

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
CRIMINAL SESSIONS CASE No. 01421 OF 2016

UGANDA PROSECUTOR

5 **VERSUS**

1. **OTIM SIMON PETER alias OPOLOT** }
2. **KYONGA EMMANUEL** } **ACCUSED**
3. **WAGUTI EMMANUEL alias MUSOMESA** }

10 **Before Hon. Justice Stephen Mubiru.**

JUDGMENT

The three accused were jointly indicted with the offence of Aggravated Robbery c/s 285 and 286
15 (2) of *The Penal Code Act*. It was alleged that three accused and others still at large on 5th
February, 2015 at Kireka Market in Wakiso District robbed Tumuhimbise Julius of a motor
vehicle Registration No. UAU 522 P a Toyota Noah, white in colour , containing; three mobile
phones, a driving permit, ATM Cards of Housing Finance Bank, Barclays Bank, and Centenary
Bank, UMEME Identity Card Number 5020878, Earth Megger, Installation Megger, Megger
20 Tester and a pair of shoes, and during, immediately before or immediately after the said robbery,
threatened to use a deadly weapon, to wit, a pistol on a one Carol N. Mugerwa, an occupant of
the vehicle. At the close of the prosecution case, the court found that the prosecution had not
made out a prima facie case against A2 Kyonga Emmanuel requiring him to be put him to his
defence and was accordingly acquitted in accordance with section 73 (2) of *The Trial on*
25 *Indictments Act* and set free forthwith.

The prosecution case against the two accused A1 Otim Simon Peter alias Opolot and A3 Waguti
Emmanuel alias Musomesa is as follows; in the early evening hours of 5th February, 2015 at
around 6.00 pm, P.W.1 Tumuhimbise Julius drove from work at the UMEME office in Kampala,
30 proceeding home to Mukono, he spotted P.W.2 Carol N. Mugerwa at the Jinja Road roundabout
and offered her a lift. He made another stopover at Kireka market to buy foodstuff. He had just
returned to the car and switched on the ignition when he received a call from home informing

him that one of his children had fallen sick and he should carry some drugs home. He switched off the engine but left the key in the ignition and went to a pharmacy. On his return, he found the vehicle missing. Upon inquiry from boda-boda riders nearby he was told two men had entered the car and driven off with the female occupant. Shortly after, he received a call from a teary P.W.2 informing him that the car had been commandeered by two robbers who had stolen all her personal effects, dropped her off along the Northern Bypass near a Church in Naalya and gone away with the car. He went to her rescue and together they reported the theft to the police. The vehicle has never been recovered and neither have any of all the items specified in the indictment that were inside the car.

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In their respective defences, both accused denied any participation. A1 Otim Simon Peter alias Opolot who testified that he spent the day and night of the fateful evening at the home of his brother in law Vincent Mutebi, where he had gone with his wife D.W.2 Namutebi Prossy for a family meeting in Mpenja, Gomba. The family meeting was to do with his father in law distributing land among his children. He was surprised to be arrested on 27th February, 2015 at Kyaliwajjala at around 9.00 pm as he returned home from attending mass at the Uganda martyrs Shrine in Namugongo. He is falsely implicated in this case because of a personal vendetta of a one Kimalya, a Flying Squad Operative, with whom he has clashed since 2009, when that operative made advances at his wife D.W.2 Namutebi Prossy. He had twice before been arrested and prosecuted once, on allegation of theft of a motor vehicle at the instigation of that Kimalya. His defence is corroborated by his wife D.W.2 Namutebi Prossy who confirmed the existing grudge with Kimalya and the family meeting of 4th to 6th February, 2015 in Mpenja, Gomba.

On his part, A3 Waguti Emmanuel alias Musomesa who testified as D.W.3 stated that on 28th February, 2015 he was summoned to report to Kireka Police post in relation to a complaint by a one Tumushabe Rogers whom he owed plaster sand worth shs. 480,000/= He was surprised to be detained only to be charged with this offence on 27th March, 2015. He has nothing to do with it.

Since each of the accused pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against each of them beyond reasonable doubt. The burden does not shift to any of the accused persons and each of them can only be convicted on the strength of the

prosecution case and not because of weaknesses in their respective defences, (see *Ssekitoleko v. Uganda* [1967] EA 531). The accused do not have any obligation to prove their innocence. By their respective pleas of not guilty, each of the accused put in issue each and every essential ingredient of the two offences with which they are indicted and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure their conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

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For the accused to be convicted of the offence 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.
- 15 3. Possession of a deadly weapon during the commission of the theft.
4. The accused participated in commission of the theft

The first element, theft 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.

20 The property alleged to have been stolen in this case is a motor vehicle Registration No. UAU 522 P a Toyota Noah, white in colour , containing; three mobile phones, a driving permit, ATM Cards of Housing Finance Bank, Barclays Bank, and Centenary Bank, UMEME Identity Card Number 5020878, Earth Megger, Installation Megger, Megger Tester and a pair of shoes.

25 P.W.1 Tumuhimbise Julius testified that as he drove home from work at the UMEME office in Kampala at around 6.00 pm, he spotted P.W.2 Carol N. Mugerwa at the Jinja Road roundabout and offered her a lift. He made a stopover at Kireka market to buy foodstuff. He had just returned to the car and switched on the ignition when he received a call from home informing him that one of his children had fallen sick and he should carry some drugs home. He switched off the
30 engine but left the key in the ignition and went to a pharmacy. On his return, he found the vehicle missing. Upon inquiry from boda-boda riders nearby he was told two men had entered

the car and driven off with the female occupant. Shortly after, he received a call from a teary P.W.2 informing him that the car had been commandeered by two robbers who had taken all her personal effects, dropped her off along the Northern Bypass near a Church in Naalya and gone away with the car. He went to her rescue and together they reported the theft to the police. The vehicle has never been recovered and neither have any of all the items specified in the indictment that were inside the car. P.W.1 presented the vehicle's log-book (exhibit P. Ex.1) and stated that the vehicle was worth shs. 18,030,000/=

P.W.2 Carol N. Mugerwa testified that shortly after P.W.1 had gone to buy drugs, two men jumped into the car and on asking them where P.W.1 was, she was told he was waiting at Victoria Pub. When the assailant who was driving the vehicle drove on past Victoria Pub, she became concerned and on asking the assailant further why he was going past the named rendezvous he pulled out a pistol, pointed it at her and ordered her to keep quiet. The man drove to some point along the Northern Bypass near a Church in Naalya where she was ordered out of the vehicle. The vehicle sped off with all her personal effects she had in her handbag.

P.W.3 No. 24706 D/Sgt. Watsemwa Sarah testified that police investigations revealed that the vehicle had been sold to a one Samonga, an army officer in the Democratic Republic of Congo but it was never recovered. In their respective defences, both accused denied any involvement. Having considered all the available evidence relevant to this element, and considering that none of these witnesses was discredited by the rigorous cross-examination to which they were subjected, I find in agreement with the assessors that the prosecution has proved beyond reasonable doubt that the property particularised in the indictment was stolen in the evening of 5th February, 2015 at Kireka Market.

The prosecution was further required to prove the use or threat of use of violence against the victim during that theft. P.W.2 Carol N. Mugerwa stated that when they went past Victoria Pub, the assailant who was driving pulled out a pistol, pointed it at her and ordered her to keep quiet. She was seated in the front passenger seat and became frightened. She was ordered to hand over her bag. She was trembling so much out of fright that she failed to open the bag. She handed it over to the assailant in the back seat. When they got to some place near a Church in Naalya along

the Northern Bypass, the driver suggested to the other assailant in the back seat that she should be abandoned there since they had got what they wanted. P.W.1 Tumuhimbise Julius testified that when P.W.2 called her shortly thereafter, she was crying. Considering the evidence as a whole relating to this element, I find that the assailants placed P.W.2 Carol N. Mugerwa under a state of fear by threat of violence toward her. Therefore in agreement with the opinion of the assessors, I find that the prosecution has proved beyond reasonable doubt that immediately before, during or immediately after theft of the property mentioned the indictment, violence was threatened against P.W.2 Carol N. Mugerwa.

The prosecution was further required to prove that immediately before, during or immediately after the said robbery, the assailants had a deadly weapon 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. Where the weapon involved is a gun, it does not matter whether or not it is real or an imitation. P.W.2 Carol N. Mugerwa testified that when they went past Victoria Pub, the assailant who was driving pulled out a pistol and pointed it at her while ordering her to keep quiet and to give them money. She was seated in the front passenger seat and was able to recognise the item pointed at her as a pistol.

Although the weapon mentioned was not recovered and hence was not 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. P.W.2 Carol N. Mugerwa testified that there was light inside the car emitted from the dashboard and from the headlights of oncoming vehicles. By that light she was able to see the object held by the assailant driving the car to have been a pistol. She was seated in the front passenger seat, only a foot or two away from the assailant. She was firm even during her cross-examination that what she was a pistol. This description suffices in the circumstances. 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 the assailants had a deadly weapon in their possession during the robbery.

Lastly, the prosecution had to prove that each of 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. Both accused denied having participated in the commission of the crime. They raised defences of alibi. An accused who puts up such a defence has no duty to prove it. The burden lies on the prosecution to disprove it by 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).

As regards A3 Waguti Emmanuel alias Musomesa, none of the prosecution witnesses has been able to link him to the scene of crime or as an accessory to the crime. P.W.4 D/AIP Kirunda Sula stated that he arrested A3 on 27th September, 2015 following the tracking of one of the phones stolen during the robbery, yet the court record indicates that A3 was charged on 27th March, 2015 and henceforth kept on remand. He was therefore in prison on the day P.W.4 claims to have arrested him. Since P.W.4 is the only witness implicating this accused and his testimony is inconsistent with that established fact, I find that the defence of this accused has not been disproved. He is accordingly found not guilty and is acquitted of the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. He should be set free forthwith unless he is being held in custody for some other lawful reason.

To disprove the defences raised by A1 Otim Simon Peter alias Opolot, the prosecution relies on the direct evidence of P.W.2 Carol N. Mugerwa who claimed to have seen and identified A1 Otim Simon Peter alias Opolot as the assailant who drove the vehicle and pointed a pistol at her. Where prosecution is based on the evidence of an identifying 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 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.

5 I have considered the circumstances that prevailed when P.W.2 Carol N. Mugerwa claims to have seen A1 Otim Simon Peter alias Opolot at the scene of crime. It was during the night at around 8.00 pm but there was light emanating from the dashboard lights and headlights of oncoming vehicles which aided her observation and identification of the accused. Although she had not known the accused before, under that condition of lighting, she came into close
10 proximity of the accused. She was seated in the front passenger seat, only a foot or two away from the assailant. The incident took a considerable period of time as she was driven from Kireka Market to a place near a Church in Naalya, a distance of approximately six kilometres, and this gave her ample time and opportunity to have an unimpeded look at the accused. That entire stretch of road is renowned for heavy traffic activity at that time of the day, when people
15 are returning home at the end of the working day. Constant vehicular activity must have provided almost constant light glaring into the interior of the car, from the headlights of cars on their way out of the city, yet the robber was driving in the opposite direction. Apart from the fact that she was in a state of fright, I have not found any significant unfavourable circumstances which could have negatively affected the ability of this witness to see and identify A1 Otim Simon Peter alias
20 Opolot. Her evidence is free from the possibility of mistake or error.

That evidence of identification is further corroborated by the circumstantial evidence of P.W.3 No. 24706 D/Sgt. Watsemwa Sarah two explained how tracking of the use of an HTC phone that was among the items stolen with the vehicle led them to Koboko, then to a one Rev. Fr. Mpoza,
25 then to a one Ibra who led them to Kyaliwajjala from where they arrested A1 Otim Simon Peter alias Opolot. During the arrest, A1 attempted to stab P.W.4 D/AIP Kirunda Sula and the flick knife he used in that attempt was recovered and exhibited in court (exhibit P. Ex.6) together with other items like ATM Cards, an account number slip, PIN slip and ATM Card holder that were in the names of other persons who later it was confirmed had reported to the police, a case of car
30 theft during which they had lost those items. I find the peculiar and distinctive appearance of exhibit P. Ex.6 to be consistent with the background of A1 Otim Simon Peter alias Opolot. In his

defence, he stated that he is an EODT (explosive ordinance detection technician) expert, and has previously worked in Iraq and Afghanistan in 2007 - 2012, contracted by the US forces. He trained in Israel and the US at the sponsorship of Babylon Gates.

5 Both P.W.3 No. 24706 D/Sgt. Watsemwa Sarah and P.W.4 D/AIP Kirunda Sula explained further as to how the tracking of call data in respect of one of the phones associated with the theft during which the ATM Cards, an account number slip, PIN slip and ATM Card holder found in possession of A1 Otim Simon Peter alias Opolot, led them to a used phone dealer on Mutaasa Kafero Building in Kampala. There they were given telephone number 0773-627819 to which
10 that phone dealer had been instructed to send the balance of the purchase price of one of the phones sold to him. That phone number was traced to A1 Otim Simon Peter alias Opolot under the pseudonym of Galiwango. Although the accused attributed these allegations to a one Kimalya, I have not found any evidence to suggest that he wielded such influence over all the police officers and the complainants involved in this case as to involve them in his personal
15 vendetta against the accused. This claim is not credible. I accordingly find that the evidence against A1 Otim Simon Peter alias Opolot has disproved his defence and placed him squarely at the scene of the crime as one of the assailants who robbed the items mentioned in the indictment. A1 Otim Simon Peter alias Opolot is accordingly found guilty and convicted for the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*.

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Dated at Kampala this 8th day of February, 2019

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Stephen Mubiru
Judge,
8th February, 2019.

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted for the offence of Aggravated Robbery c/s 285 and 286 (2) of
30 *The Penal Code Act*, the learned Principal State Attorney has submitted that; the offence carries the death penalty. He has been on remand since 27th March 2015. Robberies are rampant. She prayed for a custodial sentence against the convict.

In his submissions in mitigation of sentence, the learned defence counsel has argued that; the convict has been on remand since 2015 and that period should be deducted. During the course of the robbery there was no physical violence applied to the victim. He is also a first time offender. He is also a person with a large family which is dependent on him. He deserves a sentence of
5 eight years so that he can serve and come back. In his *allocutus*, the convict has stated that he has been disciplined in prison. He has four children and a wife and since his arrest they lost a bread winner. They have been suffering all this time. He prayed that the court finds mercy and gives him a lenient sentence that can allow him to find his children and an age that may make him able to meet them for them to realise their future. He is an orphan without a brother or sister and he
10 has been feeding the family. They are sometimes going without food. He has suffered a lot of trauma while in prison. He prayed for a lenient sentence.

Under section 286 (2) of *The Penal Code Act*, the maximum punishment for the offence of Aggravated Robbery is death. According to paragraph 18, Part 6 of *The Constitution (Sentencing
15 Guidelines for Courts of Judicature) (Practice) Directions, 2013*, the court may only pass a sentence of death in exceptional circumstances in the “rarest of the rare” cases where the alternative of imprisonment for life or other custodial sentence is demonstrably inadequate. By implication, life is the norm and death is the exception. However, "rarest of rare" is often misunderstood to mean the rarity of the case. To the contrary, the court is supposed to look at the
20 case holistically, understand the factors that led to the crime, the circumstances of the convict and the victim, among other things, before pronouncing the sentence. The death sentence is supposed to be imposed when the alternative option is unquestionably foreclosed. It a punishment of last resort when, alternative punishment of a long period of imprisonment or life imprisonment will be futile and serves no purpose. This case does not fit the category of "rarest
25 of rare" and for that reason I have found that the death penalty inappropriate. Therefore that sentence has not been imposed.

Where the death penalty is not imposed, the starting point in the determination of a custodial sentence for offences of Aggravated Robbery has been prescribed by Item 4 of Part I (under
30 Sentencing ranges - Sentencing range in capital offences) of the Third Schedule of *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* as 35

years' imprisonment. 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 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.

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I have considered sentences passed before in similar circumstances. For example in *Kusemererwa and Another v. Uganda, C.A. Criminal Appeal No. 83 of 2010*, a sentence of 20 years' imprisonment was upheld in respect of convicts who had used guns during the commission of the offence, but had not hurt the victims. In *Naturinda Tamson v. Uganda C.A. Criminal Appeal No. 13 of 2011*, a sentence of 16 years imprisonment was imposed on a 29 year old convict for a similar offence. 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 thirty (30) years' imprisonment.

20 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;- he is a first offender with no previous conviction or no relevant or recent conviction; and 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 thirty (30) years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty five (25) years.

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. The convict was remanded on 27th March, 2015 and hence has been on remand for three (3) years and eleven (11) months. I hereby take into account and set off the period the convict has already spent on remand. I therefore sentence A1 Otim Simon Peter alias
5 Opolot to a term of imprisonment of twenty one (21) years and one (1) month 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
10 court to order the person convicted to pay such sum by way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person. There was evidence that property was lost. I order that the convict is to compensate P.W.1 Tumuhimbise Julius in the sum of shs. 10,000,000/= and P.W.2 Carol N. Mugerwa in the sum of shs. 5,000,000/=

15 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 8th day of February, 2019

20 Stephen Mubiru
Judge,
8th February, 2019.