedly recovered from the home of Kimuli Alex (A1).

The legal position is that the court can convict on the basis of evidence of a single identifying witness alone. However, the court should warn itself of the danger of possibility of mistaken identity in such cases. This is particularly important where there are factors which present difficulties for identification at the material time. The court must in every such case examine the testimony of the single witness with greatest care and where possible look for corroborating or other supportive evidence. If after warning itself and scrutinizing the evidence the court finds no corroboration for the identification evidence, it can still convict if it is sure that there is no mistaken identity. **See: John Katuramu versus Uganda Criminal Appeal No. 2 of 1998**

The test of correct identification was set out in **Abdala Nabulere & another versus Uganda,** 1979 HCB 77, as follows;

"The court must closely examine the circumstances in which the identification was made. These include the length of time the accused was under observation, the distance between the witness and the accused, the lighting and the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good then the danger of mistaken identity is reduced, the poorer the quality the greater the danger."

Applying the above test, PW2 stated in her evidence that she was able to identify A1 through the light coming from the electric bulb which was in the room, she stated that A1 was armed with a panga, and that he even had the time to ask her to cover herself as her property was being taken. She also stated that she was familiar with A1 having known him for quite a while. Although A1 denied knowing the victim, I find that the conditions for correct identification were present to enable the victim identify A1.

Where reliance cannot be placed only on the evidence of identification, conviction can nevertheless still be founded on the evidence of the accused being found in possession of that property as is alleged in this case. This is referred to as the doctrine of recent possession.

The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a presumption of fact that that person was the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession. **See: Mbazira & Anor. vs. Uganda; S.C. Crim. Appeal No. 7 of 2004**

It follows therefore that where an accused person is in possession of property which has recently been stolen and the accused either gives no explanation as to how he or she came to have it or gives an explanation which could not be reasonably true, then the court may conclude that he or she stole it or received it knowing it to be stolen. It is the possession of the property recently stolen which calls, without more, for an explanation. In the absence of some explanation which you accept is reasonably possible, the conclusion maybe reached that the accused person stole or received the property. The whole of the explanation given by the accused and all the circumstances should be considered.

PW1 and PW3 testified that the stolen television set was recovered from the home of A1 (Kimuli Alex). Although he denied that it was recovered from his home, he offered no other credible explanation as to how the television set identified by PW2 was found itself at his place during the search. The evidence of PW3 the Investigation Officer and is supported by the evidence of PW2 who confirmed that indeed the television recovered from A1 belonged to her.

There was no requirement for the PW2 to prove ownership of the television set since she had already properly identified it during the search as belonging to her and there was no suggestion from defense counsel during her cross examination that the recovered television set did not belong to her. The issue was only brought by defense counsel in his submissions.

In my considered view, there is compelling evidence to suggest that the television set recovered from the home of A1 was stolen from PW2.There are no other co-existing circumstances which would weaken or altogether destroy that inference. The circumstantial evidence that linked the accused

with the robbery is the evidence of recovery, from A1, some of the items that were reported stolen in the said robbery.

All the accused each set up the defence of alibi, with A1 stating that on the material night of the incident he had gone on a safari, A2 and A3 each also denied the charges and stated that they knew nothing about the alleged offences. A1, who testified as DW1 also vehemently denied that any item was recovered from his house. The defence of alibi of A1 is dispelled by the evidence of correct identification.

As for A2 and A3, there was no evidence of identification to prove that they participated in the commission of the said offences. Other than the allegations of them being habitual criminals, there was no cogent evidence placing them at the crime scene. Accordingly, I find them not guilty of the offence as charged.

In the result, this court finds that A1 participated in the commission of the alleged offence and is hereby convicted as charged. For A2 and A3 there being no credible evidence of participation and they are hereby acquitted and should be set free unless being held on other lawful charges.

I so find.

JUDGE.

11/03/2024