THE REPUBLIC OF UGANDA

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

CRIMINAL CASE NO. **PAL-00-CR-CO-239-2024**

UGANDA :: PROSECUTION

VS

NALEBO ISSA :: ACCUSED

BEFORE: H/W KYEMBE KARIM ESQ

MAGISTRATE G.I

JUDGMENT

Introduction

The accused was arraigned before this court vide charge sheet dated 21st October/2024 and sanctioned the same day, whereof he was charged with 1(one) count; that is;

1. 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

It was the prosecution allegation that the accused, on the 6th October, 2024 at Agurur Cell in Pallisa District stole a battery and an amplifier all valued at UGX. 1,200,000/= the property of the Muslim Community of Agurur Cell.

When the charge was read to the accused, he denied the same and a plea of NOT GUILTY was accordingly entered.

It is settled law that by denying the charge, the accused put in issue all and every essential ingredient of the offence 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.**

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

1. PW1 – Sabakal Asuman
2. PW2 – Okou Sulaiman
3. PW3 – Omut Ben

On the 20th August,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 is aware of the principle laid out in **UNIVERSITY OF CEYLON VS FERNANDO (1960), WLR 233** to the effect 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, both Accused duly exploited the Opportunity.

Evidence adduced:

Sabakal Asuman testified as the prosecution 1st witness and his evidence was taken down as **PW1**.

Pw1 told court that he doesn't know the accused but on the said day, he was going to call for prayers when he found the door which he always lives tied was now open whereas the other door was locked. That when he tried to switch on the lights, they couldn't go on. That he then went and reported to the mother who also advised him to report to the father who is the imam of the mosque. That the father went and reported at police and later, the same day, returned with CID police officers and a police dog later brought at 10:00am. That when the dog was introduced to the scene, it picked up a scent which it followed all the way to the accused's home which was closed and the accused stated that he did not have the keys, but the dog reacted harshly towards him and wanted to grab him, whereupon, he was taken to the car.

PW2-Okou Sulaiman testified that the accused is one of his faithfuls at the mosque and he had employed him to dig a pit latrine. That however on the said day, when Pw1 had come to call for prayers, he found the door open and the place dark. The rest of the testimony, he re-echoed Pw1's evidence as to how he was reported to and how he reported to police, which subsequently arrived at the crime scene.

Pw3- Omut Ben is the LC1 chairperson who told court that both complainant and accused are residents in his jurisdiction. Most of the rest of his testimony was what he was told by Pw2 when he went to report the occurance.

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-Nalebo Isa told court that he didn't know what had happened that night as he was entertaining a female visitor and the next morning, he went to request for money from his work place and on his way back, he found the police together with the dog doing a tracking exercise, of which he followed the events but the people were suspecting him and he did not know why.

EVALUATION OF EVIDENCE:

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 the interest of judicial economy, I will address the ingredient of participation of the accused.

The evidence of identification in this case is a little problematic. It is alleged that the offence was allegedly committed at night. Prosecution witnesses Pw1, Pw2 & Pw3 testified that they all came to know about the alleged theft when Pw1 as the 1st witness found the item missing when

he had gone to call for prayers, whereupon he reported to Pw2 and later to Pw3.

None of the witnesses testified to having seen the accused open and enter the door which was allegedly opened to gain access to the allegedly stolen items.

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.

As a matter of fact, it is unclear whether the allegedly stolen items were stolen that night when Pw1 went to call for prayers or if they had been stolen earlier prior to that discovery.

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 offence 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 is all ***"after the fact."***

Pw1 testified that:

> *"…I was going to call for prayers when I found the door which I always live tied was now open whereas the other door was locked. When I tried to switch on the lights, they couldn't go on …"*

The evidence of Pw2&Pw3 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 as I was entertaining a female visitor and the next morning, I went to request for money from my work place and on my way back, I found the police together with the dog doing a tracking exercise, of which I followed the events but the people were suspecting me and I did not know why…."*

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

I note that Pw1 attempted to give evidence about the tracking by the police canine dog, but I haven't seen any evidence to show that he is a dog handler with expertise to testify to the outcome of the police sniffer dog exercise.

The only evidence attempting to identify the accused was that of the police canine sniffer dog and especially, Pw1, but like I have stated, his evidence in that respect is inadmissible for the reasons shown.

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, none of the witnesses laid out the background, training and experience of the police dog. As a matter of fact, this court doesn't even know the identity of that dog, whether it was a police sniffer dog, to begin with or an ordinary pet dog from a random neighbor's household**.** I have not found any reason to believe any credibility of the said dog. neither was its handler brought to testify!

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 behavior 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 the dog evidence is wholly rejected for the reasons given above.

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 open the door and steal the items being attributed to him. What court has is circumstantial evidence of, especially, Pw1 and the outcome of the botched 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 during the exercise or even when the dog attempted to attack him as testified by Pw1. This seems to be genuine conduct of an innocent person.

This court is left in doubt as to the participation of the accused. The exculpating testimony of Dw1 was not discredited by prosecution and I find it believable. He told court that:

"…I don't know what had happened that night as I was entertaining a female visitor and the next morning, I went to request for money from my work place and on my way back, I found the police together with the dog doing a tracking exercise, of which I followed the events but the people were suspecting me and I did not know why…."

The only reasonable explanation thereof is that the said items were stolen by 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. 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 offence he is being charged with.

Accordingly, I hereby ACQUIT him of the offence 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 ……14th….day of ……OCTOBER……..2025

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HIS WORSHIP KYEMBE KARIM

LEARNED MAGISTRATE

GRADE 1