THE REPUBLIC OF UGANDA

IN THE CHIEF MAGISTRATE'S COURT OF PALLISA AT PALLISA.

CRIMINAL CASE NO. **PAL-00-CR-CO-198-2024**

UGANDA :: PROSECUTION

VS

EKABA SAM :: ACCUSED

BEFORE: H/W KYEMBE KARIM ESQ

MAGISTRATE G.I

JUDGMENT

Introduction

The accused was arraigned before this court vide charge sheet dated 27th/August /2024 and sanctioned the next day on 29th August, 2024, whereof he was charged with 4(four) counts; that is;

1. Count 1: Store breaking contrary to formerly Sections 297 and 298 of the penal code Act cap 120, laws of Uganda, now section 277 and 278 of the Penal Code Act now, cap 128.
2. Count 2: 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.
3. Count 3: Burglary Contrary to formerly, Sections 295(1), now section 274 & 276 of the penal code Act cap 128, laws of Uganda,

4. Count 4: 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.

Factual background

Count1: It was the prosecution allegation that the accused together with others still at large in the night time of the 21st and 22nd of August, 2024 at Komolo "A" Village, Kameke sub county in Pallisa District did break and enter the store of a one, Anongi Emmanuel and did steal from therein.

Count 2: it was the prosecution allegation that the accused together with others still at large, on the 21st and 22nd August, 2024 at Komolo "A" Village, Kameke subcounty in Pallisa District stole 04(four) turkeys all valued at UGX. 205,000/= the property of a one, Anongi Emmanuel.

Count 3: it was also the allegation of the prosecution that the accused and others still at on the 21st and 22nd of August, 2024 at Komolo "A" Village, Kameke subcounty in Pallisa District did break and enter the house of a one, Ekuma John Francis and did steal from therein.

Count 4: in this count, it was the prosecution allegation that the accused and others still at on the 21st and 22nd of August, 2024 at Komolo "A" Village, Kameke subcounty in Pallisa district stole a laptop bag containing cash of UGX. 1,000,000/=, altogether valued at 1,050,000/=, the property of a one, Ekuma John Francis.

When the charges were read to the accused, he denied all 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 is being charged.

The prosecution bears the onus to prove all 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 4(four) witnesses. To wit;

1. PW1 – Anongi Emmanuel (complainant)
2. PW2 – Olupot Emmanuel
3. PW3 – No. 70761 Police Constable Nabafu Sarah
4. PW4 – No. 31319 Detective sergeant Okweny Abraham.

On the 10th June, 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.

This court reminded itself of the principle laid down in **WIBIRO ALIAS MUSA VS REPUBLIC (1960) EA 184** Whereof it was stated that:-

> *"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 to prove the case beyond reasonable doubts. That conclusion can only be made after the defence case is heard."*

Evidence adduced:

The complainant, **Anongi Emmanuel** testified as the prosecution 1st witness and her evidence was taken down as **PW1**.

Pw1 told court that he knows the accused who is his neighbor in the village. That in the morning of 22nd August, 2024 at around 7:00am, while in the garden next to his home, he called a minor called Opus Ronald and asked him to open for the turkeys they keep in the papyrus house. That when the said Ronald reached the said house, he called Pw1 and told him that the padlock was no-longer on the door. That on opening, they discovered that their 4 turkeys were not there, upon which, Pw1 stopped his weeding activity and went to report at Kameke police post and while at police, the accused together with a one, outa called Pw1 asking why he was at police and that's when he narrated to them his ordeal, to which they responded, ***"Neighbour, that man has real punished you."***

Pw1 told court further that it is the said Outa who suggested that they engage a police sniffer dog, a suggestion the accused shot down stating that; ***"these days, people are wise, they use motor cycles"*** to which, Pw1 responded that ***"let me try and fail".*** That around 2:00pm, the

police sniffer dog was introduced at the scene of crime, which Pw1 had instructed his family members not to tamper with. That the dog picked up a scent and dragged its handler through various paths and homes until it arrived at the accused's house, urinated and went to a small makeshift house whereof it started scratching the door. On inquiry, the owner turned out to be the accused but he was not present. That the dog then went straight to the main house whereof the accused resides, entered therein and lay on the accused's mattress.

That before arrest of the accused, 2(two) turkeys were intercepted with a man on a bicycle who fled when confronted by the LC defence secretary. Pw1 identified them as he had placed copper wires on them. That in Francis' house, it was discovered that UGX. 1,000,000/= had also been stolen.

Pw2- Olupot Emmanuel testified as to how he witnessed the police sniffer dog conduct its exercise and he re-echoed Pw1's testimony in that respect.

Pw3- no. 70761 PC Nabafu Sarah was the dog handler and she testified first to the particulars of the dog called ***Beauty*****,** her own experience in dog handling and the qualifications of the said dog and how she found the scene of crime preserved and crowned it re-echoing testimony of Pw1 as regards the movement of the sniffer dog and how it ended up at the house that turned out to belong to the accused wherein it entered and lay on the accused's bed.

Pw4- No. 31319 D/S Okweny Abraham was the investigating officer and he first told court his qualifications and experience in the criminal Investigations department. He told court how he was first approached by

the complainant who did not know who had stolen the turkeys but was more interested in seeking services of the police sniffer dog. The rest of the testimony, he re-echoed testimony of Pw1 as regards the movement of the sniffer dog and how it ended up at the house that turned out to belong to the accused wherein it entered and lay on the accused's bed. He further told court that on interrogating the accused, he denied having stolen neither the turkeys nor the UGX. 1,000,000/=. That he drew a sketch plan of the scene of crime and the same was admitted as prosecution exhibit **PEX1.**

Thereupon, prosecution rested its case.

As aforesaid, this court found a prima facie case and placed the accused to his 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-Ekaba Sam told court that he didn't know what had happened that night. That that day was a Thursday and his father is a businessman

buying and selling cattle. That on the said 22nd August, 2024, he woke up at his home at 6:00am and his father had animals to herd to the market. That he herded the same while vending and at around 9:00am, he asked his father to tend to the animals as he gets a meal. That by the time he came back, at around 10:00am, the market was already closing and he went back home and took the other animals for grazing. That he later went to have some leisure, playing games and that's when he was advised to flee because the police dog had entered his house, advice of which he rejected because he had done nothing wrong and he went and told his mother and other people who were all scared now. That he then went back to the center and in 30minutes, his elder brother came and narrated what had transpired and advised him to go to their father's place wherefrom, Okuma Emmanuel's father who is a police officer came, first greeted him and asked him to come with him to police and Dw1 then bid farewell to his people and left. He concluded denying any knowledge about the alleged theft.

EVALUATION OF EVIDENCE:

In the interest of convenience, I will first set out the law creating each offence with which the accused is being charged and the respective ingredients.

In Count 1: Store breaking contrary to formerly Sections 297 and 298 of the penal code Act cap 120, laws of Uganda, now section 277 and 278 of the Penal Code Act now, cap 128.

The offence of store breaking is created under **Section 297 and 298 of the Penal Code Act cap 128.** It provides:

Section 297. Any person who—

a) breaks and enters a schoolhouse, shop, warehouse, store, office or counting house or a building which is adjacent to a dwelling house and occupied with it but is no part of it, or any building used as a place of worship, and commits a felony in it; or

b) having committed a felony in a schoolhouse, shop, warehouse, store, office or counting house or in any such other building as mentioned in paragraph (a), breaks out of the building, commits a felony and is liable to imprisonment for seven years.

Section 298. Breaking into building with intent to commit felony.

Any person who breaks and enters a schoolhouse, shop, warehouse, store, office or counting house, or a building which is adjacent to a dwelling house and occupied with it but is no part of it, or any building used as a place of worship, with intent to commit a felony in it, commits a felony and is liable to imprisonment for five years.

The ingredients of this offence are:

i. a building used as a store
ii. adjacent to a dwelling house
iii. breaking and entering
iv. intent to commit a felony
v. participation of the accused

In Count 2: 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.

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

In Count 3: Burglary Contrary to formerly, Sections 295(1), now section 274 & 276 of the penal code Act cap 128, laws of Uganda,

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:

vi. a building used as a human dwelling
vii. breaking and entering
viii. intent to commit a felony
ix. committed at night
x. participation of the accused

In Count 4: Theft- it's the same legal provisions as in count 2 above.

In the interest of judicial economy, I will address the ingredient of participation in all the 4 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/store let alone stealing his turkeys.

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.

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."***

Pw1 testified that:

> *"…around 7:00am, while in the garden next to my home, I called a minor called Opus Ronald and asked him to open for the turkeys we*

keep in the papyrus house. When the said Ronald reached the said house, he called me and told me that the padlock was nolonger on the door. On opening, we discovered that our 4 turkeys were not there…"

The evidence of Pw2,Pw3 & Pw4 was also limited to what they witnessed later in the course of the police sniffer dog conduct its exercise.

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

"…I don't know what had happened that night. That day was a Thursday and my father is a businessman buying and selling cattle. On the said 22nd August, 2024, I woke up at my home at 6:00am and my father had animals to herd to the market. I herded the same while vending and at around 9:00am, I asked my father to tend to the animals as I get a meal. By the time he came back, at around 10:00am…"

In essence, the accused denied neither reaching the crime scene nor stealing the allegedly stolen items.

Like I mentioned from the onset, the burden lies upon the prosecution to adduce evidence placing the accused at the crime scene. It is not the accused's burden to prove his innocence.

Prosecution exhibited the accused's statement made while at police as **PEX2** and I have read the same and I note that the accused stated his whereabouts as having been the aforesaid cattle market.

The only evidence identifying the accused was that of the police canine sniffer dog and especially, Pw3.

It has been said on several occasions that evidence of sniffer dogs is not fully developed within our criminal justice system. In several other cases, the same has proven 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.

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 an 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."

In **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 give an expert opinion 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, Pw1 testified that:

"…I instructed my family not to enter and contaminate the crime scene…."

Pw3 further told court that the police dog **TP 213 Beauty** is 4 years old, with a certificate of tracking and with a rank of sergeant and that it entered the house and lay on a bed, which later turned out to belong to the accused.

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

> *"…when I was advised to run, I did not because I had nothing to hide and nothing connected to the complainant's turkeys…"*

Pw1 also told court that:

> *"…some 2(two turkeys) were intercepted with a man on a bicycle who fled when confronted by the LC defence secretary. I identified them as I had placed copper wires on them…."*

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 accused break and enter the house of Pw1. What court has is circumstantial evidence of, especially, Pw3 and the outcome of the sniffer dog.

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.*

An accused is not duty bound to testify. But once he elects to do so, everything he says may and will be used against him.

This court observed the general demeanor of the accused while testifying as Dw1. His demeanor looked of a truthful person. Coupled with the fact

that he did not flee as he had been advised and also testimony of Pw1 to the effect that:

> *"…some 2(two turkeys) were intercepted with a man on a bicycle who fled when confronted by the LC defence secretary. I identified them as I had placed copper wires on them…."*

This court is left in doubt as to the participation of the accused. Notwithstanding the fact that the police dog and testimony of Pw3 is credible, this court has not found corroboration of that testimony as to justify a conviction. This is further entrenched by the exculpating testimony of Pw1 that:

> *"…some 2(two turkeys) were intercepted with a man on a bicycle who fled when confronted by the LC defence secretary. I identified them as I had placed copper wires on them…."*

The only reasonable explanation thereof is that the said turkeys were stolen by that someone else who is not under trial.

For the reasons given above, I am not satisfied that this ingredient was proved beyond reasonable doubts by the prosecution in all the four counts. As the prosecution has failed to prove this ingredient, it would be moot to evaluate the other ingredients.

In sum total, I find the accused NOT GUILTY of having participated in the consummation of the offences he is being charged with.

Accordingly, I hereby ACQUIT on all the 4(four) counts with which he is being charged. He is hereby discharged and should be set free forthwith unless being held on any other lawful charge.

I so order.

Dated at PALLISA this ……06TH….day of ……0CTOBER……..2025

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HIS WORSHIP KYEMBE KARIM

LEARNED MAGISTRATE

GRADE 1