

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT GULU
CRIMINAL SESSIONS CASE No. 173 OF 2016

UGANDA **PROSECUTOR**

5 **VERSUS**

- 1. **OJOK CHURCHILL** }
- 2. **LANYERO VICKY** }
- 3. **OKOT SANTO alias AYOLI LANEK SIMON** } **ACCUSED**
- 4. **KIDEGA RICHARD alias BOY AIR** }
- 10 5. **OJOK MICHAEL alias MOHAMED** }
- 6. **RA 206842 L/CPL OMONA DENIS alias OPIO BENSON alias ABELLA}**

Before: Hon Justice Stephen Mubiru.

15 **JUDGMENT**

The four accused, together with two others, are jointly indicted with two counts. In the first count, they are indicted with the offence of Murder c/s 188 and 189 of *The Penal Code Act*. It is alleged that the four accused on the 19th day of March, 2016 at Layibi Centre "A" and "B" village, Layibi Division in Gulu District murdered one Komagum Louis. In Count two, they are indicted with the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that the four accused on the 19th day of March, 2016 at Layibi Centre "A" and "B" village, Layibi Division in Gulu District stole approximately shs. 2,000,000/=, mobile phones, mobile phone accessories, card readers, Airtel and MTN airtime all valued at approximately shs. 25 40,000,000/= the property of Opiyo Denis, and during, immediately before or immediately after the said robbery used a deadly weapon, namely; a gun and caused the death of said Komagum Louis, the mobile money shop attendant at the time.

The prosecution case is that the family of P.W.11 Opiyo Denis, had a dispute over land with that of A3 Okot Santo alias Ayoli Lanek Simon that was decided in favour of the family of P.W.11 consequent to which A3 threatened to kill the family of P.W.11 by shooting with a gun, since he had access to a gun as a security guard working with a private security firm in Entebbe. On or 30

about 16th March, 2016, A6 RA 206842 L/Cpl Omona Denis alias Opio Benson alias Abella, a serving soldier of the Special Forces Command of the UPDF who had deserted the army at his station in Entebbe since 26th November, 2014 when he was granted pass leave and was on the run since then, returned to his home village at Lagwe Konya from where he borrowed a sim-card
5 from P.W.8 Lanyero Vicky. A6 and P.W.8 had attended the same primary school in the past and she worked in the neighbourhood of the village home of A6. On 18th and 19th March, 2016, P.W.10 Aywek Night, an auntie of P.W.11 while on her way to the market, spotted A3 in the company of A6 and A5 Ojok Michael alias Mohamed at Layibi Centre "A" and "B" village, Layibi Division in Gulu District. She told P.W.11 to be cautious as she had seen the man who
10 had threatened them previously with shooting, within the vicinity.

On the evening of 19th March, 2016 while on his way to a drug shop, P.W.11 saw A5 standing suspiciously behind his mobile money shop in Layibi Centre "A" and "B" village. At or around the same time past 7.30 pm, P.W.9 Atim Eunice came to the mobile money shop where she sat
15 with A6 on a bench waiting to be served by the deceased, Komagum Louis, an employee of P.W.11. A6 permitted her to be served before him. As she walked away after her transaction, she saw A6 enter the mobile money shop and close the door behind him. She overheard sounds of a scuffle inside the mobile money shop followed by gunshots. She saw A6 later come out of the shop with a back pack while brandishing a gun at curious onlookers as he retreated into the dark.
20 The onlookers in the vicinity rushed the victim to Gulu Regional Referral Hospital but he was pronounced dead on arrival. The following morning during a search by the police at the scene, it was found that a considerable amount of the business stock of P.W.11 and cash had been stolen. An abandoned phone was recovered at the scene and investigations revealed that the sim-card in the phone belonged to P.W.8 Lanyero Vicky. On arrest, she disclosed that she had last had
25 possession of the sim-card the day she had given it to A6 and that morning of 20th March, 2016, A6 had sent his brother D.W.6 Odong Erick Zao, to inform her that A6 had lost the sim-card along with his phone when it dropped as he rode a motorcycle.

A search for A6 was futile. The police then arrested A1 Ojok Churchill that day 20th March,
30 2016, based on the metadata and call records on that sim-card which indicated he had been in repeated communication with the holder up to shortly before the time of the incident. A3 Okot

Santo alias Ayoli Lanek Simon was arrested three weeks later on 6th April, 2016, on account of his previous threats, having been sighted in the company of A6 within the vicinity of the scene of crime earlier on the fateful day, and for having gone into hiding after the offence was committed. A5 Ojok Michael alias Mohamed was arrested four months later on 20th July, 2016, for having
5 been sighted in the company of A6 within the vicinity of the scene of crime earlier on the fateful day, having been sighted behind the scene of crime within an hour of the incident and for having gone into hiding after the offence was committed. A6 was arrested over two years later on 9th May, 2018 at Namayiba Bus park in Kampala when he was fortuitously spotted by P.W.7 Otema Denis, the brother of P.W.8 Lanyero Vicky. At the trial, charges were withdrawn against P.W.8
10 Lanyero Vicky and she testified as a prosecution witness.

In their respective defences, all four denied any participation. A1 Ojok Churchill stated that he did not know any of his co-accused before arrest and went about his business as usual on the material date only to be arrested the following day. His phone had been borrowed by one of his
15 customers the previous day on two occasions. A3 Okot Santo alias Ayoli Lanek Simon stated that he was arrested on 6th April, 2016 while attending a burial at Palenga following the arrest and release on bond his wife and mother 29th March, 2016 at Gulu CPS. It is after his arrest that he was questioned about a death at Layibi he had no knowledge of. Since then, P.W.11 Opiyo Denis, has sold off some of their family land. A5 Ojok Michael alias Mohamed stated that he too
20 did not know any of his co-accused before he was arrested on 20th July, 2016. During April, 2016 he had returned to his home at Koro-Abili to construct his houses after failing to join the SPC training from service his status then as a Crime Preventer as he lacked academic qualifications. He had come to Gulu on that day when he was told he was needed at the CPS by O/s Asubu and on getting there he was arrested. A6 RA 206842 L/Cpl Omona Denis alias Opiyo Benson alias
25 Abella, testified that he was arrested in Kampala as he was boarding a bus to Gulu. He had deserted the army when he was granted a pass leave on 26th November, 2014 and was on the run. He was arrested for desertion and dealing in immature fish. On 19th and 20th March, 2016 he was in Lagwe Konya village at his uncle's place where his uncle's daughter was introducing her husband who had come to pay the elopement fine. He too did not know any of his co-accused
30 before they were jointly charged. He only came to know P.W.8 Lanyero Vicky on 3rd August, 2018 during a plea bargaining sensitisation activity. Opiyo Benson is not his name.

Since each of the accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each of them beyond reasonable doubt. The burden does not shift to any of the accused persons and each of them can only be convicted on the strength of the prosecution case and not because of weaknesses in their respective defences, (see *Ssekitoleko v. Uganda* [1967] EA 531). The accused do not have any obligation to prove their innocence. By their respective pleas of not guilty, each of the accused put in issue each and every essential ingredient of the two offences with which they are indicted and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure their conviction. 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).

For the accused to be convicted of Murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death.

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

With regard to the first count, death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In the instant case the prosecution adduced a post mortem report dated 20th March, 2016 prepared by P.W.1 Dr. Olwedo Onen a Principal Medical Officer of Gulu Regional Referral Hospital, which was admitted during the preliminary hearing and marked as exhibit P. Ex.1. The body was identified to him by the mother of the deceased Acan Jane, as that of

Komagum Louis. P.W.9 Atim Eunice, the last customer at the mobile shop that evening saw the deceased in a critical condition shortly after he had been shot, as he was being placed in a car to rush him to hospital. P.W.11 Opiyo Denis, followed him up at the hospital but found he had died and the body had been taken to the mortuary. In the mortuary, he saw the body with gunshot wounds to the stomach, chest and legs. P.W.12 D/Sgt Oyet Morris found the body at the hospital mortuary where it had been taken for post-mortem examination. In their respective defences, only D.W.1 Ojok Churchill admitted having seen the deceased in a critical condition shortly after he had been shot. Defence Counsel did not contest this element. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Komagum Louis died on 20th March, 2016.

The prosecution had to prove further that the death of Komagum Louis was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorised by law (see *R v. Gusambizi s/o Wesonga (1948) 15 EACA 65*). P.W.1 who conducted the autopsy established the cause of death as “haemorrhagic shock due to ruptured vessels in the thorax and abdomen causing haemothorax and peritoneum following multiple gun shots.” Exhibit P. Ex.1 dated 20th March, 2016 contains the details of his other findings which include a “gunshot wounds (entry on the right deltoid, left lower back, left dorsum of the post exit of the left back, supra-pubic and left plantar of the foot). Fractured T2 with ruptured peri-vertebrae vessel, ruptured Mesenteric vessels and multiple perforated gut with haemothorax and peritoneum.” These injuries are consistent with a gunshots.

P.W.9 Atim Eunice, the last customer at the mobile shop that evening saw a man enter into the shop after the deceased, close the door behind them and overheard sounds of a scuffle inside the shop before multiple gunshots went off. Shortly after, she saw the deceased in a critical condition before he was rushed to hospital. P.W.11 Opiyo Denis, saw the body with gunshot wounds to the stomach, chest and legs. P.W.12 D/Sgt Oyet Morris found the body at the hospital mortuary where it had been taken for post-mortem examination and saw several bullet wounds. In their respective defences, only D.W.1 Ojok Churchill admitted having seen the deceased in a critical condition shortly after he had been shot. The existence of these injuries is suggestive of a violent

death, such that the possibility of a natural death has been ruled out in favour of a finding of homicide. No co-existing facts appear which can reasonably explain the death in a manner inconsistent with a homicide. Defence Counsel did not contest it as well in their final submissions. Not having found any lawful justification for the shots fired at the deceased, I agree
5 with the assessors that the prosecution has proved beyond reasonable doubt that Komagum Louis' death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is defined by section 191 of *The Penal Code Act* as either an
10 intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person. The question is whether whoever assaulted the deceased intended to cause death or knew that the manner and degree of assault would probably cause death. This may be deduced from circumstantial evidence (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*).

15 Malice aforethought being a mental element is difficult to prove by direct evidence, Courts usually consider first; the nature of the weapon used. In this case no weapon was recovered or produced in court. Nevertheless, It has been held before that there is no burden on the prosecution to prove the nature of the weapon used in inflicting the harm which caused death nor is there an obligation to prove how the instrument was obtained or applied in inflicting the harm
20 (see *S. Mungai v. Republic [1965] EA 782 at p 787* and *Kooky Sharma and another v. Uganda S. C. Criminal Appeal No.44 of 2000*). On basis of the nature of wounds inflicted, the fact that gunshots were heard, the assailant was seen brandishing a gun as he escaped from the scene and the following day six spent cartridges with one fired bullet (slug) were recovered from the scene (exhibit P. Ex.7), there is not in doubt is that a gun was used. A deadly weapon is defined by
25 section 286 (3) of *The Penal Code Act* to include one which is made or adapted for shooting.

Courts usually consider weapon used (in this case a deadly weapon, a gun) and the manner in which it was used (inflicted multiple fatal injuries) and the part of the body of the victim that was targeted (the chest and abdomen). The ferocity with which the weapon was used can be
30 determined from the impact (multiple gun shots at close range). P.W.1 who conducted the autopsy established the cause of death as “haemorrhagic shock due to ruptured vessels in the

thorax and abdomen causing heamo-thorax and peritoneum following multiple gun shots.” Although there is no direct evidence of intention, malice aforethought can be inferred readily in a situation like this where the circumstances in which the injury was inflicted can be deduced from the very nature of the fatal injury. Any perpetrator who fires multiple gun shots aimed at the chest and stomach region of another at close range, must have foreseen that death would be a natural consequence of his or her act. None of the accused adduced any evidence or made a submission capable of casting doubt on this conclusion and neither did Defence Counsel contest this element. On basis of the circumstantial evidence, I find, in agreement with the assessors that malice aforethought can be inferred. The prosecution has consequently proved beyond reasonable doubt that Komagum Louis’s death was caused with malice aforethought.

The last ingredient of participation, is common to the second count as well and for the avoidance of repetition, will be considered alongside the other elements in the second count, the first element of which, 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 approximately shs. 2,000,000/=, mobile phones, mobile phone accessories, card readers, Airtel and MTN airtime all valued at approximately shs. 40,000,000/= the property of Opiyo Denis. P.W.11 Opyo Denis, testified that his property taken included four phones that had been on display. There were about 24 others in one carton of mixed brands. It was about one foot in width and about 1.5 feet in length. The entire box was taken. The value of the phones in total was shs. 14-15 millions because they were smart phones. The average price was shs. 520,000/= Airtime stock of about shs. 300,000/= was taken. Cash was about shs. 26,000,000/= too was missing. P.W.9 Atim Eunice, who had seen the assailant enter the shop without a bag, shortly after the gunshots she saw him emerge from the shop with a back-pack, while brandishing and pointing a gun at the curious onlookers as he retreated backwards into the night. When he arrived at the scene, P.W.12 D/Sgt Oyet Morris found signs of a place that had been ransacked and photographs of the scene were taken (exhibits P. Ex.10 A to I). 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 Opiyo Denis’ property particularised in the indictment was stolen on 19th March, 2016.

The prosecution was further required to prove the use or threat of use of violence against the victim during that theft. P.W.9 Atim Eunice, testified that she heard the gunshots and saw the gun as the assailant retreated and disappeared into the night. P.W.11 Opiyo Denis, saw the body with gunshot wounds to the stomach, chest and legs. P.W.12 D/Sgt Oyet Morris found the body
5 at the hospital mortuary where it had been taken for post-mortem examination and saw several bullet wounds. In their respective defences, only D.W.1 Ojok Churchill admitted having seen the deceased in a critical condition shortly after he had been shot. Considering the evidence as a whole relating to this element and in agreement with the opinion of the single assessor, I find that the prosecution has proved beyond reasonable doubt that that immediately before, during or
10 immediately after theft of the property mentioned the indictment, violence was used against the deceased Komagun Louis, the immediate victim of the act.

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
15 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.9 Atim Eunice, heard the gunshots and saw the gun as the assailant retreated and disappeared into the night. P.W.11 Opiyo Denis, saw the body with gunshot wounds to the stomach, chest and legs. P.W.12 D/Sgt Oyet Morris found the body at the hospital mortuary
20 where it had been taken for post-mortem examination and saw several bullet wounds. It has already been found that on basis of the nature of wounds inflicted, the fact that gunshots were heard, the assailant was seen brandishing a gun as he escaped from the scene and the following day six spent cartridges with one fired bullet (slug) were recovered from the scene (exhibit P. Ex.7), there is not in doubt is that a gun was used. A deadly weapon is defined by section 286 (3)
25 of *The Penal Code Act* to include one which is made or adapted for shooting.

Although the weapon mentioned was not recovered and tendered in evidence, according to the decision in *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
30 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 opinion

of the single assessor, I find that the prosecution has proved beyond reasonable doubt that the assailant had deadly weapon in his possession during the robbery.

5 Lastly, the prosecution had to prove in respect of both counts that each of the accused participated in commission of the offences. This is done by adducing direct or circumstantial evidence placing each of the accused at the scene of crime as perpetrator of the offence, or as an accessory thereto. In each of their respective defences, the accused denied having participated in the commission of the crime. Each of them raised the defence of alibi. An accused who puts up such a defence has no duty to prove it. The burden lies on the prosecution to disprove it by
10 adducing evidence which squarely places the accused at the scene of crime as an active participant in the commission of the offence (see *Vicent Rwamaro v. Uganda [1988-90] HCB 70; Ssebyala and others v. Uganda [1969] E.A. 204* and *Col. Sabuni v. Uganda 1982 HCB 1*).

To disprove those defences, in respect of A6 A6 RA 206842 L/Cpl Omona Denis alias Opio
15 Benson alias Abella, the prosecution relied on the direct evidence of P.W.9 Atim Eunice who testified that she first saw A6 on 19th March, 2016 at 8.00 pm. Her husband had at 7.00 pm sent her shs. 52,000/= for food and she went to withdraw the money from Layibi Centre at the "Lok-Oroma" mobile money shop, where the deceased was the attendant. As she walked to the mobile money shop, A6 came from the opposite direction and they met at the door to the shop. They sat
20 together on the bench at the veranda. She was seated next to the door and the accused sat next to her and it was only the two of them on that bench. They exchanged greetings. She noticed that A6 which was wearing a raincoat (a dusk coat) with a hood. He had a pair of blackish jeans.

Komagum was seated behind a table at the veranda, on a bench next to the wall. Komagum
25 asked A6 in Acholi whether he could serve him and the accused said "ladies first" in English. As Power from the mains had gone off and they had ignited a generator. A light bulb was hanging from the MTN billboard nearby. It was a solar bulb but powered by a generator. It was the only place with light in the surroundings because electricity had gone off. She thanked A6 and handed her phone to Komagum. As she thanked A6, she turned to him and looked him in the face. She
30 was able to see his face as she turned to him. There was a small space between the two of them as they were seated on the same bench. Komagum handed her the phone back to key in her pin.

She withdrew 52,000/= and she gave him shs. 1,000/= so that he could give her airtime of that amount. He had no air-time in his drawer. He got up and entered inside the shop from where he brought her a scratch card. A6 was still seated at the bench. When she received the scratch card she began walking away. A6 got up and followed Komagum into the shop. The entire transaction
5 at the shop took about three minutes. She was able to make a dock identification of A6 out of the then six accused persons.

Where prosecution is based on the evidence of a single indentifying witness under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of
10 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. 1 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. The Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification. In doing so, the court
15 considers; whether the witnesses were familiar with the offender, whether there was light to aid visual identification, the length of time taken by the witnesses to observe and identify the offender and the proximity of the witnesses to the offender at the time of observing him.

I have considered the circumstances that prevailed when P.W.9 Atim Eunice claims to have seen
20 A6 at the scene of crime moments before it was committed. It was during the night and electricity from the mains had gone off. She testified that there was light from a light bulb powered by a generator which aided her observation and recognition of the accused. She testified that she found the generator already running. In the clinic nearby on the same building they were using a candle. The door next to the mobile money is a photo studio but it was closed.
25 However in her statement to the police she had stated that there had been an attempt to start the generator but it failed to work and solar power was used instead. This is corroborated by P.W.11 Opiyo Denis who stated that the solar bulbs were alight because the generator had failed to start. One was inside the shop and the other was at the entrance on the veranda and both were alight when he came to the scene following the shooting.

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According to P.W.12 D/Sgt Oyet Morris there was light at the time the police arrived at the scene but shortly after, the power went off and they stopped the search. However in his self recorded statement during the investigations, he stated that the place was dark when they arrived and he told P.W.11 Opio Denis to lock the place. I have considered these inconsistencies and
5 found that although they create uncertainty about what the mechanism that powered the light bulbs, there was light from two light bulbs at the time of the transaction. I am inclined to believe P.W.11 that the bulbs were solar powered since the generator had failed to start and that at the time P.W.12 D/Sgt Oyet Morris arrived at the scene, this too had gone off. I cannot envisage P.W.9 Atim Eunice's mobile money transaction having been concluded in total darkness. The
10 inconsistencies in what the source of power at the time was appear to be the result of lapses in memory regarding detail, as a result of passage of time rather than deliberate untruthfulness on the part of these witnesses.

Under those conditions of lighting, P.W.9 Atim Eunice came into close proximity of A6, within
15 inches as they sat next to one another on the same bench. Although she had not known the accused before and his head was covered with a hood up to around his ears, she had ample time and opportunity to have an unimpeded look at his face when they exchanged greetings and when she thanked him for allowing him to be served first. Although it would have been desirable to conduct an identification parade following the arrest of A6, I have not found any significant
20 unfavourable circumstances which could have negatively affected her ability to see and recognise the accused when she saw him again in court. In any event, the possibility or mistake of error is ruled out by additional corroborative circumstantial evidence.

According to P.W.8 Lanyero Vicky, she and A6 Opio Benson went to the same school at Awinyi
25 primary School in 1995 and 1996. He was in the same class with her in P.4 but in 1996 there was insurgency in the area and they dispersed. She saw him again on Wednesday 16th March, 2016 at 10.00 am at her workplace, "Third Hope Africa" located at Lagwe-Dola, Lakwana sub-county in Omoro District, where she was a cook. She came to know that A6 lived in the neighbourhood. She received information that her child, who had a mental problem at the time,
30 had escaped from school. She bought airtime in order to call her father but the battery of her phone was down. She asked A6 to lend her his phone and he accepted. She placed her sim-card

in his phone. She called his father using the phone of A6. Her telephone number was 0782-488560 while her father's number was 0782-971185. Her father told her that he had found the child. A6 then requested her to use the airtime which was left on her sim-card. He allowed him to go ahead because he told her his wife had a child in hospital. A6 left immediately thereafter and
5 did not call in her presence. He did not return her sim-card. On 20th March, 2016 at around 8.00 am, D.W.6 Odong Eric, the bother of A6, came to her work place and told her that A6 Opio sent him to tell her that the sim-card got lost with the phone.

It was the testimony of P.W.12 D/Sgt Oyet Morris that on the morning of 20th March, 2016
10 during a search conducted at the scene of crime, an itel mobile phone handset in which a sim-card for telephone number 0782-488560 was inserted, was recovered. Upon arresting P.W.8 Lanyero Vicky she led them to the home of A6 Opio Abela in Lakwana sub-county. They searched it but only found his brothers, mother and other relatives. They told the police A6 Opio Abela had come in the morning on a motorcycle and sent one of them to tell Lanyero that his
15 phone had fallen off as he rode the motorcycle and her line had fallen. They proceeded to the home of Okot still in Lakwana sub-county but did not find him at home. They were told he had come to Gulu Town two days before and had not returned home.

Analysis of the metadata of sim-card number 0782-488560 belonging to P.W.8 Lanyero Vicky
20 (exhibit P. Ex.12) revealed that on 18th March, 2016 at 1.53 pm, telephone number 0783797528 belonging to A1 Ojok Churchill called it. It was incoming to the line of Lanyero. On the same day at 7.23 pm, 0782-488560 rang 0783797528 they were using a base station at Omoro Hill, in Lakwana sub-county, about 10 - 14 kms from the scene of crime. The first call lasted almost two minutes and the latter one was for 14 seconds. The third call was at 11.13 pm when telephone
25 number 0782-488560 rang 0783797528 for only eight seconds still using Omoro Hill base station. On 19th March, 2016 at 2.10 pm telephone number 0782488560 rang 0783797528 and the base station was Layibi Market, almost opposite the scene of crime. It lasted 52 seconds. At 5.28 pm telephone number 0782488560 rang 0789851780 which belongs to the wife of A1 Ojok Churchill used for mobile money transactions. It lasted 27 seconds and the base station was Kora
30 Bili, a place which is past the scene of crime, past the railway and past the roundabout. It is about 2 kms from the scene. The next one was at 5.51 pm. when telephone number 0782488560 rang

0789851780 and lasted 87 seconds and the base station Omoro Hill, Lakwana sub-county. Then at 8.41 pm 0782488560 rang 0789851780 and it lasted 22 seconds and the base station was Layibi Market opposite the scene of crime. On 20th March, 2016 at 8.39 telephone number 0782488560 rang 0789851780 and that is when they were tracing the owner of 0782488560.

5 According to the printout, it shows the movement of Lanyero's number from Omoro to Koro Bili and then Layibi. Both A6 Omona Denis and A3 Okot Santo Ayole come from Lakwana.

The time of a call, which number was called, how long the call lasted and which cell tower the caller phone contacted are all electronically logged, traditionally for billing purposes. That information is metadata (data used to explain mobile phone use and movement) created by automated information processing. In other words, by carrying a mobile phone, one is in effect carrying a tracking device that logs roughly where one is with every call of every day. The metadata can be used to follow someone's daily movements and when that data is collated and visualised, patterns can start to emerge. The data will show that the phone communicated with different cell towers, and the pattern of those pings can be used to make a rough guess at the journeys the person in possession of the phone made between them all. The metadata corroborates the evidence of P.W.8 Lanyero Vicky that she gave her sim-card of telephone number 0782488560 to A6 at Lagwe-Dola, Lakwana sub-county in Omoro District. The movements of the person in possession of that sim-card indicate that he was within the vicinity of the scene of crime on both 18th and 19th March, 2016 the last call having been around the time of the offence at 8.41 pm when sim-card number 0782488560 was used to call number 0789851780, a call that lasted 22 seconds where the base station was Layibi Market, opposite the scene of crime.

25 In *R v. Mason [2006] All ER (D) 168*, the Court of Appeal in England held that an entry in the memory of a co-accused's phone, which linked the number attributed to the accused to him by name, was an admissible attribution. In the instant case, the call data of 0782-488560 is linked to calls made on 12th March 2016 at 7.36 am. from telephone Number 0773-290953 belonging to his wife Apio Alice and another on the same date at 9.10 am from telephone number 30 0787524512 registered to his younger brother D.W.6 Odong Erick Zao. On 12th March, 2016 at 9.00 am telephone number 0774283388 registered to his elder brother Odoch Geoffrey, called

the number 0782-488560. The presence of call data to and from close family members creates a stronger attribution of the phone number to A6 RA 206842 L/Cpl Omona Denis alias Opio Benson alias Abella.

5 Mobile phones can of course be powerful evidence of where a particular individual was at a certain time. Its recovery at the scene of crime directly implicates A6 as the perpetrator of the crime as it was most likely dropped during the scuffle overheard by P.W.9 Atim Eunice moments before the gunshots were fired. That the sim-card was officially registered in another person's name is inconsequential since the fact that P.W.8 Lanyero Vicky had physical
10 possession and use of the sim-card before she gave it to A6, was never cast in doubt by cross-examination or other contradictory evidence. The metadata tracking the use and movement of the sim-card to number 0782-488560 on 18th and 19th March, 2016 satisfactorily corroborates the identification evidence of P.W.9 Atim Eunice, placing A6 at the scene of crime. Such evidence, coupled with evidence of calls made around certain key events, may provide the prosecution
15 with compelling material. I am therefore satisfied that her evidence is free from the possibility of mistake or error.

The prosecution evidence against A6 is further corroborated by the testimony of P.W.13 Odong Jacob Yolomoi, a Pastor of Deliverance Church Uganda who solemnised the marriage between
20 A6 and his wife Apio Alice on 26th November, 2011 at the Deliverance Church in Gulu. In the marriage Register (exhibit P. Ex. 19) A6 wrote his name as Benson Opio and that he was from Atiang Church in Lujolomole in Omoro from where the couple had received pre-marriage instruction. Being a document, like any other document offered in evidence, a recording must be authenticated: a witness must offer evidence establishing that the object is what that witness
25 claims it is. If an author or witness to the writing is available to testify, it suffices for the witness to testify that he or she recalls the writing, has seen the writing, and is satisfied that the writing accurately captured what was documented. It is thereafter sufficient to show a chain of custody which establishes the reasonable probability that no tampering occurred. This witness kept custody of the register. Minor infirmities in the chain of custody are insufficient to bar
30 admissibility of a writing, but are relevant as to the weight the court chooses to give to it.

In his defence, A6 denied the name Opio Benson. I have considered the fact that Opio Benson was stated as one of his aliases at the point of being charged, committed and taking plea and at no instance did he deny it. Almost all prosecution witnesses knew him by that name. I have not found any reason as to why P.W.8 Lanyero Vicky and P.W.13 Odong Jacob Yolomoi particularly would fabricate that name and attribute it to him. I find that his choice to deny that identity is a calculated tactic to delink him from the incriminating evidence of the mobile phone and sim-card recovered at the scene of crime. It is trite that lies told by an accused person in his defence, although they cannot form the basis of his or her conviction, can provide further corroboration of an otherwise strong case against him or her (see *Birembo Sebastian and another v. Uganda, S.C. Criminal Appeal No. 20 of 2001*). Lies are inconsistent with innocence. Proved lies can be used to corroborate prosecution evidence (See *Juma Ramadhan v. Republic Cr. App. No. 1 of 1973 (unreported)*).

All in all I have found that the evidence against A6 RA 206842 L/Cpl Omona Denis alias Opio Benson alias Abella has disproved his alibi and places him squarely at the scene of the crime as the person who fired the shots that killed Komagum Louis and also robbed the items mentioned in the indictment. He is accordingly found guilty and convicted for the offence of Murder c/s 188 and 189 of *The Penal Code Act* in respect of the first count, and the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act* in respect of the second count.

As regards A1 Ojok Churchill, in order to disprove his defence of alibi, the prosecution relies on entries in the memory of the sim-card of telephone number 0782-488560 attributed to his co-accused A6 RA 206842 L/Cpl Omona Denis alias Opio Benson alias Abella, with whom he is linked by the calls made to that number, then in the possession of A6 at the material time. To explain away that link, A1 Ojok Churchill testified that on the fateful day of 19th March, 2016 in the morning at around 10.00 and a customer had borrowed his phone to call someone he expected to send him money. P.W.11 Opiyo Benson testified that when A1 Ojok Churchill returned his call the following morning of 20th March, 2016 between 8.00 - 9.00 am, he called using telephone number 0783797528 and called telephone number 0782-488560 then in police custody. He asked him to come to the police station but A1 told him he feared to come because he thought P.W.11 had been shot the previous day. He narrated to him how a customer had gone

to him several times the previous day expecting to receive shs. 500,000/= sent from Entebbe. That the customer had asked A1 Ojok Churchill to give him his personal number so that he could withdraw the money. That A1 had given him the number and the customer had called him again at around 3.00 pm to find out if the money had been sent. He stated further that the customer had
5 used the very number 0782-488560 P.W.11 had used to call him. The person later checked on him at 4.00 pm to find out whether the money had been sent but It had not been sent. The customer had returned in the evening at around 8.00 pm and AI Ojok Churchill heard him speaking on the phone and the voice on the phone was asking him to hurry because the shop was about to close. The man went away. He then heard gunshots in the direction where the man had
10 gone.

Although A1 Ojok Churchill told a slightly varied version in his defence of this interaction with that unnamed customer on 20th March, 2016 and the customer's access to one of his phones, he was unable to account for the fact that the metadata of telephone number 0782-488560 indicated
15 that his two phone numbers; 0783-797528 used in his business for sim-card activation and registration and the other number 0789851780 registered to his wife Aber Joyce, had been in multiple repeated communication with telephone number 0782-488560 on 20th March, 2016 and not the couple or so times he explained. The evidence (exhibit P. Ex. 12) further revealed that on 19th March, 2016 at 2.10 pm his line was the first to be contacted by Lanyero Vicky's number
20 0782-488560 calling his number 0789851780, and not vice versa, and the base station is Layibi Market, which P.W.12 D/Sgt Oyet Morris said was almost opposite the scene of crime. It lasted 52 seconds.

On 19th March, 2016 at 5.28 pm, P.W.8 Lanyero Vicky's number 0782-488560 then rang
25 0789851780 Churchill's wife Number used for mobile money transactions. It lasted 27 seconds and the base station was Kora Bili which P.W.12 D/Sgt Oyet Morris said was past the scene, past the railway and past the roundabout, about 2 kms from the scene. The next one was at 5.51 pm. when P.W.8 Lanyero Vicky's number 0782-488560 rang 0789851780 and lasted 87 seconds and the base station Omoro Hill, Lakwana sub-county. Then at 8.41 pm 07824-88560 rang
30 0789851780 and it lasted 22 seconds and the base station was Layibi Market opposite the scene of crime.

Exhibit P. Ex.14 in respect of telephone line number 0789851780 registered in the name of Aber Joyce, the wife of AI Ojok Churchill shows that on 19th March, 2016 at 7.21 pm it rang the line of Lanyero 0782-488560 for 14 seconds and the base is Layibi Market, the scene of crime. At 7.42 pm the same day, the same line rang the number of Lanyero for 12 seconds and the base was Layibi Market. On the same day, at 8.12 pm it again called the same number for ten seconds. On the same day at 8.18 pm that number called Lanyero Vicky's number and the duration was 19 seconds and the base was Laybi Market. On 19th March, 8.38 pm that number called Lanyero's number and it lasted 14 seconds at Layibi Market. On the same day at 8.45 pm, around the time at which the offence was committed, that line called Lanyero and the duration was 13 seconds and that was the last communication between the two phone lines before recovery of the itel phone with sim-card for line number 0782-488560 the following morning at the scene of crime .

The use of telephone evidence is now almost an essential part of any allegation of conspiracy. The essential element of the offence of conspiracy is evidence of an agreement with others to commit an offence. The "agreement," is never a signed document expressing a contract to commit a crime. The courts usually infer the agreement from the surrounding circumstances. This will often mean heavy reliance on the phone contacts between suspects and also the timing and frequency of those contacts. For example in *Director of Public Prosecutions v. Varlack, Court of Appeal, [2008] UKPC 56*, the prosecution case against the respondent was that she was used as a lure to get the victim to go to a meeting place on the mountain road, where he was to be murdered. It was based largely on evidence of telephone calls made between the accused, from which the prosecution sought to draw the inference that she knew and agreed to the plan to kill the deceased. It was claimed that she was instrumental in getting him to travel into the mountains and tipped the accused off by telephone when he left her apartment for the meeting.

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The prosecution in that case assembled detailed evidence at trial of the significant number of telephone calls made between the accused persons and the respondent in the space of nine days from 25th August to 2nd September 2004. Expert evidence was called to place the general area in which the caller and the person called in each case were located, by identifying the location of the telephone relay stations that processed the telephone calls. The calls were summarised in the judgment of Barrow JA in the Court of Appeal, thus;

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In a period of some five months before 25th August 2004 there were sixteen telephone calls between Parsons' mobile or home telephone and Hamm's mobile or home telephone. On 25th August 2004 there were three calls by Varlack from a neighbour's telephone to Hamm's mobile telephone, and one call from Parsons' home telephone to Varlack's neighbour's telephone. These calls were all within the space of 6 minutes. On the following day there was one call from Parsons' home telephone to Hamm's home telephone. On 28th August 2004, in less than an hour beginning at 7:15 in the morning, Varlack called Hamm three times and Hamm called Varlack five times. That evening Hamm called the deceased at the latter's home and later Parsons called Hamm. On 29th August 2004, the last day the deceased was seen alive, in the morning Hamm made three calls, two to the work place and the third to the home of the deceased. Varlack called three times to the deceased's home telephone, apparently reaching him once. That evening, at 8:49 Varlack telephoned from the neighbour's home and spoke with Hamm on his mobile phone. At 9:31 the deceased made his final telephone call: it was to Hamm's mobile. Three minutes later Hamm used his mobile telephone, from an East End location, and spoke with Parsons on his mobile telephone. Five minutes later Hamm again telephoned Parsons on his mobile. Twenty minutes after that call (at 9:58) Varlack, from another neighbour's telephone, called Hamm on his mobile. Hamm was still in the area of East End. Less than a minute after that, Hamm telephoned Parsons, who was in the Road Town area of Tortola, on his mobile. Five minutes later, at 10:04, Hamm telephoned Varlack at the same neighbour's home. The final call that night was at 10:57 when Hamm called the telephone.

Based on that evidence, the Privy Council, decided in essence that in the circumstances of the case, where the respondent had been linked to a conspiracy to murder through, inter alia, mobile telephone cell site evidence, it would have been absurd for the trial judge to have ruled that an entry in the memory of the co-accused's mobile phones, which linked the number attributed to the respondent to the accused, was inadmissible. In the circumstances, it was entirely appropriate for the jury to have inferred that the number attributed to the respondent had been in the co-accused's mobile's memory as an aide-memoir pursuant to the conspiracy.

In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for

the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see *Shubadin Merali and another v. Uganda* [1963] EA 647; *Simon Musoke v. R* [1958] EA 715; *Teper v. R* [1952] AC 480 and *Onyango v. Uganda* [1967] EA 328 at page 331).

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Having duly cautioned myself, I find that in the instant case, the pattern, frequency and timing of telephone contact, between the telephone numbers used by A1 Ojok Churchill in his mobile money business with the sim-card of P.W.8 Lanyero Vicky recovered from the scene of crime is inconsistent with the explanation offered by A1 Ojok Churchill. It directly implicates him in a conspiracy to commit the offence. This is further augmented by the fact that P.W.11 testified that on the morning of 20th March, 2016 between 8.00 - 9.00 am when P.W.11 Opiyo Benson called him and asked him to come to the police station, A1 told him he feared to come because he thought P.W.11 had been shot the previous day. The total sum of the circumstantial evidence against A1 is incapable of explanation upon any other reasonable hypothesis than that of guilt.

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15 There are no other co-existing circumstances which would weaken or destroy the inference.

Although at the time the offence was committed A1 Ojok Churchill was not physically at the scene of crime, under section 19 of *The Penal Code Act*, there are different modes of participation in crime; direct perpetrators, joint perpetrators under a common concerted plan, accessories before the offence, etc. This includes every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence and every person who aids or abets another person in committing the offence. Each of such persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it. In the instant case A1 Ojok Churchill is a joint perpetrator under a common concerted plan.

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The central aspect of joint commission (also called "co-perpetration") is the presence of an agreement between a plurality of persons to commit a crime, which may take the form of a "common plan." The existence of this agreement justifies the reciprocal attribution of the contributive acts of the joint perpetrators, the coordinated sum of which results in the realisation of the objective elements of the crime. It is not required that each joint perpetrator personally

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participates in the execution of each material element of the crime, and there may be circumstances in which a particular joint perpetrator contributes to the commission of the crimes in ways other than by realising a material element of the crimes, such as by performing a crucial role at the planning or preparation stage, including when the common plan is conceived. The
5 phone contacts between A1 Ojok Churchill and A6 reveal a pattern of a person providing reconnaissance information to the actual perpetrator, right up to the time of commission of the offence. These were acts that substantially assisted or significantly effected the furtherance of the goals of the common plan, with the knowledge that his acts or omissions facilitated the crimes committed through the common plan.

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Consequently, I have found that the evidence against A1 Ojok Churchill has disproved his alibi and constitutes him into a joint perpetrator of the offence by way of abetting, facilitating, encouraging, or advising the commission of the two offences. He is accordingly found guilty and convicted for the offence of Murder c/s 188 and 189 of *The Penal Code Act* in respect of the first
15 count, and the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act* in respect of the second count.

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The prosecution evidence against A3 Okot Santo alias Ayoli Lanek Simon and A5 Ojok Michael alias Mohamed is as well entirely circumstantial. As against A3, it is to the effect that; - he
comes from Lakwana sub-county just as A6 and worked in Entebbe just as A6. He was involved in a land dispute with P.W.11 Opiyo Denis; he issued direct threats to both P.W.11 Opiyo Denis and his Aunt P.W.10. Ajwek Night, involving the use of guns and she had to relocate in fear; he was seen by in the company of A6 on 18th and 19th March, 2016 by P.W.10. Ajwek Night on both
25 days and by P.W.11 Opiyo Denis only on the latter; P.W.12 (D/Sgt Oyet Morris) went to his home in Lakwana and was told he had come to Gulu Town two days before. A subsequent search at his place of work indicated he had abandoned his work a month earlier. He was found hiding at the home of his brother in Palenga around 6th April, 2016; he could not account for his whereabouts from 18th March, 2016 to 6th April, 2016.

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As regards A5 Ojok Michael alias Mohamed, the circumstantial evidence against him is to effect that; - he was seen by in the company of A6 on 18th and 19th March, 2016 by P.W.10. Ajwek

Night on both days and by P.W.11 Opiyo Denis only on the latter; P.W.11 Opiyo Denis saw him again within an hour of the offence near the scene in suspicious circumstances; he was a crime preventer but he inexplicably ceased his routine reporting to Gulu Police Station after the commission of the offence and could not be contacted on his known mobile phone number; 5 P.W.12 D/Sgt Oyet Morris searched for him until his arrest in June, 2016 at Laiyibi where he had taken refuge with his live-in wife.

I have carefully considered the explanations advanced by both accused in their respective defences and found them to be incredible. Had A5 been disqualified from advancement to the 10 SPC course for lack of academic qualifications as he claimed, the police would have been aware. This does not explain why he could not be reached on his mobile phone number suddenly after the incident and for all that time before his arrest. Although P.W.12 D/Sgt Oyet Morris admitted to having implicated A4 on orders of his bosses but without evidence, rendering his objectivity in the investigations questionable, I have not found that a similar occurrence happened in respect of 15 any of the two accused. Both admitted having been arrested in the very circumstances he testified to. Their conduct is inconsistent with their stated innocence. It is inexplicable how they suddenly broke off all communication with each other soon after the incident.

It is very important to keep in mind that mere association or presence at the scene of the crime is 20 insufficient to establish conspiracy. The best type of evidence expected is a confession by one or more of the accused. If such a confession is not produced, the court may infer agreement from the circumstances. A Court can find conspiracy inferentially through the accused's relation, conduct, or circumstances of the parties. The first inference is one of vested interest: if the accused has an interest in seeing the crime committed, then the court could infer that the accused 25 could agree to commit the crime. The second inference is if the accused had no legitimate reason for aiding the criminals beyond being involved in the crime. An inference usually made in cases where one conspirator supplies the other conspirator(s) with the materials needed to commit the crime. I find that both inferences apply to the two accused.

30 Having duly cautioned myself about the nature and dangers of reliance on circumstantial evidence, I find that in the instant case that the evidence against both directly implicates each of

them in a conspiracy to commit the offences. The total sum of the circumstantial evidence against each of them is incapable of explanation upon any other reasonable hypothesis than that of guilt. There are no other co-existing circumstances which would weaken or destroy the inference.

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Consequently, I have found that the evidence against A5 Ojok Michael alias Mohamed and A3 Okot Santo alias Ayoli Lanek Simon, has disproved their respective alibis and constitutes them into joint perpetrators of the offence by way of abetting, facilitating, encouraging, or advising the commission of the two offences. Each of them is accordingly found guilty and convicted for the offence of Murder c/s 188 and 189 of *The Penal Code Act* in respect of the first count, and the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act* in respect of the second count.

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Dated at Gulu this 14th day of December, 2018

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Stephen Mubiru

Judge,

14th December, 2018.

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SENTENCE AND REASONS FOR SENTENCE

Sentencing is a reflection of more than just the seriousness of the offence. The court at this stage, in sentencing multiple convicts at the same trial where the facts permit, may take into account the degree of culpability of each of the convicts. Degree of culpability refers to factors of intent, motivation, and circumstance that bear on the convict's blameworthiness. Under the widely accepted modern hierarchy of mental states, an offender is most culpable for causing harm purposely and progressively less culpable for doing so knowingly, recklessly, or negligently.

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Murder is one of the most serious and most severely punished of all commonly committed crimes. The offence of murder is punishable by the maximum penalty of death as provided for under section 189 of the *Penal Code Act*. In cases of deliberate, pre-meditated killing of a victim, courts are inclined to impose the death sentence especially where the offence involved use of deadly weapons, used in a manner reflective of wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of the sanctity of life. This

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maximum sentence is therefore usually reserved for the most egregious cases of Murder committed in a brutal, in an extremely brutal, grotesque, gruesome, diabolical, revolting or dastardly, callous manner so as to arouse intense and extreme indignation of the community.

5 According to paragraph 18, Part 6 of *The Constitution (Sentencing Guidelines for Courts of*
Judicature) (Practice) Directions, 2013, the court may only pass a sentence of death in
exceptional circumstances in the “rarest of the rare” cases where the alternative of imprisonment
for life or other custodial sentence is demonstrably inadequate. By implication, life is the norm
and death is the exception. However, "rarest of rare" is often misunderstood to mean the rarity of
10 the case. To the contrary, the court is supposed to look at the case holistically, understand the
factors that led to the crime, the circumstances of the convict and the victim, among other things,
before pronouncing the sentence. The death sentence is supposed to be imposed when the
alternative option is unquestionably foreclosed. It a punishment of last resort when, alternative
punishment of a long period of imprisonment or life imprisonment will be futile and serves no
15 purpose.

In cases where the collective conscience is so shocked and filled with extreme indignation that it
will expect the holders of the judicial power to impose the death penalty irrespective of their
personal opinion as regards desirability or otherwise of retaining death penalty, the sentence
20 ought to be imposed. Life can never be adequately compensated, not even with another life but
the death penalty remains one of the lawful sentences for this type of crime. The court should not
balk out of the duty entrusted to it to express public indignation towards some of the extreme
modes of perpetration of crime.

25 The community may entertain such a sentiment when the crime is viewed from the platform of
the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature
of the crime, such as for instance provided for under Part 6 of *The Constitution (Sentencing*
Guidelines for Courts of Judicature) (Practice) Directions, 2013; particularly paragraphs 17, 18,
19 and 20; i.e. where it was planned and meticulously pre-meditated, the death of the victim was
30 caused by the offender when committing robbery, among other offence. If common purpose or
conspiracy was involved, the degree of injury or harm, and so on.

The convicts before me, A3 Okot Santo alias Ayoli Lanek Simon and A6 RA 206842 L/Cpl Omona Denis alias Opio Benson alias Abella committed the offence in the worst of the worst of manners. It was a horrific, brutal, callous, calculated, well planned and pre-meditated, senseless killing. In the victim impact statement, P.W.11 Opiyo stated that the deceased was a senior four student in his second term. He requested for work to raise fees. He offered him a job. He was committed, trustworthy and reliable. He intended to work with him for two years. He offered him a room behind the shop and he would keep the keys to the safe. He would give out stock. His Auntie told him to refer to him as a cousin. He was a bright student in class. He was among the crew for music dance and drama. A lady came claiming that she was carrying his baby. P.W.11 encouraged him not to fear and promised him support.

On her part, Ms. Sarah Nyakato Okello, the maternal aunt of the deceased stated that what the two accused did was very painful and shameful. They killed his son then in S.4 who had not wronged any of them. Although she listened to their mitigation, court should consider that she has buried her son who will never come back to life. The gap which her son has left behind, they cannot fill. They had malice in killing him. How would they feel if the victim was one of their children? When A6 was arrested the mother of the victim died as a result of shock. Court should not be lenient. They should be sentenced to death.

Against this I have considered the mitigation advanced by each of the two convicts. I have also considered the circumstances in which the offence was committed. Six bullets in all were fired at the scene at close range at such a vulnerable young man. This in my view is an offence that fits the description of "the rarest of the rare." It is one that deserves the death sentence, for the two convicts, if only to exact retribution for the brutal and horrendous manner in which the deceased was killed and also to deter other would be offenders. I therefore sentence each of the two convicts, A3 Okot Santo alias Ayoli Lanek Simon and A6 RA 206842 L/Cpl Omona Denis alias Opio Benson alias Abella, to suffer death in respect of each of the two counts. The sentence in respect of the second count is suspended.

With regard to the A1 Ojok Churchill and A5 Ojok Michael alias Mohamed, their involvement attracts only accessory liability, which is at a lower level of culpability for purpose of sentencing.

For that reason I have found that the death penalty is inappropriate for either of them for any of the two offences. Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of murder has been prescribed by Item 1 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35 years' imprisonment.

With regard to the offence of murder, I have taken into account the current sentencing practices in relation to cases of this nature, I have considered the case of *Bukenya v. Uganda C.A Crim. Appeal No. 51 of 2007*, where in its judgment of 22nd December 2014, the Court of Appeal upheld a sentence of life imprisonment for a 36 year old man convicted of murder. He had used a knife and a spear to stab the deceased, who was his brother, to death after an earlier fight. Similarly in *Sunday v. Uganda C.A Crim. Appeal No. 103 of 2006*, the Court of Appeal upheld a sentence of life imprisonment for a 35 year old convict who was part of a mob which, armed with pangas, spears and sticks, attacked a defenceless elderly woman until they killed her. In *Byaruhanga v. Uganda, C.A Crim. Appeal No. 144 of 2007*, where in its judgment of 18th December 2014, the Court of Appeal considered a sentence of 20 years' imprisonment reformatory for a 29 year old convict who drowned his seven months old baby. The convict had failed to live up to his responsibility as a father to the deceased who was victimized for the broken relationship between him and the mother of the deceased.

With regard to the offence of Aggravated Robbery, I have considered sentences passed before in similar circumstances. For example 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.

In light of the aggravating factors outlined by the learned State Attorney, and on basis of their blameworthiness, against which I have considered the submissions made in mitigation of sentence and in the *allocutus* of both convicts, I conclude that the aggravating circumstances in

this case outweigh the mitigating factors. I consider a deterrent sentence to be appropriate for each of the convicts. I for that reason deem a period of thirty five (50) years' imprisonment for count one and forty (40) years' imprisonment for count two. By reason of the mitigation advanced, each of those is reduced to forty (45) years and thirty five (35) years respectively.

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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*, requires the court to “deduct” the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This requires a mathematical deduction by way of set-off. A1 Ojok Churchill was remanded on 27th June, 2016 and hence has been on remand for 2 years and five months. A5 Ojok Michael alias Mohamed has been on remand since 11th August 2016, hence a period of two years and four months. I hereby take into account and set off the respective periods each of the two convict has already spent on remand.

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I therefore sentence the A1 Ojok Churchill to a term of imprisonment of forty (40) years and six (6) months, in respect of the first count and thirty (30) years and six (6) months in respect of the second count. Both sentences are to run concurrently and are to be served starting today. I further sentence the A1 A5 Ojok Michael alias Mohamed to a term of imprisonment of thirty seven (37) years and six (6) months, in respect of the first count and thirty (30) years and six (6) months in respect of the second count. Both sentences are to run concurrently and are 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 property was lost, in his victim impact statement P.W.11 stated that the convicts are incapable of compensating him since they do not have the means. I have therefore not found a basis for directing any of the two convicts to compensate him.

- 5 All the four convicts are advised that they have a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Gulu this 14th day of December, 2018

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Stephen Mubiru
Judge,
14th December, 2018.

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