THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0056 OF 2017

UGANDA …… PROSECUTOR

VERSUS

OCOWUN MORIS …… 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 accused and others still at large on 10th October 2013 at Lorr-ora village, Omwoyo Parish, Zeu sub-county in Zombo District robbed Alli Onenrwoth of two goats, two hoes, one metallic tray and immediately before or immediately after the said robbery, used deadly weapons, to wit, spears, pangas, bows and arrows on the said Alli Onenrwoth.

The prosecution case is that on 10th October 2013 at round 6.00 pm, the accused who was in the company of several other people attacked the home of the complainant. They did not find the complainant at home but his wife P.W.2 Alinyenya Jessica, who had received some visitors and was in the kitchen at the time the assailants arrived. They immediately began torturing one of the visitors mistaking her for P.W.2. The accused then raised his panga in an attempt to cut P.W.2 but was stopped by the visitor. P.W.2 then escaped to a banana plantation behind the house whereupon an arrow was shot at her forcing her to flee to her parents' home. She did not return until four days later only to find that two of her goats, two hoes, one metallic tray and other household property was missing. Upon his arrest, the accused denied any participation in commission of the offence. He said he only came to know about the accusation following his arrest. The complainant had caused his separation with his wife as a result of which the elders fined him two goats. He suspected that the complainant bore a grudge against him for that reason and that is why he fabricated the allegation of robbery against him.

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*).

The prosecution is required to prove the following ingredients;

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.

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 two goats, two hoes, one metallic tray. P.W.1 Jatho Dickson testified that from a distance of about twelve metres away, he saw the assailants take two goats from the compound of the complainant, two sacks full of utensils, trays and saucepans. P.W.2 Alinyenya Jessica too testified that she returned four days later and found her two goats missing, two sacks-full of utensils were missing. P.W.3 Alli Onenrwoth testified that the following day when he returned to his home he found two of his goats were missing, utensils, mattresses and clothes were missing. The accused did not offer any evidence on this ingredient. However, having considered all the available evidence relevant to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Alli Onenrwoth's property particularised in the indictment was stolen on 10th October 2013.

The prosecution was further required to prove that during the commission of that theft, the assailants used or threatened to use violence. For this ingredient, there must be proof of the use or threat of use of some force to overcome the actual or perceived resistance of the victim. In proof of this element, the court relied on P.W.2 Alinyenya Jessica who testified that during the

theft, the accused attempted to cut her with a panga, her visitor was tortured and an arrow shot at her as she hid behind the house but missed as a result of which she fled to her parents' house. One of the houses was as well set on fire. The following morning P.W.3 Alli Onenrwoth found a blade of an arrow lying in the compound. The accused did not offer any evidence on this element. Counsel for the accused did not contest this element during his final submissions. I find that the prosecution has proved beyond reasonable doubt that immediately before, during or immediately after theft of the property mentioned the indictment, violence was used against the victims of the two offences.

The prosecution was further required to prove that immediately before, during or immediately after the said robbery, the assailants had deadly weapons in their possession. A deadly weapon is defined by section 286 (3) of *The Penal Code Act* as one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. P.W.1 Jatho Dickson testified that he saw the assailants who included the accused, carrying pangas, arrows, spears and clubs. The accused was carrying a panga and a club. P.W.2 Alinyenya Jessica testified that during the theft, the accused was holding a club and a panga. The accused did not offer any evidence on this element. Although none of the weapons mentioned was recovered and tendered in evidence, however, according to *E. Sentongo and P. Sebugwawo v. Uganda [1975] HCB 239,* when the prosecution fails to produce the instrument used in committing the offence during trial, a careful description of the instrument will suffice to enable court decide whether the weapon was lethal or not. Considering the evidence as a whole relating to this element and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that that the assailants had deadly weapons in their possession during the robbery.

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 participation. He only came to know about the accusation following his arrest. The complainant had caused his separation with his wife as a result of which the elders fined him two goats. The complainant vowed to revenge one day. To rebut that defence, the prosecution relies entirely evidence of

identification by P.W.1 Jatho Dickson and P.W.2 Alinyenya Jessica. Counsel for the accused contested their ability to have made proper identification during cross-examination of the prosecution witnesses and in his final submissions.

Where prosecution is based on the evidence of indentifying witnesses under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)*. It is necessary to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. 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 both P.W.1 and P.W.2 claim to have seen the accused as part of a group that committed the offence. It was at dusk and the observation was aided by twilight. Both witnesses came into close proximity of the group, P.W.1 at twelve metres away while P.W.2 within cutting distance of a person holding a panga. Both knew the accused before and had ample time to have an unimpeded look at him. I have not found any significant unfavourable circumstances which could have negatively affected their ability to see and recognise the accused. I am therefore satisfied that his evidence is free from the possibility of mistake or error. In agreement with the assessors, I find that the prosecution has proved this ingredient as well beyond reasonable doubt.

In the final result, I find that all ingredients of the offence have been proved beyond reasonable doubt. I find the accused guilty and accordingly convict him for the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*.

Dated at Arua this 7th day of August, 2017.

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Stephen Mubiru
Judge.
7th August, 2017

7th August 2017
10.45 am
Attendance

Ms. Topacu Consolate, Court Clerk.
Ms. Harriet Adubango, Senior Resident State Attorney, for the Prosecution.
Mr. Onencan Ronald, Counsel for the accused person on state brief is present in court
The accused is present in court.

SENTENCE AND REASONS FOR SENTENCE

Upon both accused being convicted of the offence of Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*, in respect of counts 1 and 2 although she had no previous record of conviction against any of the three convicts the learned Senior Resident State Attorney prosecuting the case prayed for the deterrent sentences, on grounds that; the offence is serious and is punishable by death. The circumstances involved a lot of violence and property was stolen. The people have a tendency to take the law into their hands when they have disagreements. They should be taught that there are lawful means of dispute resolution. She prayed for a long custodial sentence and an order of compensation.

In response, the learned defence counsel prayed for a lenient sentence on grounds that; the convict is a first offender, he is remorseful, a young man in his mid thirties. He has spent four years and two months on remand. He is married, and has family responsibilities and a long custodial sentence will disrupt his care for the family. Although the offence involved deadly weapon there was no harm inflicted upon the victims. The property involved is not of the highest value from a pecuniary perspective. He has already separated with his wife and the children are now under someone's care. He deserves a lenient sentence. In his *allocutus*, the convict stated that he is sick. He takes care of orphans. His mother is dead and the father is dead. His mother left a young child under his care and he has his own children, three of them together with his sibling, they are four and they are all under his care. He wondered who is taking care of them in his absence. He had left them with his wife but currently she is not at home.

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 weapons were used, the offence involved considerable gratuitous degradation of the victim to the extent that she was shot at with an arrow. These were grave and life threatening, in the sense that death a very likely consequence of the convict;s actions. 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 of reduced on account of the relevant mitigating factors. I have taken into account the aggravating factors and for those reasons I have considered a starting point of twenty years' imprisonment. The seriousness of this offence is mitigated by a number of factors enumerated in the prayers for mitigation. The severity of the sentence they deserve has been tempered by those mitigating factors and is reduced from the period of twenty years, proposed after taking into account the aggravating factors, now to a term of imprisonment of fourteen 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 twenty years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convicts, the convicts having been in custody since October 2013. I hereby take into account and set off three years and ten months as the period the convict has already spent on remand. I therefore sentence him to a term of imprisonment of ten (10) years and two (2) 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. The evidence led during the trial sufficiently established that the complainant, lost two goats, two hoes, one metallic tray, I consider an award of Shs. 1,000,000/= to be a reasonable compensation. The convict is to compensate the complainant in that sum within a period of three (3) months from the date of this judgment in default whereof the defaulting convict is to serve an additional term of two years' 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 7th day of August, 2017.

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Stephen Mubiru
Judge.
7th August, 2017