THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL APPEAL No. 0005 OF 2015

(Arising from Koboko Grade One Magistrate's Court Criminal Case No. 0026 of 2013)

UGANDA ……. APPELLANT

VERSUS

1. GBONGA DIMBA }
2. MABE ALISA } …… RESPONDENTS
3. BAIGA JOHN }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The Respondents were on 29th January 2013, jointly charged with one count of Assault Occasioning Actual Bodily Harm c/s 236 of *The Penal Code Act*, two counts of Malicious Damage to property c/s 335 (1) of *The Penal Code Act*, and one count of Theft c/s 254 (1) and 261 of *The Penal Code Act*, before the Grade One Magistrate at Koboko. It was alleged in count one that the three of them and others at large, on 10th December 2012 at Kagoropa village, Ayire Parish in Koboko District, they assaulted Wasa John thereby causing him actual bodily harm. It was alleged that the three of them and others at large, on 10th December 2010 at Kagoropa village, Ayire Parish in Koboko District, in count two that they wilfully and unlawfully damaged / destroyed eight grass-thatched houses, an incomplete commercial building under construction and a motorcycle the property of Songa Samuel all valued at shs. 14,000,000/=; while in count four, that they wilfully and unlawfully damaged / destroyed one grass-thatched house the property of Bako Ida valued at shs. 1,000,000/=. In count three, it was alleged that the three of them and other at large, on the same day and at the same place, stole four boxes of hoes, seven water cans and six mattresses, the property of Songa Samuel all valued at shs. 60,000/=.

At their trial, the prosecution adduced evidence from five witnesses. P.W.1 Wasa John testified that he knew the three of them as village-mates and that on the fateful day at around 11.00 am, he had just returned home from digging in his garden when the third respondent, who was part of a group that comprised the first and second respondent, attacked him with a hoe hitting him on the head and back before running away. The witness ran to the garden where his father P.W.2 Songa Samuel was digging under pursuit of the attackers, and told him the third respondent had attacked him. Later his father took him to Koboko Health Centre where he was admitted for two days while receiving treatment. P.W.2 Songa Samuel testified that on that day, his son P.W.1 Wasa John ran to him shouting "Baba they are trying to kill me" and he mentioned the name of A3 as the assailant. He ran back home and found the three accused together with a group of about thirty other people armed with bows, arrows, logs and hoes, demolishing his houses. He then rushed his son to Health Centre and the following day when he returned home, he found that his motorcycle had been damaged, his four boxfuls of new hoes were missing along with his six inch mattress. He reported to the police who then visited the scene and took photographs. He believed the attack was motivated by a dispute over land that had existed for the previous four to five years.

P.W.3 Aidah Bako, the younger sister of P.W.2 testified that on the fateful day at around 11.00 am, she saw the second and third respondents armed with pangas, bows and arrows. The two of them were demolishing houses that belonged to P.W.2 Songa Samuel. When confronted by the third respondent, she escaped to a hill at a distance of about 150 metres from the scene and continued to observe what was going on. From there, for a duration of about thirty minutes, she saw the three respondents proceed to her house, which was about 100 metres from that of P.W.2, and demolish it. When she went to the scene the following day, she found her six inch mattress, cash and cooking utensils missing and the radio broken. The scene of crime was photographed by the police and the photographs were tendered in evidence. P.W.4 Detective AIP Onegiu Jimmy, testified that he was assigned to investigate the case. On 12th December 2102 he went to the scene with a Scene of Crime Officer. They found property of the complainants which had been destroyed, including houses and household property. From the scene they also recovered some of the implements which had been used during the demolition. Ten buildings in all had been demolished, nine belonging to P.W.2 and one to P.W.3. The SOCO photographed the

relevant aspects of the scene which included a damaged motorcycle and demolished buildings. Statements were recorded from witnesses and some of the people named included the three respondents who were arrested in January 2013 since they had gone into hiding. All three raised an alibi saying they had been in Arua at the time the offences were committed. P.W.5 Detective Corporal Opormalu Ben, testified that he specialises in forensic investigation as a scene of crime officer. On 13th December 2102 he was asked to visit a scene of crime in Kagoropa village. At the scene he took photographs of the relevant aspects. There were demolished houses and a damaged motorcycle. He later printed out the photographs and they were tendered in evidence.

In his defence, the first respondent denied all four counts. Although he had since the year 2008 had a land dispute with P.W.2 Songa Samuel and P.W.3 Aidah Bako springing from the fact that he stopped the two from selling clan land, on the fateful day he was in Arua where he had gone to meet his advocate, Mr. Jogo Tabu and therefore did not participate in commission of the crime. He travelled to Arua on 9th December 2012 for a meeting with his lawyer that had been scheduled for 10th December 2012 at 8.00 am. The meeting did not take place because the lawyer had been called to Kampala on short notice. He left Arua at 3.30 pm and arrived home at 5.00 pm. He only heard about the fight between the Nyori clan and the Madissa clan that had taken place earlier that day. On his part, the second respondent too stated that he travelled to Arua on 9th December 2012 for a meeting with his lawyer Mr. Jogo Tabu that had been scheduled for 10th December 2012 at 8.00 am. The meeting did not take place. He left Arua and arrived home in the evening of 10th December 2012. He was implicated in the case only because of his popularity and the land dispute between the Nyori clan and the Madissa clan that had existed since 2008 sparked by the complainants' attempt to sell clan land. He was in Arua when the fight took place. When he returned from Arua, he saw that houses belonging to P.W.2 Songa Samuel and P.W.3 Aidah Bako had been destroyed. The third respondent did not testify in his defence.

D.W.3 Mr. Peter Jogo Tabu testified that he represented the three respondents in a trial before the Chief Magistrates Court of Arua with regard to charges preferred against them in 2008. He fixed an appointment to meet them in Arua on 10th December 2012 to prepare for their defence after the court had ruled they had a case to answer. They were at his chambers on that day at 9.00 am to meet him but since he had cases in court at 9.00 am he told them to await his return from

court. When he returned from court at around 2.45 pm, he found that they had already left. When he contacted them later they told him they had to travel back home since they had run out of funds and could not stay in Arua for another night. D.W.4 Mr. Yosa James testified that he was at the Koboko Taxi Park on 10th December 2012 at around 5.00 pm when he saw the third respondent who told him he had just returned from Arua Court together with about eight other people. He had passed by the residence of P.W.3 Aidah Bako and had seen that her house had been destroyed.

In his judgment, the trial magistrate found that the evidence of P.W.3 Aidah Bako was inconsistent with her statement to the police (exhibit D.E.1) and therefore could not be relied on as an eyewitness. No medical evidence was adduced to prove actual injury had been inflicted on P.W.1 Wasa John. The three respondents were therefore acquitted of the offence of Assault Occasioning Actual Bodily Harm c/s 236 of *The Penal Code Act*. In respect of the counts of Malicious Damage to property c/s 335 (1) of *The Penal Code Act*, the trial magistrate found that the prosecution had adduced enough evidence to prove that the property had indeed been destroyed / damaged. However, the prosecution had not adduced the testimony of any independent eyewitness. The prosecution also failed to disprove the defence of alibi raised by the respondents. Consequently the three respondents were acquitted of these two counts as well. As regards the last count of Theft c/s 254 (1) and 261 of *The Penal Code Act*, the trial magistrate found that it was all based on circumstantial evidence of the complainant's house having been destroyed and finding the following day that his household items were missing. This evidence did not irresistibly point to the guilt of the respondents and hence they were acquitted of this count as well. He concluded by finding that the entire prosecution was misconceived.

Being dissatisfied with the decision, the state as prosecutor appealed the acquittal on the following grounds, namely;

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate all evidence on court record and thereby erroneously acquitted the respondents.

2. The learned trial magistrate erred in law and fact in his assessment and application of the law regarding identification when he failed to consider prosecution witnesses who identified the accused yet it was broad day light and thereby reached an erroneous conclusion and acquitted the respondents.

3. The learned trial magistrate erred in law and fact on the defence of alibi raised by the accused by failing to consider evidence of prosecution witnesses who squarely placed the accused persons at the scene of crime and as a result arrived at a wrong conclusion of acquitting them.

4. The learned trial magistrate erred in law and fact in his assessment, interpretation and application of the law of circumstantial evidence and thereby arrived at a wrong decision acquitting the respondents.

At the hearing of the appeal the learned State Attorney Mr. Emmanuel Pirimba, conceded that the circumstantial evidence was insufficient to support a conviction for the count of theft but argued that the evidence on record proved the rest of the charges. With regard to the first count, he submitted that in absence of medical evidence, the trial court ought to have considered the minor and cognate offence of common assault. As regards the two counts of malicious damage to property, the defence of alibi of the three respondents was destroyed by the evidence of identification that placed them at the scene of crime. The acquittal was therefore erroneous and ought to be reversed. Submitting in opposition to the appeal, counsel for the three respondents, Mr. Madira Jimmy argued that the trial court properly evaluated all the evidence and came to the right conclusion wherefore the appeal ought to be dismissed.

This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court

must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it".

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused are only convicted on the strength of the prosecution case and not because of weaknesses in their defence, (See *Ssekitoleko v. Uganda [1967] EA 531*). By their plea of not guilty, the respondents put in issue each and every essential ingredient of the offences with which they were charged and the prosecution had the onus to prove all the ingredients beyond reasonable doubt. 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 a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

Since the appellant conceded that acquittal of the respondents in respect of Count 3 was proper, I do not have to explain in detail the re-evaluation I have conducted of the evidence in relation to this count. Suffice it to state that the evidence in respect of this count was entirely circumstantial and before convicting an accused of an offence depending entirely on circumstantial evidence, a trial court must direct itself on the requirement that before deciding to convict upon such evidence, the inculpatory facts should be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused

(see *Ilanda s/o Kisongo v. R. (1), [1960] E.A. 780* and *Simon Musoke v. R [1958] EA 715*). I find that the trial court properly directed itself on the law and applied it correctly when it concluded that the fact of the complainant's house having been destroyed and the complainant finding the following day that his household items were missing did not irresistibly point to the guilt of the respondents as the persons who stole his household items. The possibility that a person other than the respondents took advantage of the demolished house to steal the items mentioned in the count was never discounted and yet it presented a reasonable hypothesis that is inconsistent with the guilt of the accused. The acquittal of the respondents on count three for the offence of Theft c/s 254 (1) and 261 of *The Penal Code Act* is therefore upheld.

The ingredient of participation of the respondents in commission of the rest of the offences charged is common to all counts preferred in the charge sheet and for avoidance of repetition I defer its consideration until evidence relating to all other elements of the rest of the offences has been re-evaluated. Apart from participation of the respondents, in count one, the prosecution was required to prove in addition that; (a) there was an unlawful assault of the complainant, (b) as a result of which the complainant sustained bodily injury. As regards proof that there was an unlawful assault of P.W.1 Wasa John, there are many acts which in themselves may be harmless and lawful which become unlawful if they are done without the consent of the person affected. As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. In the instant case, it was testimony of P.W.1 Wasa John at page 3 of the record of proceedings that he was hit with a hoe on the head which also touched his back. He repeated this in cross-examination. I have not found any other evidence on record to contradict this testimony and there being nothing to suggest that this witness was untruthful. This attack was without his consent and it involved such a degree of violence that the infliction of bodily harm was a probable consequence. This ingredient of the offence was proved beyond reasonable doubt.

The prosecution was required to adduce evidence to prove the second ingredient to show that P.W.1 sustained some bodily injury as a result of that assault. On a charge of assault occasioning actual bodily harm, there is need for medical evidence to ascertain the nature of the harm (see

Uganda v. Eboru s/o Emeu [1979] H.C.B 169). In the instant case, the prosecution did not adduce any medical evidence although both P.W.1 and P.W.2 testified that soon after the attack P.W.1 received medical treatment for the injury he sustained, from Koboko Health Centre. In absence of medical evidence, the trial court was right to find that this element was not proved beyond reasonable doubt and in consequently acquitting the respondents of this charge.

However, according to section 145 of *The Magistrates Courts Act*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it (see also *Uganda v. Leo Mubyazita and two others [1972] HCB 170; Paipai Aribu v. Uganda [1964] 1 EA 524* and *Republic v. Cheya and another [1973] 1 EA 500*). The minor offence sought to be entered must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in *Ali Mohamed Hassani Mpanda v. Republic [1963] 1 EA 294*, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of *The Penal Code Act.* The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code Act*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

> s. 181 of *The Criminal Procedure Code* (similar to section 145 of *The Magistrates Courts Act, Cap 16*) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted.

Section 145 of *The Magistrates Courts Act* envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the only distinction between the offence of Common Assault c/s 235 of *The Penal Code Act* and

Assault Occasioning Actual Bodily Harm c/s 236 of *The Penal Code Act,* is that the latter requires proof of bodily harm or injury which the former does not. Therefore by a process of subtraction, the offence of Common Assault c/s 235 of *The Penal Code Act* is minor and cognate to that of Assault Occasioning Actual Bodily Harm c/s 236 of *The Penal Code Act,* and a person charged with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not charged with it. The circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also. The charge under section 236 of *The Penal Code Act* gave the respondents notice of all the circumstances going to constitute the offence under section 235 for which they could be convicted.

The trial magistrate having discounted the offence of Assault Occasioning Actual Bodily Harm c/s 236 of *The Penal Code Act,* only because of absence of a medical report to aid in classifying the injury inflicted, ought to have considered the offence of Common Assault c/s 235 of *The Penal Code Act* whose facts had been proved. Had he properly directed himself, he would have come to the conclusion as I do now that the prosecution evidence proved the two elements of the minor and cognate offence of Common Assault c/s 235 of *The Penal Code Act* to the required standard.

Counts two and four charged the offence of malicious damage to property. Under section 335 (1) of *The Penal Code Act*, the offence of malicious damage to property is committed by any person who wilfully and unlawfully destroys or damages any property belonging to another. In the instant case, the burden was on the prosecution to prove that tangible property belonging to the complainants, P.W.2 Songa Samuel and P.W.3 Aidah Bako, was wilfully and unlawfully vandalised and that each of the respondents participated in the wilful and intentional vandalising or damaging of that property. This therefore required proof of three elements; (a) tangible property belonging to the complainants was damaged or destroyed, (b) the said property was damaged or destroyed through wilful and unlawful actions, and that (c) the property in issue was damaged or destroyed by the respondents.

I have subjected the evidence on record to fresh scrutiny. I find that the evidence establishing the fact that the two complainants owned the houses and household property itemised in the two counts was not challenged by the respondents in their cross-examination of the two complainants. I have examined the photographs taken at the scene of crime by P.W.5 Detective Corporal Opormalu Ben, which were received in evidence and marked as exhibits E. x P. 3 - E. x P. 13. They vividly show several demolished houses and a damaged motorcycle. There is nothing to suggest that this property belonged to anyone else. That each of the complainants owned tangible property which was damaged or destroyed was therefore proved beyond reasonable doubt.

The second ingredient required proof that whoever destroyed that property, did so wilfully and unlawfully. "Wilfully" within the context of section 335 (1) of *The Penal Code Act* means "intentionally as opposed to accidentally, that is, by an exercise of [one's] free will" (see *Arrowsmith v. Jenkins[1963] 2 QB 561*). *Black's Law Dictionary* defines it as *'voluntary and intentional, but not necessarily malicious'*. The act done need not be malicious in the sense of being motivated by spite or hatred against an individual, or *malus animus*, as denoting that the perpetrator is actuated by improper and indirect motives. The prosecution is not required to prove malice in the sense of an improper motive. All that has to be proved is that a wrongful act was intentionally done, without cause or excuse. Mere knowledge that it is likely to cause wrongful loss to the owner of the property is sufficient.

In *Regina v. Pembliton [1874-80] All ER 1163,* the accused was fighting in the street. He picked up a large stone and threw it at the people he had been fighting with. He missed and broke a window causing damage of a value exceeding £5. The jury convicted the accused, although finding that he had not intended to break the window. Quashing his conviction, the House of Lords held that the words 'unlawfully and maliciously' import the wilful doing of an intentional act. Intention could not be shown by proof of reckless disregard of a perceived risk.

In the instant case, before the court below the prosecution had to prove that the destruction was in fact intentional and wilful. The intention and will may be proved by the fact that the perpetrators knew that damage to the property would be the probable result of their unlawful act,

and yet did the act regardless of such consequences. In this regard, it was the testimony of both P.W.2 Songa Samuel and P.W.3 Aidah Bako at pages 4 – 12 of the record of appeal that their houses were demolished by persons wielding hoes, among other weapons. When he visited the scene, P.W.4 Detective AIP Onegiu recovered some of the items used in the demolition which included two hoes with broken handles (see page 13 of the record of appeal). Although these items were not exhibited in court, the fact that they were found at the scene by the police officer corroborates the testimony of the complainants and is proof of the fact that whoever used them in hitting the houses and the motorcycle in fact intended to destroy them specifically or, in the alternative, that he or she knew that what he or she was doing would or might destroy them and nevertheless did what he or she did recklessly and not caring whether they were destroyed or not. There is no evidence of a legal justification for such conduct. The prosecution therefore proved beyond reasonable doubt that the destruction was done wilfully and unlawfully.

Lastly, the respondents could not be convicted unless there was credible direct or circumstantial evidence placing each of them at the scene of the crime as active participants in the commission of the three offences. The last ingredient that was required to be proved in respect of all three counts is that each of the respondents participated in committing the offences with which they were charged. This is achieved by adducing direct or circumstantial evidence, placing each of the respondents at the scene of crime not as a mere spectators but active participants in the commission of the offences. The evidence implicating each of the respondents must be considered separately considering that even though charged jointly, their criminal responsibility is individual. In this the prosecution relied entirely on identification evidence. In *Wamunga v. Republic (1989) KLR 424* it was held at page 426 that,

> It is trite law that where the only evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.

Each of the respondents raised the defence of alibi which defence none of them was under any obligation to prove but rather the burden lay on the prosecution to disprove it (see *Uganda v. Bitarinsha John and another [1975] H.C.B.140* and *Sekitoleko v. Uganda [1967] E.A 531*). In evaluating the defence though, the learned trial magistrate overlooked some material

inconstancies in the defence of alibi that emerged, partly through cross-examination; the first respondent stated at page 34 of the record of appeal as follows;

> Our lawyer Jogo Tabu called ten of us in number to meet him in the office at 8.00 am in Arua.....I reported for the case in Arua.....I had gone to discuss the case in Arua with our lawyer Jogo Tabu. He had called us [as] he was representing us in that case. We did not meet him, he told us he was urgently called to Kampala. He found us and told us he was in Kampala we did not meet him. We reached up to his office and found his secretary Semi. He is a clerk to the lawyer.

On his part the second respondent stated at page 36 of the record appeal as follows;

> Jogo had called us for a ruling. He wanted to talk to us to find out whether the allegations against us were true. The case had come for defence but on that day Jogo did not come.

Then on his part D.W.3 Mr. Peter Jogo Tabu testified at page 39 of the record appeal as follows;

> Before 10/12/2012 there had been a ruling that they had a case to answer in the Chief Magistrate Court in Arua. I made an appointment with them to meet in Arua in [my] branch chamber on 10/12/2012 to discuss their defence.....That morning the accused reported to me on 10/12/2012 at 9.00 am at Arua in my branch chambers ten of them as per charge sheet. I had a case in High Court between Midiko Sub-county versus Yumbe District Local Government and also a case of Kasamba Silvia versus Paidha Town Council. I told them to wait for me to attend to the two cases and would return to discuss the defence. Unfortunately these matters took long, I returned at 4.45 pm they were nowhere to be seen.

Lastly D.W.4 Mr. Yosa James testified at page 41 of the record appeal as follows;

> I found A3 he told me they were coming from Arua Court... on the day of the alleged incident, the accused were in Arua Court.

The unexplained inconsistencies relate to whether the respondents were in Arua for a court hearing or rather to meet their advocate, whether they actually met with the advocate in Arua or not because he was in Kampala or proceeding to court in Arua. What is certain though is that the meeting did not take place as scheduled. These inconsistencies weakened the alibi considerably, cast doubt on the truthfulness of the alibi as it became uncertain as to whether the respondents were in Arua at all on that day and a false alibi is capable of corroborating evidence of identification (see *Kwijuka and another v. Uganda, S. C. Criminal Appeal No. 18 of 2003*) and deliberate lies told by an accused in his or her defence may corroborate the prosecution case (see

Twehamye Abdul v. Uganda, C. A. Criminal Appeal No.49 of 1999; Kutegana Stephen v. Uganda C. A. Criminal Appeal No. 60 of 1999 and *Siras Kiiza alias Tumuramye and another v. Uganda, C. A. Criminal Appeal No. 130 of 2003*).

An alibi may be disproved by adducing evidence which places the accused at the scene of crime. It is trite law that to sustain a conviction, a court may rely on identification evidence given by an eye witness to the commission of an offence. However, it is necessary, especially where the identification is made under difficult conditions, to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. To do so, the Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification. Before convicting solely on strength of identification evidence, the Court ought to warn itself of the need for caution, because a mistaken eye witness can be convincing, and so can several such eye witnesses. This point was stressed in *Abudala Nabulere and another v. Uganda Court of Appeal Criminal Appeal No. 9 of 1978* in the following passage in the judgment:

> Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. 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 accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger. In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution.

In the instant case, in respect of the first count, there was only one identifying witness, P.W.1 Wasa John. In his testimony at pages 3 – 4 of the record of appeal, he stated that he identified the three respondents as part of his assailants. He singled out the third respondent as the person who

actually struck him with a hoe. In his judgment, the learned trial magistrate did not consider any of the factors prevalent at the time, which were favourable or unfavourable to correct identification, but disregarded the evidence of this witness simply because there were "many gaps in the prosecution's case." He instead considered the evidence of P.W.3 Aidah Bako and because of inconsistencies between her testimony in court and statement to the police, rejected her evidence and found that the evidence of P.W.1 was uncorroborated. The learned trial magistrate misdirected himself when he considered that the evidence of P.W.1 required corroboration. I have considered the length of time the respondents were under observation, the distance, the light, and the familiarity of this witness with the respondents. I have not found any significant factors that could have hampered the ability of this witness to recognise the respondents considering that he knew the three of them before, the attack took place during broad day light and he was struck with a hoe at close proximity. In addition the third respondent made utterances regarding the intention to kill him as he was struck. The assailants further pursued him as he escaped and he mentioned the name of the third respondent to P.W.2 immediately upon escaping from the scene. I am not persuaded that the long-standing inter-clan dispute over land was motivation enough for this witness to falsely incriminate the respondents since there was nothing in the nature of a personal grudge between them.

The learned trial magistrate considered it erroneous that the three respondents were all put to their defence yet the evidence on this count implicated only the third respondent. This was a misdirection on his part. Section 20 of *The Penal Code Act* provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence. The respondents set out in conjunction with one another to unlawfully and forcefully evict the victims from land they claimed to belong to their clan in respect of which they saw the victims as trespassers. That the victims would be assaulted in the process was a probable and foreseeable consequence of the prosecution of that unlawful purpose. Consequently, each of them is deemed to have committed the offence proved by evidence to have been committed during that unlawful transaction. The ingredient of participation was therefore proved beyond reasonable doubt in respect of the first count.

In respect of counts two and four, there were two identifying witnesses, P.W.2 Songa Samuel and P.W.3 Aidah Bako. At pages 4 and 7 of the record of appeal, he testified that he saw the three respondents participate in the demolition of his houses and destruction of his household property. The veracity of this evidence was not considered by the learned trial magistrate. I have considered the length of time the respondents were under observation, the distance, the light, and the familiarity of this witness with the respondents. I have not found any significant factors that could have hampered the ability of this witness to recognise the respondents considering that he knew the three of them before, the attack took place during broad day light and he was in close proximity and was able to identify the weapons they were carrying. I am not persuaded that the long-standing inter-clan dispute over land was motivation enough for this witness to falsely incriminate the respondents since there was nothing in the nature of a personal grudge between them. He was not shaken at all during cross-examination and stood steadfast in his testimony.

The identification evidence of P.W.3 Aidah Bako is at pages 9 and 11 of the record of appeal. She too testified that he saw the three respondents participate in the demolition of his houses and destruction of his household property. The learned trial magistrate rejected her evidence because it was inconsistent with the statement she made to the police on 18th December 2012 (exhibit E. x. D1) in which she stated that he was at the Trading Centre when the attack began and therefore the court concluded that she could not have been at the scene to identify the assailants. Upon reading the statement, it is clear that the learned trial magistrate misconstrued it. In the police statement she said that while at the Trading Centre, she saw a group of people from the Nyori clan pass by armed with bows and arrows. She returned home and as she was preparing her breakfast, the same group attacked her in her home. The police statement therefore is not inconsistent with her testimony in court as erroneously found by the trial magistrate.

I have considered the length of time the respondents were under her observation, the distance, the light, and the familiarity of this witness with the respondents. I have not found any significant factors that could have hampered the ability of this witness to recognise the respondents considering that she knew the three of them before, the attack took place during broad day light and she was in close proximity and was able to identify the weapons they were carrying. Even when she escaped from the scene, she took a vantage position at a distance of about 150 metres

from the scene from where she continued to observe their activities. She explained in considerable detail the degree of participation of each of the respondents in the demolition of her house. Moreover for reasons similar to those already considered in respect of the first count, the respondents are equally criminally implicated by virtue the doctrine of common intention, irrespective of their divergent levels of involvement. I am not persuaded that the long-standing inter-clan dispute over land was motivation enough for this witness to falsely incriminate the respondents since there was nothing in the nature of a personal grudge between them. She too was not shaken at all during cross-examination and stood steadfast in her testimony.

On the other hand, corroboration of all the identification evidence of the three prosecution witnesses mentioned above may be found in the conduct of the respondents soon after the offences were committed. According to P.W.4 Detective AIP Onegiu Jimmy, at page 14 of the record of appeal, the three respondents were arrested in January 2013 and could not be arrested before that since they had gone into hiding soon after the offences were committed. This part of his testimony was not weakened in cross-examination. Corroboration may be found in the unexplained disappearance of a suspect from his or her home or place of work soon after an offence is committed (see *Mibulo Edward v. Uganda S. C. Criminal Appeal No.17 of 1995; Remegious Kiwanuka v. Uganda; S. C. Criminal Appeal 41 of 1995* and *Ongom John Bosco v. Uganda, S. C. Criminal Appeal No. 21 of 2007*). This is because sudden disappearance from the area is incompatible with the innocence of such a person. The sudden disappearance of the respondents was not explained and it is incompatible with their innocence.

All in all, having re-scrutinised the entire evidence on record, I have reached the conclusion that the acquittal of the respondents by the learned trial magistrate was wrong in law. It is obvious from the evidence that the prosecution satisfactorily proved the case beyond reasonable doubt in respect of counts two and four and a minor and cognate offence in respect of count one. The acquittal in respect of those counts cannot therefore be sustained and is hereby set aside. It would be contrary to the interests of justice that the respondents should go unpunished.

Consequently, acquittal of the respondents of the offence of Theft c/s 254 (1) and 261 of *The Penal Code Act,* in count three and that of Assault Occasioning Actual Bodily Harm c/s 236 of

The Penal Code Act, charged in count one is upheld but in the latter case instead, each of the respondents is found guilty of the minor and cognate offence of Common Assault c/s 235 of *The Penal Code Act* and is accordingly convicted. Each of the responds is in addition found guilty of the offence of Malicious Damage to property c/s 335 (1) of *The Penal Code Act,* as charged in counts one and four. The appeal is allowed in the said terms.

Dated at Arua this 15th day of June 2017. ……

Stephen Mubiru
Judge
15th June 2015.

28th June 2017
2.54 pm
Attendance

Ms. Sharon Ngayiyo, Court Clerk.
Ms. Emmanuel Pirimba, State Attorney, for the State
Mr. Madira Jimmy for the appellant.
The three respondents are in court
Ms. Amandu Lillian, Kakwa / English interpreter.

SENTENCE AND REASONS FOR SENTENCE

Upon the respondents being convicted of the offence of offence of Common Assault c/s 235 of *The Penal Code Act,* in respect of count 3 and Malicious Damage to property c/s 335 (1) of *The Penal Code Act* in respect of counts 1 and 4, although he had no previous record of conviction against any of the three convicts the learned Resident State Attorney prosecuting the appeal, Mr. Emmanuel Pirimba prayed for deterrent sentences, on grounds that; their conduct was heinous, the destruction was uncalled for in a civilised society. The sentences ought to be deterrent enough to enable them reconsider their conduct and in order to serve as an example to other would be offenders. They all are mature people who should have behaved differently in order to serve as examples to others. They should not have inflicted that level of suffering on the complainants. On top of any punishment, the court should order them to compensate the victims for the property they damaged.

In response, counsel for the respondents, Mr. Jimmy Madira submitted that the convicts deserve lenient sentences on ground that; they are first offenders without a previous criminal record. A1 and A2 are elderly persons. A1 is 69 years old and A2 is 67 years old. They are also undergoing prosecution for a charge of Arson arising from the same transaction before the Chief Magistrate. The matter arose out of a land dispute that has not been resolved. He prayed for a non-custodial sentence for the accused and an alternative of paying a fine. They may not manage the conditions in prison. They have family responsibilities of children and grand children to take care of. He prayed for lenience. He submitted further that the facts do not disclose the value of the property destroyed. Huts cost shs. 150,000/= and the motorcycle was not working.

The offence of Common Assault c/s 235 of *The Penal Code Act* is a misdemeanour and accordingly, if the assault is not committed in circumstances for which a greater punishment is provided by the Act, a convict is liable to imprisonment for one year. On the other hand, the maximum punishment for the offence of Malicious Damage to property c/s 335 (1) of *The Penal Code Act* is imprisonment for five years if no other punishment is provided by the Act.

In *Yoramu Kassumu and three others v. Uganda, H. C. Criminal Appeal No. 0042 of 2013* in a judgment delivered on 17th December 2014, a sentence of 18 months' imprisonment for the offence of Malicious Damage to property c/s 335 (1) of *The Penal Code Act* was upheld. In that case the convicts had felled trees, cut down maize and destroyed the garden of the complainant. In *Nasibika Peter Wejuli v. Uganda, H. C. Criminal Appeal No. 040 of 2009,* in a judgment delivered on 10th August 2010, a sentence of 6 months on the charge of assault and 8 months on the charge of malicious damage to property was substituted in place of the harsher one of five years' imprisonment that had been imposed by the trial court. In that case, the complainant heard the appellant cut down her trees. On going there she found the appellant at the scene. When she asked him why he had cut her trees, the appellant failed to answer but proposed that they negotiate over the matter so that she does not forward the matter to the sub-county. When she continued to argue with the appellant, he grabbed and assaulted her twice on the buttocks, legs and all over the body telling her that women do not have authority over land and trees. In *Okae Terensio and three others v. Uganda H. C. Criminal Appeal No.7 of 2007*, in a judgment delivered on 31st October 2010, the court substituted the sentence ordering each appellant to pay

a fine of shs 200,000/= or in default each appellant was to serve a sentence of one year's imprisonment. In addition to the fine, each appellant was ordered to pay shs 50,000/= (fifty thousand) to each of the persons whose properties was maliciously damaged. In that case the appellants had destroyed houses of the complainants. The destruction was by burning the complainants' houses with the intention of banishing them from the area because the complainants were suspected by the appellants to be practicing witchcraft.

In the instant case, the offence was committed within the context of a dispute over land. The respondents chose to take the law into their own hands in the process of which they assaulted the complainant named in count three and destroyed property belonging to the two complainants named in counts one and four. According to section 180 of *The Magistrates Courts Act* and section 110 of *The Trial on Indictments Act*, the discretion to impose the sentence of a fine is exercised where the relevant penal provision renders the offence punishable with a fine or a period of imprisonment or alternatively imprisonment as well as a fine. Neither section 235 nor section 335 (1) of *The Penal Code Act* provides for the option of a fine as part of the possible sentence.

I am cognisant of the judicial practice of imposing fines in respect of first offenders instead of custodial sentences, by virtue of section 178 (2) of *The Magistrates Courts Act* and section 108 (2) of *The Trial on Indictments Act* which permit a sentencing court to impose a fine in addition to or instead of imprisonment. Although the respondents are first offenders and two of them are of relatively advanced age, the offences they committed deserve a deterrent custodial sentence considering the level of violence involved and the rampant incidents of violence erupting from disputes over land. The complainant in count three was assaulted on the head while the complainants in counts one and four lost valuable property including a total of ten dwelling houses and a motorcycle. It is on that basis that I sentence each of the respondents to serve eight months' imprisonment in respect of count 3; two years' imprisonment in respect of count one and two years' imprisonment in respect of count four. All sentences are to run concurrently.

Section 197 of *The Magistrates Courts Act* and section 126 of *The Trial on Indictments Act* confer discretion upon a trial court, in addition to any other lawful punishment, to order the

convicted person to pay another person such compensation as the court deems fair and reasonable, where it appears from the evidence that, that other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit.

This power to award compensation is intended to reassure victims of crime that they are not forgotten in the criminal justice system. Criminal justice increasingly looks hollow if justice is not done to the direct victim of the crime. In some cases, the victims lack the resources to institute civil proceedings after the criminal case has ended. The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence.

There are obvious advantages of allowing one court to deal with the criminal and civil liability of damage caused by the offence such as; avoiding unnecessary litigation, by allowing one court to deal with both criminal and civil liability and thus secure just treatment for both the accused and the victim of the offence and saving the victim of the offence time and costs of recovering compensation or damages in a subsequent civil suit. It provides the victim with a speedy and inexpensive manner of recovering reparation. It requires no more of the victim than a request for the order. It can also be an effective means of rehabilitating the accused because this order quickly makes the accused directly responsible for making restitution to the victim. The practical efficacy and immediacy of the order helps to preserve the confidence of society in the criminal justice system.

Section 197 of *The Magistrates Courts Act* and section 126 of *The Trial on Indictments Act* are provisions designed to accord civil justice to the victim within the criminal trial. By this provision, criminal prosecutions constitute a single proceeding, in which the criminal / civil line becomes blurred. For that reason, invoking this provision should be undertaken after careful consideration of whether or not there is no real danger of causing injustice in the criminal proceedings, since the discretion to award compensation must be exercised judiciously. A

Prosecutor who desires the court to make such award needs to lead evidence relating to proof of the injury resulting out of the criminal act, and provide material to court during the prosecution case on basis of which the assessment of compensation will be made.

While the court has discretion to order compensation under this provision for damage caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit were instituted against him, he would pay substantial compensation. This means in practice that the court has to decide whether the criminal punishment is enough, or whether there is a need for compensating the victim who has suffered injury, in addition to criminal punishment which may be imposed on the convict. The victim claiming compensation must, however, establish that he or she has suffered some personal loss, pecuniary or otherwise, as a result of the offence, for which payment of compensation is essential, such as would be recoverable in a civil suit. Whether a victim who has suffered injury as a result of the commission of an offence would recover compensation in a civil suit depends very much on the nature of damage caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

From the procedural perspective, the power to order compensation under section 197 of *The Magistrates Courts Act* and section 126 of *The Trial on Indictments Act* is subject to the basic rules of a fair hearing. In order to afford an accused ample and fair opportunity to meet the claim for compensation, during the prosecution case, the court should hear prosecution evidence regarding this aspect as part of its case generally against the accused. That way the accused will have been given ample opportunity to reply or respond to evidence relevant thereto, and at the defence stage, to adduce such evidence as he or she may deem necessary, for rebutting the claim for compensation, or the assessment thereof. If this is done during and as part of the trial of the criminal liability of the accused, the court will at the same time have heard the evidence relating to proof of the damage resulting out of the criminal act and relevant to the assessment of compensation such that upon conviction of the accused, it will be in position at the same time to determine, assess and order compensation.

In the instant case, I find that there is sufficient material before the court showing that the complainants in counts one and four sustained material loss or damage in consequence of the

offences committed for which substantial compensation is recoverable in a civil suit. Whereas the power to impose fines is limited, section 197 of *The Magistrates Courts Act* and section 126 of *The Trial on Indictments Act* do not impose any such limitation. Just like the power to award general damages in civil proceedings, the power to award compensation appears to be at large but that jurisdiction cannot be exercised at the whims and caprice of a trial court. There is nothing like a power without any limits or constraints. That is so even when a court may be vested with wide discretionary power, for even discretion has to be exercised only along well-recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity. Although I do not read the section as requiring exact measurement such as is expected in proof of special damages in a civil suit, since the provision is clearly not intended to be in substitution for the civil remedy, the court should be slow to make an assessment and award of substantial amounts as compensation without clear evidence of a definite amount by admission or other proof, otherwise it risks descending into purely civil consequences of the facts that constitute a crime. Section 197 of *The Magistrates Courts Act* is not to be used *in terrorem* as a substitute for or reinforcement for civil proceedings.

It is true that on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence. But the special nature of orders for compensation requires that they be made only on the basis of evidence by admission or otherwise. The section does not spell out any procedure for resolving a dispute as to quantum; its process is, *ex facie*, summary but I do not think that it precludes an inquiry by the trial magistrate to establish the appropriate amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial. The trial magistrate should have been mindful of the fact that had the complainant been forced to undertake a civil suit to recover the sum, he would have been forced to prove his loss in a stricter manner and the fact that prospect of obtaining in a summary way from the court in exercise of its criminal jurisdiction an order of compensation equivalent to a judgment in a civil suit is an open invitation to resort to the criminal process mainly for the purpose of obtaining the civil remedy, especially in cases of crime against property committed by persons against whom a civil condemnation is likely to be of some practical value.

For that matter, an award of compensation must be reasonable. What is reasonable will depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the loss suffered the justness of claim by the victim, the ability of accused to pay and other relevant circumstances. This requires an inquiry, albeit summary in nature, to determine the paying capacity of the offender, unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that the first and the most effective check against any arbitrary exercise of discretion is the well-recognised legal principle that orders can be made only after proper evaluation. Evaluation brings reasonableness not only to the exercise of power but to the ultimate conclusion. Evaluation in turn is best demonstrated by disclosure of the reasons behind the decision or conclusion. In that case, an appellate court will have the advantage of examining the reasons that prevailed with the court making the order. Conversely, absence of reasons in an appealable order deprives the appellate court of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own.

The criteria which a court must consider in determining whether an order of compensation should be made in addition to another sentence passed have been set out by the Supreme Court of Canada in *R. v. Zelensky, [1978] 2 S.C.R. 940*. There Laskin C.J. stated at p. 961:

> The Court's power to make a concurrent order for compensation as part of the sentencing process is discretionary. I am of the view that in exercising that discretion the Court should have regard to whether the aggrieved person is invoking s. 653 (*in pari materia* with section 197 of *The Magistrates Courts Act*) to emphasize the sanctions against the offender as well as to benefit himself. A relevant consideration would be whether civil proceedings have been taken and, if so, whether they are being pursued. There are other factors that enter into the exercise of the discretion, such as the means of the offender, and whether the criminal court will be involved in a long process of assessment of the loss, although I do not read s. 653 as requiring exact measurement.

Laskin C.J. further observed that a compensation order should only be made when the amount can be readily ascertained, and only when the accused does not have an interest in seeing that civil proceedings are brought against him in order that he might have the benefit of discovery procedures and the production of documents. Obviously, though, neither the production of

documents nor the examination for discovery will be of much, if any, significance if the amount owing to the victims is fixed and acknowledged. “Where the amount lost by the victims of the appellant's criminal conduct is admitted it would not be sensible to require them to incur the additional expense of undertaking civil proceedings to establish their loss, nor do I believe that it would assist in the appellant's rehabilitation to permit him to put his victims to this additional trouble and expense” (aptly stated by Martin J.A. in *R. v. Scherer (1984), 16 C.C.C. (3d) 30, at p. 38*). A victim of crime in a situation where the amount involved is readily ascertained and acknowledged by the accused should not be forced to undertake the often slow, tedious and expensive civil proceedings against the very person who is responsible for the injury. In such situations, it would be unreasonable to deny the practical necessity for an immediate disposition as to reparation by the criminal court which is properly seized of the question as an incident of the adjudication over the criminal accusation.

Section 197 of *The Magistrates Courts Act* and section 126 of *The Trial on Indictments Act* confer discretion upon a trial court, to order “such compensation as the court deems fair and reasonable”. This requires that as long as the damage is financially assessable, the amount ordered should be proportional to the damage caused by the wrongful act. An important consequence of the principle of proportionality is that orders of compensation should not be punitive in nature. The amount determined by court should exclusively be aimed at remedying the damage caused through the wrongful act, and not conceived as an exemplary measure. The aim should be to redress only direct damage and loss resulting from the illegal act, leaving out those damages and losses which are too indirect or remote.

The court therefore takes a compensatory approach based on the principle of *restitutio in integrum*. The amount assessed by court should be exclusively aimed at remedying the damage caused through the wrongful act, but not as an exemplary measure. The aim should be ordering payment of a sum corresponding to the value which restitution in kind would bear, taking into account the ability of the accused to pay the compensation awarded. Unlike a civil court which when awarding general damages is bound to wipe out the legal and material consequences of the wrongful act by re-establishing the situation that would exist if that act had not been committed, irrespective of the defendant’s ability to pay, a criminal court is required to take into account the

ability of the convict to pay the compensation ordered, but remembering that such ability should not be the controlling factor in every case. A criminal court will therefore order compensation intended to re-establish the situation that would exist if that act had not been committed, to the extent of the convict's ability to pay. An order of compensation in a criminal trial is not necessarily full reparation for the damage occasioned. The criminal court may order partial restitution if it appears the damage caused is more than the convict will be able to pay. The requirement to consider the convict's ability to pay though does not necessarily require the court to order partial restitution. The court may, for example, order an indigent convict to pay a substantial sum in restitution after reviewing the convict's employment status, expenses, liabilities, and living situation.

For that reason, the trial court is not only required to assess the damage caused to the extent that it is financially assessable, but also to inquire into the paying capacity of the offender, unless the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. In determining whether to order compensation under section 197 of *The Magistrates Courts Act* and section 126 of *The Trial on Indictments Act*, the sentencing court should consider; (a) the amount of the loss sustained by the victim as a result of the offense; and (b) the financial resources of the convict, financial needs and earning ability of the convict and the convict's dependents, and such other factors as the court deems appropriate, bearing in mind the consideration in *United States v. Mounts, 793 F.2d 125* at page 128 where the court observed that "while a [convict's] ability to pay is a consideration in the determination of restitution . . . indigency is not a bar to an order of restitution."

United States v. Mounts, 793 F.2d 125, was an appeal from an order of restitution entered by the district court following the appellant's guilty plea on one count of a fourteen-count indictment. The appellant claimed on appeal that the district court erred in ordering restitution for the victim's losses associated with thirteen counts of the indictment for which he did not plead guilty. The district court had found by a preponderance of evidence from the arraignment and sentencing proceedings, that the complainant was a victim who had sustained losses as a result of the appellant's criminal actions. With regard to count fourteen, to which the appellant pleaded guilty, the court found that the complainant had sustained a loss of US $ 273, representing the

cost of reinstating Monroe's lapsed life insurance policy. With regard to counts one through thirteen, the court found that Monroe had sustained a loss totaling US $ 4,186, representing the total amount of the thirteen forged checks. The court ordered the appellant to pay restitution in the total amount of $4,459, “or such lesser amount as shall be determined in the civil lawsuit now pending in the Wyandotte County District Court.” On appeal, the court observed that such orders are intended to “restore the victim to his or her prior state of well-being' to the highest degree possible.” The court relied on that compensatory purpose in rejecting a restrictive interpretation of the term "offense" that would exclude losses caused by criminal acts which were not alleged in the indictment and for which the appellant was not convicted, and stated;

> In determining the amount of loss to a victim for purposes of awarding restitution …….., a district court is not limited either by the amount specified in the indictment or the specific transactions alleged in the indictment. Taking into consideration the evidence adduced at trial and the evidence presented in the sentencing phase of the case, a district court may order a defendant to pay restitution to any victim for the amount of loss sustained "as a result of the offense.”…… the amount of restitution, however, must be definite and limited by the amount actually lost by the victims. The court must be able positively to identify each victim to whom restitution is due and, in addition, the defendant must be given the opportunity to refute the amount ordered. Finally, the amount of restitution ordered must be judicially established…… If “offense” is not restricted to the specific acts for which conviction was had or for which the defendant pleaded guilty, the fact that such acts are contained in the indictment and the defendant did not plead guilty to them does not automatically preclude them from becoming the basis of restitution….. an order of restitution [may be made] for losses incurred by the victim as a consequence of the defendant's criminal acts other than those for which a guilty plea was entered, when there is a significant connection between those other criminal acts and the crime for which a guilty plea was entered….. We therefore hold that when there is evidence that the defendant committed other criminal acts that had a significant connection to the act for which conviction was had or for which a guilty plea was entered, a sentencing judge may order restitution for losses resulting from such acts if the Government can prove both that the defendant caused such losses, and the amount of such losses, by a preponderance of the evidence.

In his submissions during mitigation, counsel for the respondents suggested that a hut has a replacement cost of shs 150,000/=. The evidence during the trial of P.W.3 Aidah Bako at page 9 of the record of proceedings indicated that her hut cost her shs. 400,000/= to construct. P.W.2

Songa Samuel at page 4 of the record of proceedings testified that a total of nine houses of his were destroyed. I have taken the sum of shs. 300,000/= to be reasonable compensation for each house that was destroyed. Each of the respondents is to compensate P.W.3 Aidah Bako in the sums of shs. 100,000/= to make a total of shs. 300,000/= for her hut; and in addition, each of the respondents is to compensate P.W.2 Songa Samuel in the sum of shs. 900,000/= making a total of shs. 2,700,000/= for the nine houses that were destroyed and shs. 100,000/= for the destroyed motorcycle making a total of shs. 300,000/=. The amounts are payable within three months from today. Full indemnity may be pursued in a civil court.

In the final result, for the avoidance of any doubt, the respondents are sentenced as follows;

In respect of count 3	Gbonga Dimba:	8 months' imprisonment.
	Mabe Alisa:	8 months' imprisonment.
	Baiga John	8 months' imprisonment.
In respect of count 1	Gbonga Dimba:	2 years' imprisonment and Shs.1,000,000/=
	Mabe Alisa:	2 years' imprisonment and Shs. 1,000,000/=
	Baiga John:	2 years' imprisonment and Shs. 1,000,000/=
In respect of count 4	Gbonga Dimba	2 years' imprisonment and Shs. 100,000/=
	Mabe Alisa	2 years' imprisonment and Shs. 100,000/=
	Baiga John	2 years' imprisonment and Shs. 100,000/=

All sentences are to run concurrently and the compensation is to be paid within three months from today. The convicts are advised they have a right of appeal against both conviction and sentence within fourteen days.

Dated at Arua this 28th day of June 2017.

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Stephen Mubiru
Judge
28th June 2017