THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATES COURT OF PALLISA AT PALLISA

CRIMINAL CASE NO **PAL-00-CR-CO-242-2025**

UGANDA :: PROSECUTION

VS

AISU DAVID :: ACCUSED

Before: His Worship Kyembe Karim ESQ

Learned Magistrate G.I

JUDGMENT

Introduction.

The accused was arraigned under charge sheet dated 26th October, 2024 and Sanctioned on the 29th October, 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 on the 16th day of October, 2024 at Aubujabule village in Pallisa District did break and enter the dwelling house of a one, Obeke Franko with intent to commit a felony therein.

On count 2, it was the prosecution allegation that the accused on the night of the 16th October, 2024 at Aujabule village in Pallisa District stole 07(seven)hens and 01(one) duck all valued at approximately UGX 215,000/=*(Uganda shillings two hundred fifteen thousand only)*.

When the charges were read to the accused, he denied both allegations.

Accordingly, a plea of NOT GUILTY was entered on both counts.

It is settled law that by denying the charges, the accused put in issue all and every essential ingredient of the offences with which he was being charged.

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

The burden does not shift to the accused and the accused is only convicted on the strength of the prosecution case;- Not on the weakness of the accused's defense, as held in **SEKITOLEKO VS UGANDA (1967) EA 531.**

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

In attempt to prove the charges, the prosecution called 3(three) witnesses. To wit;

1. PW1 – Obeke Franco (complainant)

2. PW2 – Opio Tom
3. PW3 – No. 68234 D/C Iwalwa Samuel Grace (dog handler)

On the 23rd July, 2025, upon closure of the prosecution case, this court ruled that a prima facie case had been established and the accused according put on defence.

Evidence adduced:

The complainant, **Obeke Franco** testified as the prosecution 1st witness and his evidence was taken down as **PW1**.

He told court that the accused is his clan mate and a resident of their village. That on the said night at around 12:00am, his wife heard a sound of iron sheets and she asked him whether he equally had heard the sound. That he then moved outside the house and saw the door to the kitchen open. That he then asked the said wife to come out and they went to check on the kitchen and indeed it was open, but he did not allow the said wife to enter thereof. That he then flashed with his phone torch light and he found 7 hens missing, out of the total 15 and the one duck. That he then rung the chair person, a one, Opio Tom, who advised him that they wouldn't do much at night, but the next morning, Pw1 went to his home, wherefrom, they proceeded to Apopong Police station whereof they reported and also sought services of a police sniffer dog. That they waited until around 2-3pm when the dog arrived and it was taken straight to the house wherefrom the hens had been stolen from. That the dog sniffed its way until it entered the accused's house and lay on his bed.

That the accused who was sited under a mango tree at the time, was invited by police and the dog reacted with hostility towards him and even when the dog was placed back in its cage, it wanted to jump out and grab the accused.

On cross-examination, Pw1 told court further that no hens were discovered at the accused's house and that the accused was around when the police dog was conducting the sniffing exercise.

Pw2- Opio Tom re-echoed most of Pw1's testimony regarding how he was approached by Pw1 and subsequent reporting at police. He added that the scene of crime was preserved with thorny branches to stop children and other people from contaminating the crime scene. He repeated the testimony of how the Police dog sniffed its way, and also added that the people around wanted to beat the accused and the police placed him in the police tuck, but even then, the police dog continued charging towards him. That the dog has tracked a scent to the accused's home on an earlier occasion involving theft of rice.

Pw3- No. 68234- D/C Iwalwa Samuel Grace first laid out his own qualifications and the qualifications and training of the subject police sniffer dog, (beauty) and how he found the scene of crime secured from contamination with use of thorny branches. That he originally didn't know Pw1 nor did he know the accused until he got involved in this case. That when he arrived at the crime scene, he introduced the dog to the house whereof the chickens were being kept and it picked up a scent of which it followed through various paths until it reached the accused's home and lay upon his bed. That upon arrest of the accused, who now

was at the verge of being attacked by the people witnessing the exercise, he was placed in the same vehicle with the dog, although the dog was caged. *That the dog continuously wanted to attack the accused because the concentration of the scent was now in the police vehicle*. That nothing was recovered from the accused's home and the dog did not enter any other house apart from that of the accused.

At that point, the prosecution closed its case and after perusal of all evidence adduced, this court, on 23rd July, 2025 ruled that the prosecution had established a prima facie case and placed the accused to defence.

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

1. Give evidence on oath whereby he would be subjected to cross examination.
2. Give evidence not on oath whereby he is not subject to cross examination.
3. Elect to keep silent.

The accused opted to give evidence on oath.

After taking oath, the accused testified as his own only witness and his testimony was taken down as **DW1**.

Dw1 told court that on the 16th October, 2024, he was home building a house when he saw police arrive with a sniffer dog and it moved around and he was instructed to open his house of which he opened but the dog went to another house of which, upon inquiry, he told the police that it is

also his, upon which he was arrested and taken to the police station and subsequently arraigned in court.

On cross-examination, Dw1 told court that Pw3 told the police dog words ***"enter",*** upon which the dog entered his house, that he has never been arrested and the police dog became aggressive while they were in the same car and that the complainant has a grudge against him since Dw1's candidate had won his brother, Pw2 in elections. That he doesn't know what transpired in his house since he was not allowed to enter.

EVALUATION OF EVIDENCE:

Count 1: *Burglary Contrary to* formerly, Sections 295(1), now section 274 & 276 of the penal code Act cap 128, laws of Uganda

Under those provisions, the offence of burglary is created**.** It is provided 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

Ingredient i – building used as human dwelling:

Section 2 (d) of the Penal Code Act defines *"dwelling house"*

> *to include any building or structure or part of a building or structure which is for the time being kept by the owner or occupier for his or her residence or that of his or her family or servants or any of them, and it is immaterial that it is from time to time uninhabited; a building or structure adjacent to or occupied with a dwelling house is deemed to be part of the dwelling house if there is a communication between such building or structure and the dwelling house, either immediate or by means of a covered and enclosed passage leading from the one to the other, but not otherwise;*

PW1 testified that:

> *"…on the said night at around 12:00am, my wife heard a sound of iron sheets and she asked me whether I equally had heard the sound. Then I moved outside the house and saw the door to the kitchen open…"*

That testimony was not discredited. I am satisfied that this ingredient was proved beyond reasonable doubts by the prosecution.

Ingredient ii & iii- breaking and entering & intention to commit a felony:

The lead witness, Pw1 told court that:

> *"…on the said night at around 12:00am, my wife heard a sound of iron sheets and she asked me whether I equally had heard the sound. Then I moved outside the house and saw the door to the kitchen open…"*

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.

I am satisfied that whoever opened/broke into the kitchen door did that by breaking there into had an intention to commit a particular harm. I am also satisfied that that harm was actually actuated when the hens and duck were taken/ stolen therefrom. This ingredient was proved to my satisfaction.

Ingredient iv – committed at night

Both PW1 and PW2 testified as to the time when they interacted on telephone regarding the theft of the hens and duck. Specifically, Pw1 told court that:

> *"…on the said night at around 12:00am…"*

"…I then rung the chair person, a one, Opio Tom, who advised me that we wouldn't do much at night, but the next morning, I went to his home, wherefrom, we proceeded to Apopong Police station…"

I have found no reason to doubt credibility of Pw1's testimony. He appeared to be a truthful witness who told court the pattern of events on the day of the alleged offence. I am also satisfied that this ingredient was proved beyond reasonable doubts.

Ingredient v –participation of the accused

On this ingredient, this court is under duty to approach it with sober mind, especially as regards identification. Evidence of identification is a cause for unease, given that the offence is committed at night. The rules 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; and 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 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."*

It seems to this court that the only evidence linking the accused to the said hens, the burglary and the scene of crime as a whole is only the evidence gathered through the aid of the police sniffer dog.

On this ingredient, this court is under duty to approach it with sober mind, especially as regards identification. Evidence of identification is a cause for unease, given that the offence was allegedly committed at night. But it is not a difficult one.

Pw1 told court that:

> *"…on the said night at around 12:00am…"*

In the instant case before me, all evidence led at trial was after the fact. No witness testified to having seen the accused burgle Pw1s kitchen or steal the hens. The only evidence identifying the accused was that of the police canine sniffer dog.

While, admittedly, that evidence of sniffer dogs is not fully developed within our criminal justice system, the same has on many occasions proved to be extra reliable.

Reliance on evidence of sniffer dogs should be taken with caution. In the cases of **Abdallah Bin Wendo and Anor v R [1953] 20EACA165** and **Omondi And Anor v R 1967 EA 802** it was held that the evidence of sniffer dogs should be admitted with caution and great care.

> *"…There should have been evidence of the experience of the dog handler in training and handling of the dog. And secondly the experience of the dog itself. There should be evidence to show the number of arrests and degree of accuracy effected by the dog ending up in successful prosecution. There should be evidence about the conduct of the accused before and during arrest when confronted by the dog…"*

In this case, Pw3 laid out the background, training and experience of the police dog, **beauty TP213.** I have not found any reason to doubt the credibility of the said dog or its handler, Pw3.

I am alive to the accused's testimony in his defence, testifying as Dw1 stating that when the dog approached his house door, that Pw3 told it ***"enter"*** and that's when it entered the accused's house.

I however reject that evidence because, Pw1 told court that the accused was sitting under a tree. The accused testifying as Dw1 himself told court that the dog entered another house which he told police that it also belongs to him and that he was not allowed to enter the house and he didn't know what transpired therein.

That evidence taken together shows that the accused wasn't at the house wherein the dog entered and he couldn't have heard Pw3 utter words ***"enter"*** to the police dog. This was a lie.

The Court of Appeal for Eastern Africa in the case of **Abdallah bin Wendo and anor v R**[supra] observed at page 167,

> "*…We are fully conscious of the assistance which can be rendered by trained police dogs in the tracking down and pursuit of fugitives, but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identification of a suspect by a homo sapiens.*
>
> *We do not wish it to be thought that we rule out absolutely evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who has trained the dog and who can describe accurately the nature of the test employed…"*

Sniffer dog evidence was also considered in the Kenyan case of **Omondi and Anor v R [1967] E A 802, supra** where the High Court observed as follows at page 807,

> *'But we think it proper to sound a note of warning about what, without undue levity, we may call the evidence of dogs. It is evidence which we think should be admitted with caution, and if admitted should be treated with great*

care. Before the evidence is admitted the court should, we think ask for evidence as to how the dog has been trained and for evidence as to the dog's reliability.

To say that a dog has a thousand arrests to its credit is clearly, by itself, quite unconvincing.

Clear evidence that the dog had repeatedly and faultlessly followed a scent over difficult country would be required, we think, to render this kind of evidence admissible. But having received the evidence that the dog was, if we might so describe it, a reasonably reliable tracking machine, the court must never forget that even a pack of hounds can change foxes and that this kind of evidence is quite obviously fallible."

The High Court in Uganda has followed, and correctly in my view and this court is also bound by the principles set out in the foregoing cases in dealing with reception of dog evidence. One of the most recent such cases is **Uganda v Muheirwe and Anor HCT-05-CR-CN-0011 of 2012 at Mbarara High Court District Registry.** After a review of comparative jurisprudence from around the world and from Uganda too, **Gaswaga, J**., proposed the following principles to guide trial courts with regard to admissibility and reliance on dog evidence. He opined;

"…Therefore, from the above discourse, the following propositions are made as principles that may govern the considerations for the exclusion or admissibility of and weight to be attached to tracker (sniffer) dog evidence:"

a) The evidence must be treated with utmost care (caution) by court and given the fullest sort of explanation by the prosecution.

b) There must be material before the court establishing the experience and qualifications of the dog handler.

c) The reputation, skill and training of the tracker dog [is] require[d] to be proved before the court (of course by the handler/ trainer who is familiar with the characteristics of the dog).

d) The circumstances relating to the actual trailing must be demonstrated. Preservation of the scene is crucial. And the trail must not have become stale.

e) The human handler must not try to explore the inner workings of the animals mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and <u>give an expert opinion</u> as to the inferences which might properly be drawn from a particular action by the dog.

f) The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth-eliciting process of cross-examination.

g) It should be borne in the mind of the trial judge that according to the circumstances otherwise deposed to in evidence, the canine evidence might be at the forefront of the prosecution case or a lesser link in the chain of evidence.'

In the instant case before this court, Pw2 testified that:

> *"…the scene of crime was preserved with thorny branches to stop children and other people from contaminating the crime scene…."*

Pw3 told court that the police dog **TP 213 Beauty** is 4 years old, with a certificate of tracking and with a rank of sergeant.

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

> *"…on the 16th October, 2024, I was home building a house when I saw police arrive with a sniffer dog and it moved around and I was instructed to open my house of which I opened but the dog went to another house of which, upon inquiry, I told the police that it is also mine, upon which I was arrested and taken to the police station and subsequently arraigned in court…"*

On cross-examination, Dw1 further told court:

> *"…Pw3 told the police dog words* ***"enter",*** *upon which the dog entered my house, I have never been arrested and the police dog became aggressive while we were in the same car and the complainant has a grudge against me since my candidate had won*

his brother, Pw2 in elections and I don't know what transpired in my house since I was not allowed to enter..."

Court noted that Dw1's testimony regarding PW3 telling the police dog to enter the house was a lie. Judicial notice of the demeanor thereof was taken.

As said earlier, this court notes in this case that the evidence of all witnesses is after the fact. To say, none of the witnesses ever saw the hens and duck being stolen. What court has is circumstantial evidence of, especially, Pw3 and the outcome of the sniffer dog.

This court observed the general demeanor of the accused during his testimony as Dw1 and he seemed slippery and evasive. This, coupled with his untruthful testimony, regarding Pw3 telling the police dog to enter the house diminished his credibility and his defence, altogether.

For the reasons given above, I am satisfied that this ingredient was also proved beyond reasonable doubts. In sum total, I find the accused GUILTY of having participated in the consummation of the offence of burglary.

Accordingly, I hereby CONVICT him of the offence of Burglary Contrary to formerly, **Sections 295(1)**, now **Section 274 & 276** of the penal code Act cap 128, laws of Uganda.

Count 2: ***Theft contrary to*** **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.**

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.

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

Evaluation of Ingredient i, ii, iii & iv

Accused fraudulently took something capable of being stolen, the property of someone else without claim of right and with intention to permanently deprive the owner.

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.

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 before me, PW1 tod court that:

> *"… I then flashed with my phone torch light and I found 7 hens missing, out of the total 15 and the one duck..."*

It is common sense and judicially noticeable that hens and a duck are capable of being asported and indeed, they were asported from Pw1's kitchen whereof he used to keep them.

In absence of evidence to the contrary, I am also satisfied that whoever took them did not have any claim of right to the same. Thought the whole trial for more than a year, the said properties had not been returned to the rightful owner, Pw1. I am equally satisfied that whoever took them had an intention to permanently deprive the owner of the same.

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.

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

In evaluation of evidence regarding count 1, this court has already been satisfied of the participation of the accused in the burglary that happened on the same night when Pw1's hens went missing. I am aware of the testimony of Pw3 on cross-examination stating that nothing was recovered from the accused's house. But that alone does not exculpate the accused from having participated in the theft of the hens and the duck. The timing and circumstances that led the accused to be at the crime scene the very night when Pw1's hens and duck went missing sufficiently satisfies this court of the accused's participation in the theft.

In sum total, I am satisfied that this ingredient was also proven beyond reasonable doubts by the prosecution.

Accordingly, I hereby find the accused GUILTY of the offence of theft as 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.

In conclusion, I make the following orders.

1. I hereby find the accused GUILTY and CONVICT him of the offence of Burglary Contrary to formerly, **Sections 295(1)**, now **Section 274 & 276** of the penal code Act cap 128, laws of Uganda.

2. I hereby find the accused GUILTY and CONVICT him of the offence of theft as 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.

3. I hereby order that the accused pays back UGX 215,000/= to Pw1 in restitution of the stolen hens and duck.

4. Sentencing shall be done after hearing the prosecution and convict on Allocutus.

5. The Accused/now convict shall be held on remand until sentencing.

I so order.

Dated at Pallisa this ……26th….day of ……AUGUST……2025

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HIS WORSHIP KYEMBE KARIM

LEARNED MAGISTRATE GRADE 1