THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL SESSIONS CASE No. 0056 OF 2015

UGANDA …… PROSECUTOR

VERSUS

A1. UKWONG RICHARD } …… ACCUSED
A2. KISA ALFRED }

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 two accused and others still at large on 2nd December 2011 at Agoru village, Angol Parish, Atyak sub-county, Okoro County in Zombo District robbed Atimango Jalam Night of one Nokia Phone, cash shs. 180,000/=, one bag of beans, clothes, two chicken and a hoe and, at immediately before or immediately after the said robbery, threatened to use deadly weapons, to wit, pangas, arrows and a knife on the named victim.

The prosecution case is that on 2nd December 2011 at around 10.30 am, a quarrel erupted between the complainant, P.W.1 Night Atimango alias Jalam and her husband as a result of which her husband left her home and went to the home of his second wife. About half an hour later, over ten relatives of her husband, who included the two accused, attacked her. They came with bows and arrows and pangas. A1 had a panga, A2 had a bow and arrows. Some of them began assaulting her while others robbed her property. They robbed things like beans, in the main house after cutting the door to her house with a panga. A2 Kisa was among the eight people beating her while the other five broke into and entered the house. They robbed her of property including; one sack of beans, a radio, mattress, blanket, chicken which they ran after and caught, shs. 180,000/= in cash which was in a pouch with a string around her neck, a Nokia Phone which was in the same pouch. The latter items were taken by A1 who pulled the pouch from her neck. They beat her into unconscious and when she regained her consciousness the following day, she

found herself at Warr Health Centre. She was admitted there for three weeks after which she was discharged and continued to be massaged from home. She returned home after one month and her house empty. A1 Ukwong Richard denied any involvement in the attack. He stated that he spent that day at Abilambe Trading Centre. He did not know what had happened at the home of the complainant until after his arrest when he was informed by the police. A2 Kisa Alfred too denied any involvement. He only learnt about it after arrest from his garden.

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 one Nokia Phone, cash shs. 180,000/=, one bag of beans, clothes, two chicken and a hoe. P.W.1 Night Atimango alias Jalam testified the properly was hers. While the rest of the items were inside and some outside her house, the Nokia phone and cash were in a pouch around her neck. She saw the items around her neck plucked off while her household property was being taken by the rest of the items were being ferried from the house. P.W.3 Private Mustafa Watho, one of the police officers who went to her rescue, found people carrying luggage from the direction of her home and they fled on realising the police had responded. The accused did not offer any evidence on this ingredient. Counsel for the accused conceded to this

ingredient in his final submissions. Having considered all the available evidence relevant to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Atimango alias Jalam's property particularised in the indictment was stolen on 2nd December 2011.

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 the evidence of P.W.1 Night Atimango alias Jalam testified that her door was cut with a panga, and she was also beaten to unconsciousness. This is corroborated by P.W.2 Okello Akusa who at around midday found the victim being assaulted by the road side near his house and she was unconscious. PW3 Private Mustafa Watho one of the police officers who went to her rescue found her at near the home of P.W.2 in that condition and rushed her to hospital where she was admitted for three weeks. 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 Night Atimango alias Jalam.

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 testified that she saw A1 with a panga, and A2 with bow and arrows. PW2 too testified that A1 was carrying a panga while A2 was holding a bow and arrows. PW3 as well testified that as he arrived at the scene, he saw that the people fleeing from near the house of PW2 were carrying a panga, bows and arrows. Although none of the weapons mentioned was recovered and tendered in evidence, 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, A1 Ukwong Richard denied any involvement in the attack. He stated that he spent that day at Abilambe Trading Centre. He did not know what had happened at the home of the complainant until after his arrest when he was informed by the police. A2 Kisa Alfred too denied any involvement. He only learnt about it after arrest from his garden.

To rebut their respective defences, the prosecution relied on the evidence of P.W.1 and PW2 both of whom testified that they recognised the two accused as having been part of the group of assailants that attacked the complainant in her home, assaulted her and robbed her property. 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 during the mid morning hours up to around midday. There was daylight at the time which aided their respective observation and recognition of the accused. Both witnesses came into close proximity of the group, P.W.1 at matters of feet while P.W.2 within metres. Each of them holding saw A1 holding

a panga and A2 a bow and arrows. Both knew the two 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. Although P.W.1 later passed out due to the assault, that was after prolonged beating that began at her home and continued up to near the home of P.W.2. I am therefore satisfied that their 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 each of the accused guilty and accordingly convict each of them respectively for the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*.

Dated at Arua this 4th day of August, 2017.

……..
Stephen Mubiru
Judge.
4th August, 2017

7th August 2017
9.10 am
Attendance

Ms. Sharon Ngayiyo, Court Clerk.
Ms. Harriet Adubango, Senior Resident State Attorney, for the Prosecution.
Mr. Okello Oyarmoi, Counsel for both accused persons on state brief is present in court
The accused are present in court
Both assessors are present

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 State Attorney prosecuting the case prayed for the deterrent sentences, on grounds that; the offence committed is punishable by death. The circumstances are that a lot of violence was involved. The victim lost her consciousness and property. She also prayed for an order of compensation.

In response, the learned defence counsel prayed for lenient sentences for both convicts on grounds that; A1 is aged 27 years, with family responsibilities and a first offender. A2 too is a young man aged 25 years with family responsibilities also a first offender. They have been on remand for five years. They have learnt a lesson and they have reformed. A long custodial sentence will ruin them and the lives of their respective families. In his *allocutus,* A1 prayed for a lenient sentence on grounds that he is really sorrowful because of being in prison. He has people to take care of, two wives and four children. He was the bread winner, his father is now aged 80 years. Since his mother separated from his father, he now stands alone. In his *allocutus*, A2 prayed for a lenient sentence on grounds that he is an orphan. Although his parents gave birth to him, but he never saw them. Had they been there, he would not have been in prison for this long.

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 of losing consciousness and having to be hospitalised for three weeks thereafter. These were grave and life threatening, in the sense that death a very likely consequence of the convicts' 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 considered the fact that a deadly weapon was used, the offence involved a considerable degree of gratuitous degradation of the victim. These circumstances are sufficiently grave to warrant a deterrent custodial sentence. It is for those reasons that I have considered a starting point of twenty five years' imprisonment.
The seriousness of this offence is mitigated by a number of factors; the fact that both convicts are first offenders, are relatively young persons, at the age of 27 years, and 25 years respectively, still capable of reforming and becoming useful members of society. A1 has children and family to look after. The severity of the sentence they deserve has been tempered by those mitigating factors and is reduced from the period of twenty five years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty 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 charged on 8th February 2012 and kept in custody since then, I hereby take into account and set off five years and six months as the period the convicts have already spent on remand. I therefore sentence each of the accused to a term of imprisonment of fourteen (14) years and six (6) 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 PW4 lost various items of clothing, their value was not established in evidence. I am therefore unable to order any compensation in that regard. I was as well not provided with evidence on basis of which to order compensation for the injuries suffered by the victim, so I do not make any order of compensation in that regard. The evidence led during the trial sufficiently established that the complainant, Night Atimango alias Jalam, lost cash shs. 180,000/=, one bag of beans, two chicken. In light of those items, I consider an award of Shs. 700,000/= to be a reasonable compensation. Each of the convicts is to compensate Night Atimango alias Jalam in the sum of Shs. 350,000/= within a period of three (3) months from the date of this judgment in default whereof the defaulting convict is to serve an additional sentence of one year's imprisonment.

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

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

Stephen Mubiru
Judge.
7th August, 2017