

THE REPUBLIC OF UGANDA
IN THE CHIEF MAGISTRATES COURT OF PALLISA AT PALLISA
CRIMINAL CASE NO. 0400 / 2023

UGANDA PROSECUTION

VS

KYABAMU EMMANUEL ACCUSED

Before: His Worship Kyembe Karim ESQ
Magistrate G.I

JUDGMENT

Introduction.

By charge sheet dated 24th October, 2023, and sanctioned on 25th October, 2023, the Accused was charged with one count of stealing cattle Contrary to formerly, **Section 254** and **264** of the Penal Code Act, Cap 120, and now **sections 237** and **247** Cap 128 Laws of Uganda, 2023 revised edition.

Brief background.

It was the prosecution's allegation that the accused, a male adult aged 25 years, a Mugwere by tribe, peasant farmer by occupation, resident of Kadengele Central Cell, Mpumwire ward, Kamugye Town council in Pallisa District during the night of 19th October, 2023 at Kadengele Central Cell, Mpumwire ward, Kamugye Town council in Pallisa District stole one black bull, brown cow and a black and white spotted cow and all the 3 cows valued at approximately UGX. 6,000,000/=(Uganda shillings Six million only) the property of a one, Akeba John Robert.

When the charges were read to the Accused, he denied 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 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 called 6 witnesses and the accused testified in his defence and also called one more witness.

The prosecution first called the complainant who testified as **Pw1-Akeba John Robert.** He told court that on the night of 19th October, 2023, at around 1:00 am, he heard a sound of a moving vehicle which prompted him to come out of the house and flashed his torch on the phone and went to check on his cows. That he had 9 of them and he realized that 3 of them were missing. It was the bull with a white patch on the head, a brown and black cow and the other one which was wholly brown.

That he had tied the cows onto a peg but now they were gone, hence raising alarm. That his son, a one, Muyodi Charles responded first and the rest of the neighbors joined in and advised pw1 to report to police when it comes to morning. On reporting at police, they engaged the canine service for sniffing. The people who responded to the alarm had cordoned off the scene. That the sniffer dog led them together with the police to the house of the accused and lay on the accused's bed.

On cross-examination, Pw1 testified that he did not see the vehicle or type, that even though he made alarm, the accused did not make appearance and even at the first disappearance of his grandfather's cattle, the snifer dog picked out the accused.

Pw2, Pw3 & Pw4 re-echoed the testimony of Pw1 as the people who responded to the alarm and also witnessed the snifer dog participate in the investigations.

Prosecution also called **No. 68234 D/C Iwalwa Samuel Grace**, the dog handler who testified as Pw5.

He gave court the history of his training and his experience of 5 years handling police canines. He also gave the particulars of the dog that participated in the investigation and the extent of the dog to pick a specific scent and maintain it and what the dog does when it reaches where the scent is most concentrated.

He told court that when the dog was introduced and guided by the handler to the pegs which hitherto held firm the now stolen cows, the dog picked the scent and followed various paths until it arrived at a house which was loosely closed and it entered and rested on the bed therein.

That it later turned out, that the said house belonged to the accused and he was subsequently arrested.

No. 60087 D/C Olinga Bosco, the investigating officer testified as PW6 giving court his summation of the investigation and what prompted his arrest and subsequent arraignment of the accused.

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 05th February, 2025 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.

He swore in and testified as his own witness, as **DWI- Kyabamu Emmanuel**.

He denied knowledge about the allegedly stolen cows. He told court that on the said day, he doesn't know what happened. That he went to the swamp to harvest his rice and when he came back, he had people say that they had stolen from the neighbor and when they brought the police sniffer dog, it found a local dog of which the police dog chased upto the accused's home and that it did not take even 30 minutes before the police dog was returned to the vehicle. That as the police officers were preparing to go back, the complainant asked them "*how have you helped me*" and that's how the police officers arrested the accused.

Dw2- Asianutu Rebecca told court that she is 24 years of age and married to the accused with 10 years in marriage and they have 5 children, of whom the eldest is 8 years. That the previous night, she cooked supper and they ate together with the accused and after about 3-4 hours, they went to sleep. That they did not hear any alarm and the complainant did not seek their help. That the following day, she, together with the accused went in the morning to the swamp to harvest rice until later when they returned and found people gathered and an on-going police investigation.

THE LAW AND ANALYSIS OF THE EVIDENCE

The offence of stealing cattle is created under formerly, **Section 254** and **264** of the Penal Code Act, Cap 120, and now **sections 237** and **247** 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.

Section 247 Penal Code Act Cap 128 Laws of Uganda, 2023 revised edition provides:

If the thing stolen is a horse, mare, gelding, ass, mule, camel, bull, cow, ox, ram, ewe, weather, goat or pig, or the young of any such animal, the offender is liable on conviction for a first offence to imprisonment for seven years and for a subsequent offence to imprisonment for fifteen years.

UGANDA vs STEPHEN ONYABO [1979] HCB 39, it was stated that:

“...in every criminal prosecution, conviction should only be based on the actual evidence adduced and not on any other attractive or fanciful theories of reasoning since by doing so, there is great danger of being led astray by the type of mental gymnastics when drawing any inferences on reaching conclusion...”

In **UGANDA VS MUNGURIEK JOSEPH ALIAS ONDIKI & ANOR**
Criminal Session Case No. 008 Of 2017.

Justice Steven Mubiru stated the ingredients of the charge of theft of cattle to be;

1. Taking / asportation of cattle, goats, cows etc.
2. The property belonging to another.
3. Intention to permanently deprive the owner.
4. The accused's participation.

Ingredient 1: Taking / asportation of cattle, goats, cows etc.

In ***Haji Asuman Mutekanga –Vs- Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995***, 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...”

After hearing the prosecution evidence, no doubt is left in my mind that indeed, there existed cows of different colours and shade, the property of Pw1. The testimony of all witnesses, Pw1, Pw2, Pw3 and even Dw1 shows that indeed, the complainant rears cows at his home.

Pw1 testified that:

“.... I had 9 cows and realized that 3 of them were missing. It was the bull with a white patch on the head, a brown and black cow and the other one which was wholly brown ...”

That testimony was not discounted in cross-examination. By that evidence, I am satisfied that the allegedly stolen cattle was asported from

the home of Pw1. The prosecution proved this ingredient beyond reasonable doubts.

Ingredient 2: The property belonging to another.

No documentary proof was adduced by prosecution to prove ownership of the allegedly stolen cows. However, I am alive to the principle laid down in the aforesaid authority of **Haji Asuman Mutekanga -Vs- Equator Growers (U) Ltd, supra**, whereof it was stated that:

“...proof does not necessarily always require documentary evidence. Oral testimony is also good evidence to prove a fact in issue...”

All prosecution witnesses testified that the allegedly stolen cows belonged to Pw1. That testimony was not discredited in cross-examination. I have not found any reason to believe otherwise.

It is also my finding that the cattle, the property of another (*other than the accused*) was indeed asported from Pw1's home. The prosecution proved this ingredient beyond reasonable doubts to the satisfaction of this court.

Ingredient 3: Intention to permanently deprive the owner.

The prosecution evidence that spoke to the intention to permanently deprive the owner was that of Pw1.

Pw1 testified that:

“...on the night of 19th October, 2023, at around 1:00 am, I heard a sound of a moving vehicle which prompted me to come out of the house and I flashed my torch on the phone and went to check on my cows. I had 9 of them and I realized that 3 of them were missing....”

I have not seen any evidence to show that the said cows have ever been recovered for more than two years now. This evidence was not discredited in cross-examination. I also find corroboration in the testimonies of both Pw1 and Pw2 & Pw3.

From the above testimony and all circumstances, there is no doubt left in my mind that indeed, whoever asported the complainant's cattle/cows deep in the night at 1:00 am, the cattle of which have never been seen again for about 2years now indeed harbored the intention to permanently deprive the owner of the same.

The net effect is that I am also satisfied that this ingredient was proved by the prosecution beyond reasonable doubts.

Ingredient 4: participation of the accused

The ingredient of participation of the Accused is not a difficult one. All the prosecution witnesses testified to having been present and witnessed how the accused was arrested.

Pw1 testified that:

“...On reporting at police, they engaged the canine service for sniffing. The people who responded to the alarm had cordoned off the scene and the sniffer dog led them together with the police to the house of the accused and lay on the accused's bed who was later arrested...”

Pw5- the dog handler, after laying out experience and how the sniffer dog operates, testified that:

“...when the dog was introduced and guided by me, the handler to the pegs which hitherto held firm the now stolen cows, the dog picked the scent and followed various paths until it arrived at a house which was loosely closed and it entered and rested on the bed therein...”

“...it later turned out, that the said house belonged to the accused and he was subsequently arrested...”

In his testimony as Dw1, the accused raised a general defence of denial and alibi and this court is aware that he is not under obligation to prove his defence.

His evidence, in a nut shell is that he was being falsely and that the alleged sniffer dog entering his house was after the police officers broke there into and that the sniffer dog only came towards his house chasing after a local dog.

Testifying as Dw1, the accused told court that:

“...I have no knowledge about the allegedly stolen cows. On the said day, I don't know what happened. I went to the swamp to harvest my rice and when I came back, I heard people say that there had been a theft at the neighbor's and when they brought the police sniffer dog, it found a local dog of which the police dog chased upto the my home. It did not take even 30 minutes before the police dog was returned to the vehicle. However, as the police officers were preparing to go back, the complainant asked them “how have you helped me” and that's how the police officers arrested me....”

It is the prosecution's burden, beyond reasonable doubts to dislodge that defence from being entrenched and believed by a court of law.

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** or **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.

To do so, this court is enjoined to evaluate evidence having regard to factors that are favorable and those that are unfavorable to correct identification.

In this case the evidence of all witnesses is after the fact. To say, none of the witnesses ever saw the cows being stolen. What court has is circumstantial evidence of Pw5 and the outcome of the sniffer dog.

It is trite that evidence from sniffer dogs must be corroborated by other evidence to be admissible. And courts must exercise caution as held in **Abdallah Bin Wendo and Anor Vs R (1953) 20 EACA at 165.**

Prosecution must provide affirmative answers to questions regarding reliability of handling the police dog before that evidence can be admitted.

In this case, Pw5 lay out for court his training and experience with handling police dogs. The accused was duly granted opportunity to cross-examine the witness. I must say, I found nothing discrediting the credibility of Pw5 and the evidence he gathered using the police dog.

All the prosecution witnesses corroborated evidence of Pw5 as they witnessed the police dog movement all the way to the accused's house and onto his bed.

In his defence, testifying as Dw1, the accused told court that the police dog only chased a local dog and that's how it ended up at his house.

Dw2 on the other hand told court that Dw1 told her to chain up their dog so as not to disrupt the investigations.

However, Prosecution witnesses told court that the accused was not present when the police dog was sniffing and he only showed up later, upon inquiry from authorities and that's when he was arrested.

The defence evidence appeared untruthful. Like I mentioned from the outset, the accused is not duty bound to testify. But if he elects to do so, his testimony is also evidence in light of **Section 2 of the Evidence Act** and this court can rely upon it.

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.

This court listened to both prosecution and defence witnesses.

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, as to how the police dog sniffed its way into the accused's house and on to his bed is believable as against the defence evidence to the effect that the police dog was chasing a local dog, hence ending up in the accused's house.

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 failed to produce eye witnesses. But the unexplained circumstances under which the police dog ended up in the accused's house and onto his bed left this court in no doubt as to the participation of the accused in the theft of the cows. The police dog traced the scent from the pegs where the cows had been fastened all the way to the accused's house for reasons, the accused did not explain.

It is my finding that the evidence before me meets the minimum threshold of establishing proof beyond reasonable doubt as specifically required in **SEKITOLEKO VS UGANDA**, Supra.

The evidence before me fully establishes that the accused had full participation and substantially contributed to or had a substantial effect on the consummation of the offence with which he is being charged.

I find that the 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 stealing cattle Contrary to formerly, **Section 254** and **264** of the Penal Code Act, Cap 120, and now **sections 237** and **247** Cap 128 Laws of Uganda, 2023 revised edition.

His bail is hereby cancelled and shall be held on remand until hearing on *allocutus* and subsequent sentencing.

The sureties are hereby discharged unless duty bound by other lawful obligations.

I so order.

Dated at PALLISA this ____22nd____ day of ____APRIL____ 2025.



HW KYEMBE KARIM

Magistrate G.I