THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATES COURT OF PALLISA AT PALLISA

CRIMINAL CASE NO **PAL-00-CR-C0-010-2024**

UGANDA :: PROSECUTION

VS

KAMBO KEZEKIA :: ACCUSED

Before: His Worship Kyembe Karim ESQ

Learned Magistrate G.I

RULING ON PRIMA FACIE CASE

Introduction.

The accused was arraigned under charge sheet dated 12th January, 2024 and Sanctioned on the 17th January, 2024, and charged with one count of Burglary Contrary to formerly, Sections 295(1), now section 274 & 276 of the penal code Act cap 128, laws of Uganda, one count of theft contrary to, formerly, Section 254(1) and 261 of the penal code Act, now, Sections 237 of the penal code Act cap 128, laws of Uganda.

Brief facts.

On count 1, it is the prosecution's assertion that the accused and others still at large on the 16th day of December, 2024 at Bukalijoko Village in Butebo district did break and enter the house of a one, Ekanya John with intent to commit a felony of theft therein.

On count 2, it was the prosecution allegation that the accused and others still at large on the 16th day of December, 2024 at Bukalijoko Village in Butebo district stole 5 bags of ground nuts, sofa set chairs, two mattresses, all valued at approximately UGX 2,300,000/= *(Uganda shillings two million three hundred thousand only).*

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

It is settled law that by denying the Charges, the accused placed in issue all and every essential ingredient of the offence with which he is being charged.

It is also trite that 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 also aware and I have cautioned myself that the accused has no obligation to prove his innocence and a conviction can only be handed down on the strength of the prosecution evidence, not the weakness of the accused's defence.

After presenting 4 witness, when the case came up on the 17th June, 2025, the prosecution closed its case. This is a ruling, therefore on whether or not the prosecution established a prima facie case against the accused as to require him to defend himself.

In **WIBIRO ALIAS MUSA VS REPUBLIC (1960) EA 184** it was

held:

> *"This court is not even obliged at this time to find whether the evidence is worthy of too much credit or if believed, is weighty enough, beyond reasonable doubts. That conclusion can only be made after the defence case is heard".*

Evidence adduced:

In attempt to prove the charges, the prosecution first called the said Ekanya John whose testimony was taken down as **Pw1.**

Conspicuously, this court noted that, Pw1 testified that, on the said Sunday morning of 17th December, 2024, he opened the door and found when the 5 bags of ground nuts were not there, upon which he reported the matters to police which later introduced a police sniffer dog 2 days later and the sniffer dog sniffed its way through various homes until it eventually started oscillating between the accused's father's house and that of the accused.

Pw2 –Kawu James was the chairperson of the area. He testified as to how the matters were brought to his attention and how he later witnessed the police sniffer dog conduct its exercise.

Pw3 also re-echoed testimony of Pw1 in respect to witnessing the police sniffer dog conducting its exercise.

No. 68234-PC Iwalwa Samuel Grace who was the dog handler testified as the 4th prosecution witness and his testimony was taken down as **Pw4.**

He told court that he found the scene of crime preserved. That upon introducing the dog to the scene, it picked a scent and went through various homes including a school. Pw1 conspicuously told court that on that day, the dog did not enter any house and the accused's home is about 1km away from the scene of crime and this was the first time tracking into that home.

Consideration by court:

Under **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****. [Bolding & underlining added for emphasis].*

Under **Section 101** of the Evidence Act the burden to prove a case in a criminal trial rests entirely upon the prosecution.

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.

The offence of burglary is created under, formerly, **Section 295(1),** now, Section 274 & 276 of the penal code Act cap 128, laws of Uganda, **of the Penal Code Act.** It provides that any person who—

a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony in it; or

b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony in it, or having committed a felony in any such building, tent or vessel, breaks out of it,

commits the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

The ingredients of this offence are:

i. a building used as a human dwelling
ii. breaking and entering
iii. intent to commit a felony
iv. committed at night
v. participation of the accused

In the interest of judicial economy, I will address the ingredient of participation in both counts, since, it is alleged the offences were committed simultaneously.

Evidence of identification is a cause for unease, given the fact that the offences were allegedly committed at night. Prosecution witnesses Pw1, Pw2 & Pw3 testified that they all came to know about the alleged burglary and alleged theft the next day.

None of the witnesses testified to having seen the accused burgle Pw1's house nor steal the said 5 bags of groundnuts. The only evidence linking the accused to the scene of crime is the evidence of the police sniffer dog which allegedly sniffed its way to the accused's house.

The rules regarding identification on offences allegedly committed at night were laid down in **Roria vs. Republic [1967] E.A. 583.**

The reason for this is that there is greater danger of convicting an innocent person on such evidence, than is the case with other forms of evidence.

While even the evidence of a single identifying witness can suffice to found a conviction, it is less safe to do so than is the case with multiple identification witnesses. Therefore the Court is under duty to satisfy itself that in all the circumstances of the case, it is safe to act on such evidence of identification.

These principles were followed by the Supreme Court of Uganda in **Bogere Moses & Anor. vs. Uganda – S.C. Crim. Appeal No. 1 of 1997**; which cited with approval, the case of **Nabulere vs. Uganda – Crim. Appeal No. 9 of 1978; [1979] H.C.B. 77,** in which the Court had clarified that;-

"…the need for the exercise of care arises both in situations where the correctness of disputed identification depends wholly or substantially on the testimony of a single or multiple identification witnesses; and that the Court must warn itself and the assessors of the special need for caution before arriving at a conviction founded on such evidence…"

The Court further stated that:

"…The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one, and that even a number of such witnesses can all be mistaken. The Judge should then examine closely the circumstances in which the identification came to be made particularly the length of time, the distance, the light, the familiarity of the witness with the accused."

In the instant case as observed in the foregoing, no witness saw the accused commit the alleged offences being attributed to him. The evidence that attempts to place him at the scene of crime through the testimony of all witnesses, Pw1,Pw2,Pw3 & Pw4 is all ***"after the fact."***

Prosecution witnesses Pw1, Pw2 & Pw3 told court that the police sniffer dog oscillated between the accused's house and that of this father and that it subsequently entered the house of the accused and rested on his bed.

On the contrary, Pw4, the dog handler testified that

"…the dog did not enter any house on that day…"

The testimony of Pw1 was to the effect that:

> *"...police which later introduced a police sniffer dog 2 days later..."*
>
> *"...the dog kept oscillating between the accused's house and that of his father..."*

I have failed to understand how Pw1,Pw2 &Pw3 came to the conclusion that the police sniffer dog entered the accused's house and rested on his bed. They are not dog handlers! The police dog handler who testified as Pw4 told court that:

> *"... the dog did not enter any house..."*

That contradiction was not a minor one.

This court understands the society's desire to have a villain in the face of such predicament. And as much as there is a strong suspicion against the accused, based on alleged previous suspicions as testified by Pw2, this court has failed to see any link between the accused and the crime scene.

All in all, this court is not satisfied that the accused's participation was proved to the acceptable standard.

Having found that the prosecution failed to prove the participation of the accused, it will be moot to examine the rest of the ingredients.

In **Uganda Vs Tweyanke (1975) HCB 143,** it was stated that where the prosecution fails to establish a prima facie case, the accused must be acquitted.

I am not satisfied that the prosecution has established a prima facie case as to require the accused to enter defence and I order as follows;

1. The accused is found NOT GUILTY of the offence of Burglary leveled against and he is duly ACQUITTED of the same.
2. The accused is found NOT GUILTY of the offence of Theft leveled against him and he is duly ACQUITTED of the same.
3. The accused is hereby discharged and set free henceforth unless he is being held on other lawful charges.

I so order.

Date at PALLISA this _____1st_____ day of ____July_____2025

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H/W KYEMBE KARIM ESQ

Magistrate G.I