

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT NEBBI
CRIMINAL SESSIONS CASE No. 0008 OF 2017

UGANDA **PROSECUTOR**

5 **VERSUS**

1. **MUNGURIEK JOSEPH alias ONDIKI** }
2. **ONGEIWUN KIZITO** } **ACCUSED**

Before Hon. Justice Stephen Mubiru

10 **JUDGMENT**

The accused are indicted with one count of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that the two accused, and others still at large, on 29th September, 2015 at Ajupani village, in Nebbi District robbed Mugabo John of a cow worth shs. 1,600,000/= and, at immediately before or immediately after the said robbery, threatened to use deadly weapons, to wit, a panga, bow and arrows on the said Mugabo John.

The prosecution case is that on 29th September, 2015 at around 11.00 am, while P.W.3 Mugabo John was out herding cattle belonging to P.W.5 Simbiizi William, he was accosted by three men, two of are the accused before court with another one still at large. A2 grabbed him from behind and held him tightly across his chest. A1 pulled out a rope concealed around his waist and used it to tie his legs. He handed a panga to A2 and directed him to cut Mugabo with it. A2 held the panga against the back of Mugabo's neck and threatened to cut him if he made any noise. They forced him to the ground and left the third man guarding him with a bow and arrows as they drove away one of the cows, a mature white a black patched (Bugondo) cow. The other man shortly thereafter followed them as they disappeared into the bush with the stolen cow. P.W.4 Eugene Munyaneza was out too out herding his own cattle and he saw that stolen cow being driven away, with A2 holding a rope tied to one of its hind legs, and he claimed to be taking it to the L.C. for having been found destroying their sim-sim garden. A search for the whereabouts of the cow that evening ended unsuccessfully. The following morning P.W.3 Eugene Munyaneza

and P.W.5 Simbiizi William found the remains of the cow; the two horns, some hair and blood at a scene in the bush about away which they recognised. the case was reported to the police. A1 was arrested on at Owinyo-Pyelo along Arua Road after four or five days at Alwi Trading Centre where he had gone for a disco.

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In his defence, A1 Munguriek Joseph alias Ondiki denied any involvement in the robbery. He testified that he spent that day at Aryek village Kalwang Parish, Nebbi sub-county in Nebbi District mining sand with eight other people whose names he does not remember. He vividly remembers that day because of the high demand for sand that required him to participate in the mining to beef up the available manpower. He did not go to Ajupani village that day and did not see Mugabo William that day. P.W.5 Simbiizi William had a grudge against him since 2012 because of not allowing him to graze his cattle on his one acre piece of land. P.W.5 caused his arrest in 2012 when he alleged D.W.1 had stolen his cows when he impounded three of his cows for destroying his sim-sim garden. Although he returned the cows and cautioned P.W.5, he was tried and convicted for the offence of theft and sentenced to two years' imprisonment. He was released in July, 2014 only for P.W.5 to come up with the current accusation.

On his part, A.2 Ongeiwun Kizito too denied any involvement. He testified that during August, 2015 he left his home at Jupalega East village, Falwonga Parish and went to Pacego to fish. He returned to Jupalega East village in mid November, 2015. On 11th December, 2015 he had was proceeding from a weekly market at Pateng village to another at Kucwiny to buy a hoe and panga when he was arrested on allegations of involvement in multiple rapes. He neither knows P.W.3 Mugabo John nor P.W.4 Eugene Munyaneza. He only knows P.W.5 Simbiizi William who had late in 2014 threatened him with imprisonment for having participated in the confiscation of about 50 head of cattle which had destroyed his brother's garden when they escaped one night.

The prosecution has the burden of proving the case against each of the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused may only be convicted on the strength of the prosecution case and not because of any weaknesses in their respective defences, (See *Ssekitoleko v. Uganda [1967] EA 531*). By their respective pleas of not

guilty, the accused put in issue each and every essential ingredient of the offence with which they are jointly charged and the prosecution had the onus to prove all the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at
5 its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

The prosecution is required to prove the following ingredients;

1. Theft of property belonging to another.
2. Use or use threat of use of violence against the victim.
- 10 3. Possession of a deadly weapon during the commission of the theft.
4. The accused participated in commission of the theft.

Taking of property belonging to another requires proof of what amounts in law to an asportation (that is carrying away) of the property of another without his or her consent. The property stolen
15 in this case is alleged to be a cow worth shs. 1,600,000/= Counsel for the accused disputed this ingredient this ingredient in his final submissions arguing that the remains of the cow were never tendered in evidence yet the three witnesses gave inconsistent descriptions of the cow allegedly stolen, as regards its colour and number of births. The law however is that when there is failure to produce an exhibit during trial, a careful description of it ought to be made to enable court
20 make an appropriate deduction of its nature (see *E. Sentongo and P. Sebugwawo v. Uganda* [1975] H.C.B 239 and *Uganda v. Byamukama Peter* [1981] H.C.B.16). Failure to exhibit an item is thus not necessarily fatal to a criminal prosecution.

In lieu of an exhibit, the prosecution relies on the testimony of P.W.3 Mugabo John who
25 testified that on 29th September, 2015 at Ajupani village at about 11.00 am he was out herding cattle belonging to P.W.5 Simbiizi William, one of them, a white a black patched (Bugondo) mature cow, was driven away by three assailants after they had tied him up with a rope and threatened to kill him if he raised an alarm. P.W.4 Eugene Munyaneza, was out too out herding his own cattle when he an hour or so later he saw that cow being driven away with a rope tied to
30 one of its hind legs, by two men who claimed to be taking it to the L.C. for having been found destroying their sim-sim garden. Although the descriptions of the cow varied slightly with P.W.3 saying it was white with black patches while P.W.4 and P.W.5 said it was white with brown

patches, all three witnesses described it as "Bugondo." There were also some discrepancies as regards how many times it had calve, but they all described it as a mature cow that had calved multiple times. I do not find the minor discrepancies in colour and number of births to be the result of deliberate untruthfulness and they are therefore ignored.

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The following morning P.W.3 Eugene Munyaneza and P.W.5 Simbiizi William found the remains of the cow; the two horns, some hair and blood at a scene in the bush about away which they recognised. From the fact that these witnesses tracked the hooves-print of the cow from the spot where it was stolen to the spot whir its remnants were found, I find that it can safely be deduced that the remains found at the second scene were that of cow that was stolen and that it was slaughtered. Having considered all the available evidence relevant to this element, in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that P.W.5 Simbiizi William's cow, worth shs. 1,600,000/= was stolen on 29th September, 2015.

15 The prosecution was further required to prove that during the commission of that theft, the assailants used or threatened to use violence. For this ingredient, there must be proof of the use or threat of use of some force to overcome the actual or perceived resistance of the victim. In proof of this element, the prosecution relied on the oral testimony of P.W.3 Mugabo John who testified that before the assailants took the cow away, they tied his legs with a rope, tripped him by kicking his legs causing him to fall onto the ground, they threatened to cut him on the back of the neck with a panga and one of them, whom he did not know before, was carrying a bow and arrows. This is corroborated by the admitted evidence of P.W.1 Mr. Binene Charles, a Clinical Officer at Pakwach Health Centre IV, who medically examined the victim on 7th October, 2015 (nine days after the incident) and found a dislocation and tenderness of the right ankle joint as stated in the medical report P.F 3 (exhibit P. Ex.1). This injury is consistent with his testimony that he was kicked on the legs, tripped and fell down. It is further corroborated by P.W.4 Eugene Munyaneza who saw two men driving the cow away, one of whom was armed with a panga, bows and arrows. Further corroboration can be found in the testimony of P.W.5 Simbiizi William who a few hours later saw his herd arrive at the dam for watering but without herdsman and split into multiple groups, which was an unusual occurrence. I find that the prosecution has

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proved beyond reasonable doubt that immediately before, during or immediately after theft of the cow, violence was used against the herdsman, P.W.3 Mugabo John.

5 The prosecution was further required to prove that immediately before, during or immediately after the said robbery, the assailants had deadly weapons in their possession. A deadly weapon is defined by section 286 (3) of *The Penal Code Act* as one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. P.W.3 Mugabo John testified that she saw A1 had a panga, and the other assailant he had not known before carried a bow and arrows. A1 handed the panga to A2 who threatened
10 to cut him with it at the back of his neck if he made any noise. When P.W.4 Eugene Munyaneza saw two men soon thereafter driving the cow away, A2 was armed with a panga, bows and arrows. Although none of the weapons mentioned was recovered and tendered in evidence, according to *E. Sentongo and P. Sebugwawo v. Uganda [1975] HCB 239*, when the prosecution fails to produce the instrument used in committing the offence during trial, a careful description
15 of the instrument will suffice to enable court decide whether the weapon was lethal or not. Considering the evidence as a whole relating to this element and in agreement with the joint opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that that the assailants had deadly weapons in their possession during the robbery.

20 Lastly, the prosecution must prove that the accused participated in commission of the offence. This is done by adducing direct or circumstantial evidence placing the accused at the scene of crime as perpetrator of the offence. In his defence, A1 Munguriek Joseph alias Ondiki denied any involvement in the robbery. He spent that day at Aryek village mining sand with eight other people whose names he does not remember. He did not go to Ajupani village that day and did
25 not see Mugabo William that day but P.W.5 Simbiizi William bears a grudge against from an incident in 2012 when he stopped him from grazing his cattle on his one acre piece of land whereupon he caused his arrest on allegations that he had stolen his cows. Although he returned the cows and cautioned P.W.5, he was tried and convicted for the offence of theft and sentenced to two years' imprisonment. He was released in July, 2014 only for P.W.5 to come up with the
30 current accusation.

On his part, A.2 Ongeiwun Kizito too denied any involvement. He testified that during August, 2015 he left his home at Jupalega East village, Falwonga Parish and went to Pacego to fish. He returned to Jupalega East village in mid November, 2015. On 11th December, 2015 he had was proceeding from a weekly market at Pateng village to another at Kucwiny to buy a hoe and
5 panga when he was arrested on allegations of involvement in multiple rapes. He neither knows P.W.3 Mugabo John nor P.W.4 Eugene Munyaneza. He only knows P.W.5 Simbiizi William who had late in 2014 threatened him with imprisonment for having participated in the confiscation of about 50 head of cattle which had destroyed his brother's garden when they escaped one night.

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To rebut their respective defences, the prosecution relied on the evidence of P.W.3 and P.W.4 both of whom testified that they recognised the two accused as having participated in robbing the cow. Where prosecution is based on the evidence of indentifying witnesses, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla
15 Bin Wendo and another v. R (1953) E.A.C.A 166; Roria v. Republic [1967] E.A 583; and Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. 1 of 1997*). It is necessary to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. To do so, the Court evaluates the evidence having regard to factors that are favourable, and those that are unfavourable, to correct identification.

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I have considered the circumstances that prevailed when both P.W.3 and P.W.4 claim to have seen the accused participating in commission of the offence. It was during the mid morning hours up to around 3.00 pm. There was daylight at the time which aided their respective observation and recognition of the accused. Both witnesses came into close proximity of the
25 accused, P.W.3 in direct physical contact while P.W.4 within talking distance. Both knew the two accused before, P.W.3 for one year and P.W.4 for about ten years. Both had ample time to have an unimpeded look at the accused and to talk to them. The attack was not sudden as P.W.3 saw then approach from a distance and instantly recognised them even before they came into direct physical contact with him. I have not found any significant unfavourable circumstances
30 which could have negatively affected their ability to see and recognise the accused. I am therefore satisfied that their evidence is free from the possibility of mistake or error. In

agreement with the assessors, I find that the prosecution has proved this ingredient as well beyond reasonable doubt.

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

Dated at Nebbi this 13th day of April, 2018.

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Stephen Mubiru
Judge.
13th April, 2018.

16th April, 2018.

9.10 am

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Attendance

Mr. Cannyutuyo Michael, Court Clerk.

Mr. Muzige Amuza, Senior Resident State Attorney, for the Prosecution.

Mr. Pirwoth Michael, Counsel for the accused person on state brief is present in court

Both accused are present in court

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SENTENCE AND REASONS FOR SENTENCE

Upon both accused being convicted of the offence of Aggravated Robbery c/s 285 and 286 (2) of
the *Penal Code Act*, the learned State Attorney prosecuting the case prayed for deterrent
25 sentences, on grounds that; the court should consider the degree of harm suffered by the victim.
His right ankle joint was dislocated. A panga bow and arrows were the weapons used in the
commission of the offence. The convicts committed the offence as a group. The victim was
discriminated against because of the tribe. They referred to the victim as Mulaalo, Munyankore.
The value of the cow was valued consistently at shs. 1,600,000/= They committed other cats
30 during the crime. They assaulted the victim by tripping him (Ngwara), tied his hands and
threatened violence by killing. A panga was placed on his neck. There was pre-meditation It was
not by coincidence. They had two ropes, one for the cow and the other for the victim. The crime
is rampant. Stealing cattle is on the rise in the region. A1 is a habitual offender. He is a convict
of stealing cattle, from the same complainant and hardly three months after serving sentence. He

has learnt nothing and forgot everything. He is now a big threat to the society and is not remorseful. They told lies on oath. The cow was not recovered. In view of paragraph 56 and part 1 column 4 of the third schedule the sentence should be between 30 years to death. He proposed 35 years. They can still come out and catch up with the world. Under s. 286 (4) of The Penal Code Act read together with *Cpt. Munyangondo Chris v. Uganda, S .C. Criminal Appeal 5 of 2011*, it is mandatory for the convicts to compensate where the value of the property is proved. The value has been established to be 1,600,000/=.

In response, the learned defence counsel prayed for lenient sentences for both convicts on grounds that; A2 is a first offender, he is a young man of 22 years. He has parents who are weak. He had wife who deserted him and left five children. Remorsefulness is not proved by exercise of the right to defend himself. They are remorseful. The rampancy of the offence is disputed. There are 44 cases on the cause list and only 5 of aggravated robbery. That does not warrant that the offence is rampant. This is the first conviction arising out of Alwi. That is not rampancy. Many of the people in Alwi are cattle keepers. Mentioning someone's tribe is not segregation because that was his tribe. A2 has five children and that is a very serious family responsibility. Para 32 of the sentencing guidelines puts family responsibility as one of the mitigating factors. A1 has four children of his elder brother. He has no parents at all now. He was head of the family and that is a strong responsibility on him. He is still 33 years old. A1 is not a habitual offender. It was an issue of land dispute. The case of *Cpt. Munyangondo* at page 10 para 3 the Supreme Court gives discretion to determine the sum a convict should pay when being sentenced. It is not totally the value as stated by the prosecution, especially where they are to serve long sentences. The compensation should be disregarded. The court should be lenient with them and give them ten years at most.

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In his *allocutus*, A1 prayed for a lenient sentence on grounds that; he has children. He is also paying fees for his children and his brother's children. He was remanded on 7th October, 2015 and has a problem with his head he feels dizzy and at times he sees darkness. It began from home before his arrest. His mother is alive but weak and his father is dead and he is the one looking after his mother. He is the only survivor in the family. On the previous occasion he had impounded cows for destroying his garden. He prays for a few years so that he can go home. Five

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years would do. He will not commit the offence again. If he ever comes before court again, he should be sent for life.

In his *allocutus*, A2 prayed for a lenient sentence on grounds that; he has five children, his
5 mother is insane and roaming in Nebbi Town. She left him with two children and he has three of his own. They all now cannot go to school. His father is weak. He has a problem with the hand and he was the one now providing for the family. The children are scattered. He does not know how they are surviving. He was operated upon in his belly. It will be hard to support the children. He was remanded on 12th December, 2015. He is a first offender and deserves three years. He
10 never did such a thing as place a panga on his neck and if it had happened, he will not do it again. If he ever comes back to court, he should be sent for life.

According to section 286 (2) of the *Penal Code Act*, the maximum penalty for the offence of Aggravated Robbery is death. However, this punishment is by sentencing convention reserved
15 for the most extreme circumstances of perpetration of such an offence such as where it has lethal or other extremely grave consequences. Examples of such circumstances relevant to this case are provided by Regulation 20 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* to include; the use and nature of weapon used, the degree of meticulous pre-meditation or planning, and the gratuitous degradation of the victim like multiple
20 incidents of harm or injury or sexual abuse.

In *Ninsiima v. Uganda Crim. Appeal No. 180 of 2010*, the Court of appeal opined that these guidelines have to be applied taking into account past precedents of Court, decisions where the facts have a resemblance to the case under trial. I have considered the fact that deadly weapons
25 were used and that the offence involved a degree of meticulous pre-meditation or planning. That notwithstanding, I have discounted the death sentence because the circumstances, although serious, are not in the category of the most extreme manner of perpetration of offences of this type.

30 When imposing a custodial sentence upon a person convicted of the offence of Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*, the *Constitution (Sentencing Guidelines for*

Courts of Judicature) (Practice) Directions, 2013 stipulate under Item 4 of Part I (under Sentencing ranges - Sentencing range in capital offences) of the Third Schedule, that the starting point should be 35 years' imprisonment, which can then be increased on basis of the aggravating factors of reduced on account of the relevant mitigating factors.

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I have considered the fact that a deadly weapon was used, the offence involved a considerable degree of gratuitous degradation of the victim and that the offence involved a degree of meticulous pre-meditation or planning. These circumstances are sufficiently grave to warrant a deterrent custodial sentence. It is for those reasons that I have considered a starting point of
10 twenty five years' imprisonment.

In respect of A1, the seriousness of this offence is mitigated by a number of factors; the fact that he has children and family to look after and faces some health issues. However, having committed the offence barely three months after serving sentence for a similar offence involving
15 theft of cattle, the severity of the sentence he deserves has been reduced from the period of twenty five years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty years.

It is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take
20 into account the period spent on remand while sentencing a convict. Regulation 15 (2) of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, is to the effect that the court should "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This approach requires a mathematical deduction by way of set-off. From the earlier proposed term of twenty years'
25 imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been remanded on 7th October, 2015 and kept in custody since then, I hereby take into account and set off two years and six months as the period the convict has already spent on remand. I therefore sentence A1 Munguriek Joseph to a term of imprisonment of seventeen (17) years and six (6) months, to be served starting today.

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This in my view is comparable to sentences passed in similar circumstances. For example in with the sentence in *Kusemererwa and Another v. Uganda, C.A. Criminal Appeal No. 83 of 2010*, a sentence of 20 years' imprisonment was upheld in respect of convicts who had used guns during the commission of the offence, but had not hurt the victims. In *Naturinda Tamson v. Uganda*
5 *C.A. Criminal Appeal No. 13 of 2011*, a sentence of 16 years imprisonment was imposed on a 29 year old convict for a similar offence.

In respect of A2, the seriousness of this offence is mitigated by a number of factors; the fact that he is a first offender, he is a relatively young person at the age of 22 years still capable of
10 reforming and becoming a useful member of society. He has children and family to look after. The severity of the sentence he deserves has been tempered by those mitigating factors and is reduced from the period of twenty five years, proposed after taking into account the aggravating factors, now to a term of imprisonment of seventeen years.

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*, is to the effect that the court should "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This approach requires a
20 mathematical deduction by way of set-off. From the earlier proposed term of seventeen years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the convict having been remanded on 12th December, 2015 and kept in custody since then, I hereby take into account and set off two years and four months as the period the convict has already spent on remand. I therefore sentence A2 Ongeiwun Kizito to a term of imprisonment of fourteen
25 (14) years and eight (8) months, to be served starting today.

It is further mandatory under section 286 (4) of *The Penal Code Act*, where a person is convicted of Aggravated Robbery c/s 285 and 286 (2), unless the offender is sentenced to death, for the court to order the person convicted to pay such sum by way of compensation to any person to the
30 prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person. Although there was evidence that P.W.3

suffered physical injury, the cost of medication was not established in evidence. I was as well not provided with other evidence on basis of which to order compensation for the injuries suffered by that victim, so I do not make any order of compensation in that regard. The evidence led during the trial sufficiently established that P.W.5 Simbiizi William, lost a cow worth shs. 1,600,000/= I consider an award of Shs. 800,000/= to be a reasonable compensation. Each of the convicts is to compensate P.W.5 Simbiizi William in the sum of Shs. 400,000/= within a period of three (3) months from the date of this judgment.

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

Dated at Nebbi this 16th day of April, 2018.

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Stephen Mubiru
Judge.
16th April, 2018.

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