THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL SESSION CASE NO.072 OF 2023

UGANDA==========PROSECUTION

VERSUS

1. OTAI AARON
2. SSEKAMANYA VINCENT==========ACCUSSED PERSONS

BEFORE HON: JUSTICE ISA AC MUWATA

JUDGEMENT

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

It is alleged that the accused persons and others at large on the 18th day of April, 2022 at Katoogo Zone, Kinawataka-Mbuya, Nakawa Division in Kampala District, robbed Samiru Sowobi of a mobile phone valued at UGX 280,000/=, Cash Money worth 300,000/= all totalling to Uganda shillings 580,000/= and wallet containing National ID, Work ID and a phone receipt belonging to Samiru Sowobi and immediately before the robbery did use a bottle to the said Samiru Sowobi.

Representation

Counsel Sselwanga Geoffrey appeared for the accused persons while SSA Amerit Timothy appeared for the prosecution.

Burden and Standard of Proof

It is trite law that in criminal proceedings, the burden of proof rests squarely on the prosecution to establish the guilt of the accused beyond reasonable doubt. This principle was enunciated in the case of Woolmington v DPP [1935] AC 462

The accused persons bear no burden to prove their innocence; any reasonable doubt must be resolved in their favor. If, at the end of the trial, the court is left with any doubt as to the guilt of the accused, they must be acquitted.

The offence of aggravated robbery under sections 266 and 267(2) formerly sections 285 and 286(2) of the Penal Code Act, Cap. 120 comprises the following essential ingredients, each of which must be proved beyond reasonable doubt:

1. That there was theft of property.
2. That there was use or threat of use of violence immediately before, at, or immediately after the theft, or that the victim suffered grievous harm.
3. That a deadly weapon was involved.
4. That the accused persons participated in the commission of the offence.

In a bid to prove its case, the prosecution adduced the evidence of 2 witnesses

Theft

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 237 (1) of the Penal Code Act.

To prove the ingredient of theft, the prosecution sought to rely on the evidence of the victim, PW2. He testified that on the 18th of April, 2022, while walking to the abattoir, he was intercepted by four individuals who stopped and surrounded him. PW2 stated that these individuals, who were armed with bottles, demanded money from him. It was further his evidence that the assailants reached into his pockets and removed some items.

According to section 237(1) of the Penal Code Act, theft requires the physical taking of a specific thing capable of being stolen.

The specific thing capable of being stolen must also be an identifiable object of value. By testifying that some items were taken without further description, the witness has failed to

provide the court with the necessary particulars to determine if the objects removed were indeed things capable of being stolen. Legal certainty demands that the prosecution specify whether the property was money, a mobile phone, or any other thing capable of being stolen.

Furthermore, the definition of theft under section 237(1) of the Penal Code Act relies on the fraudulent taking of property. Without a specific description of the items, it is impossible to prove the element of asportation. The court cannot be certain that any specific property was moved from the possession of PW2 if PW2 himself cannot name what was lost. This lack of essential detail creates a material gap and the court is left to guess at the identity of the property, which is a departure from the requirement of proof beyond a reasonable doubt.

In **Uganda v. Oloya (1976) HCB 8**, court emphasized that the prosecution must first prove the commission of theft before the elements of robbery, such as violence or the threat of violence, are considered. The court held that if the element of theft fails, the charge of robbery cannot be sustained. The court further explained that all other elements of robbery, such as the use of force or the presence of a deadly weapon, depend on the commission of theft as the base offense.

In the instance case, because PW2 failed to identify and describe, the items taken, the theft remains unproved. Consequently, since the underlying theft has not been established with the requisite legal certainty, the prosecution has failed to build the necessary foundation to support a conviction for the more serious offense of aggravated robbery.

That there was use or threat of use of violence immediately before, at, or immediately after the theft, or that the victim suffered grievous harm.

PW2 the victim testified that he was attacked by 4 people who stooped him and asked for money, it was his evidence that he was hit with a bottle during the incident, he testified that after he was hit with a bottle, he first went home and later went to a clinic in Mbuya for treatment.

The prosecution also relied on the evidence of PW1, the medical officer who examined the victim. It was his evidence that he examined the victim after he had reported to him that he had been assaulted on the night of 18/4/2022. In his evidence PW1 described the condition in which the victim was in at the time and stated that he was a fair condition. He also described the injuries sustained by the victim as harm. A PF3 was tendered in as proof that indeed the examination was carried out. A close look at the PF3 indicates that injuries were caused by blunt force. PW1 also testified that he classified the injuries examined as harm because it would kill or cause permanent disability to the victim.

The absence of the physical bottle as an exhibit is not fatal to the prosecution's case, as the ingredient of a deadly weapon or causing harm can be proved through the consistency of oral and medical evidence. While the bottle itself was not produced, the direct testimony of PW2 who stated he was hit with a bottle is strongly corroborated by the expert evidence of PW1 and the PF3. The medical officer's finding that the injuries were caused by blunt force aligns with the victim's account of the attack.

Furthermore, PW1's classification of the injury as harm due to its potential to cause death or permanent disability satisfies the legal definition of a deadly weapon under Section 267(3(a) the Penal Code Act, which focuses on the lethal capability of the instrument in the manner it was used. Therefore, the combined weight of the victim's evidence and the medical findings safely establishes this ingredient beyond a reasonable doubt, notwithstanding the lack of the physical weapon as an exhibit.

Participation

In determining the issue of participation, the court must examine all evidence closely, bearing in mind the established general rule that an accused person does not have to prove his innocence. And that by putting forward a defense like alibi or any other, an accused does not thereby assume the burden of proving the defense except in a few exceptional cases provided for by law. It is up to the prosecution to disprove the defense of the accused persons by adducing evidence that shows that, despite the defense, the

offence was committed and was committed by the accused persons. ***See: Sekitoleko Vs Uganda [1967] EA 531,***

In a bid to prove participation, the prosecution relied on the evidence of PW2 the victim who stated that after the incident, they chased after the group and managed to arrest A2 who was later taken to Jinja Road Police Station. It was also his evidence that before they got hold of A2, A1 hit him with a bottle. PW2 also testified that he knew the accused persons before and that he had always met them at the spot where they attacked him. PW2 also stated that the incident happened at 4am in the morning.

In their defense, DW1 denied the offence and stated that he was at home and was only arrested the following day as he was heading for work. He denied knowing his co accused and testified that he only got to know him while he was in prison.

DW2 the co accused also denied the offence, he testified that on the day the incident is said to have happened, he was at home in Mbuya when people in plain clothes came and picked him up claiming that he had a case.

From the prosecution evidence, it is stated that the incident happened at 4am in the morning and there was only one single identifying witness. In order to guard against mistaken identity, the court must be cautious and ensure that the conditions were favorable for correct identification. It was the prosecution evidence that the alleged offence took place in the night, which raises the question of whether there was proper identification of the accused persons.

The established principles with regard to identification evidence were laid down in the case of *Abdallah Nabulere & Anor Vs Uganda Criminal Appeal No. 9 of 1978*. The court had this to say .....

"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."

In the instant case, the prosecution's reliance on the identification of the accused persons is bolstered by several factors that mitigate the challenges of a night time identification. First, the immediate pursuit and apprehension of A2 shortly after the incident creates a direct link between the crime and the arrest, reducing the likelihood of mistaken identity.

Regarding A1, the victim (PW2) specifically identified him as the assailant who struck him with a bottle, a detail supported by the victim's prior familiarity with both accused persons. PW2 testified that he regularly encountered them at the very location where the attack occurred, suggesting that his recognition was based familiarity rather than a fleeting glance of a stranger.

Consequently, despite the darkness at the scene, the combination of the victim's recognition of familiar faces and the immediate pursuit and arrest of A2 provides the court with sufficient credence and that the identification was reliable and accurate.

The accused persons maintained a defense of alibi, stating they were at their respective homes at the time of the offense. Legally, raising an alibi does not shift the burden of proof to the accused; they are not required to prove their absence from the crime scene. Instead, the burden remains squarely on the prosecution to disprove the alibi by placing the accused at the scene of the crime and establishing their identity as the perpetrators. This principle was clearly affirmed in ***Festo Androa Asenua and Another v. Uganda (S.C. Criminal Appeal No. 1 of 1998).***

In the present case, the prosecution has successfully discharged its burden. Based on the finding that the identification evidence was reliable, the accused were effectively placed at the scene of the crime. Furthermore, the arrest of A2 immediately and the positive identification of A1 serve to directly refute and destroy the defense of alibi raised by the accused persons. Accordingly I find that participation was proved

Section 88 of the Trial on Indictment Act provides that;

"When a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it."

Under this provision, if the prosecution fails to establish every element of a greater offence but successfully proves the facts of a lesser related one, the court has the power to convict the accused of that minor offence, even if it was not specifically listed in the original indictment. This prevents a miscarriage of justice when the conduct of the accused persons clearly constitutes a crime that is within the original charge.

In *Kyambadde V Uganda Criminal Appeal No.479 of 2020 [2024] UGA 146* the Court of Appeal held that ***"a minor cognate offence is a lesser offence that is related to the greater offence and shares several of the elements of the greater offence and is of the same category"***

Therefore, for an offence to be considered a minor cognate offence, it must satisfy three specific criteria. First, it must be minor, meaning it carries a lower maximum penalty than the original charge. Second, it must be cognate, signifying that both offences belong to the same category. Finally, the minor offence must be a subset of the major one; all its essential elements must already be present within the definition of the greater charge.

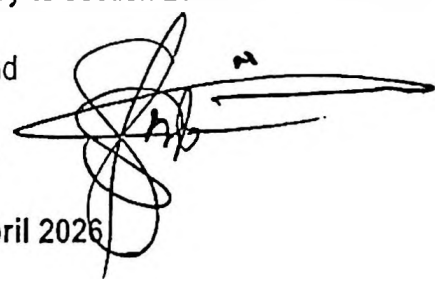
In the instant case, the accused was charged with aggravated robbery, an offence requiring proof of theft, violence, and the use of a deadly weapon. However, the evidence at trial failed to prove the element of theft and therefore the charge of robbery in any form cannot stand. In such a scenario, the court must look to the lesser offence revealed by the proved facts to determine if a minor cognate offence exists within the same category.

The offence of assault with intent to steal, provided for under Section 269 of the Penal Code Act, is a minor cognate offence of aggravated robbery. It is minor because it carries a significantly lower maximum penalty (five years imprisonment) compared to the capital nature of Aggravated Robbery. It is cognate because it falls in the same category; i.e. the same elements of an unlawful assault coupled with the intent to steal). Since these two

elements are essential ingredients of any robbery indictment, the accused is not taken by surprise by such a conviction because they are presumed to have been defending against the allegations of violence and criminal intent from the start of the trial.

Accordingly, I find the accused persons guilty of the offence of Assault with intent to steal
195 contrary to section 269 of the Penal Code Act and they are accordingly convicted.

I so find



Judge

2nd April 2026