

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0151 OF 2016

UGANDA **PROSECUTOR**
VERSUS
OTTO FABIANO **ACCUSED**

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused is indicted with one count of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that the accused and others still at large on the 2nd day of November 2011 at Alero village in Zombo District robbed Parmu Charles of his bicycle, four inch mattresses, blanket, bed sheets and two pairs of women dresses and immediately before or immediately after the said robbery threatened to use a deadly weapons, to wit, a panga and knife on the said Parmu Charles.

The prosecution case is that there was a land dispute over land between the co-accused of the accused and relatives of the complainant. The complainant is one of the occupants of the land in dispute. The dispute became the subject of Arua High Court Civil suit No. 6 of 2009 which on 10th October 2011 was decided in favour of the complainant's relatives. Being dissatisfied with the decision, the accused together with numerous other people on the 2nd day of November 2011 attacked the complainant at his home during the morning hours, assaulted him, ordered him to lie on the ground face down under the guard of the complainant who at the time was holding a panga while the rest of the assailants destroyed his crops growing in the garden, and looted all his household property. After the attack, he was ordered to flee as a group of about eight of them including the accused pursued him up to the residence of the L.C.1 Chairman where he reported the incident. He in turn involved the police and the accused together with three others were arrested and charged. One of his co-accused died before the commencement of the trial while the other two were admitted to bail but could not be found for service of criminal summons. In his defence, the accused denied the offence stating he was surprised to be arrested.

At the end of his trial, the learned State Attorney Mr. Emmanuel Pirimba submitted that all ingredients of the offence had been proved beyond reasonable doubt and therefore he should be convicted as indicted while his advocate on state brief Mr. Onencan Ronald submitted that he contested only the participation of the accused in the offence since the complainant said he was only peeping from the ground and it was a big group of assailants while P.W.3 said he was observing the scene for only ten minutes and from a distance. None of them could have recognised the accused as a participant in the commission of the offence. In their joint opinion, the assessors advised the court to convict the accused since he had been properly identified at the scene of crime and the rest of the elements had been proved beyond reasonable doubt.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v. Uganda* [1967] EA 531). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is indicted and the prosecution has the onus to prove the ingredients of the offence 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 Vs Minister of Pensions* [1947] 2 ALL ER 372).

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.
4. The accused participated in commission of the theft.

Proof of theft of property belonging to another requires evidence 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 a bicycle, four inch mattresses, blanket, bed sheets and two pairs of women dresses. The prosecution relies on the oral testimony of P.W.1 Parmu

Charles, the victim who stated that he saw his assailants collect everything in his house including jerry-cans. They also took his bicycle, four inch mattresses, blankets, bed sheets, two pairs of women dresses and a twenty five litre jerry can used by his wife to brew local beer. This is corroborated by P.W.3 Angala Peter the L.C.1 Chairman who went together with the complainant to the scene after the victim had reported to him and found that the house had been emptied. Failure to recover the items allegedly stolen does not, in itself, negate the fact of theft. The complainant provided sufficient description of the items to satisfy the court that indeed they were stolen. Counsel for the accused did not contest this ingredient during his final submissions. Having considered the available evidence on this element, in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that the items enumerated in the indictment were stolen from the complainant Parmu Charles on 2nd November 2011.

The prosecution must prove as well that the theft was accompanied by the use or threat of the use of force against the complainant. To prove this element, the prosecution relies on the oral testimony of P.W.1 Parmu Charles the victim who testified that he was slapped, beaten, kicked and made to lie face down during the ordeal. This is corroborated by P.W.3 Angala Peter the L.C.1 Chairman who said the victim ran to him while being pursued by a group of about eight men who said had he not run to him they would have killed him. They were carrying weapons which included pangas, clubs, hoes, and slashers. He saw that P.W.1 had been beaten all over the body and was crying in pain. Counsel for the accused did not contest this element during his final submissions. Having considered the available evidence on this element, in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that force and the threat of force was involved in the theft from the complainant Parmu Charles of the items enumerated in the indictment.

Furthermore, it has to be proved that during that robbery; the assailant had a deadly weapon in their possession. A deadly weapon is 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. In this there is oral testimony of P.W.1 Parmu Charles the victim who said the assailants were carrying pangas which they used to slash his

crops and to prevent him from stopping them from doing so. P.W.3 Angala Peter the L.C.1 Chairman said the group of about eight men he saw pursuing the victim were carrying weapons which included pangas, clubs, hoes, and slashers. The two witnesses thus gave a description of the weapons. Counsel for the accused did not contest this during his final submissions. Pangas and knives are instruments adapted to cutting and stabbing and therefore deadly weapons. Having considered the available evidence on this element, I believe both witnesses in their description of the weapons they saw and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that during the robbery of the items enumerated in the indictment, the assailants had deadly weapons in their possession.

Lastly, the prosecution is required to adduce direct or circumstantial evidence placing the accused at the scene of the crime as a participant in the commission of the crime. The defence of the accused is an outright denial. The first time he came to know of the offence was when he was arrested on 7th September 2012 when he went to receive sage money payments. He therefore relies on alibi, in the sense that he was not at the scene of crime but elsewhere when the offence was committed. It is the duty of the prosecution to disprove his defence. He has no obligation of proving anything. The prosecution counteracts this with the evidence of three identifying witnesses; P.W.1 Parmu Charles the victim who said the accused slapped him, kicked his legs and made him to lie face down. He kept guard over him throughout the ordeal while the rest of the assailants plundered his property and crops. P.W.2 Onegwa Julius saw the accused from a distance and watched the attack for about ten minutes. P.W.3 Angala Peter the L.C.1 Chairman said he saw the accused among the group of about eight men who pursued the victim to his home.

This being identification evidence, it should be considered with caution. 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.

In the instant case, the identifying witnesses knew the accused person before as a resident with whom they lived on the same village. The assault took place during day time. It therefore took place during broad day light and continued for a considerable time. However, the identification by both P.W1 and P.W.2 was done during day time but in stressful circumstances for P.W.1 involving threats of death, brandishing of weapons and being made to lie face down. He was peeping from the ground for most of the time. Nevertheless, the three witnesses saw the accused from distances favourable to correct identification. Although the attack at the scene occurred in chaotic circumstances associated with multiple assailants involved in different activities all at the same time, I am satisfied that the factors favouring correct identification of the accused far outweighed those unfavourable to correct identification. Although counsel for the accused contested their ability to have made proper identification during the cross-examination of the three prosecution witnesses and in his final submissions, I am satisfied that the evidence of identification is free from the possibility of error or mistake. The denials raised by the accused in his defence have been disproved by the prosecution evidence of identification. The prosecution has succeeded in placing the accused at the scene of crime as an active participant in the commission of the offence.

Under section 20 of *The Penal Code Act*, 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. Therefore, where offences are alleged to have been committed by two or more people in the course of the same unlawful transaction, there is no need to prove that each of them participated in each of the offences if by their nature they were a probable consequence of the prosecution of that purpose. It is enough if they are proved to have shared a common intention. What is required under the law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not to have dissuaded themselves from the intended criminal act for which they shared the common intention.

In the instant case, the accused person set out together to drive the complainant from land over which they had a dispute. Their criminal design quickly descend into plunder of his household and crops. At no stage did the accused disassociate himself from the activities of his co-assailants

in circumstances where plunder of his property was a foreseeable probability of the unlawful attempt to evict him from the land. The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the accused in maintaining guard over the complainant as the rest of the assailants plundered his property. No direct evidence of common intention is necessary. I am therefore satisfied that the prosecution has proved participation in aggravated robbery by the accused person beyond reasonable doubt. For that reason I find the accused guilty as indicted and hereby convict the accused for the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*.

Dated at Arua this 8th day of February, 2017.

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Stephen Mubiru
Judge.

10th January 2017

9.15 am

Attendance

Ms. Mary Ayaru, Court Clerk.

Ms. Jamilar Faidha, State Attorney, for the prosecution.

Mr. Samuel Ondoma for the convict on State Brief.

The convict is present in Court.

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted of the offence of Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*, although she had no previous record of conviction against any of the three convicts the learned State Attorney prayed for a deterrent sentence, on grounds that; the maximum penalty for the offence is death, the offence is rampant in the region and there is need to deter other potential offenders. The victim of the offence lost valuable property. He sustained injuries which inflicted a lot of pain and loss of time while nursing the wounds. He was denied his right to shelter and movement when he was driven off the land and his bicycle stolen. She suggested a sentence of twenty years' imprisonment and also prayed that the convict be ordered to compensate the victim, the value of the property stolen. In response, the learned defence counsel prayed for a lenient sentence for the convict on grounds that; he is a first offender and remorseful. He is 71 years old and has been on remand for three years and three months. He has

two wives and seventeen children for whom he provides upkeep. He also has eight orphans of his late brothers and eldest son to look after. He suffers from a broken collar bone sustained in a motor accident. In his *allocutus*, the convict prayed for a lenient sentence since he will never engage in fights again.

According to section 286 (2) of the *Penal Code Act*, the maximum penalty for the offence of Aggravated Robbery is death. However, this punishment is by sentencing convention reserved for the most extreme circumstances of perpetration of such an offence such as where it has lethal or other extremely grave consequences. Examples of such circumstances relevant to this case are provided by Regulation 20 of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* to include; the use and nature of weapon used, the degree of meticulous pre-meditation or planning, and the gratuitous degradation of the victim like multiple incidents of harm or injury or sexual abuse.

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. I have considered the fact that a deadly weapon was used, the offences involved some pre-meditation or planning, and there was gratuitous degradation and humiliation of the victim which included assaulting him and making him to lie face down in his own compound. That notwithstanding, I have discounted the death sentence because the circumstances, although serious, are not in the category of the most extreme manner of perpetration of offences of this type.

When imposing a custodial sentence upon a person convicted of the offence of Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*, the *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* stipulate under Item 4 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors or reduced on account of the relevant mitigating factors. I have considered the fact that a deadly weapon was used and the rest of the circumstances mentioned earlier are sufficiently

grave to warrant a deterrent custodial sentence. It is for those reasons that I have considered a starting point of fifteen years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact he is a first offender, he is 71 years old with considerable family responsibility and his expression of remorse. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of fifteen years, proposed after taking into account the aggravating factors, now to a term of imprisonment of eleven years. This in my view is comparable to sentences passed in similar circumstances. For example in with the sentence 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.

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*, is to the effect that the court should "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This approach requires a mathematical deduction by way of set-off. From the earlier proposed term of twelve years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convicts, the convict having kept in custody since September 2012, I hereby take into account and set off four years and three months as the period the convict has already spent on remand. I therefore sentence the accused to a term of imprisonment of six (6) years and nine (9) months to be served starting today.

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 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 victim lost

various items of household property their value was not established in evidence. I am therefore unable to order any compensation in that regard.

The convict is advised that he has a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Arua this 10th day of February, 2017.

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Stephen Mubiru
Judge.