

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KITGUM

CRIMINAL SESSIONS CASE No. 0372 OF 2018

UGANDA

PROSECUTOR

5 **VERSUS**

1. **AKENA KENNETH alias AMIYA }**

2. **OTENYA GAUDENSIO } ACCUSED**

3. **RWOT ONAMA CHARLES }**

10 **Before Hon. Justice Stephen Mubiru.**

JUDGMENT

The three accused were jointly indicted with two counts. A *Nolle Prosequi* SR. No. 1009 dated
15 22nd September, 2016 having been filed in favour of A3 Rwtot Onama Charles, the case against
him was terminated. For the remaining two accused, in Count 1 they are indicted with the
offence of Murder c/s 188 and 189 of *The Penal Code Act*. It is alleged that the two accused and
others still at large on the 3rd day of February, 2016 at Palimo West village, Pajimo Parish.
Labongo Akwang sub-county, Chua West County in Kitgum District murdered one Odong
20 Richard. In Count two, the two accused are jointly indicted with the offence of Aggravated
Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that the two accused and others
still at large on the 3rd day of February, 2016 at Palimo West village, Pajimo Parish. Labongo
Akwang sub-county, Chua West County in Kitgum District robbed one bull, 11 goats, cash
25 670,000/= ox plough, chickens and a bicycle at approximately ten million shillings, the property
of Odong Richard, and during, immediately before or immediately after the said robbery used
deadly weapons, namely; pangas and axes on the said Odong Richard.

The prosecution case is that the two accused were part of a bigger group which on the night of 3rd
February, 2016 at around 10.00 - 11.00 pm attacked the home of the deceased, set all his huts on

fire, cut him with an axe and hit him with clubs to death. They also roughed up members of the family of the deceased, and stole a number of items from the home which are listed in the indictment. The following morning, the police began its investigations that resulted in the arrest of the two accused.

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In their respective defences, both accused denied any participation. A1 Akena Kenneth stated that he was a captive all through the attack. On 3rd February, 2016, in the evening he was asleep at his home when someone kicked the door at around 9.30 pm and woke him up. He was ordered to come out and when he did he found Acire, Oyoo, Otto and Paul. They told him to move ahead of them as Acire slapped him in the face and forced him to move on saying he would kill him if he continued lying he was sick. He did not know where they were going. We crossed the main road. There were other people who remained at the main road. He saw his younger brother Okot Patrick, Racikara and Oyoo Lutoya were among them. It was dark and I could not see the rest of the people clearly.

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When they were about to reach the home of the deceased, Paul, Acire and Oyoo began running toward the home of the deceased, and he began seeing fire. By the time he arrived at the home of the deceased, the fire was dying out. The assailants had divided themselves into two groups at the home of the deceased. He heard someone crying at a distance of about thirty metres. They were talking to a girl. It appeared they knew the girl. Other people like Acire began beating the girl and others beat Kanyan Odong. He saw the stick exhibited in court was being held by Acire. He had an axe in the other hand. They were saying that you have killed ours now you want to live. They said he had killed Okello Dick who had died by beating four days before. He was the brother in law of Acire and the clan brother of A1. They began beating Kanyan. Acire, Oyoo, Otto were involved in the beating. They had tied A1 with his shirt and I was seated on the ground. They suspected that A1 would alert the authorities and had tied him up right from his home when they got him out of his house.

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Paul hit the deceased with an axe. The deceased was already weak and on the ground. He hits him on the back. Acire wanted to hit the wife of the deceased but she raised her hands in defence and pleaded for mercy. She said you have killed Odong. Paul left and began beating chicken on

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the tree. Acire carried Waragi that had been brewed by the wife of the deceased. Oyoo began blowing a whistle. He heard the wife of the deceased say you are going to hit me for nothing. Paul began raising an alarm. Acire picked the stick he was using for beating Odong, he threw it onto the body of Odong and told her to take it to the police and cause his arrest. That he did not
5 fear and that was not the only case he had committed. He said he had killed before and no bad omen would follow. Otto then made a phone call. Acire told him to get up. He got up and Acire kicked his buttocks and he fell down because they had tied his hands. He told A1 they would have killed him from there if he continues revealing their secrets. They left the home of the deceased but he did not know why they took him to the scene. They began drinking the Waragi
10 they had picked. They drank along the road.

When they got to the junction they began separating themselves. Otto began speaking on phone telling a person they had finished the issue of one. They left A1 by the roadside. He branched to his home. He had not even been untied. His hands were tied at the front. He used his teeth to bite
15 and untie the shirt, picked a papyrus mat and slept behind the house. He could still hear them celebrating. In the morning he wanted to get to the main road and tell the story but his thigh was painful as they had kicked him. He could not walk to the main road. He went into the house and had picked potatoes which he took behind the house when the police arrived. They asked him not to run. They saw the injury on his neck and decided not to beat him. They arrested him and went
20 with him to the main home of Olunya. People had disappeared and the place was deserted. They tried to trace for them but in vain. They continued to the home of the deceased. The body had already been loaded onto the vehicle. He was placed on that vehicle as well. They picked the jacket he was wearing. They tried to handcuff him but found his hands were tiny and used his shirt first before the handcuffs. He was brought up to Pagimo Barracks where the soldiers who
25 had participated in his arrest remained and he continued with police officers only. They went to the main hospital where the body of the deceased was left. He was taken to the police.

On his part, A2 Otenya Gaudensio testified that he spent the night at his home with his wife and was only arrested the following day as he pursued recovery of a motorcycle which had been
30 stolen from his son. On the morning of 4th February 2016 he was leaving to cut bamboo at Tee Abayo in Padibe West when he met some old woman, Lakot Josephine, on the road at 6.00 am.

She asked him where he was going and told him she was on her way to his home with her husband who was to follow shortly. He turned round and went back home. Within five minutes the husband Odwong Peter had arrived. He held a radio across his chest. He told A2 he had received bad news at the main road. He said he had met the wife of the deceased Odong Richard
5 running with a twig that is believed to signify something good or bad. She was running while crying and that when he asked her what had happened she said her husband had been killed by Acire. Both women began crying, his wife and that of Peter. They had not told him yet what they had come for.

10 He stopped them from crying and asked them to tell him what they had come to tell him in the first place. Odwong Peter wanted to borrow shs. 2,200,000/= Their son, Lam, in Somalia had sent money for purchase of land but it was short by that much. They wanted to top it up. He went into the house and gave them shs. 800,000/= they said they would take their cow to Amach Market in Lira and would pay him back. Odwong Peter told him that now since someone had
15 died, A2 should not go to where he had planned to. He told him that he should not go to the home of the deceased alone before the arrival of the police because the person had been murdered. A2's home is about two kilometres from that of the deceased. He remained at his home and they returned to theirs. A2 sent two of his children; Ocira Bosco and Ociti George, a son to a neighbour, with a boda-boda to pick sim-sim from Cubu parish in Lamwo so that they
20 can sell and get school fees for Ocira Bosco. It was around 9.00 am. They came back at around 5.00 pm and brought two sacks full. He told them to go and sell it. They were arrested at Agwen along the road at around 6.00 pm by a group of people.

The mob chased Ociti up to the home of A2. He told A2 that Ocira had been arrested and the
25 motorcycle taken. They ran to where he was. It was about 1.5 kms away. They stopped at a distance and saw lights from phones. A2 feared to draw closer since he did not know who they were. He went and slept behind some home of Orienga Justine. The following morning he mobilised people in the area and they began moving towards Agwen. They only found his shoes. They followed the motorcycle tyre tracks up to Ujwara stream and the people stopped there. A2
30 continued moving alone up to a borehole past his home, about a kilometre from his home. He found many people with his motorcycle. When they saw him and they began running away with

the motorcycle. They left his behind and took the one he had just hired. His was Registration Number UDW 167 A Bajaj, red in colour. It had been left at the home of the deceased. He began chasing them on foot and he stopped after a short distance. At that time he did not know where his motorcycle was. He then saw many people come back towards him. There were two police
5 officers among them. The police arrested him, made him sit down and began questioning him. they asked him where he was going and he told them he was following up on his motorcycle. He was then taken to the home of the deceased and there he found his motorcycle and the one he had hired. The home of the deceased is about one kilometre from the borehole. They began asking him about the two motorcycles and he told them they were his. They asked him to tell them the
10 registration numbers and he told them. They asked him where he had been the previous day.

At the home of the deceased on Friday 5th February, 2016 he saw three burnt houses and many people. He was asked where his children had been. He told them his sons had the motorcycles. He was taken to the police station. He was told the following morning. The first time he came to
15 know the charge against him was from court. He told the police he had learnt about the death of the late Odong from Peter Odwong. That his wife had told him that Acire had killed him. He told them he did not know the persons who had killed the deceased. He also wrote a statement about his motorcycle. It is from the court that he heard he had been to the home of Odong and that he had cut him with an axe. He did not know any reason why the widow of the deceased would tell
20 lies against him. He had no grudge with the family of the deceased before his death. His clan is Lukwor and he did not know the clan of the deceased. Lukwor clan lives five kilometres from Akwang. He lives with maternal uncles, has lived there for about forty years and has lived there peacefully for all that long. He did not know why Odong was killed. It is not true that A2 killed him. His wife D.W.4 (Akwero Rose) corroborated the alibi.

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Since each of the accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each of them beyond reasonable doubt. The burden does not shift to any of the accused persons and each of them can only be convicted on the strength of the prosecution case and not because of weaknesses in their respective defences, (see *Ssekitoleko v. Uganda [1967] EA 531*). The accused do not have any obligation to prove their innocence. By
30 their respective pleas of not guilty, each of the accused put in issue each and every essential

ingredient of the two offences with which they are indicted and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure their conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates
5 a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

For the accused to be convicted of Murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

- 10 1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

15 For the accused to be convicted of Aggravated Robbery, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Theft of property belonging to another.
2. Use or use threat of use of violence against the victim.
3. Possession of a deadly weapon during the commission of the theft.
- 20 4. The accused participated in commission of the theft

With regard to the first count, death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In the instant case the prosecution adduced a post mortem report dated 4th February,
25 2016 prepared by P.W.1 Dr. Godfrey Akena a Medical Officer of Kitgum Government Hospital, which was admitted during the preliminary hearing and marked as exhibit P. Ex.1. The body was identified to him by the widow Atim Sarah as that of Odong Richard. P.W.5 Atim Sarah, the widow of the deceased testified that she saw the body of the deceased when he lay dead in his compound and also attended the funeral at Ateng village on 7th February, 2016. P.W.6 Anena
30 Novia, a daughter of the deceased, too saw the body of the deceased at the scene. P.W.7 D/ASP Ocen Bosco Olukuwode found the body at the scene and organised for its carriage to the hospital

mortuary for post-mortem examination. In his defence, A1 Akena Kenneth admitted having seen the body of the deceased. Defence Counsel did not contest this element. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Odong Richard died on 3rd February, 2016.

5 The prosecution had to prove further that the death of Odong Richard was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorised by law (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). P.W.1 who conducted the autopsy established the cause of death as “massive haemorrhage leading to cardiopulmonary arrest and death.” Exhibit P. Ex.1 dated 4th
10 February, 2016 contains the details of his other findings which include a “head, abdomen and chest soiled with dry blood plus the cloth. Found depressed fracture of the temporal bone at closed anterior fontanelle (space between the bones of the skull where ossification is not complete and the sutures not fully formed. The main one is between the frontal and parietal bones). Fracture of right middle third femur. Open lacerated wound on the skull / scalp; 3 x 3
15 cm, 1.8 cm in depth.” P.W.5 Atim Sarah, the widow of the deceased witnessed the assault of the deceased by a mob wielding axes, clubs and pangas. P.W.6 Anena Novia, too witnessed the assault. P.W.7 D/ASP Ocen Bosco Olukuwode saw visible external injuries on the back, head and nearly the entire body had injuries but mainly on the head and the back. There were weapons scattered nearby and he recovered a blood stained club (exhibit P. Ex.2) and a small axe (exhibit
20 P. Ex.3). In his defence, A1 Akena Kenneth admitted having witnessed the assault of the deceased that led to his death. Defence Counsel did not contest it as well in his final submissions. Not having found any lawful justification for that assault, I agree with the assessors that the prosecution has proved beyond reasonable doubt that Odong Richard' death was unlawfully caused.

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Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is defined by section 191 of *The Penal Code Act* as either an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to
30 cause death or knew that the manner and degree of assault would probably cause death. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

Malice aforethought being a mental element is difficult to prove by direct evidence, Courts usually consider first; the nature of the weapon used. In this case a blood stained club (exhibit P. Ex.2) and a small axe (exhibit P. Ex.3) were produced in court as some of the weapons used in assaulting him. On basis of the nature of wounds inflicted, there is no doubt that they are indeed some of the weapons used in the assault. A deadly weapon is defined by section 286 (3) of *The Penal Code Act* to include instruments made or adapted for cutting and those which when used of offensive purposes are capable of causing death. I find that deadly weapons were used in assaulting the deceased.

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The Court then considers the nature of the weapon used (in this case deadly weapon, clubs and axes) and the manner in which they were used (inflicted multiple fatal injuries) and the part of the body of the victim that was targeted (the head). The ferocity with which the weapons were used can be determined from the impact (fracture of the temporal bone at closed anterior fontanelle and an open lacerated wound on the skull / scalp). P.W.1 who conducted the autopsy established the cause of death as “massive haemorrhage leading to cardiopulmonary arrest and death.” Although there is no direct evidence of intention, malice aforethought can be inferred readily in a situation like this where the circumstances in which the injury was inflicted can be deduced from the very nature of the fatal injury. Any perpetrator who used those deadly weapon to inflict such injuries on the head of the deceased, must have foreseen that death would be a natural consequence of his or her act. None of the accused adduced any evidence or made a submission capable of casting doubt on this conclusion and neither did Defence Counsel contest this element. On basis of the circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred. The prosecution has consequently proved beyond reasonable doubt that Odong Richard’s death was caused with malice aforethought.

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The last ingredient of participation, is common to the second count as well and for the avoidance of repetition, will be considered alongside the other elements in the second count, the first element of which, taking of property belonging to another, requires proof of what amounts in law to an asportation (that is carrying away) of the property of another without his or her consent. The property stolen in this case is alleged to be one bull, 11 goats, cash 670,000/= ox plough,

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chickens and a bicycle all valued at approximately ten million shillings. P.W.5 Atim Sarah, the widow of the deceased saw chicken and goats being carried away. P.W.6 Anena Novia, too saw chicken and goats being carried away. Counsel for the accused conceded to this ingredient in his final submissions. Having considered all the available evidence relevant to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that some of Odong Richard's property particularised in the indictment was stolen on 3rd February, 2016. It does not matter that not all the property listed was proved to have been stolen. Proof of theft of any of the items listed suffices for purposes of the offence.

10 The prosecution was further required to prove the use or threat of use of violence against the victim during that theft. P.W.4 Lanyero Irene, daughter in law of the deceased, testified that during the raid when she jumped out of a burning hut she was immediately assaulted to unconsciousness. P.W.5 Atim Sarah, the widow of the deceased narrated that houses were set on fire, weapons were brandished and her husband was killed in the process. P.W.6 Anena Novia, 15 daughter of the deceased too narrated that houses were set on fire, weapons were brandished and her father was killed in the process. In their respective defences, only A1Akena Kenneth admitted having witnessed the mayhem and the violence involved in the raid. Considering the evidence as a whole relating to this element and in agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that immediately before, during or 20 immediately after theft of some of the property mentioned the indictment, violence was used against the deceased Odong Richard, to the point of killing him.

The prosecution was further required to prove that immediately before, during or immediately after the said robbery, the assailants had deadly weapons in their possession. A deadly weapon is 25 defined by section 286 (3) of *The Penal Code Act* as one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. P.W.4 Lanyero Irene, saw men carrying arrows and axes. She was hit on the back with an axe and a log and became unconscious. P.W.5 Atim Sarah, the widow of the deceased narrated that houses were set on fire, weapons were brandished and her husband was killed in the 30 process. P.W.6 Anena Novia testified just as much. P.W.7 D/ASP Ocen Bosco Olukuwode saw weapons scattered near the body at the scene and he recovered a blood stained club (exhibit P.

Ex.2) and a small axe (exhibit P. Ex.3). Considering the evidence as a whole relating to this element and in agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that the assailants had deadly weapons in their possession during the robbery.

5 Lastly, the prosecution had to prove in respect of both counts that each of the accused participated in commission of the offence. This is done by adducing direct or circumstantial evidence placing each of the accused at the scene of crime as perpetrator of the offence, or as an accessory thereto. Both accused denied having participated in the commission of the crime. A1 stated that he was a captive of the mob throughout the time it attacked the homestead of the
10 deceased. A2 Otenya Gaudensio raised the defence of alibi. An accused who puts up such a defence has no duty to prove it. The burden lies on the prosecution to disprove it by adducing evidence which squarely places the accused at the scene of crime as an active participant in the commission of the offence (see *Vicent Rwamaro v. Uganda [1988-90] HCB 70*; *Ssebyala and others v. Uganda [1969] E.A. 204* and *Col. Sabuni v. Uganda 1982 HCB 1*).

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To disprove those defences, the prosecution relies on identification evidence of P.W.5 Atim Sarah, the widow of the deceased who narrated on the evening of 3rd February, 2016 at around 10.00 - 11.00 pm she was seated together with her deceased husband at home with their children. The deceased remained at the fireplace trying to roll a cigarette. He called her to take him
20 drinking water. They heard people come running and she sent the children into the house. She entered the kitchen and as she brought the water inside, the boy who came running was saying come outside. She asked him what the problem was. Then a one Lutoya said whom are you fooling, don't you know that we are also men? He recognised the voice as that of Lutoya. He came close to her and he saw his face. He was about two meters from him. He was aided by the
25 light from the fireplace. Lutoya began hitting the deceased and an axe on the forehead. He was with Acire who hit the neck of the deceased with a log. A1 Akena cut the back of the deceased with an axe. Oyoo hit the thigh of the deceased with an axe and fractured the bone. She did not remember the fifth person very well but he hit the deceased on the chest with an axe. The deceased fell down, and then they went to my co-wife's place Irene. Her house is 35 - 40 metres
30 away. She heard a voice of Onama say, "you leave them to go when they are still alive? These people should be finished one by one." One person had moved around the house before the

attack. He, Acire, returned and said "I have come and now you are to die." He hit the chest of the deceased and he fell down dead.

They began setting the house and granaries on fire, they hit the goats chicken and took some
5 away with them. They destroyed four bags of sim-sim in the house , two bags of g-nuts, one bag
of millet and the rest got burnt in the granary. A2 cut the deceased with an axe on the shoulder.
She knew the two of them because they lived together in the same neighbourhood and she used
to see them every day. They draw water from the same place. When they set the house on fire
she was able to identify them. They hit her with a panga once but she had forgotten the name of
10 that person who did it. She was hit on the left thigh. In the morning she reported to a home at the
main road at the home of Otita. He is the one who went and reported to the police. The police
came together with soldiers to the scene. They carried the body to the hospital. The deceased was
buried at Ateng village, Ateng sub-county on 7th February, 2016. She attended the funeral.

15 P.W.6 Anena Novia testified that they were together with the deceased at home in the evening at
around 9.00 pm listening to football commentary on radio in the compound near the fireplace.
They were are about seven; her mother Atim Sarah, her father, her sister Atimango Jenneth, her
brother Opara Boniface. She entered the kitchen and picked a torch and began moving to the
house where she sleeps. She lay down in the house. In less than five minutes she heard voices of
20 many people with one saying anyone who escapes just shoot. She sat up for about three minutes
wondering what was going on. She heard them surround the house and set it on fire. She told
Lanyero Alice to get out. She stopped her. P.W.6 insisted that the house had been set on fire.
Lanyero Alice told her to first wait. Paul hit the door with an axe and it opened. P.W.6 got out as
the house was very hot. As she got out and the assailants threatened her with an axe and ordered
25 her out. They stood next to the compound. When Lanyero got out, A2 Otenya hit her on the
back. Paul told her to go where her mother was. Paul walked beside her to her mother. When she
got there she found her father had already been hit and was lying on the ground. She was
grieving for her father. A1 Amia stopped her from crying if she did not want to die as well. She
found him at the compound of her mother. He was standing with Lotoya Oyoo, Okot Oguru,
30 Acire, and many other people. They had surrounded the home. Lutoya then told the people he
was with to follow him and asked them whether they knew what had brought them. They began

beating the goats and chicken and throwing them into the fire. When they were done they told P.W.6 and the rest if they were powerful to call the police and began moving away. They took some of the goats and the chicken. They began by setting the house on fire and there was moonlight as well. That is how she was able to recognise them. When she recognised them they were about ten metres from her and the burning hut was about six metres from her.

P.W.4 Lanyero Irene, the deceased's daughter in law testified that on 3rd February, 2016 at around 10.00 - 11.00 pm she left the fireplace at the home of the deceased when he and his wife went to their house and she, Aneno Nevia and Atim too went to her house to sleep. The houses are about thirty five metres apart. Later they heard something running behind their house and she thought initially it was an animal. Then she heard a voice saying "if someone runs just shoot." She recognised the voice as that of Paul, one of the sons of the brothers of the accused. She got up and stood near the wall inside the house. She looked through the window and she saw a drawn arrow and an axe. It was Otto who had aimed the arrow and Paul carried the axe. Then Oling John set the house she was in on fire. She told Aneno they should escape from the house.

Aneno was the first to jump out. When she got out, Atim followed. The two were told to sit down. It is Paul who ordered them to sit down. She too then came out as well. Onama Charles said she was the eldest. Then Paul asked for a one Omony. She told them Omony, her husband, was not around. Oling then said they should stop asking her questions and begin the work. Paul began hitting her on the back with an axe. She fell down. Onama then asked why they were hitting her lightly and just playing with her. Oling John picked a log and hit her on the right hand. She saw and recognised them with aid of the light from the burning hut. Otto, one of the children of the brother of Akena too was there. They hit her a third time on the back and she became unconscious. She regained her consciousness in Kitgum Government hospital after two days. She did not identify the two accused because there were many people involved in the attack. The ones she mentioned are the ones she could remember.

It turns out therefore that the prosecution relies only on the identification evidence of P.W.5 Atim Sarah, the widow of the deceased and that of P.W.6 Anena Novia the daughter of the deceased. Where prosecution is based on the evidence of indentifying witnesses under difficult

conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. 1 of 1997*). It is necessary to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. The Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification. In doing so, the court considers; whether the witnesses were familiar with the offender, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the offender and the proximity of the witnesses to the offender at the time of observing him.

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I have considered the circumstances that prevailed when both P.W.5 Atim Sarah and P.W.6 Anena Novia claim to have seen the two accused at the scene of crime. It was during the night but there was light emanating from the burning huts and moonlight which aided their observation and recognition of the accused. Under those conditions of lighting, both witnesses came into close proximity of both accused. They also had known the two accused before. The attack took a considerable period of time and this gave them ample time and opportunity to have an unimpeded look at both accused. They were able to give a detailed non-contradictory account of the level of involvement of each of the two accused. Both accused were at the centre of the activity such that the likelihood of being mistaken for other persons at the periphery is minimal.

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In respect of A1Akena Kenneth, he admitted in his defence to having been at the scene and his account of the sequence of events and other persons named in the attack is consistent with that of the two witnesses. I have not found any significant unfavourable circumstances which could have negatively affected the ability of the two witnesses to see and recognise the two accused.

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In his defence, A1 Akena Kenneth claimed to have been a captive throughout the attack. Under section 14 of *The Penal Code Act*, a person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or her or do him or her grievous bodily harm if he or she refuses; but threats of future injury do not excuse any offence. To succeed with this defence, the accused must show that; (i) there was a present,

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immediate, or impending threat of death or serious bodily injury to the accused or a family member of the accused if the accused did not commit or participate in the commission of the offence; (ii) the accused had a well-grounded fear that the threat of death or serious bodily injury would be carried out; (iii) the accused had no reasonable opportunity to escape the threatened harm; and (iv) the accused surrendered to authorities as soon as it was safe to do so.

I have considered the circumstances that prevailed as narrated by A1 Akena Kenneth. He did not disclose any present, immediate, or impending threat of death or serious bodily injury to him or a member of family that compelled him to participate in the commission of the offence. There is no evidence that he had a well-grounded fear that any threat of death or serious bodily injury would be carried out. There is no evidence that he had no reasonable opportunity to escape the threatened harm. Finally, there is no evidence that he surrendered to authorities as soon as it was safe to do so. Instead, he claimed to have suffered such pain from a single kick to his buttocks that he was incapable the following morning to report to the police. I find his entire version implausible. I do not accept that the mob, believing him to be a snitch, would have taken the trouble to wake him up from his house and let him witness the attack, in circumstances when it would be easier to have gone ahead without alerting him in order to deny him the opportunity to reveal the identity of the participants in the crime. I have therefore reject his defence.

All in all I have found that the evidence against A1 Akena Kenneth and A2 Otenya Gaudensio has disproved their respective defences and placed each of them squarely at the scene of the crime as persons who participated in killing Odong Richard and also robbed him of some of the items mentioned in the indictment. Each of the accused is accordingly found guilty and convicted for the offence of Murder c/s 188 and 189 of *The Penal Code Act* in respect of the first count, and the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act* in respect of the second count.

Dated at Gulu this 5th day of December, 2018

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Stephen Mubiru
Judge,

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SENTENCE AND REASONS FOR SENTENCE

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Sentencing is a reflection of more than just the seriousness of the offence. The court at this stage, in sentencing multiple convicts at the same trial where the facts permit, may take into account the degree of culpability of each of the convicts. Degree of culpability refers to factors of intent, motivation, and circumstance that bear on the convict’s blameworthiness. Under the widely
10 accepted modern hierarchy of mental states, an offender is most culpable for causing harm purposely and progressively less culpable for doing so knowingly, recklessly, or negligently.

Murder is one of the most serious and most severely punished of all commonly committed crimes. The offence of murder is punishable by the maximum penalty of death as provided for
15 under section 189 of the *Penal Code Act*. Similarly, according to section 286 (2) of the *Penal Code Act*, the maximum penalty for the offence of Aggravated Robbery is death. In cases of deliberate, pre-meditated killing of a victim, courts are inclined to impose the death sentence especially where the offence involved use of deadly weapons, used in a manner reflective of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind
20 regardless of the sanctity of life. This maximum sentence is therefore usually reserved for the most egregious cases of Murder and Aggravated Robbery, committed in a brutal, in an extremely brutal, grotesque, gruesome, diabolical, revolting or dastardly, callous manner so as to arouse intense and extreme indignation of the community.

25 According to paragraph 18, Part 6 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the court may only pass a sentence of death in exceptional circumstances in the “rarest of the rare” cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate. By implication, life is the norm and death is the exception. However, "rarest of rare" is often misunderstood to mean the rarity of
30 the case. To the contrary, the court is supposed to look at the case holistically, understand the factors that led to the crime, the circumstances of the convict and the victim, among other things,

before pronouncing the sentence. The death sentence is supposed to be imposed when the alternative option is unquestionably foreclosed. It a punishment of last resort when, alternative punishment of a long period of imprisonment or life imprisonment will be futile and serves no purpose.

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This case does not fit the category of "rarest of rare" and for that reason I have found that the death penalty is inappropriate for either of the two convicts in respect of any of the two offences. Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment. In *Ninsiima v. Uganda Crim. Appeal No. 180 of 2010*, the Court of appeal opined that these guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial.

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With regard to the offence of murder, I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v. Uganda C.A Crim. Appeal No. 51 of 2007*, where in its judgment of 22nd December 2014, the Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight. Similarly in *Sunday v. Uganda C.A Crim. Appeal No. 103 of 2006*, the Court of Appeal upheld a sentence of life imprisonment for a 35 year old convict who was part of a mob which, armed with pangas, spears and sticks, attacked a defenceless elderly woman until they killed her. In *Byaruhanga v. Uganda, C.A Crim. Appeal No. 144 of 2007*, where in its judgment of 18th December 2014, the Court of Appeal considered a sentence of 20 years' imprisonment reformatory for a 29 year old convict who drowned his seven months old baby. The convict had failed to live up to his responsibility as a father to the deceased who was victimized for the broken relationship between him and the mother of the deceased.

30 With regard to the offence of Aggravated Robbery, I have considered sentences passed before in similar circumstances. For example in *Kusemererwa and Another v. Uganda, C.A. Criminal*

Appeal No. 83 of 2010, a sentence of 20 years' imprisonment was upheld in respect of convicts who had used guns during the commission of the offence, but had not hurt the victims. In *Naturinda Tamson v. Uganda C.A. Criminal Appeal No. 13 of 2011*, a sentence of 16 years imprisonment was imposed on a 29 year old convict for a similar offence.

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In light of the aggravating factors outlined by the learned State Attorney, and on basis of their blameworthiness, against which I have considered the submissions made in mitigation of sentence and in the *allocutus* of both convicts, I conclude that the aggravating circumstances in this case outweigh the mitigating factors. I consider a deterrent sentence to be appropriate for each of the convicts. I for that reason deem a period of thirty five (50) years' imprisonment for count one and thirty five (35) years' imprisonment for count two. By reason of the mitigation advanced, in respect of count one, it is reduced to forty (40) years with regard to A1 and (44) years with regard to A2. In respect of the second count, to twenty eight (28) years respectively.

15 It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a convict. Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, requires the court to "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. Each of the convicts, A1 Akena Kenneth and A2 Otenya Gaudensio was remanded on 9th February, 2016 and hence has been on remand for two (2) years and ten (10) months. I hereby take into account and set off the respective periods each of the two convicts has already spent on remand.

25 I therefore sentence the A1 Akena Kenneth to a term of imprisonment of thirty eight (38) years and two (2) months, in respect of the first count and twenty five (25) years and two (2) months in respect of the second count. Both sentences are to run concurrently and are to be served starting today. I further sentence A2 Otenya Gaudensio to a term of imprisonment of forty one (41) years and two (2) months, in respect of the first count and twenty five (25) years and two (2) months in respect of the second count. Both sentences are to run concurrently and are to be served starting today.

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It is mandatory under section 286 (4) of *The Penal Code Act*, where a person is convicted of Aggravated Robbery c/s 285 and 286 (2), unless the offender is sentenced to death, for the court to order the person convicted to pay such sum by way of compensation to any person to the
5 prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person.

Although there was evidence that property was lost, no evidence was led to guide court regarding the capacity of any of the two convicts to pay compensation and any award therefore will be
10 speculative. I have therefore not found a basis for directing any of the two convicts to compensate the family of the deceased.

Both convicts are advised that they have a right of appeal against both conviction and sentence within a period of fourteen days.

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Dated at Gulu this 5th day of December, 2018

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Stephen Mubiru

Judge,

5th December, 2018.