THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATES COURT OF NWOYA AT ATIAK

CRIMINAL CASE NO. 102 / 2024

UGANDA :: PROSECUTION

VS

KARANGWA DAVID :: ACCUSED

Before: His Worship Kyembe Karim ESQ

Magistrate G.I

JUDGMENT

Introduction.

By charge sheet dated 10th August, 2024, and sanctioned on the 13th August, 2024, the Accused was charged with one of theft contrary to, **Section 237 and 244 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 42 years, a mukiga by tribe, peasant by occupation, resident of Lorikowo West village, Elegu Town council in Amuru district, on the 04th day of August, 2024 at the Parliament Bar and Lodge in Elegu Town Council in the Amuru district stole money in cash worth UGX.2,500,000/=*(Uganda shillings two million five hundred thousand only)* the property of a one, Lamaro Prossy.

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

By denying the Charge, the accused placed in issue all and every essential ingredient of the offence 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-Lamaro Proscovia**.

Pw1 testified that she knows the accused since he was working as her cashier at the bar called *"the parliament"* in Elegu Town council. That it was on the 5th August, 2024, around 8:00am when she got a call from her neighbor about an incident that had transpired at the said bar. That she rushed to the said business premises and managed to appear, even though she had been in hospital, having undergone an operation. That when she reached the premises, she found the accused tied with a shoe lace on the arms, a T-shirt on the feet and a handkerchief on the neck while some other customers had approached to witness.

Pw1 told court further that upon arrival, the accused uttered words ***"Mummy I have been robbed."*** That Pw1 first went to check on her items and thereupon, the accused told her that people had stolen all the money and that it is only the money in cash that had been stolen. That at that point, Pw1 was surprised as to why the alleged thieves had not stolen the new motor cycle, the laptop, the flat screen TV and other valuable items instead.

That at that point, Pw1 then called police who came to the scene and conducted a body search on the accused and discovered UGX.150,000/= in his pocket, and yet he had said he had nothing on him. That on being questioned, the accused said that the robbers gave him that money and asked him to run away.

That when the accused was taken to police, the accused encouraged the police to also go to his home/hotel and check his bag, which they did and at first, they found nothing but later found the money amounting to UGX.730,000/= sewn in the said bag and to this, the accused said that it was part of the money the thieves had given him to run away, but for him, he did not.

Pw1 testified further that before going to hospital, the accused used to bring to her proceeds of day's sales but when she fell sick for about 21 days, Pw1 did not receive the money from the accused for about 9 days after her operation. Pw1 testified that the money was collections from the lodging facilities, bar and the pool table. That while at police, the accused stated that he had UGX.1,800,000/= in the bar counter but he did not know how much had been taken.

Pw1testified further that her lodging facilities comprise of 6 rooms each at UGX.15,000/= for the 21 days she was under hospitalization

amounting to a total of UGX.1,890,000/= and that the pool table used to gather UGX.130,000/= up to UGX. 150,000/= per day amounting to abo

That when Pw1 confronted the accused asking him why he had stolen from him, the accused replied ***"Madam, I stole from you but I was buying different alcohol /crates."***

On cross-examination by the accused, Pw1 told court that the accused was the only one at the counter together with the girls and he never asked for security; that she only came to discover the theft in the said morning but she didn't know when the money was stolen, that they have a list of the people who utilize the lodging facilities and they write their names together with amount of money paid and before going to hospital, Pw1 together with accused used to balance the books together and the night they were supposed to balance again is the night when the accused claimed to have been robbed . That at the said bar, there are 6 workers including the accused whereof the girls sleep behind and the accused sleeps at the counter and it is the accused who determines when to close the bar depending on the inflow of customers.

On re-examination, Pw1 testified further that all workers were present but they work from the block behind and that it is the accused who works at the front and that she did not find any injuries on the accused.

NO.73477 Detective Corporal Kwazire Faisal testified as the 2nd prosecution witness and his testimony was taken down as **Pw2.**

Pw2 testified that he knows the accused who was a suspect in a case of theft. That on the 5th August, 2024 at around 6;00am, he received a call from the O/C CID, a one, Emmanuel Okot, who requested him to respond to a call from a bar called *"the parliament"* whereof it was

alleged that there was someone who had been tied up. That Pw2 immediately also received a call from Pw1 and upon arrival, he found people at the scene and the suspect, now accused's hands were tied up with a shoe lace, legs tied with a T-shirt and the neck with a handkerchief. That when Pw2 asked what had happened, the accused told him that armed robbers entered the bar, tied him and removed cash from him and he also said that he had all the money that he had kept for the period when his boss was away on him.

Pw2 testified further that, on trying to untie the accused, he noticed that the knots were not strongly tied, even the hands could easily be untied and that there was no sign of violence on him.

That when Pw2 asked the accused on why he did not call for help or make alarm, the accused responded that he did but no one came to his rescue. That Pw2 then conducted a body search on the accused, whereupon he discovered UGX.150,000/= on him and people ganged up to beat him but pw2 stopped them. That when Pw2 asked the accused about the money he had discovered on him, the accused stated that the robbers gave him the said money and advised him to escape but he did not give a reason why he did not escape.

That at that point, Pw2 placed the accused on a motorcycle because the situation at the scene was becoming intense and took him to the police station whereof, the complainant followed them as well. That while at the police station, the accused asked for his back pack he had left at the bar and Pw2 personally went and collected it and brought it to the police station, whereof, he also searched the same in the presence of the accused, complainant and other police officers.

Pw2 then noticed that the said bag had been cut and money stashed therein and sewn back together. The money was counted and it totaled UGX.669,000/= and when questioned, the accused stated that the said money was also part of the money the robbers gave him before advising him to flee. That Pw1 exhibited the money and also recorded relevant statements from fellow workmates present, compiled the file and that the total money recovered from the accused was UGX.819,000/= and in proof thereof, prosecution exhibited an Exhibit slip dated 5th August, 2024 which was admitted as **PEX1** and a sketch plan of the crime scene admitted as **PEX2.**

On cross-examination by the accused, Pw2 testified further that it is not his first time to go to the parliament bar (crime scene), he is not a director there and that the accused formerly worked at another bar whereof he sustained a wound which he showed court.

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 19th November, 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-Karangwa David.**

Dw1 testified that on the 5th August, 2024, he was approached by customers at around 2:00am who asked him whether there were available rooms for lodging, to which he responded, yes. The said customers requested to check the rooms, of which they appreciated. On retreating back to the counter in the bar, the customers gave Dw1 a UGX.50,000/= note and Dw1 gave them back change of UGX.35,000/=. One of the said customers then gave Dw1 UGX.10,000/= to purchase some refreshments. The said customers left and returned later after about 20 minutes and knocked stating: *"Manager, Nkomyeewo."*

That when Dw1 opened, instead, 6 people entered and they had knives, bottles and they asked Dw1 for money re-stating that they had seen Dw1 with money and that he had even given them change.

That they said people beat Dw1 and beat him with a bottle and tied him up with ropes. That they used shoe laces to tie Dw1's legs using a T-shirt they had found in the counter. That the money Dw1 had in the counter was UGX.1,200,000/= and he didn't remember how much was in the pool table but they had collected that money for 21 days, the period when Pw1 was not around. He testified further that He had bought 5

crates of beer at UGX. 355,000/= feeding for 21 days at a cost of 10,000/=, paid electricity of 10,000/= for every 3 days amounting to 70,000/=, D-Light solar for 2 days at a cost of 66,000/=, cartons of view water at a rate of 7500 totaling 60,000/= and generator Petrol at 56,000/=

Dw1 further stated that he gave the robbers UGX.1,200,000/= in total and at around 4:00am, he made an alarm but it was drizzling and it is around 6:00am when a customer saw him and called the neighbors. That it is that male customer who assisted Dw1 to stand and that's where the police found him. That Police found Dw1 with UGX. 150,000/= which belonged to his friend called Emma, having sent the same to buy a phone but the police officer said, it seems that was the money that had been given to Dw1 in order to run away, to which, Dw1 responded that, No.

On cross-examination by the prosecution, Dw1 testified further that his role was to sale and collect the money and he was also in charge of the lodging facilities, that he had a wound before, but it was re-opened when he was attacked with a bottle, that he was tied with shoe laces brought by the said robbers and he only managed to make alarm around 4:00am after gaining some consciousness.

THE LAW AND ANALYSIS OF THE EVIDENCE

The offence of theft is created under formerly, **Section 254(1) and 261** of the Penal Code Act, Cap 120, and now **Sections 237** and **244** 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.*

As regards taking of money, **Section 237(2)(e) of the Penal Code Act** states that a person who takes such money with an intent to use it at the will of the person who takes or converts it, although he/she may intend after words to repay the amount to the owner still commits the offence of theft.

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

Evaluation of Ingredient i, ii, iii & iv

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:

> *"…at that point, I then called police who came to the scene and conducted a body search on the accused and discovered UGX.150,000/= in his pocket, and yet he had said he had nothing on him. On being questioned, the accused said that the robbers gave him that money and asked him to run away…"*
>
> *"…the accused encouraged the police to also go to his home/hotel and check his bag, which they did and at first, they found nothing but later found the money amounting to UGX.730,000/= sewn in the said bag and to this, the accused said that it was part of the money the thieves had given him to run away, but for him, he did not…"*

In corroboration hereof, Pw2 testified that:

> *"…then I conducted a body search on the accused, whereupon I discovered UGX.150,000/= on him…"*

In his defence to the aforesaid evidence, the accused, testifying as Dw1 told court that:

> *"…Police found me with UGX. 150,000/= which belonged to my friend called Emma, having sent the same to buy a phone but the police officer said, it seems that was the money that had been given to me in order to run away, I responded that, No…"*

From the testimony above, it seems to me that indeed the UGX. 150,000/= was recovered from the accused. This, he did not dispute but he explained that his friend, a one, Emma had sent it to him to purchase a phone. This raised some doubt as regarding the source of the said 150,000/=.

However, there was also the UGX.730,000/= recovered from the accused's back pack whose source was not explained. At police, he stated that it was part of the money left for him by the robbers so as to flee, but while in court, he had no explanation for the same.

This court is left wondering, if the said robbers hit the accused with a bottle which led him to lose consciousness, how did the said 730,000/= get stashed away in the accused's back pack with such precision that the said bag had to be sewn back together?

Similarly, why did the said robbers not also steal the said 150,000/= found in his pockets when, evidently, the accused had lost consciousness?

Like I set out in the introduction, an accused is not under compulsion to testify. If he elects to testify, everything he tells court is evidence and can be relied upon as provided in **Section 2 of the Evidence Act Cap 8.**

Ironically, when Pw2 was untying the accused, he noticed that the knots were not firm and did not see any sign of violence. He testified that:

> *"…on trying to untie the accused, I noticed that the knots were not strongly tied, even the hands could easily be untied and that there was no sign of violence on him…"*

On the other hand, Pw1 testified further that:

> *"…at that point, I was surprised as to why the alleged thieves had not stolen the new motor cycle, the laptop, the flat screen TV and other valuable items instead..."*

From that testimony as a whole, this court is not convinced as to the veracity of Dw1's defence/testimony in as far as it alleges that robbers

appeared at the crime scene and stole the money while living behind the new motorcycle and other valuable items and the UGX. 150,000/= recovered from the pockets of the accused.

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.

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."***

The accused did not make alarm until he was discovered by a customer who had come to the lodges.

From my evaluation above, I have already found that the disappearance of the said money or circumstances surrounding its disappearance

cannot be explained away by Dw1's testimony alleging that robbers tied him up and robbed the money.

On the other hand, prosecution evidence is quite convincing. This court is satisfied that there existed money, the property of Pw1.

This Court is also satisfied that the said money, hitherto in the custody of the accused has since disappeared. Part of it was recovered from the accused's pockets and from his back pack while the rest has not been recovered.

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.

The evidence before me fully establishes that there existed money, the property of the complainant and that the same was asported fraudulently with intention to permanently deprive the owner of the same.

It is my finding that the said ingredients have been proven to the satisfaction of court beyond reasonable doubts.

I find that the prosecution successfully proved ingredients i,ii,iii & iv ingredient beyond reasonable doubts.

Ingredient v: participation of the accused

Pw2 testified that:

"…on trying to untie the accused, I noticed that the knots were not strongly tied, even the hands could easily be untied and that there was no sign of violence on him…"

Pw1 testified further that:

"…at that point, I was surprised as to why the alleged thieves had not stolen the new motor cycle, the laptop, the flat screen TV and other valuable items instead..."

Testifying in his defence as Dw1, the accused told court that:

"…I gave the robbers UGX.1,200,000/= in total and at around 4:00am, I made an alarm but it was drizzling and it is around 6:00am when a customer saw me and called the neighbours…"

From my evaluation of ingredient i,ii,iii & iv, I have already found and rejected the accused's plea that he was robbed and tied down. Mostly, I rejected that defence because the said robbers would ordinarily have stolen the UGX. 150,000/= found on the accused at the crime scene.

I have looked at all the exculpatory facts adduced by the accused and they are extremely incompatible with his innocence. I find so, because I did not find them truthful or capable of explanation upon any other reasonable hypothesis than that of guilt of the accused as the sole participant.

For those reasons, I also find that prosecution proved this ingredient beyond reasonable doubts.

Having found that the prosecution satisfied court on all the ingredients of the offence charged, I find the Accused GUILTY and CONVICT him of

the offence of theft contrary to **Section 237 and 244 Penal Code Act** Cap 128 Laws of Uganda, 2023 revised edition.

In conclusion, I make the following orders.

1. I hereby I find the Accused GUILTY and CONVICT him of the offence of theft contrary to **Section 237 and 244 Penal Code Act** Cap 128 Laws of Uganda, 2023 revised edition.

2. I order restitution of the said stolen money amounting to UGX.2,500,000/=, less by the total money recovered from the accused and given back to the complainant, *that is,* UGX.819,000/= comprised in Exhibit slip dated 5th August, 2024 which was admitted as **PEX1**,therefore te accused should pay 1,681,000/= (one million six hundred eighty one thousand shillings only).

3. The accused shall continue on remand until hearing on *allocutus* and subsequent sentencing.

I so order.

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

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HIS WORSHIP KYEMBE KARIM

MAGISTRATE GRADE 1