

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KITGUM

CRIMINAL SESSIONS CASE No. 0374 OF 2018

UGANDA

PROSECUTOR

5 **VERSUS**

1. **KINYERA WALTER** }

2. **OKOT BOSCO** }

3. **OYOO FRANCO** }

4. **OCAYA JACKSON** }

..... **ACCUSED**

10

Before Hon. Justice Stephen Mubiru.

JUDGMENT

15 The four accused were originally jointly indicted with two counts of Aggravated Robbery C/s 285 and 286 (2) of *The Penal Code Act*, where it was alleged that on the 16th April, 2016 at Lukwor village in Kitgum District had robbed the victim, Angwech Agnes and her mother Alal Grace, of cash shs. 970,000/= and a motorcycle Registration Number UEK 035 F, and had during that robbery used deadly weapons (pangas and tear gas) on the victims. During the
20 testimony of P.W.2 , Angwech Agnes, it became apparent that the facts of the case could not support the indictment preferred. It was thus amended.

The amended indictment has three counts; in Count 1, the four accused are jointly indicted with the offence of Criminal Trespass C/s 302 of *The Penal Code Act*. It is alleged that the four
25 accused and others still at large on the 16th day of April, 2016 at Lukwor village in Kitgum District entered the compound of Angwech Agnes with intention to commit an offence, or to intimidate, or to annoy or to insult the said Angwech Agnes. In Count 2, A1 Kinyera Walter is indicted with the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*. It is alleged that on the 16th day of April, 2016 at Lukwor village in Kitgum District, the accused stole shs.

970,000/= (nine hundred seventy thousand shillings only) and two money purses, the property of Alal Grace. In Count 3, A3 Oyoo Francis is indicted with the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*. It is alleged that on the 16th day of April, 2016 at Lukwor village in Kitgum District, the accused stole a motorcycle Registration Number UEK 033 F Bajaj valued at
5 shs. 3,800,000/=, the property of Angwech Agnes.

The prosecution case briefly is that A1 Kinyera Walter who is the village L.C.1 Chairman and P.W.2 Angwech Agnes are former lovers who later became neighbours. P.W.2 is a practicing witchdoctor. On 9th April, 2016 P.W.2 Angwech Agnes, who also doubles as the area L.C.III
10 Councillor, organised a victory party at her home that attracted a multitude of people from the over five neighbouring villages. A day or so after that party, the family of a one Night Aryemo of Lumule Parish, Kitgum Matidi who last saw her while on her way to attend that party, realised she was missing. A search for her was conducted until her decomposing body was discovered on
14th April, 2016, about twenty meters from the shrine of P.W.2. Angwech, where she performs
15 her rituals. Police investigations into the circumstances of her death began during which P.W.2 was required to report to the local police post to record a statement and was released.

Suspecting P.W.2 to be complicit in the death of Night Aryemo and being dissatisfied with the slow progress of police investigations into her death, A1 Kinyera Walter was anxious that P.W.2
20 would escape, he sought the assistance of his uncle, A4 Ocaya Jackson, a police officer then on pass leave. He therefore during the evening of 16th April, 2016 arranged a meeting with the family of the late Night Aryemo. He met a few of their representatives who included A2 Okot Bosco, at Kanica village and notified them of his suspicion that P.W.2 was about to escape. Together, they went to the home of P.W.2 Angwech Agnes carried by a boda-boda rider A3
25 Oyoo Franco, where they arrived some time toward midnight. They called her to come out. When she refused to come out, A4 Ocaya Jackson lobed a tear gas canister into her compound while A1 Kinyera Walter used a pepper spray beneath the door to her house. Overwhelmed by the noxious fumes, P.W.2 Angwech Agnes came out with her mother Alal Grace. Both were immediately handcuffed, placed onto A3 Oyoo Franco's motorcycle and were carried by A4
30 Ocaya Jackson towards Kitgum Police Station.

Unfortunately, on their way to the police station, the motorcycle ran out of fuel. P.W.2 Angwech Agnes and her mother Alal Grace flagged down a boda-boda rider who happened to be passing by and asked him to carry them to Kitgum Police Station, which he did. On arrival, P.W.2 Angwech reported a case of aggravated robbery committed by the four accused at her home. In
5 the meantime, A1 Kinyera Walter on learning that A4 Ocaya Jackson had ran out of fuel, picked P.W.2 Angwech Agnes' motorcycle Registration Number UEK 035 F, from her then deserted house and sent A3 Oyoo Franco with it to buy fuel and deliver it to A4 Ocaya Jackson. A3 carried A2 Okot Bosco with him but found A4 Ocaya Jackson had pushed his motorcycle to Kitgum Police Station. He refuelled his motorcycle and handed the key to motorcycle
10 Registration Number UEK 035 F. However, since P.W.2 Angwech had already reported a case of aggravated robbery, the three; A2 Okot Bosco, A3 Oyoo Franco and A4 Ocaya Jackson were arrested and detained.

The following morning, the police went to the home of P.W.2 Angwech where it was discovered
15 that her bag, two money purses and a sum of shs. 970,000/= in cash, the property of her mother, was missing. On interrogation, A1 Kinyera Walter admitted having picked the bag but with the authorisation of P.W.2 Angwech. He returned it to her in the presence of the police. He too was arrested and detained at Kitgum Police Station together with the three other accused. The four were eventually charged and remanded.

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In their respective defences, the four accused denied having committed the offences with which they are indicted. In his defence, A1 Kinyera Walter stated that on the night of 15th April, 2016 at 8.00 pm he was sleeping in his house when his neighbour Tabu Robert came and told him that he had heard that the relatives of the deceased Night Aryemo were organising to come from Lumule
25 the following day 16th April, 2016, to attack in revenge. He devised means to meet the brother of the deceased Odong alias "Baby" who was a police officer in Kampala but had come for the burial. He wanted him to stop the people from revenging but realised he did not have his phone contact. He did not tell them that Angwech was attempting to flee. He called other relatives on phone and seven of them came. They came with dangerous things; bows and arrows, one person
30 had an axe the Clan Chief had a counter book. They met him at the Kanica village, located about four kilometres from his home, at the home of Ayoo Lilly from whom he obtained the phone

contact of Odong and called him at around 10.00 pm. I called and asked him to meet me there. It was. The CPS is about five miles away from his home. He was Kanica village Oyoo A2 on a motorcycle. They later resolved that they all go the home of Angwech. The relatives of the deceased decided that they would spend a night at his home. He was more or less a captive of the seven. They used one motorcycle which carried them in two groups. The first group comprised himself and Odong alias "Baby." He had a bow and four arrows. They were left at Angwech's place. The motorcycle went back to pick others. It picked the clan Chief and A4 Ocaya Jackson. The clan Chief was not armed. The other four ran on foot. They stopped near his home, about eighty meters from the home of Angwech. He then went to the home of Angwech with A4 Ocaya and A2 Okot Bosco and other relatives of the deceased. He wanted to tell her to leave the house for her safety. The threat was from "Baby," who had a bow and arrow a one Okot who had an axe. As he alerted her they were behind her house. He bent beneath the door and called her out. He told her secretly from the shop while she slept in the rear. The neighbours had vacated the area. They had caught wind of the attack during the day. No teargas was used. She came out willingly. He told her to go to his home. He wanted to provide her with security at his home. His family had in the meantime vacated the home for the bush where they spent the night. He wanted her to hide and then he would go to the police. He did not have airtime on the phone. The raid had stopped at around 10.00 pm.

He then instructed A4 Ocaya to take P.W.2 Angwech to the police for he feared they would attack her. She was taken by A4 Ocaya Jackson using A3 Oyoo's motorcycle, while Oyoo remained behind with him. About twenty minutes later, P.W.2 Angwech called him on phone asking him whether the people had taken her motorcycle. He told her that no one had entered her house. They had all left her home and they were at his home. She then told him they had ran out of fuel on their way to the police and that he should pick her motorcycle from her house and assist them with fuel. She had left her door open. She told him the key was on the mat where she had slept. The bag was together with the keys. She told him to take the bag to his home. She did not tell him the reason why. He knew it as the bag used to store her artefacts for rituals. She had lived at him home before where he had cohabited with her as husband and wife for about eighteen months.

He returned the bag to Angwech on the 16th April, 2016 in the presence for the police and about 200 relatives of the deceased. He did not take the shs. 970,000/= On 17th April, 2016 he was arrested. He had gone to the police station to visit the three co-accused and he was detained. He asked for police bond. He was asked to pay cash shs. 400,000/= He sent his brother to pick
5 money from his mother and he raised only shs. 200,000/= which they brought to him and secured his release. It was used as well to secure the release of all for the rest. He lent each of his co-accused shs. 50,000/= The money exhibited in court is the one they paid for the bond. He was not asked about the shs. 970,000/= His purpose of going to the home of Angwech was to secure her safety and for not other purpose.

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In his defence, A2 Okot Bosco stated that he neither knew A3 Oyoo Francis nor A4 Ocaya Jackson before. He came to know them on 16th April, 2015. He was in Lumule that evening with P.W.3 Odong Ali Muhammad sleeping at the burial place of Aryemo Night when P.W.3 was called by A1 Kinyera Walter on phone. He said that the person near whose home the body was
15 found, Angwech Agnes, was planning to escape. A1 Kinyera Walter told them to go to Lukwor. Before they could respond another call was made. "Baby" told them they should meet him at Lumule Centre. They first awoke the elders who were sleeping next to them and informed them that they had been called to Lukwor. This was because earlier in the day they had received a call from the police not to go to Lukwor because there would be a meeting between the elders of
20 Lumule and Lukwor. The elders permitted them to go. Seven of them went and found A1 Walter Kinyera at Kanisa in Lumule Centre. They were not armed. The Clan Chief asked A1 Kinyera Walter whether Angwech was still at home and he said she was still around. Together they went to Lukwor at around 10.00 pm but he did not reach the home of Angwech..

25 He remained behind while the L.C. and the Askari P.W.3 Odong Ali who was in charge of security in their clan, were carried by A3 Oyoo Franco. P.W.3 Odong Ali although an Askari he does not use any weapons. Five of them remained behind. Only two went with A1. The five of them walked to Lukwor and they found A1 at the main road. He was alone. He was coming from his home towards them. A2 asked him whether he had found Angwech at home and he answered
30 they had found her still at her home. He told A2 that he had already arrested her and Ocaya had

taken her to the police. A1 had told them that she was a key suspect in the murder. He went to stop her from running away.

As they waited by the roadside, Walter was called on phone and he said Angwech had told him the motorcycle should be given to Oyoo and that he should take it to obtain fuel. A2 asked him if she had been arrested why was she sending for fuel. They asked their clan chief for Advice. He advised A2 to go with Oyoo to established the truth so that we do not have a meeting the following day. A2 was carried on Angwech's motorcycle and taken to the police. Oyoo passed by a fuel station by the taxi park and obtained fuel in a Rwenzori mineral water bottle. He found his motorcycle at the police station and refuelled. He picked the key to his motorcycle from A4 Ocaya who had carried Angwech. All of them were called inside, asked whether they relatives of the deceased and knew about the incident at Lukwor. They were told to sit there and that is how he got arrested.

In his defence, A3 Oyoo Franco stated that on the night of 15th April, 2016 at around 8.00 pm A1 Walter Kinyera asked him to carry him and A4 Ocaya Jackson to Lumule. He carried the two there and brought them back at around 11.00. He carried A1 Walter Kinyera together with the clan chief of Lumule and left them at the home of A1 Walter Kinyera who told me to go and carry the Askari P.W.3 Odong Ali. I did not know what their mission was. About seven people came but they were not armed. He carried Askari P.W.3 Odong Ali and A4 Ocaya Jackson on the second trip. He dropped them at the home of the L.C.1, A1 Walter Kinyera. He did not steal Angwech's motorcycle. When he carried the last two that night, he remained at the home of Kinyera and within four minutes Kinyera came with Alaro Grace and Angwech Agnes. He was instructed to give A4 Ocaya his motorcycle to take them to the police. He handed over the motorcycle and they went.

After about twenty minutes, A1 Walter Kinyera spoke on phone and after receiving the call, he told them Angwech Agnes had told him that the motorcycle had ran out of fuel. She had asked A1 to send her fuel for the motorcycle. A1 Walter Kinyera told him that he should go and pick her motorcycle so that he takes them fuel. He was told to go straight to the police straight since they were rolling the motorcycle there. A1 picked the motorcycle from the home of Angwech

and brought it to A3 at his home. He handed it over to A3 at the main road where he had remained waiting with the people who came from Lumule. He carried A2 on the instructions of the clan chief for him to confirm that Angwech was at the police. He carried him to the police. They passed by the bus park at Don Petrol Station. He had shs. 5,000/= they bought fuel in a
5 Rwenzori Mineral Water bottle and rode to the police. On arrival he found his motorcycle parked at the police. Angwech was already inside. He parked her motorcycle near his and entered inside where they were. He told her he had delivered the fuel. He picked the keys for his motorcycle from A4 Ocaya, opened the tank of his motorcycle and re-fuelled. He went back inside and gave Angwech the key to her motorcycle and sat down. A lady at the counter asked him whether he
10 was from Lukwor. She told him he was not to go anywhere. She asked him to hand over the keys to his motorcycle and he handed them over. I was the placed under arrest. It was at the time of recording the statement that he was told that he was charged with robbery of a motorcycle. He was given police bond after five days and was told to keep on reporting. The bond was revoked after one week.

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In his defence, A4 Ocaya Jackson stated that he is a police officer and works with a one Odong Alfred, the brother of the deceased Aryemo Night, in Mbarara. He had been given one week's pass leave and had been in the village for two days when on 15th April, 2015 he was at Opette village when he received a call at 8.00 - 9.00 pm from A1 Walter Kinyera who is his nephew. He
20 asked him whether he was at home. He told A4 that the family of the deceased, Aryemo Night, was planning a retaliation. A1 Walter Kinyera asked him for the telephone number of any policeman at CPS Kitgum. He told A1 that he had the number of the DPC whom he had known before when he was O/c Station at Hoima. A1 asked him to communicate and if possible they should provide help. He communicated but ran out of airtime during the call. He began to discuss
25 with A1 what should be done next. A1 came riding a motorcycle and told him they by-passed Angwech on their way to his home. A1 carried A4 from his home when he offered to help.

A4 Ocaya Jackson arrived at the home of Angwech Agnes together with A1 Walter Kinyera and A3 Oyoo Franco at around 10.00 - 11.00 pm. There were other residents at the home. A4 had the
30 intention of evacuating the occupants of Angwech Agnes' home. The other people were coming to revenge. A1 ordered the occupants to come out and six people came out. A1 stood at the door

on the Western side while A4 I was on the Eastern together with A3 Oyoo Franco. No teargas was used. He did not hear an explosion or anything irritating. He did not throw a tear gas canister into the house. This was a rescue not an arrest. He did not have handcuffs and no one handcuffed them. When they came out A1 held the hand of Angwech telling her to go straight to his place.

5 A4 did not see anyone from Lumule. A1 requested A4 to take them to the police. When they left Lukwor, went down the slope towards the road of Abiligiri swamp, and as they began the ascent, the motorcycle ran out of fuel. He lay it down on one side to drain the little fuel left and was able to ride it to the police station. In the process of laying the motorcycle P.W.2 Angwech made a call to A1 to notify him of the situation. She directed A1 to pick the motorcycle from her house
10 and help bring them fuel. They sat back on the motorcycle after he had lain it down. Before the station, the fuel run out completely. A motorcycle came towards them. He stopped that motorcycle and requested the rider by showing him my warrant card, to take the two women to the police as pushed the motorcycle that had ran out of fuel. He pushed the motorcycle to the police. He found the complainant on phone and her mother behind the counter.

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At the police he found a woman AIP in charge do the counter to whom he explained what had happened. He showed her his ID and then handed over the key of A3's motorcycle. He was accused of having threatened P.W.2 Angwech. He was detained on charges of threatening violence on SD 41/15/2016. He was released on 19th but earlier than the other three co-accused.
20 He was released on police bond but for aggravated robbery of cash shs. 970,000/= and her motorcycle. He had got to know the complainant during the campaigns. He had no problems with her. He was enforcing the law and did not threaten the complainant. His bond was renewed once on 25th and when he reported at the police he was detained and brought to court.

25 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
30 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 four accused to be convicted of Criminal Trespass, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Intentional entry onto property in possession of another.
 2. The entry was unlawful or without authorisation.
 3. The entry was for an unlawful purpose.
 4. That each of the accused entered onto the premises in those circumstances.
- The offence requires that; (i) there must be an actual entry by the person accused. Constructive entry by a servant, for instance, acting on the orders of his master is not an entry, within the meaning of the section. The section covers both movable and immovable property, for instance there can be a criminal trespass to a motor car as well as to land and proof of the use of force is not necessary; (ii) the possession is clearly intended to be possession at the time of entry and it does not imply that the person in possession must be present at the actual time of the entry; (iii) the entry onto the property must be unlawful. The section does not protect a trespasser in possession as against a party lawfully entitled to possession. It is worthy of note that the party lawfully entitled to possession has a right to private defence of his property embedded in the defence of bona fide claim of right under section 7 of *The Penal Code Act*; (iv) the intent to annoy and intimidate must be not with respect to any and every person connected with the property but with respect to any person in actual possession of such property. A person in constructive possession is not contemplated by the section. The word "annoy" as used in the section should be taken to mean annoyance which would reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual; and (v) the existence of a

bona fide claim of right under section 7 of *The Penal Code Act*, ordinarily excludes the criminal intention.

5 The first two elements of the offence of criminal trespass preferred in the first count will be considered together, and these require proof of a deliberate unauthorised or otherwise illegal entry onto premises or other direct interference with possession of such premises, by way of intruding into the airspace, throwing or placing objects on the premises, while such premises are in actual possession of another. This arises from the protection guaranteed by article 27 (1) (b) of *The Constitution of the Republic of Uganda, 1995* proscribing unlawful entry by others of the
10 premises of any person. Article 27 (2) thereof specifically provides that no person shall be subjected to interference with the privacy of that person's home or other property. Although this right is entrenched, nevertheless, it is not absolute, i.e., it can be derogated for the purposes of prevention of crime and protection of the rights or freedom of others.

15 An involuntary entry will not constitute trespass. Where there is a deliberate entry i.e. an entry that is intentional, even though made under a mistake, lack of knowledge will not be a defence (see *Conway v. George Wimpey & Co [1951] 2 KB 266, at 273*). Trespass will thus arise where a person enters or crosses the property of another out of negligence or even on reliance of the permission of a person who has no authority to give that permission.

20

It is a defence if the occupier of premises gives the accused person permission to perform an act which, in other circumstances, would be considered a trespass. Unauthorised entry onto premises in possession of another may be lawful when done in exercise of, for example: a public right of way; a right given by the common law, such as the right to abate a nuisance (or out of necessity,
25 to prevent serious harm to person or property); and a right of access given by statute (such as a law enforcement officer entering the premises with authority or entering the premises as reasonably necessary to perform a duty or exercise authority created by law, such as governmental inspectors or fire-fighters). However, if a person who has lawfully entered the premises of another remains there, after his or her right of entry ceases, he or she commits
30 trespass. A licensee whose license has terminated by expiry can be prosecuted as a trespasser if he or she does not vacate after request and lapse of reasonable time.

Possession within the meaning of this section refers to effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession or detention as distinct from a legal right to possession. One enters another's premises if he or she physically
5 crosses a boundary onto that person's premises. He or she may enter on the surface of the land, but she also may enter above or below the surface, because ownership of land extends below the earth and above the earth for some distance that's reasonably useable in connection with the surface. The entry may be intentional or negligent. A person commits an intentional trespass as long as he or she intentionally takes the action that interferes with the complainant's right to
10 exclude. An entry resulting from intentional action is a trespass even if the trespasser didn't mean to trespass or didn't realize that his or her action would be a trespass, unless perhaps a court feels that the trespasser's mistake was excusable.

In the instant case the complainant P.W.2 Angwech Agnes stated that on 15th April, 2016 around
15 8.00 pm, she entered her house and went to bed with her children together with her mother Alaro Grace. It was around 11.00 pm when A4 Ocaya Jackson called her on phone asking whether she was at home. She heard a motorcycle coming towards her compound around five times and carrying passengers to her premises on each occasion. When she later was forced by irritating fumes to open the door and come out of her house, she found three people at her home. P.W.3
20 Ali Odong Mohammed stated that when A1 arrived as a Chairperson they began moving towards Angwech's door. A1 Walter Kinyera began commanding P.W.2 Angwech to come out. In their respective defences, only A1 Walter Kinyera and A4 Ocaya Jackson admitted having entered onto the complainant's premises. That entry was a deliberate or intentional entry onto property in possession of P.W.2 Angwech Agnes. She was in actual possession, she did not unauthorise that
25 entry, yet it constituted a direct interference with her possession of the premises. Being a witchdoctor was not a licence for persons to enter onto her premises at will, without first seeking her consent. Therefore in disagreement with the assessor, I find that the first two ingredients have been proved beyond reasonable doubt.

30 As regards the element that the entry was for an unlawful purpose, this requires proof of a specific intent "to commit an offence" or to "to intimidate" (meaning to overawe, to put in fear

by a show of force or threats or violence), or "to insult" (meaning to assail with scornful abuse or offensive disrespect), or to annoy (meaning to molest) any person in actual possession of the premises (see *Kigorogolo v. Rueshereka* [1969] EA 426). It may also involve a person who or, after having lawfully entered into or upon such property, remains there with the intention thereby
5 to intimidate, insult or annoy any person in possession of such property.

Since the offence of criminal trespass is dependent on the intention of the offender, intention at the time of entry or thereafter is material for determining liability for this offence. In order to constitute the offence of criminal trespass, it is not necessary that the accused actually commits
10 an offence or actually intimidates, annoys or insults the person in possession of the property, mere intention to do so will amount to criminal trespass. This intention can be inferred from the circumstances but it must be actual and not a probable one.

The Constitution of the Republic of Uganda, 1995 proscribes unlawful entry by others of the
15 premises of any person. It provides specifically that no person shall be subjected to interference with the privacy of that person's home or other property. It guarantees to all persons the right of privacy free from unreasonable state intrusion. The right of the people to be secure in their person, houses, and effects against unreasonable entry, searches, and seizures, is not to be violated. Both business or commercial premises and private residences are afforded protection from
20 unreasonable entry when done without a warrant. Consequently, unless as otherwise warranted by a court, the constitutional right to privacy of a person under a criminal proceedings in respect of a criminal offence is inviolable.

Although this right is entrenched, nevertheless, it is not absolute, i.e., it can be derogated for the
25 purposes of prevention of crime and protection of the rights or freedom of others. If the complainant consents to an entry, the entry is not unlawful. But the complainant can revoke the permission anytime. If the complainant does so, the licensee becomes a trespasser if he or she remains on the premises. Even a person who is lawfully on the premises can commit a trespass by exceeding the scope of the permission or privilege to be on the premises. Unauthorised entry
30 onto premises in possession of another may be lawful when done in exercise of, for example: a public right of way; a right given by the common law, such as the right to abate a nuisance (or

out of necessity, to prevent serious harm to person or property); and a right of access given by statute (such as a law enforcement officer entering the premises with authority or entering the premises as reasonably necessary to perform a duty or exercise authority created by law, such as governmental inspectors or fire-fighters). However, if a person who has lawfully entered the premises of another remains there, after his or her right of entry ceases, he or she commits trespass.

Generally, police entry onto premises to conduct searches or arrests that are not supported by a warrant are unlawful. The general rule is that persons are to be secure in their homes except where there is a warrant based on reasonable suspicion. Therefore, entry onto another's property may not be constitutionally conducted without the consent of the owner or the operator or occupant of the affected premises or without a duly issued search or arrest warrant. Wherever possible, the reasonable suspicion test should be combined with a requirement for a warrant so that it is an independent third party, a Magistrate, who decides whether there are reasonable grounds to justify entry. This is a valuable safeguard against any arbitrary use of a power of entry. In the absence of consent, an entry may be made without a warrant if the premises searched are one in which there is a legitimate public interest and if the entry is made under the authority of a statute meeting certain specificity requirements. An entry such as the one under consideration, which is conducted outside the judicial process without consent and without prior approval (without a warrant) is not reasonable, unless it can be showed that it falls within one of the well-established exceptions to the rule proscribing unauthorised entry by others onto the premises of any person.

Without a warrant, the police will be required to justify their entry onto the private property. The home may be a castle but it is not a fortress. Warrantless searches are allowed only under a power of entry within certain strict, exigent circumstances (circumstances that would cause a reasonable person to believe that entry was imminent and inevitable), subject to the requirement that exigent circumstances do not justify a warrantless search when the exigency was “created” or “manufactured” by the conduct of the police. Police officers will be found to have created or manufactured an exigency when their investigation was contrary to standard or good law enforcement practices. A power of entry is a statutory right for a person (usually a public official

such as a police officer or a member of enforcement staff of a regulatory body) to legally enter defined premises, such as businesses, vehicles or land for specific purposes.

To prove that an entry was "reasonable," the police must generally show that it was more likely
5 than not that a crime had occurred, and that if an entry to conduct a search was done, it was
probable that they would find either the offender, the stolen goods or evidence of the crime. This
is called reasonable suspicion. The court then considers how serious it would be if a failure or
omission occurred in the activity which is intended to be effected by the power of entry and
whether the power of entry is essential for effective enforcement or there are other existing
10 powers that could be applied (in some cases with modifications) or better suited measures to
achieve the same outcome.

The purposes for which a power of entry might be exercised include;- to arrest a person for
whom a warrant of arrest has been issued; to arrest a person reasonably suspected that to have
15 committed or about to commit an arrestable offence (section 23 of *The Police Act*); undertaking
an inspection, dealing with an emergency; searching for evidence during an investigation
(section 27 of *The Police Act* and section 69 of *The Magistrates Courts Act*); if it is necessary to
prevent the imminent destruction of evidence; if the police is in "hot pursuit" of a suspect who
enters private premises after fleeing the scene of a crime; recapturing a person who has escaped
20 from custody (section 21 of *The Criminal Procedure Code Act*); if they have reasonable grounds
to believe that the person they are searching for is on the premises (section 3 of *The Criminal
Procedure Code Act*); saving life or limb or preventing serious damage to property (section 24 of
The Police Act); or in light of an immediate threat to the public safety and welfare, such as
preventing a breach of the peace (section 26 of *The Criminal Procedure Code Act*).

25

Where entry is on basis of a warrant, the police may extend the search beyond the specified area
of the property or include other items in the search beyond those specified or listed in the warrant
if it is necessary to: ensure their safety or the safety of others; prevent the destruction of
evidence; discover more about possible evidence or stolen items that are in plain view; or hunt
30 for evidence or stolen items which, based upon their initial search of the specified area, they
believe may be in a different location on the property. A right of entry does not necessarily imply

that the police has the right to use force to effect entry. In the majority of cases, if it is necessary to use force or where it is suspected that reasonable force may be required to facilitate entry, a warrant must be obtained before exercising the power.

5 Every unlawful entry is not necessarily an offence. Under section 9 (1) of *The Penal Code Act*, a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he or she believed to exist. If the accused person had an honest and reasonable, although mistaken belief, the defence succeeds (see *Wilson v. Inyang [1951] 2 K.B. 799*) “Mistake of fact” generally refers to a mistaken understanding by
10 someone as to the facts of a situation, which mistake results in the person committing an illegal act. Mistake of fact, can act as a defence in a criminal case if the actions of the accused would not have been unlawful had the facts that he or she assumed been true. Mistake of fact is a defence to a crime where the mistaken belief, if it were true, would negate a mental state that’s
15 an element of the crime.

Section 9 (1) of *The Penal Code Act* requires consideration of whether the accused's belief, based on the circumstances as he or she perceived these to be was held on reasonable grounds, as opposed to whether a reasonable person would have held it (see *R v. Julian (1998) 100 A Crim R*
20 *430*). While "Suspect" requires a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation as to whether an event has occurred or not (see *Commissioner of Corporate Affairs v. Guardian Investments Pty Ltd [1984] VR 1019 at 1023-1025*), “belief” is an inclination of the mind towards assenting to, rather than rejecting, a proposition; the grounds which can reasonably induce that inclination of the mind may,
25 depending on the circumstances, leave something to surmise or conjecture (see *George v. Rockett (1990) 179 CLR104 at 116*). There must be evidence that the person had grounds for believing, and there is the additional requirement that the grounds must be reasonable, i.e. that anyone looking at those grounds would so believe.

30 The implication is that an accused who mistakenly but honestly believes that it is necessary to act is entitled to be judged on the basis that his or her mistaken belief is true. Even if the court comes

to the conclusion that the mistake was an unreasonable one, if the accused may genuinely have been labouring under it, he is entitled to rely on it. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence. The unreasonableness of the belief goes only to its plausibility. The belief must be both honestly and reasonably held. The
5 reasonableness or unreasonableness of the accused's belief is material to the question of whether the belief was held by the accused genuinely or at all, i.e. the question is whether the accused genuinely believed on reasonable grounds.

Where it is both unreasonable and unfounded, it is less likely to be believed or, more correctly,
10 to engender a reasonable doubt. If the court comes to the conclusion that the accused believed, or may have believed, that there was an imminent attack on the complainant, and that force was necessary to protect her or to prevent the crime, then the prosecution have not proved their case. If, however, the accused's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly
15 held and should be rejected. At a practical level, where there are no reasonable grounds to hold a belief it will only exceptionally that a court will conclude that such a belief was or might have been held.

In his defence, A1 Walter Kinyera stated that he entered the premises under a mistaken belief
20 that the relatives of the late Aryemo Night were planning a retaliatory attack on P.W.2 Agwech Agnes that night. This version is refuted by both P.W.3 Ali Odong Mohammed and A2 Okot Bosco, both of whom stated that it is A1 Walter Kinyera who got them involved by telling them to the key suspect in that case was planning to escape. That A1 Walter Kinyera made these contradictory statements is an indication that he had an improper motive and was not driven by a
25 mistaken understanding as to the facts of the situation. He came up with a deliberate ruse he sold to two. His defence is rejected.

On his part A4 Ocaya Jackson stated that he too was led by A1 Walter Kinyera to believe that it was necessary to intervene in order to safeguard P.W.2 Agwech Agnes from an imminent
30 retaliatory attack by the relatives of the late Aryemo Night. The defence of mistake of fact is available to an accused person, however ill founded, where the accused firmly believed that he

had a right of entry. Anything “bona fide” connotes “good faith” i.e. sincere and genuine. Thus, for a mistake of fact to qualify a bona fide claim of right, it must be made in good faith, without fraud or deceit and reasonable. The accused must present evidence to support the defence and to raise a reasonable doubt as to the element of intent, although this is not an affirmative defence.

5 An affirmative defence means that the accused has the burden of proving the defence by a preponderance of the evidence.

Reasonable belief exists when it is founded on personal knowledge of facts and circumstances which are reasonably trustworthy. It must be based on specific and articulable facts and
10 circumstances that would justify a person of average caution to believe that a crime has been or is being committed. The belief must have been one that a reasonable person would have held under the circumstances. The accused has the evidential burden of producing evidence to support the reasonableness of the belief. The accused must show that he had a subjective belief of the existence of the facts or circumstances and that this belief is objectively reasonable. In weighing
15 the credibility of the justification, what the accused subjectively believed is tested against objective reasonableness. This is because although the standard is subjective, the objective reasonableness of the accused’s claimed belief is relevant to the court’s assessment of the sincerity of that belief. The absence of objectively reasonable grounds would support a finding that the belief was not in good faith.

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Police may use first-hand information, or tips from an informant to justify the need to enter and search premises. If an informant’s information is used, the police must prove that the information is reliable under the circumstances. Police officers, concerned citizens, and crime victims all are presumed credible, but there may be need to prove that there was a face to face meeting with the
25 informant for purposes of verifying the informant’s basis of knowledge, to ensure that the informant had first-hand knowledge of the incident being reported, for example, on whether the informant just happened to view the incident or heard about it as hearsay. There is need to establish that the informants have a strong motive to tell the truth. The informant must have furnished probable veracity of the information provided based on first-hand knowledge and not a
30 mere supply of hearsay information.

The concerned citizen's identity should be known to the police. One way to establish a basis of knowledge is if the informant states that he or she saw the criminal activity; another way is if the information from the informant is so detailed that a reasonable officer could infer that the informant was an eye witness or received the information from a reliable source who was
5 himself or herself an eyewitness. Without any statements as to the informant's basis of knowledge, there may be no means of determining whether that information was obtained first-hand or through rumour. Wherever reasonable or practicable, the police officer ought to determine whether some or all of the informant's factual statements are corroborated (e.g., through police surveillance), and there should be evidence that the police officer assessed, from
10 his or her professional standpoint, experience, and expertise, the probable significance of the informant's provided information.

The reason advanced by A1 Kinyera Walter is that he went there to tell P.W.2 Angwech Agnes to leave her house for her own safety. A2 Okot Bosco stated that he stopped by the road near and
15 at the home of A1 and never stepped a foot onto the premises of the complainant P.W.2 Angwech Agnes. A3 Oyoo Franco too denied having been at the premises of the complainant. He only admitted having been asked by A1 Walter Kinyera to carry him and A4 Ocaya Jackson to Lumule. He carried the two there and brought them back at around 11.00 and left them at the home of A1 Walter Kinyera. He did not know what their mission was. He stayed at the home of
20 Kinyera and within four minutes Kinyera came with Alaro Grace and Angwech Agnes. He was instructed to give A4 Ocaya his motorcycle to take them to the police. A4 Ocaya Jackson stated that he offered to help A1 Walter Kinyera to secure the safety of the complainant P.W.2 Angwech Agnes by taking her to the police station, out of reach of the family of the deceased, Aryemo Night, that was planning a retaliation against her.

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To refute those defences, the complainant P.W.2 Angwech Agnes stated that when she heard the voice of A1 Walter calling her to come out, he said; "Angwech come outside I have come to kill you together with your mother." She picked a padlock and locked the door from inside. P.W.3 Ali Odong Mohammed stated that it took Angwech around 15 minutes to come out of the house.
30 The test for determining whether the entry onto a premises in the possession of another person was made with the intent to annoy is whether causing of annoyance was the main aim of the

entry, that is, the dominant intention which prompted the entry. For establishing the offence it is not sufficient merely to show that the person entering upon the premises of another had knowledge that his or her act would cause annoyance, but, the entry must be with an intention to commit an offence or intimidate, insult or annoy such person. It is not enough that the
5 prosecution should ask the court to infer that the entry is bound to cause intimidation, insult or annoyance.

A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to intent to insult or annoy within that section. There is a distinction between the phrases "with
10 intent" and "with knowledge." Knowledge is the accumulation of information, learned through education or experience while intent implies having something in mind as a plan, purpose or design, committing an act with a specific goal in mind, i.e. what one has clearly formulated in mind to do or bring about or alternatively, a decision to bring about, insofar as it lies within the accused's power, the commission of the offence, no matter whether the accused desired that
15 consequence of his or her act or not. For this offence, the concept of intent involves acting knowingly and purposely. For this offence, a person is considered to have acted with intent if the definitions of purpose and knowledge are satisfied.

According to section 27 (7) of *The Police Act*, no police officer may search any premises unless
20 he or she is in possession of a warrant card or a search warrant issued under the provisions of *The Magistrates Courts Act*. A search warrant may be issued only upon a show of reasonable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained (see sections 56 and 70 of *The Magistrates Courts Act*). The
25 warrant is issued only when the court is satisfied that all the following criteria are fulfilled: an arrestable offence has been committed; and there are items on the premises that will be of significant value when investigating the offence; and these items will be useful as evidence during a trial; and that the items are not protected by legal privilege; and that a police officer will be prevented from entering the premises, either because there will be nobody available to grant
30 him or her entry or they will not allow them entry and the search may be seriously affected if the police does not gain immediate access, if they do not possess a warrant. Therefore, the police

may enter premises only where there are reasonable grounds to suspect a breach of the law or reasonable grounds to suspect that a state of affairs exists which necessitate such entry.

Even where there are reasonable grounds to suspect that a state of affairs exists which necessitate
5 such entry, the decision in the case of *O’Loughlin v. Chief Police officer of Essex [1998] 1 WLR*
374 (CA) made it crystal clear that before resorting to the use of force, police officers must tell
an occupier of private premises the real reason why entry is required (thereby permitting an
opportunity of voluntary admission), unless circumstances make it impossible, impracticable or
undesirable to give the reason. A very important factor in deciding whether the police have
10 proved that use of force to enter was necessary, is whether before using force the police have
explained the (proper) reason why they require entry, and none the less have been refused.

For example the case *Syed v. Director of Public Prosecutions [2010] 1 Cr App R 34* provides
particularly firm guidance, in a familiar scenario. In that case, a member of the public called
15 police to report a disturbance (shouting; possibly screaming) at the claimant’s address. When
police arrived, they found no sign of any disturbance for themselves; they saw no injury or
damage and heard no complaint from other occupants. The officers attempted to enter. The
claimant resisted entry, head-butting one officer and spitting in the face of another. He was
convicted of assaulting a police officer in the execution of his duty. Before the police officers
20 attempted to force entry (and before the head-butt) the claimant had appeared to the officers to be
evasive under questioning. The police explained to him that they would exercise their power to
enter the property without a warrant, because of a fear for the welfare of a person or persons
within the house. The court ruled that this was not a proper basis for exercise of the power of
entry, stating:

25 Concern for welfare is not sufficient to justify an entry..... It is altogether too low a
test. I appreciate and have some sympathy with the problems that face police officers
in a situation such as was faced by these officers. In a sense they are damned if they
do and damned if they do not, because if in fact something serious had happened, or
was about to happen, and they did not do anything about it because they took the
30 view that they had no right of entry, no doubt there would have been a degree of *ex*
post facto criticism. But it is important to bear in mind that Parliament set the

threshold.....because it is a serious matter for a citizen to have his house entered against his will and by force by police officers. Parliament having set that level, it is important that it be met in any particular case.

5 The claimant's conviction for assaulting a police officer in the execution of his duty therefore could not stand. Accordingly, a police officer must reasonably apprehend that a breach of the peace is occurring in his or her presence, or is about to occur or which, having occurred, may be renewed. In the instant case, A4 Ocaya Jackson did not seek to establish from A1 Walter Kinyera, the concerned citizen's identity from whom he had obtained information about the
10 planned attack. He never bothered to establish the basis of knowledge of the said informant as to whether he or she was privy to the criminal activity being planned. He never took steps to determine whether or not the information provided to A1 Walter Kinyera was so detailed that a reasonable officer could infer that the informant was an eye witness or received the information from a reliable source who was himself or herself an eye witness. Without any statements as to
15 the informant's basis of knowledge, there may be no means of determining whether that information was obtained first-hand or through rumour. Nevertheless he chose to take action based on such information.

In general terms, where a person is aware of probable and possible consequences of his or her
20 planned action, the decision to continue with such a plan means that all the foreseen consequences are to some extent intentional. The court will combine both subjective and objective elements but being an element of specific intent, court will tend to use a more subjective than objective test, hence this specific intent must also be demonstrated on a subjective basis. The more certain the consequences would be to a reasonable person and the
25 accused, the more justifiable it is to impute sufficient desire to convert what would otherwise only have been recklessness into intent. But if the degree of probability is lower, the person will be considered to have acted with mere knowledge or recklessness.

A person will be held to intend a consequence (obliquely) when that consequence is a virtually
30 certain consequence of their action, and they knew it to be a virtually certain consequence (see *R v. Woollin [1999] AC 82* where use of the phrase "substantial risk" in place of "virtual certainty"

was held to have blurred the line between intention and recklessness). The court is therefore entitled to infer the necessary intention, where it feels sure that the prohibited consequence was a virtual certainty (barring some unforeseen intervention) as a result of the accused's actions and that the accused appreciated that such was the case. An accused person will be taken to intend to accomplish all outcomes necessary to the overall plan, including all additional consequences that flow naturally from the original plan, when it is his or her conscious object to engage in conduct of that nature or to cause such a result. Merely knowing that a result is likely does not prove intention, but once it is shown that the accused was aware of the nature of the act and was practically certain of the consequences, the court may then infer that he or she intended to cause that particular result when committing the act.

Being a mental element, the intention may be deduced from utterances, or certain acts designed to intimidate, insult or annoy any person in possession of such property. Before the court may rely on circumstantial evidence to conclude that the accused had the required intent, yet must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the accused had the required intent. If the court can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the accused did have the required intent and another reasonable conclusion supports a finding that the accused did not, the court must conclude that the required intent has not been proved by the circumstantial evidence. However, when considering circumstantial evidence, the court must accept only reasonable conclusions and reject any that are unreasonable.

The criminal law test of belief in these situations contains, arguably, both subjective and objective elements. In *Regina v. Ghosh [1982] QB 1053*, it was held that in order to prove a person was acting dishonestly, the Court must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter. If it was dishonest by those standards, then the Court must consider whether the accused himself must have realised that what he or she was doing was by those standards dishonest.

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In essence, the honesty of belief is to be assessed, first, by a subjective approach; did the accused honestly believe the set of circumstances existed? But then by an objective rider; is such a claim plausible, or unreasonable or unfounded, having regard to the view that would be taken by reasonable and honest people? the objective arm of the test becomes whether the belief was so implausible that in the circumstances, other reasonable police officers could not have come to the same conclusion. This may be determined by considering how much detail about the alleged attack was available to the police officer at the time the decision was made. Applying the plausibility test the question then would be whether other reasonable police officers, given the information available to the accused at the time, would have reached the same conclusion.

10 The defence succeeds if it is shown that the accused genuinely believed on reasonable grounds, after a reasonable investigation that an attack on the complainant was imminent. Officers must be able to explain the basis for their suspicion or action by reference to intelligence or information. Reasonable grounds should normally be linked to accurate and current intelligence or information such as a reasonable police officer would entitle a reasonable police officer to reach the same conclusion based on the same facts and information and / or intelligence. A police officer cannot have reasonable grounds for believing there was an imminent, unless there has been a reasonable investigation or intelligence which the circumstances permit, which yielded evidence justifying, as a matter of reason and good sense, acceptance that an attack was afoot. Reasonableness must satisfy an objective observer, though what may be regarded as reasonable will depend on all the circumstances of the case.

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When there is an issue in a trial as to whether a police officer had reasonable grounds to believe in the existence of a state of affairs, his or her claim to have had knowledge or to have received reports on which he or she relied may be challenged. It is within this context that there may be an evidential issue as to what he believed to be the facts, but it will be for the court to adjudge what were the facts which made him act (*Castorina v. Chief Police officer of Surrey*, [1988] NLJR 180). In doing so the court must consider by the objective standards of the hypothetical reasonable police officer, rather than by reference to its own subjective views, whether the accused acted within a band or range of reasonable responses. The objective part requires some evidence to show that there were grounds that common sensed, right-thinking police officer

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would consider as sufficient to lead a person to suspect that an attack was imminent, while the subjective part requires proof that those grounds were known to the accused.

Whether the mistake is rooted in an accused's mistaken perception, or is based upon objective, but incorrect, facts confided to him by another, should be of no consequence. If his belief is found to be mistaken, then honesty of that belief must be considered. To be honest the accused's belief cannot be reckless, wilfully blind or tainted by an awareness of the fact that the allegation has not been investigated. The reasonableness of suspicion or belief requirement on basis of which police action must be based forms an essential part of the safeguard against arbitrary police action. Having a reasonable suspicion or belief presupposes the existence of facts or information which would satisfy an objective observer that the complainant was in imminent danger of an attack. If he acted without any reasonable ground, and refrained from making any proper inquiry, that is generally very good evidence that he did not act honestly.

With the defence of justification to a charge of criminal trespass, the test is not whether, if the accused had not done those acts, the danger would in fact have resulted in injury. Neither is it whether the accused believed that it would have resulted in injury. The test, is whether, having regard to the rights of the complainant, there was such real and imminent danger to his or her property or person as that he or she was entitled to act and whether his or her acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger. Interference with the property or the person of another, which otherwise would certainly constitute an actionable trespass, cannot be justified by mere proof on the part of the alleged trespasser of his or her good intention and of his or her belief in the existence of a danger which he or she sought by his or her act of interference to avert, but which in fact did not exist at all (see *Cope v. Sharpe (No 2)* [1912] 1 KB 496).

On the other hand, when it turns out that the real set of circumstances were contrary to his or her belief and by the exercise of prudence he would have discovered the true circumstances, by not doing so he or she will be deemed to have acted with wilful blindness when he or she acted without having first made the necessary inquiries to inform himself or herself. Devlin J in *Roper*

v. Taylor Garages (Exeter) [1951] 2 TLR 284 at 288 drew the distinction between constructive notice and wilful blindness thus;

A vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which a person does not care to have [wilful blindness], and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make [constructive knowledge].

In the instant case, A4 Ocaya Jackson acted without first verifying the informant's basis of knowledge, there is no means of determining whether that information was obtained first-hand or through rumour. The information he received was not so specific and specialised that it could only be known to a person with inside information. Further, the fact that A1 Walter Kidega was the L.C.1 Chairman was not so self-verifying to establish the reliability of the informant from whom he had allegedly obtained that information. The statements made by A1 Walter Kidega to A4 Ocaya Jackson were not sufficiently corroborated. There was no independent police investigation that could enhance the reliability of A1 Walter Kidega's information or that of his undisclosed informant's tip.

In his defence, A4 Ocaya Jackson did not show an assessment of the probable significance of that information based on his professional standpoint, experience, and expertise. The nature of the information provided was very generic that other people could easily know about. It was not particularly probative for the informant to supply a information about facts that other people could easily know about. A4 Ocaya Jackson did not directly evaluate the informant's tip on the basis of the his general knowledge of retaliatory attacks of that nature. There was no attempt at finding corroboration, in verifying the reliability of the informant or in demonstrating an adequate basis of knowledge. Considered in its totality, I do not find that the information provided was sufficient to support a finding of reasonable suspicion. A4 Ocaya Jackson acted on a rumour rather than verified, credible information of an impending attack. The defence of honest mistake is not available to him since there was no such real and imminent danger to the property of P.W.2 Angwech Agnes or her person as that A4 Ocaya Jackson was entitled to act.

On the other hand, the acts of both A1 Walter Kidega and A4 Ocaya Jackson while on the premises were not reasonably necessary in the sense of acts which a reasonable person would properly undertake to meet a real danger, of the type they claim to have suspected. When P.W.2 Angwech Agnes refused to come out of the house, it was the testimony of P.W.3 Ali Odong Mohammed that A4 Ocaya Jackson then asked A1 Walter Kidega to give him what he had in his pair of trousers. Walter pushed his hand into his pair of trousers and pulled out a round thing and another square thing which he gave to A4 Ocaya Jackson. A4 then moved round the house and threw it into the house and it exploded. After a few minutes P.W.3 Ali Odong Mohammed felt his eyes were smarting. He moved behind the house and asked them why they were deploying teargas. A1 Walter Kidega then began spraying another irritating substance under the door to P.W.2 Angwech Agnes' house.

P.W.2 Angwech Agnes testified too that she heard something explode from outside. Her eyes then began to smart. Fumes began irritating her throat. They were spraying something under her door. She was then forced to open the door and come out of the house. P.W.4 D/ASP Ocen Bosco Olukuwode who visited the home the following morning testified that he found that there was an irritating smell of tear gas on the premises. Although both A4 Ocaya Jackson and A1 Walter Kidega denied having used teargas on the premises, I have not found any reason why the three prosecution witnesses who testified to the contrary would misstate this fact. I find that the two accused used teargas to force P.W.2 Angwech Agnes out of her house. This in itself was a hostile act inconsistent with their claim of having come to the premises to rescue her.

That aside, according to P.W.2 Angwech Agnes, when she came out of the house, A1 Walter Kinyera held her hands and began pulling her together with her mother. He picked a stick and wanted to beat her. A3 Oyoo Franco approached and wanted to kick her. Her mother grabbed Oyoo against her chest and told him, "my child why are you doing this when we used to stay well together?" A1 Walter Kinyera handcuffed her hand to that of her mother. Walter and Ocaya began pulling her to the main road. The handcuff was only removed when they realised they could not carry the two of them on a motorcycle while handcuffed. P.W.4 D/ASP Ocen Bosco Olukuwode testified that he saw a pair of handcuffs the following morning, recovered from A1 Walter Kinyera. Although these handcuffs were not tendered in evidence, I believe the testimony

of the two witnesses that a pair of handcuffs was used by the accused. This is another hostile act that is inconsistent with their claim of having come to the premises to rescue P.W.2 Angwech Agnes. It seems to me that their real intention was to arrest her rather than rescue her.

5 The reason advanced by A1 Kinyera Walter justifying his presence on the premises of P.W.2 Angwech Agnes that night is that he was there to tell her to leave her house for her own safety. In essence he was there to rescue her. The fact that his version to A4 Ocaya Jackson, A2 Okot Bosco and to P.W.3 Ali Odong Mohammed was that they needed to prevent the key suspect in the murder of Aryemo Night reveals his insincerity. What he told the latter three was a cover up
10 of his true intention, arresting P.W.2 Angwech Agnes. I therefore find that the prosecution has proved beyond reasonable doubt that A1 Kinyera Walter went onto the premises of P.W.2 Angwech Agnes that night with the intention of intimidating and annoying her. He is accordingly convicted of the offence of Criminal Trespass C/s 302 of *The Penal Code Act*.

15 As regards A4 Ocaya Jackson, wilful blindness and constructive knowledge negate the good faith requirement of section 9 (1) of *The Penal Code Act*. A4 Ocaya Jackson wilfully and recklessly failed to make such inquiries as an honest and reasonable police officer would have made. In *Royal Brunei v. Tan [1995] 2 AC 378* Lord Nicholls said that an honest person does not:

20 deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless ... Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and
25 importance of his role, the ordinary course of business, the degree of doubt, The circumstances will indicate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained.

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A4 Ocaya Jackson chose to act without independent police investigation that could verify the information provided by A1 Walter Kidega's. He chose to act on basis of a rumour rather than verified, credible information of an impending attack. It turns out that there was no such real and imminent danger in fact to the property or person of P.W.2 Angwech Agnes that entitled him to
5 act. While on the premises, he engaged in acts that were not reasonably necessary in the sense of acts which a reasonable person would properly engage in to meet the danger as he perceived it. His defence of honest mistake is a cover up of his true intention, of arresting P.W.2 Angwech Agnes. I therefore find that the prosecution has proved beyond reasonable doubt that A4 Ocaya Jackson went onto the premises of P.W.2 Angwech Agnes that night with the intention of
10 intimidating and annoying her. He too is accordingly convicted of the offence of Criminal Trespass C/s 302 of *The Penal Code Act*.

A3 Oyoo Franco denied having been at the premises of the complainant. He only admitted having been asked by A1 Walter Kinyera to carry him and A4 Ocaya Jackson to Lumule. He
15 carried the two there and brought them back at around 11.00 and left them at the home of A1 Walter Kinyera. He did not know what their mission was. He stayed at the home of Kinyera and within four minutes Kinyera came with Alaro Grace and Angwech Agnes. An accused who puts up such a defence has no duty to prove it. The burden lies on the prosecution to disprove it by adducing evidence which squarely places the accused at the scene of crime as an active
20 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*).

His defence is refuted by P.W.2 Angwech Agnes who testified that when she opened the door and came out due to the irritating fumes. she found A1 Walter Kinyera standing on the Western
25 side of the door. A4 Ocaya Jackson was on the Eastern side. A3 Oyoo Franco stood behind A4 Ocaya Jackson. Although she testified that he wanted to kick her before her mother grabbed him against her chest. 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 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*
30 *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 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 both P.W.2 Angwech Agnes claims to have seen A3 Oyoo Franco at the scene of crime. It was during the night but there was a security light which aided her observation and recognition of the accused. Under those conditions of lighting, she came into close proximity of the accused. She also had known the accused before. The attack took a considerable period of time such as gave her ample time and opportunity to have an unimpeded look at the accused, as evidenced by the fact that she actually saw her mother hold her against her chest and prevent him from assaulting her. I find that there is no possibility of error or mistake in her identification of the accused and that her evidence has disproved the alibi of A3 Oyoo Franco. He was at the premises of P.W.2 Angwech Agnes together with A4 Ocaya Jackson, A1 Walter Kidega and P.W.3 Ali Odong Mohammed that night.

Nevertheless, I have not found evidence to show that A3 Oyoo Franco was aware of the true intentions of both A4 Ocaya Jackson and A1 Walter Kidega that night. He cannot be found to have aided and abetted the offence without proof of that prior knowledge. I therefore find that the prosecution has not proved beyond reasonable doubt that A3 Oyoo Franco went onto the premises of P.W.2 Angwech Agnes that night with the intention of committing an offence or to intimidate or to insult or to annoy her. He may have attempted to assault her while at the premises but the offence of common assault not minor and cognate to that of Criminal Trespass. A3 Oyoo Franco is accordingly found not guilty and is acquitted of the offence of Criminal Trespass C/s 302 of *The Penal Code Act*.

As for A2 Okot Bosco, he stated that he stopped by the road near the home of P.W.2 Angwech Agnes and later went to the home of A1 and never stepped a foot onto the premises of the complainant. None of the prosecution witnesses placed him at the scene of crime. His defence has therefore not been disproved. He too is accordingly found not guilty and is acquitted of the

offence of Criminal Trespass C/s 302 of *The Penal Code Act*. This being the only count in which he is named, he should consequently be set free forthwith unless he is being held in custody for some other lawful reason.

- 5 For A1 Kinyera Walter and A3 Oyoo Francis to be convicted of the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act* in counts two and three respectively, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;
1. An act of taking property belonging to another (appropriation of property).
 2. Unlawfully and without claim of right (dishonestly without consent or claim of right).
 - 10 3. With intention to permanently deprive.
 4. The accused participated in commission of the act.

For the first ingredient, there must be 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 alleged to have been stolen in this case in Count two is shs. 970,000/= (nine hundred seventy thousand
15 shillings only) and two money purses, the property of Alal Grace; and in count three, a motorcycle Registration Number UEK 033 F Bajaj valued at shs. 3,800,000/=, the property of Angwech Agnes. The offence requires factual possession of the item at the material time by the person from whom it is alleged to have been stolen as distinct from a legal right to possession. Factual possession signifies an appropriate degree of physical control over the item.

20

Property will be regarded as belonging to any other person having possession or control of it. It is the reason why a person may be liable for theft of their own property if it is deemed to be in the possession or control of another. For example in *R v. Turner (No 2) [1971] 1 WLR 901*, the accused took his car in to a service station for repairs. When he went to pick it up he saw that the
25 car was left outside with the key in. He took the car without paying for the repairs. He was found guilty of theft of his own car since the car was regarded as belonging to the service station as they were in possession and control of it. In the instant case, the facts disclose that P.W.2 Angwech Agnes had retained exclusive physical control of her home at all material time since it even in her physical absence there from, it had to be accessed with her permission.

30

In his defence, A1 Kinyera Walter stated that about twenty minutes after P.W.2 Angwech Agnes had been taken to the police, she called him on phone asking him whether the people had taken her motorcycle. He told her that no one had entered her house. They had all left her home and they were at his home. She then told him they had ran out of fuel on their way to the police and
5 that he should pick her motorcycle from her house and assist them with fuel. She had left her door open. She told him the key was on the mat where she had slept. The bag was together with the keys. She told him to take the bag to his home. She did not tell him the reason why. He knew it as the bag used to store her artefacts for rituals. She had lived at him home before where he had cohabited with her as husband and wife for about eighteen months. He returned the bag to
10 Angwech on the 16th April, 2016 in the presence for the police and about 200 relatives of the deceased. He did not take the shs. 970,000/=

On the other hand A3 Oyoo Franco stated in his defence that it is A1 Kinyera Walter who picked the motorcycle from the home of Angwech and brought it to him. He handed it over to A3 who
15 then carried A2 to the police station on the instructions of the clan chief for him to confirm that Angwech was at the police.

On her part, the complainant P.W.2 Angwech Agnes stated that about ten minutes after her arrival at the police station, she saw A3 Oyoo come while riding her motorcycle which she had
20 left in the house. She had locked it and had left the key in the pocket of her jacket. The police asked A3 Oyoo where he got it from and he said it was A1 Walter who told him to pick it. The following morning she went with the police home where they arrived at around 10.00 am. She found both her mother's money purses missing from her house. The police asked A1 Walter Kinyera what happened. He said he is the one who entered the house and picked the money purse
25 and the back pack. The purses were found empty when he handed them to her.

P.W.3 Ali Odong Mohammed stated that after A4 Ocaya had left with the complainant and her mother on their way to the police station, A1Walter told A3 Oyoo that "let's go back to Angwech's home." He said A4 Ocaya had called him that the motorcycle had ran out of fuel. He
30 said Angwech had said they pick her motorcycle from her house and follow them. When they reached the door, A1 Walter opened the door, which was not locked. There was light inside the

house but P.W.3 did not enter. He could see what was going on. A1 Walter entered alone and came out with a black bag. A1 opened the gate and called Oyoo to roll the motorcycle and then A1 Walter closed the gate. A3 Oyoo rolled the motorcycle to the compound of Walter. A1 took the bag into his house. The following day the police came to the home of the L.C. and arrested
5 A1 Kinyera Walter. He brought the bag from his house. P.W.4 D/ASP Ocen Bosco Olukuwode stated that when he went to the scene the following morning, he found some property missing from the home. Two of the complainant's mother's small handbags, black in colour, were missing, one of which contained shs. 970,000/=and a motorcycle Reg. No. EUK 035 K a Bajaj.

10 Upon consideration of the all the above stated evidence regarding this element, I find that the prosecution has proved beyond reasonable doubt that shs. 970,000/= (nine hundred seventy thousand shillings only) and two money purses, the property of Alal Grace alleged in count one and a motorcycle Registration Number UEK 033 F Bajaj valued at shs. 3,800,000/=, the property of Angwech Agnes alleged in count three, were taken from the home of Angwech Agnes on the
15 night of 16th April, 2016.

The next two ingredients require proof that the taking was without the consent of the owner and without a claim of right, with intention to permanently deprive the owner of the property taken. Intent, generally, must be inferred from circumstances. In determining intent, the court will
20 consider the conduct of the accused and all the circumstances revealed by the evidence. A person is deemed as having the intention of permanently depriving the other of property if his or her intention is to treat the thing as his or her own to dispose of regardless of the other's rights. This may be evidenced by conduct of selling or bargaining with it, rendering it useless or dealing with in a manner which risks its loss or to dispose of the property in such a way as to make it
25 unlikely that the owner will recover it. The intention to permanently deprive is not demonstrated if the person merely uses the property. Merely using the property is not enough to show such intent. There is no liability for stealing if at the time of taking or converting, the accused honestly believed he or she was exercising a legal claim of right. Belief has to relate to a legal claim of right, not a moral claim. Belief is not held honestly if it can be established that the accused acted
30 fraudulently.

A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his or her intention is to treat the thing as his or her own or to dispose of regardless of the other's rights. A borrowing or lending of the property may amount to treating
5 the thing as one's own, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

In his defence, A1 Kinyera Walter stated that when P.W.2 Angwech called him, she told him to take the bag to his home. He returned the bag to Angwech on the 16th April, 2016 in the presence
10 of the police and about 200 relatives of the deceased. This is corroborated by P.W.3 Ali Odong Mohammed whom he told that Angwech had said they pick her motorcycle from her house and follow them. It is further corroborated by A3 Oyoo Franco who in his defence stated that A1 Kinyera Walter received a call after which he told him that P.W.2 Angwech Agnes had said they pick her motorcycle from her house. P.W.4 D/ASP Ocen Bosco Olukuwode stated that when he
15 went to the scene the following morning, he found a motorcycle Reg. No. EUK 035 K a Bajaj was missing. The motorcycle was later returned to the complainant (exhibit slip P. Ex.8).

A3 Oyoo Franco stated in his defence that about twenty minutes after A4 Ocaya Jackson had carried P.W.2 Angwech Agnes on his motorcycle, A1 Walter Kinyera spoke on phone and after
20 receiving the call, he told them Angwech Agnes had told him that the motorcycle had ran out of fuel. A1 picked the motorcycle from the home of Angwech and brought it to A3 at his home. He handed it over to A3 at the main road where he had remained waiting with the people who came from Lumule. He carried A2 on the instructions of the clan chief for him to confirm that Angwech was at the police. He carried him to the police. They passed by the bus park at Don
25 Petrol Station. He had shs. 5,000/= they bought fuel in a Rwenzori Mineral Water bottle and rode to the police. On arrival he found his motorcycle parked at the police. Angwech was already inside. He parked her motorcycle near his and entered inside where they were. He told her he had delivered the fuel. He picked the keys for his motorcycle from A4 Ocaya, opened the tank of his motorcycle and re-fuelled. He went back inside and gave Angwech the key to her motorcycle
30 and sat down. A lady at the counter asked him whether he was from Lukwor. She told him he

was not to go anywhere. She asked him to hand over the keys to his motorcycle and he handed them over. He was the placed under arrest

I am inclined to believe this version rather than that of the complainant considering that both the
5 bag and the motorcycle were handed over to her in circumstances that don't suggest an intention to deprive her of any of that property. A3 Oyoo Franco rode the motorcycle to the police station and handed the ignition key to her while A1 Kinyera Walter handed the bag back to her the following morning on her return from the police station. In taking both items, the accused honestly believed they had been authorised by the complainant. Their conduct in respect of these
10 two items does not manifest an intention of permanently depriving P.W.2 Angwech Agnes of them or to treat them as their own or to dispose of regardless of her rights. The defence of A3 Oyoo Franco has therefore not been disproved. The motorcycle being the only item he is alleged in Count three to have stolen, he too is accordingly found not guilty and is acquitted of the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*. This being the only count left in
15 which he is named, he should consequently be set free forthwith unless he is being held in custody for some other lawful reason.

A1 Kinyera Walter is nevertheless further accused in count two of having stolen shs. 970,000/= (nine hundred seventy thousand shillings only) and two money purses, the property of Alal
20 Grace. His defence is that he did not take the shs. 970,000/= Upon his arrest on 17th April, 2016 he asked for police bond. He was asked to pay cash shs. 400,000/= He sent his brother to pick money from his mother and he raised only shs. 200,000/= which they brought to him and secured his release. It was used as well to secure the release of all for the rest. He lent each of his co-accused shs. 50,000/= The money exhibited in court is the one they paid for the bond. He was
25 not asked about the shs. 970,000/=

To refute that defence, P.W.4 D/ASP Ocen Bosco Olukuwode stated that when he went to the scene the following morning, he found some property missing from the home. Two of the complainant's mother's small handbags, black in colour, were missing, one of which contained
30 shs. 970,000/= The black bag was recovered from A1 Kinyera Walter. Shs. 250,000/= was

recovered from A1 Kinyera (Five notes of shs. 50,000/= each. exhibits P. Ex.5A - 5E and P. Ex.6).

5 In order to determine whether or not someone intended to deprive the owner of the property permanently, or at least permanently enough to amount to an offence, the court considers how the person dealt with the property after taking it away. This may be manifested by for example by; (a) withholding the property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) disposing of the property so as to make it unlikely that the
10 owner will recover it; or (c) selling, pawning or bargaining with it; or (d) rendering it useless; or (e) dealing with it in a manner which risks its loss. In the absence of countervailing evidence to the contrary, the very trespassory act of taking an item may be considered proof of intent to permanently deprive.

15 In the instant case, the defence raised by A1 Kinyera Walter to explain away the shs. 250,000/= (five notes of shs. 50,000/= each. exhibits P. Ex.5A - 5E and P. Ex.6) recovered from him by P.W.4 D/ASP Ocen Bosco Olukuwode as a partial refund of the money he is accused of having stolen is most unsatisfactory. He could only account for shs. 200,000/= which he claimed to have given the police for bond whereas under section 38 (1) of *The Police Act*, no fee or duty should
20 be taken of charged for a recognisance for personal appearance or otherwise issued or taken by a police officer. If he is to be believed, the implication is that he meant the amount to be received as a bribe. He further claimed that he lent each of his co-accused shs. 50,000/= to make the total of shs. 200,000/= with himself inclusive, but A4 Ocaya Jackson denied having been party to that arrangement since he secured his release hours before the rest did. He claimed that P.W.4 D/ASP
25 Ocen Bosco Olukuwode received the shs. 200,000/= as a bribe and only turned around to use it to implicate the accused when his bosses intervened. Not only did the witness withstand cross-examination on this allegation but also this does not explain where the additional shs. 50,000/= came from. It seems most improbable that P.W.4 D/ASP Ocen Bosco Olukuwode would go out of his way to use his personal financial resources to bolster the case of a refund made to him. The
30 additional allegation that he is covering up for his inefficiencies in the investigation of the death of Night Aryemo too was unsubstantiated and is remote.

In light of the inconsistencies and gaps in the defence of A1 Kinyera Walter, I am inclined to believe the testimony P.W.4 D/ASP Ocen Bosco Olukuwode. This money (shs. 250,000/= exhibits P. Ex.5A - 5E and P. Ex.6) is a partial refund of the money he is accused of having stolen and not money paid to the police for release on bond. That he made a part payment of the money is conduct inconsistent with his innocence. It is bolstered by the circumstantial evidence of P.W.3 Ali Odong Mohammed that it is only A1 Kinyera Walter he saw enter the house of P.W.2 Angwech Agnes that night, from where he emerged with a black bag and motorcycle. The accused had both the opportunity an time to pick the two money purses in which the missing cash was.

In disagreement with the assessor, I therefore find that the prosecution has proved beyond reasonable doubt that A1 Kinyera Walter stole the two money purses and the cash in respect of which he is indicted in count three. He is accordingly found guilty and is hereby convicted of the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*.

Dated at Gulu this 13th day of December, 2018

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Stephen Mubiru

Judge,

13th December, 2018.

SENTENCE AND REASONS FOR SENTENCE

Both A1 Walter Kinyera and A4 Ocaya Jackson having been convicted of the offence of Criminal Trespass C/s 302 of *The Penal Code Act* in count one and A1 Walter Kinyera having been convicted of the additional offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*, in count two, the learned state attorney has submitted that both convicts have no previous conviction. Both offences are rampant. A1 is the brain behind the incident, he initiated and planned it. He had premeditation. Part of the stolen money was not recovered. There was a breach of trust. A1 was a neighbour to the victim. He owed her a duty. A4 was a law enforcement officer and had he played his role the offence would have been averted. The offence of Criminal

trespass attracts a sentence one year's imprisonment while that of Theft attracts a sentence ten years' imprisonment. He has prayed for an appropriate sentence.

In response, counsel on private brief for A4 has submitted that he is a first offender and has
5 family responsibilities. He was on remand for close to three years. He was remanded on 28th
April, 2016. It is in excess of the maximum sentence. The period he served is sufficient. A1 is
married and has six children with family responsibilities. He is 45 years. He has learnt his lesson.
He was on remand from the same date. He can reconstitute the complainant in a month. The period
10 he has spent on remand is sufficient. He should pay the balance. In his *allocutus*, AI has prayed
for forgiveness and undertook to refund the money stolen, back to the complainant. He was on
remand for two years and his children have dropped out of school. He prayed to be released to
look for the money. A4 has chosen not to add anything by way of *allocutus*, to what his advocate
has stated in mitigation.

15 Under section 302 of *The Penal Code Act*, the maximum punishment for the offence of Criminal
Trespass is one year's imprisonment. The Sentencing range for theft and theft related offences
has been prescribed Regulation 37 of *The Constitution (Sentencing Guidelines for Courts of
Judicature) (Practice) Directions, 2013*. Under rule 38 thereof, the factors to be considered
include; (a) the nature and prevalence of the offence; (b) the circumstances surrounding the
20 commission of the offence; (c) the relationship between the parties and the conduct of the
offender; or (d) any other factor as the court may consider relevant.

Under item 1 of Part V of the Third Schedule to *The Constitution (Sentencing Guidelines for
Courts of Judicature) (Practice) Directions, 2013*, the starting point is six months' imprisonment
25 which may be lowered up to a caution or increased to the maximum term of one years'
imprisonment, depending of the aggravating and mitigating factors of the case. In *Ninsiima v.
Uganda Crim. Appeal No. 180 of 2010* though, 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.

30

I have therefore taken into account the current sentencing practices in relation to cases of this nature. I have considered the case of *Edonyu Augustine v. Uganda, H.C. Criminal Appeal No. 25 of 2012*, where in its judgment of 7th August, 2013, the High Court considered a maximum sentence of twelve months' imprisonment for the offence of criminal trespass, excessive in light
5 of the fact that the convict had not been violent. In *Katusiime Edward v. Uganda, H.C. Criminal Appeal No. 0010 of 2013* where in its judgment of 7th October, 2013, the High Court upheld a sentence of eight months' imprisonment for the offence of criminal trespass. The appellant had encroached on the complainant's land thereby destroying his coffee, cassava and houses and planted his own crops on the land. In *Elineo Mutyaba v. Uganda, H.C. Criminal Appeal No. 45*
10 of 2011, where in its judgment of 27th February, 2012, the High Court upheld a sentence of four months' imprisonment for the offence of criminal trespass. In that case, the appellant was a live-in partner with the complainant between July 2007 and April 2008. This relationship allegedly ceased when the accused sent the complainant and her children off the premises in April 2008. He was charged with criminal trespass when he refused to vacate the premises.

15

It would seem that where the conduct of the accused posed direct physical threat to the complainant or where damage is occasioned to property found on the premises of the complaint, this will aggravate the sentence. Under regulation 39 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the offence is aggravated by, among other
20 factors; (a) the degree of pre-meditation; (b) intimidating, insulting or annoying language or behaviour; (c) nature and gravity of the offence committed upon entry on property; (d) use or threat of use of force or violence while on the property. In light of the aggravating factors outlined by the learned State Attorney and most especially the deceitful nature of their defences
25 and the fact that they used tear gas to force her out of her home, I conclude that the aggravating circumstances in this case outweigh the mitigating factors. I consider a deterrent sentence to be appropriate for the convicts. I for that reason deem a period of six (6) months' imprisonment to be the appropriate starting point. By reason of the mitigation advanced and the *allocutus* of the convicts, that period is reduced to four (4) months' imprisonment.

30 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. Both convicts were remanded on 28th April, 2016 and released on
5 bail on 30th November, 2018, hence a period of two (2) years and seven (7) months. I hereby take into account and set off the period of time the convict has already spent on remand. I find that their period has exceeded by far, the punishment they would deserve. The two convicts are accordingly sentenced to "the time served" in respect of Count One. Since this is the only count for which A4 Ocaya Jackson has been convicted, he is accordingly discharged.

10

The maximum punishment for the offence of Theft is a term of imprisonment not exceeding ten years according to section 261 of *The Penal Code Act*. The Sentencing range for theft and theft related offences has been prescribed Regulation 45 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*. Under rule 46 thereof, the factors to be
15 considered include; (a) the value of the property stolen; (b) prevalence of the offence in the community; (c) the circumstances surrounding the commission of the offence; (d) the impact of the offence on the victim and the community; (e) any breach of trust where the offender is an employee, relative, neighbour or a person in a position of trust; (f) any aggravating or mitigating factors; (g) antecedents of the offender, etc.

20

Under item 2 of Part VII of the Third Schedule to *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the starting point is five years which may be lowered up one year's imprisonment or increased to the maximum term of ten years' imprisonment, depending of the aggravating and mitigating factors of the case. In *Ninsiima v. Uganda Crim. Appeal No. 180 of 2010* though, the Court of appeal opined that these guidelines
25 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 for that reason taken into account the current sentencing practices in relation to cases of
30 this nature. I have considered the case of *Tamale David v. Uganda, H.C. Criminal Appeal No. 22 of 2013*, where in its judgment of 30th April, 2014, the High Court upheld a sentence of three

years' imprisonment for the offence of theft. The appellant was an employee of the complainant from whom he stole business stock of an assortment of electronics worth shs. 30,000,000/= (thirty million). In *Magara v. Uganda C.A. Criminal Appeal No. 146 of 2009*, the Court of Appeal upheld a sentence of seven years' imprisonment for the offence of theft.

5

I am cognisant of the judicial practice of imposing fines in respect of first offenders instead of custodial sentences, by virtue of section 108 (2) of *The Trial on Indictments Act* which permit a sentencing court to impose a fine in addition to or instead of imprisonment. Although A1 Walter Kinyera is a first offender, the offence he committed deserves a deterrent custodial sentence considering the propensity of violence that could have erupted from his deceitful conduct. It is on that basis that I deem a period of five (5) years' imprisonment to be the appropriate starting point. By reason of the mitigation advanced and the *allocutus* of A1 Walter Kinyera, that period is reduced to three (3) years' imprisonment.

15

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. Both convicts were remanded on 28th April, 2016 and released on bail on 30th November, 2018, hence a period of two (2) years and seven (7) months. I hereby take into account and set off the period of time the convict has already spent on remand. I find that their period left is only five months. However, since he has for that period unfairly laboured under a misconceived indictment of aggravated robbery, the punishment he would deserve has been met by the anxiety occasioned by that accusation, for which A1 Walter Kinyera is accordingly sentenced to "the time served" and is discharged.

25

Section 126 of *The Trial on Indictments Act* confers discretion upon a trial court, in addition to any other lawful punishment, to order the convicted person to pay another person such compensation as the court deems fair and reasonable, where it appears from the evidence that,

30

that other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit.

5 This power to award compensation is intended to reassure victims of crime that they are not forgotten in the criminal justice system. Criminal justice increasingly looks hollow if justice is not done to the direct victim of the crime. In some cases, the victims lack the resources to institute civil proceedings after the criminal case has ended. The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the
10 complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence.

While the court has discretion to order compensation under this provision for damage caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit
15 were instituted against him, he would pay substantial compensation. This means in practice that the court has to decide whether the criminal punishment is enough, or whether there is a need for compensating the victim who has suffered injury, in addition to criminal punishment which may be imposed on the convict. The victim claiming compensation must, however, establish that he or she has suffered some personal loss, pecuniary or otherwise, as a result of the offence, for
20 which payment of compensation is essential, such as would be recoverable in a civil suit. Whether a victim who has suffered injury as a result of the commission of an offence would recover compensation in a civil suit depends very much on the nature of damage caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

25 In the instant case, I find that there is sufficient material before the court showing that P.W.2 Angwech Agnes sustained of shs. 970,000/= in consequence of the offence committed, which is recoverable in a civil suit. I therefore order restitution of that sum by A1 Walter Kinyera to P.W.2 Angwech Agnes within ninety days of this judgment. The sum of shs. 250,000/= (five notes of shs. 50,000/= each. exhibits P. Ex.5A - 5E and P. Ex.6) that was tendered in court is to
30 be paid to her as part payment of the total amount, in the event that A1 Walter Kinyera does not appeal this decision within the statutory fourteen days.

Each of the convicts is advised that he has a right of appeal against both conviction and sentence within a period of fourteen days.

5 Dated at Gulu this 13th day of December, 2018

Stephen Mubiru

Judge,

13th December, 2018.