THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL SESSION CASE NO. 0454 OF 2015

UGANDA……..PROSECUTOR

VERSUS

1. **OBUA POLYCAP**
2. **OTIM ALEX OKOCH……..… ACCUSED**

JUDGMENT

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

Introduction

The accused persons **OBUA POLIYCAP alias OTIM ALEX OKOCH** stand jointly indicted for the offence of aggravated robbery contrary to sections 285 and 286(2) of the Penal Code Act Cap 120 LOU (hereinafter referred to as the Act). It is stated in the indictment that the two accused and others still at large, on 12/7/2015, at Wilson Avenue in the Jinja District, robbed Munguriek Anthony of cash Shs. 12,500,000/-, M Horse phone, Airtel airtime worth Shs. 1,000,000 and a national ID and at or immediately before or immediately after the time of the said robbery, used a deadly, weapon to wit a knife, on the said Munguriek Anthony.

The accused denied the offence and their plea of not guilty was recorded on 7/2/2018. Mr. Muliro James represented the State, while the accused were represented by Counsel Stephen Muzuusa.

Brief Facts

The brief facts of the prosecution case are that on the night of 12/7/2015 at about 8.30pm, Anthony Munguriek (PW1) a resident of Wilson Road Jinja and an airtime salesman, was returning home. Upon reaching his gate, four men came out of the gate of his residence, attacked him and took away his bag containing money, a cell phone, national ID and a balancing book. They beat him severely, stabbed him and then left him unconscious. That using a tracking system, the stolen cell phone was traced to the accused persons who were then charged with aggravated robbery.

The two accused persons denied the offence. A1 Obua Polycap stated that he was summoned and assisted PW1 after the attack and only found, but did not steal the cell phone. A2 stated that he was not involved in the attack and received a cell phone from A1.

It is trite that on a charge of aggravated robbery, the prosecution has the burden to prove the following elements beyond reasonable doubt:-

i. A theft of property belonging to the victim
ii. Use of violence or threat of use of violence during the theft
iii. Possession of a deadly weapon during the theft
iv. Participation of the accused in the theft.

It is incumbent upon the prosecution to prove all four elements to the required standard, which according to the authority of **Woolmington Vs. DPP (1935) AC 462** and **Sekitolelo Vs. Uganda (1967) EA 53,** should erase all reasonable doubt of the accuseds' commission of the crime with malicious intent. Where the accused person raises a reasonable doubt, either through weakness of the prosecution case

or by his/her defence, then he must be acquitted. See for example **Abdu Ngobi vs. Uganda Criminal Appeal No. 10/1991 (Supreme Court).**

Proof of theft

Theft of the items in the indictment was not contested. I emphasize that, according to Section 254 PCA, theft is committed when a person fraudulently and without claim of right takes anything capable of being stolen. According to PWI, on the night of 12/7/15 at about 8.30am, he was man handled by four men as he entered his home gate. He struggled with them but they managed to take from him a bag containing airtime, Shs. 12,500,000, an M-Horse cell phone, national ID and balance book. According to PW2 and PW4 the cell phone was eventually traced and exhibited in Court as P. Exhibit 1. None of the other items were ever recovered.

PW1 was clear that the items were taken from by force which indicates that he was deprived of them without his consent or authority. One item, the phone, was later retrieved from one who is believed to have taken part in the robbery. The fact of theft and asportation was not contested. I would conclude that the first ingredient was proved to the required standard.

Use of violence during the robbery

According to PW1, he was attacked at his home gate. Two men converged from either side of his body, held him by the neck and dragged him towards a flower garden. They beat him badly on the right hand arm, chest and thighs and also stabbed him with an object that he was unable to identify then. This was indeed use of violence during the offence and I conclude that this ingredient has also been proved to the required standard.

Use of a deadly weapon

PW1 stated that as a result of the stabbing he suffered a swollen head, a stab on the left hand chest and thigh. He was later informed by a neighbor that the assailants attacked him with a knife. However, the alleged instrument used was never exhibited in court. It is provided under Section 286(3) (a) (i) of the Act that,

> *"Deadly weapon" includes any instrument made or adopted to ……..…..stabbing…..or any imitation of such instrument 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…"*

According to PW1, he lost consciousness and was hospitalized for several days. He did not know what instrument was used to attack him, and was only informed by a neighbor that it was a knife which was found at the crime scene. The alleged knife was neither shown on the sketch map nor exhibited in court. PW1 indicated that he was subjected to medical examination and his injuries were recorded in Police Form 3dated 24/7/15. The form was only exhibited for identification purposes (as PIDI) which would be an indication, that it was contested. That notwithstanding, in his submissions, defence counsel clearly stated that this particular ingredient was not contested which would mean that the form was likewise not in contention.

Even if uncontested, I am still reluctant to rely on PIDI. No reasons were advanced to explain why the weapon used in the robbery was not exhibited or even shown in the sketch map. The position in our law is that as much as possible, the weapon of attack should be exhibited in Court, and where it is not, it should be explicitly described. Justice Odoki (as he then was) in **Uganda Vrs Kaweke Musoke (1976)**

HCB 12, in the absence of evidence of the type of weapon used or a proper description of it, there would be doubt as to the nature of the weapon used, which doubt must be resolved in favour of the accused person.

PW1 the victim stated that he felt stabbing during the attack but fell into a coma as a result of the violence meted out against him. His examination was carried out 10 days after the attack, and the doctor described the object that caused his injuries as simply being 'sharp' without giving further particulars. The examining doctor was not called to explain the report which could have given better corroboration of A1's testimony of his injuries. It was a serious omission of the prosecution, for not calling that vital witness. In my view, the evidence fell short of proving that a deadly weapon was used during the robbery, which is an integral ingredient of the offence of aggravated robbery.

That notwithstanding, I am satisfied that a great degree of force and violence was used against PW1 during the attack. He was held by the neck, dragged and then stabbed by four men. His injuries were classified as 'harm'. The evidence of violence and injuries on PW1's body were not contested. I would hold therefore that PW1 was a victim not of aggravated robbery, but simple robbery as defined by Section 285 of the Penal Code Act which provides that-:

> *"Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery."*

<u>Proof of participation of the accused persons</u>

Ms Nakigudde submitted that the phone that PW1 lost during the robbery, was traced to one Otim Alex who revealed that it was given to him by Obua. It was eventually retrieved from one Okware John who had purchased it. Evidence was that all three men were resident in the same area. She argued that it could not be a coincidence that A1 who claimed to have rescued PW1, was the same person who picked up the phone and then kept it, instead of handing it over to police. In her view, the accused persons were properly placed at the crime scene which would mean, they took part in the robbery.

On his part, defence counsel argued that the conditions of identification were not favourable and indeed, PW1 admitted that he did not identify his assailants. That it was not plausible for A1 to have participated in the robbery and at the same time, been present at his place of work. That it was not disputed that A1 was only at the scene as PW1's helper and he did explain how he came to pick up the stolen phone and gave reasons why he did not hand it over to police. He contested the evidence that the phone was sold to Okware on the instructions of A1, and the only possible charge against him should have been being in possession of stolen property, but not aggravated robbery.

The decision of Court

PW1 was emphatic that he was never able to see any one of his assailants but was aware that at the material time, A1 worked as a security guard at a property opposite his home, where he was attacked. It follows then that prosecution evidence relied solely on circumstantial evidence.

In my decision of **Nankwanga Fauza &Ors Vrs Uganda CSC No. 243/2015**, I followed the decision of the Supreme Court of Nigeria sitting at **Abuja in**

Tajudeen Iliyasu Vrs The State SC 241/2013 which considered that evidence in great detail. It was held that circumstantial evidence -

> *"….. is evidence of surrounding circumstances which by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics….this is so for in their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person, caused the death of the deceased person. Simply put, it meant that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence.*
>
> *However the court cautioned that "….such circumstantial evidence must point to only one conclusion, namely that the offence had been committed and that it was the accused person who committed it. For the purpose of drawing an inference of an accused's person's guilt from circumstantial evidence, there must not be other co-existing circumstances which would weaken or destroy that inference…..Thus all other factors and surrounding circumstances must be carefully considered for they may be enough to adversely affect the inference of guilt….Each case depends on its own facts. However, one test which such evidence must, satisfy is that it should lead to the guilt of the accused person and leave no degree to possibility or chance that other persons could have been responsible for the commission of the offence.*

It was an undisputed fact that PW1 lost a smart phone and other property during the robbery. The cell phone was exhibited in court as P. Exhibit 1. PW2 testified that he was assigned the duty to track the phone which PW1 operated on No. 0703722133. Working with Airtel in Kampala, he secured its serial No.

352778064868834 and traced its user to PW2 Alex Otim Okoth on No. 0784551273. That Otim admitted having used the phone between 15/7/15 and 16/7/15, explaining that he had borrowed it from A1 who had requested him to find a buyer. That upon those instructions he sold the phone to one Okware for Shs. 70,000, the latter who was then arrested and handed over the phone to PW4 Chemonges, the latter who then handed it over to PW3 Detective Corporal Onapa, who exhibited and kept it in police stores. PW2 further stated that he conferred with PW1 who confirmed from the serial number that it was indeed his stolen phone that was retrieved from Okware. Okware was eventually released and never charged in court.

On his part, PW4 Chemonges stated that following a lead, he confirmed that A1 worked as a guard with Tight Security and was on the date of the robbery on duty at a property opposite PW1's home. He arrested and interrogated A1 who confessed that on the night of the robbery he was on duty and informed of the attack by a child. That he proceeded to where PW1 was attacked and found him lying down and crying for help. He organized for him to be taken to hospital and when further questioned, stated he was not aware that PW1 had lost any property in the robbery. Chemonges continued, that when he interrogated A2, he first denied knowledge of the phone, but on a second interrogation, he admitted having received the phone but insisted that A1 had given him the cell phone with instructions that he sells it, which he did. A1 admitted he gave the phone to A2, but that his instructions were that he takes it to either LCs or police.

Although both accused persons strongly denied having participated in robbing PW1, I am persuaded that the smart cell phone found with Okware was indeed the cell phone that PW1 lost during the robbery. There was an unbroken chain of

evidence that after it was stolen, it was tracked through proper channels and with the correct data, to confirm that A2 had used it a few days after the robbery. Upon arrest, A1 admitted having handed over the phone to A2, the latter who told some prosecution witness that he sold it to Okware on the instructions of A1.

PW1 identified the exhibited phone in court as the one that was stolen from him. Neither accused persons disputed the phone, only stating that it was not stolen, but found. That being the case, their involvement in the robbery could be inferred by the fact that they were found in possession of property stolen during the robbery soon after it happened; what in law would be referred to as the doctrine of "recent possession".

The Supreme Court in her decision in **Izongoza William Vrs Uganda Criminal Appeal No. 6/1998** when considering the above doctrine was of the view that the doctrine is merely an application of the ordinary rule relating to circumstantial evidence, and thus, the rules of that type of evidence should apply. In defining the doctrine the Court avised that:-

"In the case of circumstantial evidence surrounding a robbery or theft, if the prosecution adduces adequate evidence to show that the accused was found in possession of goods recently stolen or taken as a result of a robbery, the accused must offer some credible explanation of how he or she came to posses the goods otherwise the evidence of recent possession would justify his/her conviction."

The Court made also made reference to Section 112 Evidence Act.

The Court further advised that the guilt of the accused in this context can either be of stealing or of receiving articles in question. The Court is thus enjoined to treat

each case on its circumstances. Factors such as the nature of the property stolen, whether it is a kind that can readily be passed from hand to hand, the trade or occupation of the accused etc.

On the other hand, the Court in **Kigoye and Anor Vs Uganda (1970)EA 402,** had advise before a court can rely on the doctrine, the possibility of the accused being a receiver must be removed.

I would accordingly investigate the reasons advanced by either party to explain how they came in possession, and retained the phone.

A1 stated that he arrived at the crime scene soon after the robbery and assisted A1's wife in lifting A1 onto a motor cycle, which carried him to hospital. Early morning the next day at around 7am, while on his way from work, at a place called show grounds (a distance of about 1Km from the crime scene), he found the phone on the side of the road in the grass. That since he was still armed and proceeding for duty in another place, he handed over the phone to A2 with instructions that he hands it over to police. That by then he did not know A2 who he found on Main Street on the way to Iganga Road about half a kilometer from the crime scene.

On his part, A2 stated that before the incident, he had known A1 for a period of six months as a neighbor in Soweto village and a security guard with Tight Security. That on 13/7/15, while on his way to school, he met A1 who gave him the phone with instructions to take it to police. He did not do as instructed but instead, handed over the phone to one Okware John, also a neighbor in Soweto village, with the same instructions that he takes the phone to police. He never bothered to find out whether Okware carried out the instructions until his arrest on 15/7/15. In response

to questions put to him by the Court, he admitted retaining the phone for three days before handing it over to Okware, because he was very busy with school at the material time, and could not find time to take it to police.

A1 placed himself squarely at the crime scene. His testimony is that he was called to the scene just after the robbery and he found PW1 laying face down, injured and bleeding. He continued that he even had a short conversation with both A1 who asked him to call his wife. That he also talked to A1's wife and a neighbor, and then assisted them to load PW1 onto a motor cycle. PW1's version was different. He stated that he was beaten so badly and left unconscious. He came to three days later in hospital and explained his ordeal to the police. He did not mention A1's interventions after the attack and during cross examination, denied ever attempting to exonerate him.

I chose to believe PW1's version of events. This is because A1's conduct upon arrest was suspicious and evasive. According to PW4, upon his arrest he first denied knowledge of the phone or even knowing A2. Throughout the trial, he insisted that he did not know A2 at the time he gave him the phone, a fact which A2 disputed. He explained he had had known A1 as a village mate for six months before the incident, and one who worked as a guard with Tight Security.

In my view, A1 had no reason to be deceptive on this point, since his version was that he acted as a good Samaritan aiding a victim of a robbery and asking a friend to take the phone to the police. To explain his intervention, PW1 even took PW4 to the place where he allegedly picked the phone. If his version were believed, he must have known, when he picked the phone that it was likely an item dropped by the assailants on their way from the crime scene the previous night. Being a

security officer himself, it is inconceivable that he treated his discovery lightly by handing over the phone to A2, who at the time he regarded a stranger to take it to an LC or police.

To the contrary, according to PW4, when he first interrogated A1, he was specific that he did not know whether the PW1 had lost any item during the robbery. When questioned further, he changed that version and admitted having given the cell phone to A2. A2 contradicted A1's story by stating that A1 asked him to find a buyer for the phone, which he did, and that A1 was paid the purchase price of the phone in two installments.

The Courts are very wary of a witness who fabricate in matters that are material in a trial. The Court in **Khatijabhai Jiwa Hasham Vs Zenab d/o Chandi Nansi (1957) EA 38** advised that when a witness lies on a material point, his other evidence may be rejected. Also according to **Connel J in Field's Introduction on the Law of Evidence at page 37/54,** the falsehood should be considered in weighing the evidence , and it may be so glaring as to utterly destroy the confidence in the witness altogether. Where the fabrication is considered as being minor it can be rejected but the rest of the statement that is considered credible believed.

By his own testimony, A1 testimony admitted that on the night of the robbery he was on duty a mere 30M away from the crime scene. That fact was confirmed in P. Exhibit 5. Nothing would have prevented him from moving from his post and joining the gang that attacked PW1 and robbed him. If at all he assisted PW1, which I have rejected, he may have returned to his post and then pretended to return to assist PW1. It is possible as stated by PW4, that he was aware of PW1's

station in life, way laid and then robbed him. He stole the phone from PW1 during the robbery and the chain of evidence led that phone to him in a matter of few days. That evidence eliminates all possibility that A1 was a mere innocent receiver of the cell phone. In my view, his fabrication was flagrant and went to the root of his testimony. It taints his version that he was merely at the scene to assist PW1 and that he picked the cell phone a few meters away from the scene of the robbery. I choose to treat it as pack of lies.

In my view, A1 participated in the robbery and I hold so.

PW2 was equally culpable. According to PW4, upon his arrest, he first denied knowledge of the cell phone but changed that version the next day. According to PW2, upon arrest, A2's story was that between 15/7/15 and 16/7/17, he had borrowed the phone from A1 who then told him to find a buyer which he did. A2's version in court was that he met A1 on the morning of 13/7/15, at 7:30am who gave him the phone to take to police. He did not so and instead handed it over to one Okware because he was busy, and then forgot about it.

I chose to believe prosecution's version. The reasons given by A2 not to take the phone to the police himself were lame. He should not have accepted the serious responsibility of taking a phone to police if he was otherwise busy. In response to questions by the Court, he admitted keeping the phone for three days before handing it over to Okware. It was proved by PW2 that when the phone was traced, it was confirmed that A2 had used it for two days. A2 who claimed to be too busy to hand over the phone to police, did not explain why he inserted his sim card and used the phone for that period of time.

That said, A2's testimony proves that he was aware or should have been reasonably aware as he received the phone from A1, and his agreement to take it to police, that it was stolen phone or one with a dicey history. His first reaction to deny knowledge of the phone and his general conduct after he received the phone from A1, depicts one who was aware or had reason to believe that the phone was stolen or feloniously or unlawfully taken. Even with that knowledge, he admitted retaining the phone for three days before allegedly handing it over to Okware to take to police. I would thus believe prosecution evidence that his instructions by A1 were to find a buyer for the phone which he did. It was to this buyer, one Okware, to whom the phone was traced. Had he been consistent, he should have taken the trouble to call Okware as his witness to corroborate his version that Okware was never a buyer. Ordinarily, an accused has no duty to prove his defence, but when the doctrine of recent possession is invoked, then it is incumbent upon that accused person, to adduce any and all evidence in proof of the fact that his possession of what is confirmed to be stolen property, is innocent.

That said, there was no other circumstantial evidence unequivocally connecting A2 to the robbery. I would instead find that he knowingly received and retained a stolen smart phone from A1, which in our law is a felony.

In summary, A1's participation in the robbery was with circumstantial evidence, proved beyond reasonable doubt. I accordingly find him guilty of the offence of simple robbery contrary to section 285 and 286(1)(b) of the Penal Code Act.

I have with reason found that A2 knowingly received property that was conclusively proved, to have been feloniously stolen. I accordingly find him guilty

of the offence of receiving stolen property contrary to section 314(1) and Section 314(b) of the Penal Code Act.

I so order.

Signed

EVA K. LUSWATA
JUDGE
27/6/2019.