

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0112 OF 2014

UGANDA **PROSECUTOR**
VERSUS
OPOI ONGIERA **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 another on 22nd September 2013 at Ajupani village, in Nebbi District robbed one Kalisa Kalaudio of a cow worth shs. 1,000,000/=, and at or immediately before or immediately after the said robbery, threatened to use a deadly weapons, to wit, bows, arrows, a panga and knives on the said Kalisa Kalaudio.

The prosecution case is that on 22nd September 2013 while out herding cattle belonging to his master, P.W.2 Simbizi William, the complainant Kalisa Kalaudio was attacked by a group of men who included the accused, armed with bows, arrows, a panga and knives and forcefully took away one cow. Later that day, the complainant reported the incident to Simbizi William's wife. When he returned from work later in the evening, the wife reported to Simbizi William what the complainant had told her earlier in the day. Simbizi William immediately called by phone and alerted the L.C. Chairmen of the neighbouring villages to be on the lookout for the missing cow. The following day at around midday, he received a call from the L.C.1 Chairman of Payela village who invited him to inspect what remained of a carcass of a cow found with some suspects, who included the accused, under suspicious circumstances. When he went there, he recognised it as his cow by the brand mark of a v-shaped cleft on what remained of the ear and the colour of the skin. The carcass had been recovered from the bush where P.W.3 Ogenmungu Christopher had at around 11.00 am found a group of about four men, including the accused, cooking meat, smoking some and putting out the rest on a rock, to dry. The accused was arrested

a few days later at his home around 4.00 am and charged with the offence together with another suspect. His co-accused pleaded guilty and was on 25th March 2015 sentenced to serve a term of imprisonment of seventeen years and a half for the offence of Aggravated Robbery. In his defence, the accused stated that on 28th September 2013 when he was arrested he had spent part of the previous night watching a football match at a video hall where he was responsible for collecting the entry charges.

At the close of the trial, it became abundantly clear that the prosecution had not adduced any evidence of violence or possession of a deadly weapon during the theft. This was because the only eyewitness to the theft, the complainant Kalisa Kalaudio, was reported to have died in May 2015, before the commencement of this trial. Upon his death, what was left of the prosecution evidence was only inadmissible hearsay regarding the circumstances surrounding the theft. For that reason the learned State Attorney Ms. Jamilar Faidha restricted her submissions to the minor and cognate offence of theft in which case she argued that all the ingredients of that offence had been proved and the accused should be convicted accordingly. Defence counsel on state brief for the accused, Ms. Winfred Adukule was unable to make final submissions. In their joint opinion, the assessors advised the court to convict the accused of the minor and cognate offence of theft.

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 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).

According to section 87 of *The Trial on Indictments 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. Theft c/s 254 and 261

of *The Penal Code Act* is minor and cognate to the offence of Aggravated Robbery c/s 285 and 286 (2). The offence is constituted by the following ingredients;

1. Taking of property belonging to another.
2. Unlawfully and without claim of right, with intention to permanently deprive.
3. The accused participated in commission of the theft.

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 a cow. P.W.2 Simbizi William testified that on 22nd September 2013, his herdsman Kalisa Kalaudio reported to his wife, the forceful taking of one of the cows he was herding, which had occurred during the day as he was out herding the cattle as they grazed. P.W.2 confirmed the loss and sent out information for the public to be on the lookout. A carcass of a cow was found the following morning in suspicious circumstances. He was called to the home of the L.C. 1 Chairman of Payela village where he positively identified part of the carcass by the colour of the skin and branding by way of a cleft ear. The accused denied the offence and by implication disputes this element. However, having considered all the available evidence relating to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that P.W.2 Simbizi William's cow was stolen on 22nd September 2013.

The prosecution was further required to prove that the cow was taken unlawfully and without claim of right, with intention to permanently deprive the owner. For this ingredient, there must be proof of unlawful taking without legal justification and an intention to permanently deprive. The prosecution relies on the oral testimony of P.W.2 who testified that neither himself nor his herdsman Kalisa Kalaudio consented to the taking of this cow. Direct and Circumstantial of P.W.3 indicates intention to permanently deprive, by virtue of the fact that he found the cow already slaughtered and the fact that those who slaughtered it did so clandestinely in hiding, deep in the bush away from the prying eyes of the public. The accused denied the offence and by implication this ingredient as well. However, having considered all the available evidence relating to this element, I have not found any lawful justification for the taking and eventual slaughter of the cow. In agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that the cow was taken unlawfully, without claim of right, and with the intention to permanently deprive it from the owner, Simbizi William.

Lastly, the prosecution must prove that the accused participated in commission of the offence. This is done by adducing direct or circumstantial evidence placing the accused at the scene of crime as perpetrator of the offence. In his defence, the accused denied any involvement in the theft. The defence of the accused is denial. He neither advances any explanation nor accounts for his whereabouts on 22nd September 2013 when the cow was stolen or 23rd September 2013 when part of the carcass was discovered. He only accounts for events of 28th September 2013 when he was arrested after having spent part of the previous night watching a football match at a video hall where he was responsible for collecting the entry charges. He has no duty of proving his whereabouts. It is the duty of the prosecution to disprove his defence. He has no obligation to prove anything.

In proof of his whereabouts on 23rd September 2013, the prosecution relies on the testimony of P.W.3 who stated that he found him in the bush at around 10.00 am cooking meat from the stolen cow together with three or four other people. 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.

I have considered the circumstances that prevailed when P.W.3 claims to have seen the accused as part of a group of three others in the bush with the carcass. It was day time and the observation was aided by day light. He came into close proximity of the group and talked to one of them. He knew all the suspects before and had ample time to have an unimpeded look at them before leaving the scene to alert his father and later the L.C.1 Chairman. I have not found any unfavourable circumstances which could have negatively affected his ability to see and recognise the accused. I am therefore satisfied that his evidence is free from the possibility of mistake or error. The result is that the accused was found in possession of the carcass of the stolen cow less than twenty four hours after it was stolen.

In *Mudasi v Uganda S.C. Criminal Appeal No 3 of 1998*, the Supreme Court summarized the law relating to the doctrine of recent possession as follows:

It is now well established that a court may presume that a man in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession. This is an inference of fact which may be drawn as a matter of common sense from other facts including the particulars of the fact that the accused has in his possession property which it is proved had been unlawfully obtained shortly before he was found in possession. It is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against the accused person must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. According to the particular circumstances, it is open to a court to hold that an unexplained possession of recently stolen articles is incompatible with innocence. On finding of possession of property recently stolen in the absence of a reasonable explanation by the Appellant to account for his possession a presumption does arise that the Appellant was either the thief or a receiver. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen whether it is a kind that readily passes from hand to hand and the trade to which the accused belongs can all be taken into account (See *Obonyo v. R* [1962] EA 542).

Where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a natural event. This is especially so because invariably the former is independently verifiable while the latter solely depends on the credibility of the eye witness (see *Bogere Moses v. Uganda, S.C. Criminal Appeal No. 1 of 1997*).

According to P.W.2 the cow was stolen on 22nd September 2013 at an unspecified time during the day and the following day at 23rd September 2013 at around 10.00 am, P.W.3 found the accused together with three other men in the bush roasting, cooking and putting out to dry, some of the meat from the carcass of the stolen cow. The accused did not offer any explanation for this possession. His explanation relates to events he was engaged in which took place some six days later on 28th September 2013. Considering that the cow could not have otherwise come into his possession within such a short time, the only inference to be drawn is that he was the thief. In agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that the accused stole the cow.

In the final result, I find the accused not guilty of the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act* and I accordingly acquit him of that offence. I however find the accused guilty of the minor and cognate offence of theft c/s 254 and 261 of *The Penal Code Act* and accordingly convict him of that offence.

Dated at Arua this 9th day of February, 2017.

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Stephen Mubiru
Judge.

10th February 2017

9.20 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 Theft c/s 254 and 261 of the *Penal Code Act*, although she had no previous record of conviction against the convict the learned State Attorney prayed for a deterrent sentence, on grounds that; the maximum penalty for the offence ten years' imprisonment, the offence is rampant in the region and there is need to deter other potential offenders. The convict deserves a deterrent sentence of seven years' imprisonment. The victim of the offence lost valuable property worth shs. 1,000,000/=. She also prayed that the convict be ordered to compensate the victim, the value of the stolen cow. In response, the learned defence counsel prayed for a lenient sentence on grounds that; he is a first offender and remorseful. He is 51 years old and suffers from hernia which requires an operation. He has two wives and ten children three of whom are of school going age. He therefore deserves a lenient sentence of Community Service.

Some of the factors to be considered by a trial court at sentencing are outlined in Regulations 5 and 6 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice)*

Directions, 2013 and they include; the character and antecedents of the convict, including any other offences admitted by him or her whether or not he or she has been convicted of such offences, denunciation (public criticism) of the unlawful conduct, deterrence to the offender and to others of a similar mind, protection of the public, rehabilitation of the offender, and reparation (make amends) for harm done to victims or to the community while promoting a sense of responsibility in offenders.

I have considered the current sentencing practice for this offence. In *Shaban Mugabi v. Uganda C.A Criminal Appeal No.12 of 1995*, the Court of Appeal set aside a sentence of 12 months' imprisonment and substituted it with one of 7 months' imprisonment for a convict who had pleaded guilty to a charge of theft of shs. 1,500,000/= and was also a first offender. In *Magara v Uganda C.A. Criminal Appeal No. 146 of 2009*, the Court of Appeal upheld a sentence of seven years' imprisonment for the offence of theft.

The maximum punishment for the offence of theft under section 261 of *The penal Code Act* is ten years' imprisonment. Taking into account both the aggravating and mitigating factors presented to court, I consider a term of eight years' imprisonment as appropriate punishment for the convict. 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. The convict having been charged on 7th November 2013 and kept in custody since then, I hereby take into account and set off three 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 four (4) years and nine (9) months to be served starting today.

Section 126 of *The Trial on Indictments Act* empowers the High Court to order a convicted person to pay such compensation as the court deems fair and reasonable to a person who suffered material loss or personal injury in consequence of the offence committed, in addition to any other lawful punishment. This provision 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 or loss 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, injury or loss 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 damage, injury or loss, 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, injury or loss caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

From the procedural perspective, the power to order compensation under 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, injury or loss 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.

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 court 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 court 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 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 126 of *The Trial on Indictments 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 126 of *The Trial on Indictments Act* confers 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. In this case, since the facts that emerged in the course of the trial are so clear and were not contested by the accused as regards quantum, I deem it unnecessary to inquire into this value for I consider the amount of shs. 1,000,000/= to be reasonable compensation to the complainant for the loss of this cow. I order the convict to pay that amount within six months from the date of this order, failure of which he is to serve an additional six months' imprisonment.

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.