

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KABALE

HCT -11-CR-SC –NO.00184 OF 2022

UGANDA:PROSECUTOR

VERSUS

TWESIGYE SIMON KYEMESE ACCUSED

BEFORE: HON. JUSTICE SSEMOGERERE, KAROLI LWANGA

JUDGMENT

Representation:

The learned Director of Public Prosecutions was represented by Ms. Grace Nabaggala Ntege, Chief State Attorney, Kabale. The accused was represented by Mr. Felix Bakanyabonera on state brief. The court was assisted by Ms. Mercy Kembabazi and Mr. Livingstone Ndyamutunga, as assessors.

Brief Facts:

The accused is charged with aggravated robbery contrary to Sections 266 and 267(2) of the Penal Code Act, Cap 128 (the "Penal Code Act"). It is alleged on the 13th day of March, 2022, in the vicinity of Kabale National Teachers' College, in Kabale Municipality, Kabale district, the accused robbed Babigamba James of two mobile phones; a POP2, and a Techno mobile and cash whose total value is 971,000/= (Nine hundred seventy-one thousand shillings) and immediately after the said robbery threatened to use a deadly weapon to wit a panga to threaten the victim.

5 **Evidence at trial:**

Prosecution adduced the following evidence. PW1, Babigamba James, the victim 41 years old, a carpenter, resident in Nyakabungo Cell in Kabale Municipality. PW1, told court that on the fateful day while he was walking home; he saw the accused jumping into the road, and thought he had been easing himself. That the accused was holding a panga and tried to accost him. He felt something tapping him on the shoulder, and saw another person with a panga. He knew the accused, for about 1 ½ years as a resident of Nyakambu in Mwanjari ward, by the name, Kyemese, but didn't know exactly where he stayed, and didn't have prior dealings with him. Victim stated the accused used the word "Girigiri", and 4 children came out, in the bracket ages of 14-15 years old. Whereupon they searched him, took his wallet, removed his national id, took his money and phones. They returned his national ID to him. There was ample moonlight, they didn't harm him.

PW2, Biryomumeisho Johnson, 45 years old, is a former LC Defence Secretary, Kamukira Cell. He told court he knew the accused for his notoriety way laying people from the bridge in Kamukira, over River Brazini in Kamukira cell neighbouring the National Teacher's College. He is accused of also waylaying students of the National College of Commerce, NCC. These institutions are close to each other in a busy section of Kabale Municipality, away from the main town centre. He told court that on the fateful day; he had organised a patrol to night guard in Kamukira village and Kekubo village. They received a police officer as support. That the patrol around 2.00 a.m. laid a trap at the bridge. They accosted the accused, and after trying to stop him, he raised his hand with a panga, and tried to cut one of the members of the patrol, Richard with a panga, Rwhen he came closer. The accused was arrested. He was found with 4 padlocks in his possession and also had a 1liter jerrycan with black oil like viscous liquid in it. PW2 did not see the accused commit the crime.

PW3 Asiimwe Benson 58 years old police officer formerly attached to Kabale CPS, Criminal Investigations Department. PW 3 told court, the victim, reported to police that thugs armed with pangas had attacked him, robbed him of 2 mobile phones and 65,000/= in cash at Nyakambwe Southern Division. He stated that the victim told him he identified one of them, a short black man, who he was familiar with for about 3 years. They had 6 people in custody, one of whom the victim/complainant identified as

- 5 that person. The stolen phones were not tracked. He drew a sketch map of the scene.

Defence adduced the following evidence:

- 10 Court found the accused had a case to answer and on September 23rd, 2025, the accused was required to put on his defence.

- 15 DWI the accused Twesigye Solomon, 31 years old gave sworn testimony. He stated he was at home on the fateful day, after working the whole day as a boda boda rider. He was told to pick a passenger, and found police officers waiting for him. He stated at the time of his arrest; he wasn't carrying anything. He didn't have any phones, only his bicycle. He was at police for 2 weeks. Confronted on cross examination, he was asked why in the statement he made at police, he admitted he had a panga at the time of arrest, and was coming from the funeral rites of a one Gloria. He was also confronted that he ran away from police for fear they would find him.

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Discussion and Analysis:

- 25 The offence of robbery is provided for in Section 266 of the Penal Code Act, which defines robbery and Section 267(2) of the Penal Code Act which provides for a death sentence where the accused at the time of, or immediately before, or immediately after the time of robbery, is in possession of a deadly weapon, or causes death or grievous harm to any person.

- 30 In this case, the accused pleaded not guilty. In such cases, the burden of proof rests with the prosecution and never shifts. (See *Woolmington v DPP*, 1935 AC 462).

Secondly, the standard of proof required of the prosecution is to a level beyond a reasonable doubt, but this is not the same as beyond a shadow doubt. The prosecution must prove the ingredients of the offence. (See Lord Denning at page 374, in *Miller v Minister of Pensions* 1947 2 ALLER 372).

- 35 Thirdly, the evaluation of evidence must be done as a whole, carefully balancing or weighing all items against each other. Lastly, if there are any defences available to the accused, they must be carefully evaluated, and not dismissed summarily. I have already discussed how court should treat

5 evidence in these circumstances, where there is a single identifying witness, see the decision of this court, in *Uganda v Rukundo Nichodemus*, HCT-11-CR-SC-0147-2021.

The elements of the offence of aggravated robbery must be established by the evidence at trial.

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Evaluation of the evidence by court:

Turning to the evidence before it, the relevant evidence is evaluated below:

1. Theft of Property:

15 The prosecution must prove that property belonging to another was stolen. This involves demonstrating that the property was taken without the owner's consent with the intent to permanently deprive the owner of it. Victim stated he lost 2 mobile phones and 65,000/= at the hands of the accused and other unknown persons and pangas were carried by the suspects.

20 2. Violence:

The theft must be accompanied by the use or threat of force against the victim. The violence can occur before, during, or immediately after the theft. Victim stated that the accused pulled out a panga. Victim wasn't beaten.

25 3. Possession of a Deadly Weapon:

The offender must be in possession of a deadly weapon at the time of the robbery. A deadly weapon is defined as any instrument made or adapted for shooting, stabbing, or cutting, or an imitation of such an instrument. Accused person allegedly had a panga. PW2, the Defence LC Secretary
30 confirmed he was arrested with a panga, later on at 2.00 a.m. in the vicinity of the crime. DW1 on cross examination admitted he was carrying a panga for his safety on his way back from a funeral.

4. Accused's Participation:

35 The prosecution must prove that the accused individual was involved in the commission of the theft. This means placing the accused at the scene of the crime. The crime occurred at night. Victim identified the accused using moonlight, was familiar with the accused and had known him for 1 ½ years.

5 5. Defences by the accused.

Defence on the other hand stated an alibi, he was going home when he was called to pick a passenger and then arrested. On cross examination, he denied what he had told the police in his statement, that he was carrying a panga for his safety. He denied participation in the crime.

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Opinion of the Assessors:

The assessors recommended acquittal of the accused and gave their reasons as follows. Their evaluation and mine of the evidence of PW1, the victim was similar. They recommended acquittal due to lack of corroboration of
15 two material facts; by PW2 and PW3. First, that no phones and money were recovered by PW2 when the accused was arrested. Second, the assessors also faulted the prosecution for failing to exhibit the panga as an exhibit. Third, they took into account that the accused had consistently denied the charges. I respectfully disagree with the assessors.

20 Taking into account the provisions of Section 83(3) of the Trial on Indictments Act, Cap 25 requires me to state my reasons for departing from their opinion, these are:

First, non-production of exhibits alone is of no effect unless it contradicts the testimony on the record. In *Wanzama and Others v Uganda*, 2001 UGSC 13,
25 the Supreme Court observed as follows:

“We are not persuaded by the arguments of counsel for the appellants. With respect, we do not think that the absence of exhibits can be referred to as contradictions.” [emphasis mine].

Second, I wish to add, the absence of exhibits, could not water down the
30 victim’s clear and uncontroverted testimony that a panga was present, and the accused’s own testimony on cross examination admitting he was arrested with a panga. In the same decision, the Supreme Court lays the circumstance in which failure to produce an exhibit may have an adverse effect on the prosecution. At page 6 of the judgment, they noted:

35 “Equally we don’t have a rationale on the basis of which we can make any adverse inference against the prosecution for failing to produce in evidence the letter whose contents were read or announced to the crowd by the first appellant.”

5 This reasoning applied to this case, would be to the effect, that failure to exhibit the pangas would contradict the prosecution's case, or create substantial doubt, which would resolve in favour of the accused person.

The court in Wanzama (ibid) unanimously added:

10 "The weapons (stones, sticks and pangas) mentioned by the two witnesses, those with which each of the appellants hit the deceased are common place objects. The record of evidence shows that the two witnesses were able to describe the weapons and neither was challenged as to the accuracy of the description and types of these weapons."

15 Prosecution of cases like aggravated robbery, present other challenges. First, they as in this case, mostly occur at night. Robbery is a crime of opportunity. The crime according to PW1 was committed at 8.30 p.m. Second, in such offences, unless, the crime is at a place of habitation, the identifying evidence is likely to be that of a single witness, the victim. The caution is
20 tempered in this case by the familiarity of the accused with the victim. See Abdullah Nabulere and 2 others v Uganda, Criminal Appeal No. 9 of 1978.

In ordinary life, witnesses don't voluntarily place themselves at the scene of crime to observe and corroborate the evidence of the victim. Second, the quality of evidence may also be affected by the use of; or threat to use
25 violence. In this case, the accused was holding a panga, as he was being accosted, someone was tapping his shoulder, then children came out, 4 in number, 14-15 years old searched him and ransacked him. It is almost humanely impossible to assertively identify so many individuals in a fleeting moment. This masks these robberies.

30 Finally, I disagree with the assessors giving the accused the benefit of doubt because he consistently denied participating in the crime. This is at variance with the court record. On cross-examination, the accused disowned his statement to police that he was carrying a panga for his own safety. In his statement he had told police, he was coming from the funeral rites of Gloria and was using the panga for protection. He also ran away from police when
35 confronted. On further cross examination, he told court that the people who arrested him were wearing army fatigues, but declined to assert that they were made up. I find the accused's evidence detailed but obstructive and full of contradictions. It was incapable of belief. The accused has a right



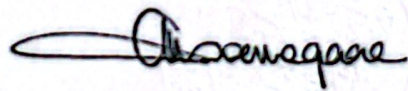
5 to remain silent, but once he chose to testify, his testimony only served to bolster the prosecution's case.

Findings and Conclusion:

10 The prosecution has established the ingredients of the offence of aggravated robbery as committed by the accused beyond a reasonable doubt. I accordingly convict the accused of the offence of aggravated robbery.

15 I SO ORDER

DATED AT KABALE THIS 7TH DAY OF OCTOBER 2025.



SSEMOGERERE, KAROLI LWANGA
JUDGE.



20 Judgment read in open court. Ms. Noerine Naggayi for the Prosecution, Mr. Felix Banyakabonera for the Accused. Accused Person in Court. Sentencing is for October 13, 2025.