THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATES COURT OF NWOYA AT ATIAK

CRIMINAL CASE NO. 067 / 2024

UGANDA ::: PROSECUTION

VS

AGU BASHIR ::: ACCUSED

Before: His Worship Kyembe Karim ESQ

Magistrate G.I

JUDGMENT

Introduction.

By charge sheet dated 07th May, 2024, and sanctioned the same day, the Accused was charged with one of theft contrary to, then, **Section 254(1) and 261, now section 237** and one count of Assault occasioning actual bodily harm contrary to then **Section 236, now, Section 219 Penal code Act, cap 128,** Laws of Uganda, 2023 revised edition.

Brief background.

It was the prosecution's allegation that the accused, a male adult aged 23 years, an Aringa by tribe, mason by occupation, resident of Lorikowo West village, Elegu Town council in Amuru district, on the 20th day of April, 2024 at Elegu Town Council in the Amuru district stole two mobile phones, an Infinix Smart and one Intel button, battery power bank and clothes, all valued at UGX. 2,425,000/= *(Uganda shillings two million four hundred twenty five thousand shillings only),* the property of a one, Anyase Simon.

In count 2, it was alleged that the accused on the 30th Day of April, 2024 at Elegu Town council in the Amuru district assaulted a one Anyase Simon thereby causing him actual bodily harm.

When the charges were read to the Accused, he denied all the Charges and a plea of NOT GUILTY accordingly entered.

By denying the Charges, the accused placed in issue all and every essential ingredient of the offences with which he is being charged.

The prosecution bears the burden to prove the ingredients beyond reasonable doubts as laid out in the case of **MILLER VS MINISTER OF PENSIONS (1947)2 ALLER ER AT 372**.

The burden does not shift to the accused and the accused is only convicted on the strength of the prosecution evidence and not the weakness of the Accused's defence as laid out in **SEKITOLEKO VS UGANDA (1967) EA AT 531**.

Bearing the above principles in mind, I am aware and I have cautioned myself that the accused has no obligation to prove his innocence.

In attempt to prove the charge, the prosecution first called the complainant who testified as **PW1-Anyase Simon**.

Pw1 testified that he knows the accused since they live in the same village. That on the said 30th April, 2024, he reported the theft of his items at Elegu police station and the accused was arrested over the same. That before reporting at police, Pw1 had indulged the services of a phone tracker called Tonny, who gave Pw1 details of the button phone.

That when he received the said details, he gave them to the police, who later retrieved the accused's contact and they called him to the police but he refused.

Pw1 further told court that he then called the accused's number and pretended to be a one, Majid and arranged an appointment. That when he reached the agreed venue, Pw1 asked one of the people around to assist with a phone, of which he then used to call the accused's number, whereupon, the said phone showed a saved name as "Lazer." When Pw1 asked the said person who Lazer was, the said person pointed out the accused who was in a furniture workshop.

It is at that time that Pw1 asked the accused to come because the police wanted him but the accused refused which prompted Pw1 to take matters in his own hands and arrest the accused while asking other members to assist him and in that scuffle, the accused wounded Pw1.

On cross-examination, Pw1 testified that the phone rang while flashing the lights in the accused's pocket and the said phone was taken to police. That the said phone fell from the accused's pocket during the arresting scuffle and the lady who picked it and took it to police was also present and that in the course of the arrest, that's when the accused a metal implement which has never been recovered to hit Pw1. To prove the injuries suffered, the prosecution exhibited a **PF3** which was admitted as **PEX1.**

Prosecution also called a one, **Achidi Godfrey** whose testimony was taken down as **Pw2.** His testimony, in a nutshell was the medical expert confirmation of the contents of **PEX1**

In **University Of Ceylon VS Fernando (1960), WLR 233** Court observed that the opportunity to cross examine the adversary witness is a fundamental one but where that opportunity is extended and the party does not take it up, does not amount to denial of that opportunity. In this case, the accused duly exploited the opportunity.

Upon closure of the prosecution case and having heard all the evidence from the prosecution this court, on the 08th October, 2024 ruled that a prima facie case had been established, hence the accused was placed to his defence.

All the three modes of defence were explained to the accused. That is;

1. Give evidence on Oath, whereby he will be subjected to cross examination by the prosecution.
2. Give evidence not on Oath whereby the accused will not be subject to cross examination.
3. Elect to keep silent.

The Accused opted to give evidence on Oath and his testimony was taken down as **Dw1-Agu Bashir.**

Dw1 testified that on the 20th April, 2024, he had agreed with a one, Maliyamungu Yasini to go and do some work in Sudan. Some delays occurred but in the course of going back home to collect the tools, they met a certain lady called Nadia who was demanding UGX 15,000/= from the said Yasini, who did not have changed money to pay. After a while, Dw1 met with the Pw1 who first called him "Churu" and as he approached, he grabbed Dw1 and the colleagues joined him, searched him, removed his shoes and with a rope, they tied Dw1's hands and legs while others were slapping him. The people who saw

what happened then gathered, including the market chairman who intervened to stop the beating and took Dw1 to one of the stores.

On cross-examination, Dw1 denied ever making a statement at police since he doesn't even know how to write but the prosecution exhibited the said statement and the same was admitted as **PEX2**

THE LAW AND ANALYSIS OF THE EVIDENCE

Count 1: - Theft

The offence of theft is created under formerly, **Section 254(1) and 261** of the Penal Code Act, Cap 120, and now **section 237** Cap 128 Laws of Uganda, 2023 revised edition.

According to Section 2 of the Evidence Act Cap 8 "evidence" denotes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and includes testimonies by accused persons, admissions, judicial notice, presumptions of law and ocular observation by the court in its judicial capacity.

Section 237 Penal Code Act Cap 128 Laws of Uganda, 2023 revised edition provides:

> *A 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.*

To prove the charge the prosecution has to prove beyond reasonable doubts the following ingredients.

i. The accused fraudulently took something,
ii. Anything capable of being stolen.
iii. the property of someone else
iv. Without claim of right.
v. An intention to permanently deprive the owner of the thing.
vi. Accused's participation

<u>Evaluation of Ingredient i, ii, iii & iv</u>

The legal position in Uganda, as stated by the Supreme Court in **Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993,** regarding what the crime of theft is, stands as follows:-

> *"There must be what amounts in law to an asportation (that is carrying away) of the goods of the complainant without his consent… The removal, however short the distance maybe, from one position to another upon the owner's premises is sufficient asportation… "*

Property will be regarded as belonging to any other person having possession or control of it. It is the reason why a person may be liable for theft of their own property if it is deemed to be in the possession or control of another.

> *For example in **R v. Turner (No 2) [1971] 1 WLR 901,** the accused took his car into a service station for repairs. When he went to pick it up he saw that the car was left outside with the key in. He took the car without paying for the repairs. He was found guilty of theft of his*

own car since the car was regarded as belonging to the service station at the time as they were in possession and control of it.

The prosecution must also prove an intention to permanently deprive the owner of the thing allegedly stolen. This is sometimes called *mensrea*. In **R VS CUNNINGHAM (1957)2 QB 396**, court stated that:

" mensrea is the actual intention to do a particular kind of harm or recklessness as to whether such harm will occur or not."

In the instant case, Pw1 testified that:

"…on the said 30th April, 2024, I reported the theft of my items at Elegu police station and the accused was arrested over the same. That before reporting at police, I had indulged the services of a phone tracker called Tonny, who gave me details of the button phone. When I received the said details, I gave them to the police, who later retrieved the accused's contact and they called him to the police but he refused…"

From the above testimony, I note that the complainant made report of alleged loss of his items a whole 10 days later, the same having been allegedly stolen on the 20th April, 2024 as per the charge sheet.

I also note that the complainant did not even know the particulars of his allegedly stolen phone. He only came to know the particulars thereof from the phone tracker, a one, Tonny and that's when he went to the police.

I have not seen any evidence of ownership that was exhibited by prosecution to prove that the allegedly stolen phone belonged to the complaint or that it had lawfully come into his possession prior to the alleged theft.

On cross-examination, Pw1 testified further that:

> *"…the phone rang while flashing the lights in the accused's pocket and the said phone was taken to police. The said phone fell from the accused's pocket during the arresting scuffle and the lady who picked it and took it to police was also present…"*

From that testimony, it seems to me that the allegedly stolen phone was recovered and taken to police.

However, it was not exhibited in court. Neither was any exhibit slip exhibited and the lady who is alleged to have picked the same also did not come to testify in court.

For those reasons, this court is not satisfied with the existence of the allegedly stolen phone in the first place.

As no phone has been proven to have existed in the first place, it cannot be said that it was stolen.

I'm alive to the principle laid down in ***Haji Asuman Mutekanga –Vs- Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995,*** whereof it was stated that:

> *"…it is trite law that strict proof does not necessarily always require documentary evidence. Oral testimony is good evidence to prove a fact in issue…"*

However, after hearing all the prosecution evidence and considering that the complainant did not even know the particulars of his allegedly stolen phone, the clandestine steps taken by the accused before reporting at the police and the long waiting of 10 days before reporting at police lives this court in great doubt as to the motive behind the instant charge.

This court is also alive to the principle laid out in **ABDALLA BIN WENDO & ANOR V.R (1953) EACA AT 166** and **RORIA V REPUBLIC (1967) EA AT 583** and also, in **BOGERE MOSES & ANOR V UGANDA SC cr Appeal no.1 of 1997** to the effect that where prosecution does not produce identifying witnesses, the court must exercise the greatest care so as to satisfy itself that it is free from the danger of mistaken identity.

In this case none of prosecution witnesses testified to having seen the accused steal the phone. The only evidence that attempted to link the accused to the crime was that of Pw1 when he told court that:

> *"…the phone rang while flashing the lights in the accused's pocket and the said phone was taken to police. The said phone fell from the accused's pocket during the arresting scuffle and the lady who picked it and took it to police was also present…"*

But like I have already mentioned, the same was not exhibited in court, yet, the same testimony states that the said phone was taken to police.

Article 28 of The Constitution of the republic of Uganda, 1995 presumes all accused persons innocent until proven guilty or if they have pleaded guilty.

The prosecution bears the onus to adduce evidence before this court can take away this constitutional presumption of innocence.

In **UGANDA VS WANYAMA STEVEN CRIMINAL SESSION CASE NO 0405/2015** Hon. Justice Steven Mubiru held that for the prosecution to secure a conviction there must be credible and direct circumstantial

evidence placing the accused at the scene of crime as an active participant in the commission of the offence.

In this case, the prosecution evidence, especially of Pw1 is of the eye witness who arrested *(the irregularity notwithstanding)* the accused before handing him over to police. He was the complainant, investigator and *"arresting officer"* in his own case!! This raises considerable doubt as to whether the allegedly stolen phone was not planted on the accused. To say, evidence was tampered with by the complainant himself.

In **UGANDA V WANYAMA STEVEN** supra, court further held that in a case depending exclusively on circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The circumstances must be such as to produce moral certainty to the exclusion of any reasonable doubt. It is necessary before drawing the inferences of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference as held in **SHUBADIN MERALI & ANOR VS UGANDA (1963) EA 647.**

In the instant case, like I have already noted here-above, prosecution witnesses' credibility was in dire want, besides lack of direct evidence.

For those reasons, it is my finding that the evidence before me does not meet the minimum threshold of establishing proof of ingredients i,ii,iii & iv beyond reasonable doubt as specifically required in **SEKITOLEKO VS UGANDA,** Supra.

The evidence before me does not establish that there existed a phone, the property of or in possession of the complainant and that the same was asported fraudulently with intention to permanently deprive the owner of the same.

As the said ingredients have not been proven, it is redundant to examine the ingredient of participation of the accused on the consummation of the offence with which he is being charged.

I find that the prosecution failed to prove ingredients i,ii,iii & iv ingredient beyond reasonable doubts.

Having found that the prosecution failed to satisfy court on all the first four ingredients of the offence charged, I find the Accused NOT GUILTY and ACQUIT him of the offence of theft contrary to, then, **Section 254(1) and 261, now section 237 Penal Code Act** Cap 128 Laws of Uganda, 2023 revised edition.

Count ii ASSUALT OCCASSIONING ACTUAL BODILY HARM Contrary to, then, **Section 236** of the Penal Code Act Cap 120, and now **Section 219** Cap 128 Laws of Uganda, Red volumes, 2023 revised edition.

The prosecution was required to prove that;

Ingredients:

i. there was an unlawful assault of the complainant,
ii. as a result of which the complainant sustained bodily injury
iii. the accused's participation.

Evaluation of evidence:

<u>Ingredient i</u>: There was an unlawful assault on the complainant

It is the general presumption that every harm is unlawful unless there is evidence that the accused needed to defend himself or acted under provocation or other lawful excuse.

The accused's defence from what I gathered from his testimony was self defence and provocation when he was assaulted with slaps and being tied with ropes by the complainant in the company of colleagues in the course of effecting his arrest.

An accused who sets up a defence does not have a duty to prove it, but it's the duty of the prosecution to disprove it as held in ***Vicent Rwamaro v. Uganda [1988-90] HCB 70.***

The question of whether a person acted in self-defense or under provocation or not is one of fact and each case must be considered and judged on its peculiar facts and surrounding circumstances as a whole.

The accused raised the defense and is not expected to prove it beyond reasonable doubt. All he has to do is adduce the facts alleged to constitute the defense.

Once some evidence is adduced as to make the defense available to the accused, it is up to the prosecution to disprove it. The defense succeeds if it raises some reasonable doubt in the mind of the court as to whether there is a right of self-defense or in this case, whether there was provocation from the complainant.

Similarly, it is an accepted proposition of law that a person cannot avail himself of the plea of self-defense when he was himself the aggressor and willfully brought on himself, without legal excuse, the necessity of

inflicting harm as stated in **Uganda v Okech and Anor Criminal Appeal No. 21 of 2015 High Court at Gulu**.

In the instant case, the evidence of both prosecution and defence witnesses point to the fact that the encounter ensued after the complainant attempted to arrest the accused.

Pw1 testified that:

> *"…the said phone fell from the accused's pocket during the arresting scuffle and the lady who picked it and took it to police."*
>
> *"…in the course of the arrest, that's when the accused used a metal implement which has never been recovered to hit me…"*
>
> *To prove the injuries suffered, the prosecution exhibited a **PF3** which was admitted as **PEX1.***

The accused in his defence testifying as Dw1 told court that:

> *"…the complainant grabbed me and the colleagues joined him, searched me, removed my shoes and with a rope, they tied my hands and legs while others were slapping me. The people who saw what happened then gathered, including the market chairman who intervened to stop the beating and took me to one of the stores…"*

Ironically, from the above testimony, it is the complainant who was himself the aggressor and willfully brought on himself, without legal excuse, the necessity of inflicting harm. He held himself out to investigate, arrest the accused on allegations which he had not yet even registered with police.

For those reasons, this court finds that the accused's defence of self defence and provocation succeeds. The net effect is that the prosecution failed to prove this ingredient.

<u>Ingredient ii:</u> as a result of which the complainant sustained bodily injury

In ***Uganda v. Eboru s/o Emeu [1979] H.C.B 169,*** it was stated that on a charge of assault occasioning actual bodily harm, there is need for medical evidence to ascertain the nature of the harm.

In this case, prosecution led testimony of Pw2 and exhibited **PEX1** – Police Form 3 showing the medical examination of the complainant.

This court is satisfied that this ingredient was proven beyond reasonable doubts.

<u>Ingredient iii:</u> the accused's participation.

Pw1 testified that:

> *"…in the course of the arrest, that's when the accused used a metal implement which has never been recovered to hit me…"*

The accused in his defence testifying as Dw1 told court that:

> *"…the complainant grabbed me and the colleagues joined him, searched me, removed my shoes and with a rope, they tied my hands and legs while others were slapping me. The people who saw what happened then gathered, including the market chairman who intervened to stop the beating and took me to one of the stores…"*

From the testimony above, this court is also satisfied that this ingredient was proven beyond reasonable doubts.

However, since one of the ingredients was not proven to the satisfaction of court, this court is compelled to find that the charge has not been proven to the required standard. Accordingly, the accused is also acquitted on <u>count ii.</u>

In conclusion, I make the following orders.

1. I hereby I find the Accused NOT GUILTY and ACQUIT him of the offence of theft contrary to, then, **Section 254(1) and 261, now section 237 Penal Code Act** Cap 128 Laws of Uganda, 2023 revised edition.

2. I also find the Accused NOT GUILTY and ACQUIT him of the offence of ASSUALT OCCASSIONING ACTUAL BODILY HARM Contrary to, then, **Section 236** of the Penal Code Act Cap 120, and now **Section 219** Cap 128 Laws of Uganda, Red volumes, 2023 revised edition.

3. The accused should forthwith be set free unless he is being held for any other lawful reason.

I so order.

Dated at ATIAK this …17TH…….day of ……DECEMBER………2024

…………………………………….

HIS WORSHIP KYEMBE KARIM

LEARNED MAGISTRATE GRADE 1