

**Uganda v Musoke (Criminal
Session Case 46 of 2020) [2024]
UGHC 731 (28 March 2024)**

[2024] UGHC 731

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BEFORE HON. LADY JUSTICE CHRISTINE KAAHWA

JUDGMENT

The Accused person was indicted with the offence of Aggravated Robbery Contrary to Sections 285 and 286(2) of the Penal Code Act Cap 120 as amended. It is alleged that the Accused person and others still at large on the 20th day of July 2019 at Mukono Secondary School Road Junction, in Mukono District robbed **Nsengiyunva Trevor Henry** of his Samsung smart phone valued at Ug. Shs. 350,000/= (Uganda Shillings Three Hundred and Fifty Thousand), and cash of Ug. Shs. 200,000/= (Uganda Shillings Two Hundred Thousand) and immediately before or after threatened to use a deadly weapon to wit a knife against the said **Nsengiyunva Trevor Henry**.

The Accused pleaded not guilty to the indictment.

Mr. George Bigira Senior State Attorney and Ms. Siratwa Bassajabalaba, State Attorney appeared jointly for the Prosecution. The defence was represented by Mr. Mustapha Songoni, Counsel on state brief.

At the hearing of the case, Prosecution presented three witnesses whereas the defence presented one witness.

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Burden of Proof

In determining the innocence or guilt of the Accused, Court has to bear in mind the established principles of the law that "the burden of proof rests on the Prosecution to prove all the elements of the offence beyond reasonable doubt. This burden of proof does not shift to the Accused person unless there is a specific statutory provision to the contrary and in this case there is no such statutory provision.

It should also be noted that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The standard is satisfied if having considered all the evidence, there is little or no doubt that the Accused person committed the crime. See *Miller v. Minister of Pensions* [1947] 2 ALL ER 372)

For the offence of Aggravated Robbery, the Prosecution has to prove the following elements beyond a reasonable doubt:

- 1. That there was theft of property.
- 2. Use or threat to use violence at, before or after the theft or that the Accused persons caused grievous harm to the complainant.
- 3. The Accused participated in the robbery.

By his plea of not guilty, the Accused put in issue each of the above ingredients of the offence with which he is charged.

Evaluation of evidence:

1. That there was theft of property:

Theft, as can be discerned from **Section 254 (1)** of the Penal Code Act Cap120 as amended 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.

In this case, PW1, Trevor Henry Nsengiyunva testified that on the fateful day at around 8:00 p.m. at the junction of Mukono Secondary School in Kitete, Mukono,

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he was robbed by the accused and another person who was not arrested. That at the time, his mother had sent him to buy milk and that as he approached the said junction he met the accused who requested from him directions to Mukono Boarding School. That the duo took his phone, a Samsung JS, his open stepper shoes and money amounting to Ug. Shs. 200,000/= (Uganda Shillings Two Hundred **Thousand**). That when he reached home, he told his mother and that the following day he went to report to Police.

PW3 stated that the phone was a Samsung, black in colour, with a cracked screen and that he exhibited the same. The exhibit slip and photograph of the phone were tendered in court as PEX. 3 and PEX. 6 respectively.

I have carefully evaluated the above evidence in regards to theft and I note that apart from the evidence of PW1, there is no any other evidence led proving that the cash and shoes of PW1 were stolen.

In regard to theft of the phone, I note that there is direct evidence.

Section 254 (1) of the Penal Code Act Cap 120 as amended provides that the offence of theft is proved if proof is provided that one fraudulently and without claim of right took anything that is capable of being taken or fraudulently converts it to his use at the detriment of the general or special owner.

I therefore find that the Prosecution has proved theft of the said phone beyond reasonable doubt.

2. Use or threat to use violence at, before or after the theft:

This ingredient can be proved by direct evidence of the victim or any other witnesses who have witnessed the violence, or threat to use violence or the causing of grievous harm on the complainant. A medical report can also be proof of the grievous harm.

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PW1 told Court that while being robbed an object that felt like a knife was placed on his back and although he was scared and feared, he remained calm. In cross examination, he said he did not sustain any cuts or bruises.

PW3, the Investigating Officer, testified that the victim told him that the Accused pulled a knife to stab him and that the Accused's colleague boxed him and he fell down. This evidence is not corroborated by the testimony of the victim which is silent about these set of facts. I am satisfied that the object placed on the back of the Accused made him believe that the object was a knife which is classified as a deadly weapon. Section 286 (2) of the Penal Code Act defines "deadly weapon" to mean:

\$(i)\$ an instrument made or adapted for shooting, stabbing or cutting, and any imitation of such an instrument;

Therefore, the threat to use violence was proved. I am therefore inclined to find that the Prosecution has satisfied this Court beyond reasonable doubt that there was threat to use during the theft.

3. The Accused participated in the Robbery:

Regarding participation of the Accused, the Court is obligated to examine all evidence closely, bearing in mind the established principle that an Accused person does not have to prove his innocence. It is up to the Prosecution to disprove the defense of the Accused person by adducing evidence that shows that, despite the defense, the offence was committed and was committed by the Accused person. See: Sekitoleko Vs Uganda [1967] EA 531,

As I have already stated. PW1 testified that he was sent by his mother to buy milk and that as he approached the junction at Mukono High School in Kitete Mukono, he met the Accused who greeted him and asked him for directions to Mukono Boarding School. He said as he was directing the Accused person, a tall, slim and dark-skinned gentleman came and put something he thought was a knife on his

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back and the duo demanded that he gives them everything he had on him. According to PW1, all this happened at about 8:00 p.m. in the night.

He also said the place was kind of dark but it had some lights from the saloon that was nearby. He testified further that he stayed with the Accused for around 5-10 minutes while giving him directions to Mukono Boarding school.

PW1 testified that the following day after the Robbery, he went to the LC1 Chairperson of YMCA to report the incident and that as he was moving he saw the Accused and identified him as someone who had robbed him the previous night. He stated that he immediately went to Mukono Taxi Park Police Post and reported. That the Police engaged the LC1 Defence Secretary who arrested the Accused.

During cross examination, PW1 testified that before the robbery, he had never seen the accused and that he did not know the other second assailant who was with the Accused.

PW2, Wilberforce Nsale told Court that the Accused came to him and requested that he lends him Ug. Shs. 70,000/= [Uganda Shillings Seventy Thousand] since he had a sick person. He told Court that the Accused gave him the stolen phone and pledged it as security. That Police later called and told him that the phone was stolen. He later took the phone to Police, made a statement and the phone was exhibited. The photograph of the phone was tendered in Court and marked as Pexh 4. The Police Statement of PW2 was tendered in Court and Marked as Pexh 2.

In rebuttal, the Accused led sworn evidence and he informed Court that on the fateful day he went to Kikubakima and was not in Mukono Town. He stated that he returned at around 7:30 p.m. and picked his wife from her workplace which was just across the road where they stay. They then went home and that he never left home until morning. He said that the next day he had a friend, Namusisi alias Mama Eddy in town who had lost a sibling and he was supposed to travel to attend the last funeral rites. That when he reached at Mama Eddy's place, a car had been hired

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and that all the people couldn't fit in the car. He said he opted to remain behind and the others left for the burial. That he then went behind the house to greet Namusisi's mother and that as he was greeting her, a crime preventer called John came to ask him about Kalumba's whereabouts. He said he was not cooperative with the crime preventer's inquiry and that the crime preventer did not take it well.

He said that he then went at Mama Jovia's restaurant to eat and that as he was eating somebody called Badiru told him that he was needed at LC1 Chairman's place. He said he went and found the LC1 Defence Secretary who told him that his issues would end at the Police and he was taken at Mukono Taxi Park Police Post.

At the Police, he said he was placed in the cell for two days and that Police later told him to sign a paper and so that he can be released, but he refused to sign since he did not know what he was signing. He testified that when he refused to sign, the Police Officer took him back to the cell and told him that he would see what a "mukiga" is. He was then transferred to Mukono Central Police Station and that it is there that he was told that he stole. He said he spent about a week at the Mukono Police.

When asked whether he knows the Pastor, PW2, the accused said he met him only once.

The Accused testified that has never been a congregant in the Pastor's church and that he has never prayed from there. He stated that he was of the Islam faith. He also said that he has never sold any phone to the Pastor.

I have evaluated the oral and documentary evidence led by the Prosecution in respect of the participation of the Accused in committing the offence that he is charged with.

PW2's Police Statement was tendered in Court as exhibit PEXH 2. I have carefully looked at the statement and I note that it contradicts the evidence of the Prosecution

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as to the participation of the Accused in committing the crime. At Police on 29th July, 2019, the date the statement was made by PW2, he told Police that the Accused gave him the alleged stolen phone on 20th July, 2019 at about 7:30 p.m. and requested him for a loan. The phone was allegedly security for the loan. The Prosecution case is that on 20th July, 2019 at about 8:00 p.m., the Accused robbed **Nsengiyunva Trevor Henry** of his phone, cash and shoes. This implies that the Accused allegedly gave the stolen phone to PW2 as security even before it was allegedly stolen.

Furthermore, PW3, the Investigating Officer told this Court that the Accused made a statement admitting to committing the crime and that a statement to that effect was made. During cross examination, the said statement was tendered in Court by the defence as DEX1.

The Accused on the other hand told this Court that the Police tried to force him to sign a statement and he refused to do so. He said he did not know what the contents of the statement were and therefore did not sign it.

I have carefully looked at the alleged statement of the Accused marked as DEX1 and observe that it does not bear the signature or finger print of the Accused. The averments in the statement are different from what is in the charge and caution statement marked DEX2. In the Police Statement which is not signed by the Accused, the Accused allegedly admits to committing the crime whereas in the Charge and caution statement, which is signed by the Accused, the Accused's narrations are the same as those he told this Court in his evidence in Chief. DEXH 2 also bears the Accused's name written in his own handwriting.

I find no basis for the conclusion of the Investigating Officer that the Accused admitted to having committed the crime. DEXH 2 supports the defence of the Accused that the Police tried to force him to sign a statement admitting to the

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commission of the crime. This casts doubt as to whether indeed the Accused committed the crime and also taints the credibility of PW3, the Investigating Officer.

In regard to the identification evidence as guided in **Abdallah Nabulere & Anor Vs Uganda Criminal Appeal No. 9 of 1978**,

"Where the case against the Accused depends wholly or substantially on the correctness of one or more identifications of the Accused, which the defence disputes, the Judge should warn himself and the Assessors of the special need for caution before convicting the Accused in reliance on the correctness of the identification or identifications.....the Judge should then examine closely the circumstances in which the identification came to be made, particularly, the length of time the Accused was under observation, the distance, the light, the familiarity of the witness with the Accused. All these factors go to the quality of the identification evidence."

The Court will therefore in order to avert that danger look at the circumstances under which identification in this case was done.

I now turn to the evidence of PW1, the victim, who testified that he identified the Accused the following day after the commission of the crime. It was his evidence that the place of attack was kind of dark but had some light which emanated from the lights of the saloon shop that was nearby. Prosecution did not lead evidence as to how bright the saloon light was for purposes of identification or the distance from the light and scene of crime. The victim stated that he had never seen the assailants before and that he spent 5 to 10 minutes directing the Accused person; the time in my view seems to be too long for giving directions.

The gaps left in the chain of evidence of the Prosecution coupled with the contradictions I have pointed out here above leave me in doubt as to whether the accused participated in the robbery of the victim. As it is the principle in our jurisprudence, these gaps and contradictions are decided in favour of the Accused.

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I am therefore in disagreement with the Joint Opinion of the Assessors in regard to the Accused involvement in the commission of the offence.

I find that participation of the Accused in commission of the crime has not been proved by the Prosecution to the required standard.

The Accused is not guilty of the offence of Aggravated Robbery as indicted and henceforth order for his release from Prison immediately unless he is being held on other lawful charges.

I so order.

Dated at Mukono this 28th day of March , 2024.

CHRISTINE KAAHWA JUDGE

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