THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

CRIMINAL SESSIONS CASE No. 1234 OF 2016

UGANDA …… PROSECUTOR

VERSUS

ASEA DENIS …… ACCUSED

Before Hon. Justice Stephen Mubiru.

JUDGMENT

The accused is indicted with one count of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that the accused and others still at large on 17th October, 2015 at Rubaga in Kampala District robbed Nziba Abdu of a motorcycle Registration No. UEH 987 U a Bajaj Boxer, red in colour and during, immediately before or immediately after the said robbery, used a deadly weapon, to wit, an iron bar on the said Nziba Abdu.

The prosecution case is that at around 6.30 am on that day, the complainant P.W.1 Nziba Abdu was riding the motorcycle from his home on the way to his place of work. A vehicle approaching from behind flashed its lights repeatedly signalling him to stop. When he stopped by the roadside, two men jumped out of the car and one of them hit him with an iron bar on the helmet and it cracked. When he fell down, the other assailant picked the motorcycle and rode away. He reported the incident to Nakulabye Police Post and to the tracking company that had installed a tracking device on the motorcycle. Meanwhile P.W.3 No. 20732 Sgt. Nakirya Hellen who was on duty near the border between Nakaseke and Masindi District, was notified by phone call that a stolen motorcycle was headed her way, she shortly saw it pass by and alerted the police ahead to intercept it. The motorcycle was intercepted at Kyarutunga Trading Centre. The case file, the suspect under arrest and the motorcycle were forwarded to Masindi Police Station. The

recovered motorcycle was photographed at the police station (exhibit P. Ex.4) and an exhibit slip in regard thereto was prepared (exhibit P. Ex.5).

P.W.2 No. 39366 D/C Kedi Festo had while at Nakulabye Police post at around 7.30 am. had received a report from P.W.1 reported to him the occurrence of that robbery and later when he received information that the motorcycle had been recovered, he went with P.W.1 and another policeman to Masindi to collect it, together with the suspect, the accused.

In his defence, while he admitted having been arrested while in possession of that motorcycle, he denied having participated in its theft. He had travelled during the night from Arua by bus and alighted from the bus at Matugga at around 7.00 am where he waited for the motorcycle to be brought to him. It was eventually brought to him by a one Silvano and Silvano's brother Angua who was supposed to lead him to Masindi. The accused was a boda-boda rider in Arua. He had met Silvano in Arua as his usual customer and the accused had borrowed shs. 80,000/= as a top up for his child's school fees. By way of repayment, Silvano asked him to travel to Kampala. Along the way, he with Silvano's counterpart aboard the bus received a call from Silvano instructing them to alight from Matugga At around 7.30 am Silvano came with the motorcycle and instructed him to follow his brother Angua to Masindi. He did just that until he was intercepted at Kyarutunga Trading Centre. He was wearing a red, not a black jacket and it is the one the police used to bandage his head as he bled from wounds inflicted by a mob during his arrest. He was not aware that the motorcycle was stolen.

Since the accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the accused person and he can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence, (see *Ssekitoleko v. Uganda [1967] EA 531*). The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue each and every essential ingredient of offence with which he is indicted and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure his 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 is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

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

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

The first element, taking of property belonging to another, requires proof of what amounts in law to an asportation (that is carrying away) of the property of another without his or her consent. The property stolen in this case is alleged to be motorcycle Registration No. UEH 987 U a Bajaj Boxer, red in colour. P.W.1 Nziba Abdu testified that at around 6.30 am on that day, he was riding from home to his place of work. A vehicle approaching from behind flashed its lights repeatedly signalling him to stop. When he stopped by the roadside, two men jumped out of the car and one of them hit him with a bar on the helmet and it cracked. When he fell down, the other assailant picked the motorcycle and rode away. He reported the incident to Nakulabye Police Post and to the tracking company that had installed a tracking device on the motorcycle. Later that day he learnt that the motorcycle had been recovered and together with the police he collected it from Masindi. P.W.2 No. 39366 D/C Kedi Festo testified that while at Nakulabye Police post at around 7.30 am. P.W.1 reported to him the occurrence of that robbery and later when he received information that the motorcycle had been recovered, he went with him and another policeman to Masindi to collect it.

P.W.3 No. 20732 Sgt. Nakirya Hellen testified that when she was notified by phone call that a stolen motorcycle was headed her way, she shortly saw it pass by and alerted the police ahead to intercept it. The motorcycle was intercepted at Kyarutunga Trading Centre. The case file, the suspect under arrest and the motorcycle were forwarded to Masindi Police Station. The recovered motorcycle was photographed at the police station (exhibit P. Ex.4) and an exhibit slip in regard thereto was prepared (exhibit P. Ex.5). In his defence, the accused admitted that the

motorcycle in question was recovered from his possession. 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 motorcycle Registration No. UEH 987 U a Bajaj Boxer, red in colour was stolen on the morning of 17th October, 2015.

The prosecution was further required to prove the use or threat of use of violence against the victim during that theft. P.W.1 Nziba Abdu testified that when two of the assailants jumped out of the vehicle, one of them hit him on the head with an iron bar, cracking the helmet. He sustained an injury at the back of his head. P.W.2 No. 39366 D/C Kedi Festo testified that when P.W.1 reported at the police post, he noted that he had an injury at the top of his head. He issued him with a P.F 3 for medical examination. The form was returned and it was exhibited in court as exhibit P. Ex.1. It indicates that the complainant sustained a swelling on the occipital part of the head (back and lower part of the skull) and there was tenderness on that part of the head. Considering the evidence as a whole relating to this element and in agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that immediately before and during the theft of that motorcycle, violence was used against P.W.1 Nziba Abdu.

The prosecution was further required to prove that immediately before, during or immediately after the said robbery, the assailants had deadly weapons in their possession. A deadly weapon is defined by section 286 (3) of *The Penal Code Act* as one which is made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death. P.W.1 Nziba Abdu testified that when two of the assailants jumped out of the vehicle, one of then hit him on the head with an iron bar that cracked the helmet. The weapon mentioned was not recovered and neither was the cracked helmet tendered in evidence.

According to the decision in *E. Sentongo and P. Sebugwawo v. Uganda [1975] HCB 239,* when the prosecution fails to produce the instrument used in committing the offence during trial, a careful description of the instrument will suffice to enable court decide whether the weapon was lethal or not. In the instant case, this was a sudden attack and the object used hit the complainant from behind. He could only have had a fleeting glance at it. In absence of a more detailed description, for example as to length and thickness, his statement that it was an iron bar is too generic and may be based on surmise. The alternative would have been to infer its nature from

the type of injury and damage it inflicted. The injury itself appears to be superficial yet the helmet was never tendered in court to enable the court perceive its relative thickness and tensile strength. In agreement with the assessors, I find that this evidence is inadequate to support a finding beyond reasonable doubt that the item the complainant saw was a a deadly weapon.

Lastly, the prosecution had to prove that the accused participated in commission of the offence. This is done by adducing direct or circumstantial evidence placing each of the accused at the scene of crime as perpetrator of the offence, or as an accessory thereto. The accused denied having participated in the commission of the crime and set up an alibi. By the time the offence was committed, he was still aboard a bus from Arua on his way to Kampala. In fact he never reached Kampala but stopped at Matugga, 12 mile way from Kampala. 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 participant in the commission of the offence (see *Vicent Rwamaro v. Uganda [1988-90] HCB 70; Ssebyala and others v. Uganda [1969] E.A. 204* and *Col. Sabuni v. Uganda 1982 HCB 1*)..

To disprove that defence, the prosecution relies on identification evidence of P.W.1 Nziba Abdu who testified that although the robbery occurred at around 6.30 am, there was light from the clear sky at dawn, it took the accused about five minutes as he fidgeted with the motorcycle in an attempt to disengage the gears before he could kick-start it again and he was observing him throughout that time. The man was wearing a black jacket. Where prosecution is based on the evidence of indentifying witnesses under difficult conditions, the Court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see *Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166*; *Roria v. Republic [1967] E.A 583*; and *Bogere Moses and another v. Uganda, S.C. Cr. Appeal No. l of 1997)*. It is necessary to test such evidence with the greatest care, and be sure that it is free from the possibility of a mistake. 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 P.W.1 Nziba Abdu claims to have seen the accused at the scene of crime. It was approaching dawn and according to him it was a clear sky, growing lighter with each passing minute at the break of dawn. Visibility was within fifteen meters and the light from the clear sky aided his observation and recognition of the accused. Under those conditions of lighting, he came into close proximity of the accused. When he fell onto the ground after being hit with an object on the head, the motorcycle fell within a meter from him. The accused took a considerable period of time which he estimated to have been about five minutes as he struggled to disengage the gear and kick-start the motorcycle before he sped off. This gave them ample time and opportunity to have an unimpeded look at the face of the accused. I have found that the unfavourable circumstances which could have negatively affected the ability of the this witness to see and recognise the accused, are exceedingly overwhelmed by those that favoured correct identification. Moreover, at the point of recovery, when photographed at the police station (exhibit P. Ex.4) a black jacket is seen wrapped around the handlebars. This dispels the version of the accused that he had been wearing a red jacket and instead corroborates the identification evidence of P.W.1 that the accused wore a black jacket.

On the other hand, the doctrine of recent possession, as a species of circumstantial evidence, augments the evidence of identification. The motorcycle was robbed at around 6.30 am in Kampala and by 11.00 am it had been sighted by P.W.3No. 20732 Sgt Nyakirya Hellen going past Jijunjua Police Post in Masindi District, more than 150 kilometres from Kampala. The time period of four hours qualifies the accused's possession of the motorcycle to be recent. When an accused is found in recent possession of stolen property, for which he has been unable to give a reasonable explanation, the presumption arises that he is either the thief, or the receiver of the stolen goods, depending on the circumstances. Once the accused has been proved to have been found in recent possession of stolen property, it is for the accused to give a reasonable explanation. He will discharge this onus on the balance of probabilities, whether the explanation could reasonably be true. If he does so then an innocent possibility exists which receives the presumption to be drawn from other circumstantial evidence.

His explanation for the possession is that for a debt of shs. 80,000/= he was asked by a one Silvano to drive that motorcycle from Kampala to Arua. It was handed over to him from

Matugga and Silvano instructed him to follow his brother Angua to Masindi. It is curious that Silvano would choose a person who had never been to Kampala before as the accused claimed, for such an errand. It is further curious that the original plan was changed at Matugga and the accused was instead instructed to drive the motorcycle to Masindi, another place he had never been to before. It does not make sense that Silvano would have chosen such a cumbersome process to deliver a motorcycle when it would be much cheaper and safer to do it by loading it onto traders' trucks headed to Arua, and that the accused would accept to do it that way unless they both knew that it was a stolen motorcycle. The fact that the accused was preceded by another person riding a motorcycle whom he was following was never put to P.W.3No. 20732 Sgt Nyakirya Hellen in cross-examination. I find the explanation offered by the accused to be unbelievable, an afterthought and total fabrication which therefore is not a reasonable explanation for his recent possession. The circumstances show that he is not a mere guilty receiver but the thief.

All in all I have found that the evidence against him has disproved his defence and placed him squarely at the scene of the crime as a person who participated in robbing the motorcycle. Since the prosecution failed to prove beyond reasonable doubt that he had a deadly weapon in his possession during that robbery, he is accordingly found not guilty and is acquitted for the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*.

However, according to section 87 of *The Trial on Indictments Act*, when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it. (see also *Uganda v. Leo Mubyazita and two others [1972] HCB 170; Paipai Aribu v. Uganda [1964] 1 EA 524* and *Republic v. Cheya and another [1973] 1 EA 500*). The minor offence sought to be entered must belong to the same category with the major offence.

Section 87 of *The Trial on Indictments Act* envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the

only distinction between the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act* and Simple Robbery c/s 285 and 286 (1) (b) of *The Penal Code Act,* is that the involvement of a deadly weapon which the latter does not. Therefore by a process of subtraction, the offence of Simple Robbery c/s 285 and 286 (1) (b) of *The Penal Code Act* is minor and cognate to that of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*, and a person indicted with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not indicted with it. The circumstances embodied in the major indictment necessarily and according to the definition of the offence imputed by that indictment constitute the minor offence too. The indictment under sections 285 and 286 (2) of *The Penal Code Act* gave the accused notice of all the circumstances constituting the offence under sections 285 and 286 (1) (b) of *The Penal Code Act* for which he can be convicted.

In the final result, I find that the prosecution has proved all the essential ingredients of the offence of Simple Robbery c/s 285 and 286 (1) (b) of *The Penal Code Act* beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Simple Robbery c/s 285 and 286 (1) (b) of *The Penal Code Act*.

Dated at Kampala this 7th day of February, 2019

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Stephen Mubiru
Judge,
7th February, 2019.

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted for the offence of Simple Robbery C/s 285 and 286 (1) (b) of *The Penal Code Act*, the learned Principal State Attorney has submitted that; the convict has been on remand since 29th October, 2015. He has no record of previous conviction. The punishment under section 261 of *The Penal Code Act* is imprisonment for life. She prayed for a custodial sentence to deter would be offenders, although the motorcycle was recovered.

In his submissions in mitigation of sentence, the learned defence counsel has argued that; the convict is a first offender with no criminal record. The item was recovered and he has been on remand for three years and more. He has family responsibilities. He has a wife and children of school going age, five of them the eldest is 13 and the youngest is four years old. He was the sole bread winner. He deserves a sentence he can serve and return. He is 37 years of age. He should be re-integrated. He prayed for a lenient sentence. The convict has participated in bible studies deliverance and bible based trauma healing course of 5th February 2018 to 15th June 2018. He prayed that court finds that he has had time to reflect on his life. In his *allocutus*, the convict prayed for a lenient sentence on grounds that; he is an orphan. His mother ran mad. His wife is an orphan. He prayed for a lenient sentence so that he can look after his children and his mother. He stopped in P.2.

According to section 286 (1) (b) of the *Penal Code Act*, the maximum penalty for the offence of Simple Robbery life imprisonment. A sentence of life imprisonment may be justified by extreme gravity or brutality of the crime committed, or where the prospects of the offender reforming are negligible, or where the court assesses the risk posed by the offender and decides that he or she will probably re-offend and be a danger to the public for some unforeseeable time, hence the offender poses a continued threat to society such that incapacitation is necessary (see *R v. Secretary of State for the Home Department, ex parte Hindley [2001] 1 AC 410*). However, since proportionality is the cardinal principle underlying sentencing practice, I do not consider the sentence of life imprisonment to be appropriate in this case. Moreover, it is unusual to impose a maximum sentence on a first offender and it has been held in the past to be wrong to depart from the rule of practice (see *Josephine Arissol v. R [1957] EA 447*).

When a custodial sentence other than imprisonment for life is considered appropriate for the offence of Simple Robbery c/s 285 and 286 (1) (b) of *The Penal Code Act*, Regulation 30 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* requires the court to be guided by the sentencing range specified in Part III of the Third Schedule thereto which stipulate that the starting point should be 15 years' imprisonment, which can then be increased on basis of the aggravating factors of reduced on account of the relevant mitigating factors. The range is from three years up to imprisonment for life.

Some of the factors under Regulation 31 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* aggravating the sentence applicable to this case are;- the offender being part of a group or gang and the role of the offender in the group, gang or commission of the crime; the value of the property or amount of money taken during the commission of the offence; the offence having been committed as part of a premeditated, planned or concerted act and the degree of pre-meditation; the rampant nature of the offence in the area or community. Furthermore, 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 for that reason considered the sentences imposed in; *Katuku Asirafu v. Uganda,.C.A Criminal Appeal No. 7 of 2009*, where the Court of Appeal allowed an appeal against a sentence of twenty years' imprisonment for an accused who broke into a house at night and robbed the occupant of shs. 140,000= and reduced it to twelve years' imprisonment. The money that had been robbed in that case had been recovered and returned to the victim. In *Adam Owonda v. Uganda, S.C. Criminal Appeal No.8 of 1994*, a sentence of 8 years' imprisonment was confirmed by the Supreme Court as appropriate for the offence of simple robbery. The court commented that the sentences in this type of case ranged from 8 to 14 years in the High Court. In *Haruna Turyakira and two others v. Uganda, S.C. Criminal Appeal No. 146 of 2003*, the Supreme Court upheld a sentence of 14 years' imprisonment where the convicts had robbed shs. 2,500,000/= from the victim. I have in light of the aggravating factors in the case and guided by the current sentencing practice in offences of this nature, adopted a starting point of fifteen (15) years' imprisonment.

Some of the factors under Regulation 32 of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* mitigating the sentence applicable to this case are;- the offender having had a subordinate or lesser role in a group or gang involved in the commission of the offence; he is a first offender with no previous conviction or no relevant or recent conviction; the property robbed was recovered; the family responsibilities of the offender;

The seriousness of this offence is mitigated by those factors. The severity of the sentence the convict deserves has been tempered by those mitigating factors and is reduced from the period of fifteen (15) years, proposed after taking into account the aggravating factors, now to a term of imprisonment of eleven (11) years.

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 accused. 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. From the earlier proposed term of eleven (11) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict. I note that the convict has been in custody since 29th October, 2015, a period of three years and four months. I therefore sentence the convict to a term of imprisonment of seven (7) years and four (4) months to be served staring today.

The convict is advised that he has a right of appeal against both conviction and sentence within a period of fourteen days.

Dated at Kampala this 7th day of February, 2019

Stephen Mubiru

Judge,

7th February, 2019.