

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL CASE No. 0141 OF 2016

UGANDA **PROSECUTOR**

VERSUS

1. OMIRAMBE JIMMY }
2. OYENY MANUEL } **ACCUSED**
3. OMIRAMBE DAVID }

Before Hon. Justice Stephen Mubiru

JUDGMENT

The accused are jointly indicted with two counts of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act*. It is alleged that the three accused and others still at large on the 15th August 2015 at Angaba Lower village in Zombo District robbed; in Count I, Ocan Wilson of six goats and one pig valued at shs. 600,000/=; and in count 2, Warom Charles of a pair of shoes and T-shirt worth shs. 38,000/=, and in both cases at, immediately before or immediately after the said robbery threatened to use a deadly weapons, to wit, bows and arrows on each of the named victims. The indictment also contains seven counts of Arson c/s 237 (a) of *The Penal Code Act*. It is alleged that the three accused and others still at large on the 15th August 2015 at Angaba Lower village in Zombo District, they willingly and unlawfully set fire; to the house of Okumu Malisters in count 3, the house of Jawiambe Moses in count 4, the house of Obemu Albert in count 5, the house of Otwing-Cwinyi Albert in count 6, the house of Ocan Wilson in count 7, the house of Afoyocan Maurine in count 8, and the house of Warom Charles in count 9.

The facts as narrated by the prosecution witnesses are briefly that on 15th August 2015 at around 11.30 am, while P.W2 Ocan Wilson, PW3 Afworoth Maureen, PW4 Warom Charles and PW5 Jawiambe Morris were in the garden about 60 – 70 meters from their homes, they were attacked by a group of around thirty people, who included the accused, blowing horns making a lot of noise and armed with bows, arrows and pangas. The group was led by a one Naal. They insulted the witnesses, set fire to PW2’s house, the houses of Obengu, Otwing-Cwinyi, Jawiambe Moses

and many more people. They shot arrows at them and one of the arrows struck Warom Charles in the chest. P.W2 saw A2 unfetter his goats and a pig and take them away. He saw A1 attack PW3 with a panga. On her part PW3 testified that when A1 approached her, he raised a panga and was about to cut her in the face when a man near him stopped him saying they should not attack women. Nevertheless A1 swung the panga aiming at her upper body and as she dodged it, the panga struck her on the lower abdomen inflicting a cut which left a scar that was visible to court when she testified. She managed to escape with her child and was later taken to Zombo General Hospital from where she received treatment. He came to know A1's name as Jimmy because his colleagues called his name during the attack. PW4 Warom Charles testified that it a one Naal who shot him with an arrow. They burnt houses starting with that of Onen, then Ocan's and continued to the rest. They picked his clothes, including a jacket, and took the clothes with them. A1, A2 and Naal were the ringleaders and the threesome were bare chest, unlike the rest of the group. PW5 Jawiambe Morris testified that he witnessed A1 cut PW3. A3 gathered clothes that had been put out to dry, threw them inside the house and set it on fire. The witnesses escaped from the scene and on return found that PW2's goats were missing. A total of about 22 houses were set on fire by the assailants. PW6 Obemu Albert testified that he learnt about the incident on his way home at around midday. By the time he arrived at the scene, he found that his house had been burnt down. All his property had been destroyed in the house.

In his defence, A1 denied the accusations. He was attending prayers that day and later passed time at the trading centre. He only learnt about the incident when he was arrested at around 5.00 pm. A one Angaba is the one who falsely accused them of having been involved in the fight. A2 on his part stated he was arrested at around 5.00 pm. He had spent part of the day in his garden burning charcoal. He was not involved in the alleged attack at all. A3 stated that at the time he was arrested, he had gone to his sister in law to see the land which had been given to her. In the course of asking for directions, he was arrested at around midday, being a stranger in the area.

In her final submissions, the learned State Attorney prosecuting the case Ms. Jamilar Faidha argued that all ingredients of the offence had been proved beyond reasonable doubt and the accused should be convicted as indicted. Regarding the counts of Aggravated Robbery, the prosecution witnesses adduced reliable evidence that property belonging to Ocan Wilson and Warom Charles had been stolen, that during the process violence was used in the form of injuries

inflicted on PW3 Afworoth Maureen, PW4 Warom Charles the arrows shot at P.W2 Ocan Wilson and PW5 Jawiambe Morris and the over 22 houses which were set on fire. All those witnesses saw the assailants armed with bows. Arrows and pangas all of which are deadly weapons and all three accused were properly identified by the witnesses since the offences were committed during day time and in close proximity of the witnesses. In respect of the counts of Arson, she argued that the same witnesses saw the accused set the houses on fire and they did so wilfully, unlawfully and maliciously.

In her final submissions, counsel for the accused on state brief Ms. Winfred Adukule argued that the prosecution had failed to prove the case against the accused beyond reasonable doubt and that therefore they should be acquitted. She argued that the evidence regarding theft of the property allegedly stolen was unsatisfactory as the witnesses did not see who took the livestock but only found it missing after the attack. Upon failure to prove theft of property, the issue of violence and possession of a deadly weapon become irrelevant. No weapons were produced in evidence and none of the accused was properly placed at the scene of crime by the evidence of identification. All counts of Arson were not proved since there was no evidence that any of the houses was unlawfully set on fire. Although she did not refute the evidence that the houses were burnt, he contended that none of the witnesses had seen any of the accused set the houses on fire. She prayed that the case be dismissed.

In their joint opinion, the assessors advised court to convict the accused on grounds that all elements of the offence of Aggravated Robbery and Arson had been proved. They advised the court to reject the defences of the accused since they acted in common intention of recovering their land.

In this case, the prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (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 charged and the prosecution has the onus to prove the ingredients of each count 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 its best creates

a mere fanciful possibility but not any probability that the accused are innocent, (see *Miller Vs 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 in respect of counts one and two, beyond reasonable doubt;

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

The first ingredient requires proof of the fact that property belonging to the two complainants in counts one and two was stolen. For this ingredient, there must be proof of what amounts in law to an asportation (that is carrying away) of the property of the two complainants without their consent. The property stolen in this case is alleged to be in Count 1, six goats and one pig valued at shs. 600,000/= the property of Ocan Wilson and in count 2, a pair of shoes and T-shirt worth shs. 38,000/= the property of Warom Charles. This was corroborated by PW5 Jawiambe Morris who stated that when they returned to the home after escaping from their attackers, they found his neighbour's goats were missing. PW2 Ocan Wilson testified that his six goats and one pig, which had been grazing a short distance from his house, were untied by A2 and taken by the assailants. Although all the accused denied having stolen any items as alleged or at all and their counsel argued in her final submissions that there was no evidence of theft of these items, none of the witnesses who testified in respect of Count 1 was broken down in cross-examination regarding this aspect. I find their evidence reliable and that this ingredient of count 1 has been proved beyond reasonable doubt.

However, in respect of the second count, there is no evidence relating to the specific items alleged to have been stolen but rather a generalised statement that clothes belonging to PW4 Warom Charles were stolen. On his part PW4 Warom Charles, the other victim, stated that the assailants took his clothes, including his jacket, with them. He did not specifically mention the pair of shoes and T-shirt stated in the indictment. To pass the constitutional muster of a fair trial, the material averments of an indictment must allege lucidly and accurately, without necessarily itemising them, the essential elements of the offence charged. It need not exactly track the statutory language, provided that it alleges the essential elements of the offence charged. This requirement ensures that the indictment will (1) identify the offense charged; (2) protect the

accused from being twice put in jeopardy for the same offense; (3) enable the accused to prepare for trial; and (4) enable the court, on conviction, to pronounce a sentence befitting the crime and the offender. For those reasons, in respect of a property related offence, such as this, property that is the subject matter of the offence should be described with sufficient particularity so as to show it to be the subject of robbery and to provide adequate notice to the accused regarding the items he is alleged to have stolen. Sometimes though it may not be possible to describe certain items of property with precision such as where an indictment may allege that the accused took an unspecified amount of cash. Whichever way the property is specified, the prosecution is expected to prove theft of the specific items alleged to have been stolen and in some situations, vague generic references to property of a similar kind will not suffice.

That notwithstanding, the essence of the offense of Aggravated Robbery is not the taking of specific property, but rather a taking of property in possession of another by use or threat of force or violence and putting in fear the victim by the use of a deadly weapon. Therefore, although in the instant case the prosecution did not adduce evidence relating to the specific items of clothing mentioned in the indictment, but rather a generic evidence of clothes of PW4 Warom Charles, I find that the variance between the indictment and the proof presented during the trial is not fatal to this case. I do not see any prejudice likely to be caused to an accused alleged to have stolen shoes and a T-shirt of the victim against whom at trial evidence is adduced instead of multiple items of unspecified clothing of the victim having been stolen. The evidence adduced leaves no doubt in my mind that Warom Charles saw various items of his clothes being stolen and for that reason, in respect of count 2 this element has been proved beyond reasonable doubt.

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 court was presented with the oral testimony of PW2 Ocan Wilson who said the assailants shot arrows at them and set houses on fire. PW3 Afworoth Maureen testified that she was cut with a panga and showed a scar to court. PW1 Okello Ronald examined her on 22nd August 2015 and his report P.E.X. 1 confirmed existence of that injury. PW4 Warom Charles testified that it a one Naal shot him with an arrow. PW5 Jawiambe Morris said the

assailants shot arrows at them and set houses on fire. He also witnessed the attack on P.W3 and her baby. All the accused denied this and although their counsel refuted evidence relating to this element, I find that the prosecution has proved beyond reasonable doubt that immediately before, during or immediately after theft of the property mentioned in counts 1 and 2, violence was used against the victims of the two offences.

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 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. In this regard, the court was presented with the oral testimony of PW2 Ismael Haruna, PW3 Afworoth Maureen, PW4 Warom Charles and PW5 Jawiambe Morris, all of whom stated that the assailants were armed with bows, arrows and pangas. A panga was used to cut PW3 and was raised in a failed attempt to cut her baby. PW4 Warom Charles was shot him with an arrow. All the accused denied participation and by inference refuted this element. Their counsel contended that this element was not proved because none of the weapons mentioned was recovered and tendered in evidence. However, 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 of the instrument will suffice to enable court decide whether the weapon was lethal or not. Both instruments which were used to inflict harm on PW3 and PW4, a panga and arrow respectively, are by their very nature instruments adapted for shooting, stabbing or cutting. I therefore find that the prosecution has proved beyond reasonable doubt that immediately before, during or immediately after robbery of the property mentioned in counts 1 and 2, the assailants had deadly weapons in their possession. The last ingredient of participation of the accused persons is common to all counts preferred in the indictment and for avoidance of repetition I defer its consideration until evidence relating to all other elements of the rest of the offences have been evaluated.

In counts three to nine, the accused are jointly charged with the offence of Arson. Under section 327 (a) of *The Penal Code Act*, Arson is committed by any person who wilfully and unlawfully sets fire to any building or structure, whether completed or not. For the accused to be convicted

of Arson, the prosecution must prove each of the following essential ingredients in respect of counts three to nine, beyond reasonable doubt;

1. Setting fire to a building.
2. The fire is set unlawfully and wilfully.
3. The accused set the fire.

The first ingredient requires proof of the fact that there was a deliberate act of setting fire. It requires proof that the fire was not a mere inadvertence or accidental occurrence. It may also be proved by evidence establishing conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created. It may also be proved by evidence establishing that the risk of fire is one which would have been obvious to a reasonably prudent person, even if the particular accused gave no thought to the possibility of there being such a risk.

For example in the case of *Regina v Miller* [1983] 2 AC 161, [1983] 2 WLR 539, [1983] 1 All ER 978, the accused, a vagrant, fell asleep in an empty house. His lighted cigarette fell onto his mattress, and a fire started. Rather than put it out, he moved to another room. He was charged with arson. It was held by the House of Lords (Lord Diplock, Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Brightman) that an accused would be guilty even though he did not know he had started the fire. He was, in doing nothing about it, reckless as to what further damage would be caused. Conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence, will give rise to criminal liability.

Similarly in *Elliott v C* [1983] 1 WLR 939, [1983] 2 All ER 1005, a 14-year old girl of low intelligence entered a shed, poured white spirit on the floor and set it alight. The fire destroyed the shed after she left. The allegation was that she was reckless. It was held that if the risk is one which would have been obvious to a reasonably prudent person, once it has also been proved that the particular accused gave no thought to the possibility of there being such a risk, it is not a defence that because of limited intelligence or exhaustion she would not have appreciated the risk even if she had thought about it.

In the instant case, there is no evidence to suggest that the fire was a mere inadvertent or accidental occurrence but rather a deliberate act. PW4 testified that it was A1 who lit the fire. PW4 Warom Charles and PW5 Jawiambe gave an eyewitness account of how the houses were set on fire by the assailants, starting with that of Onen, then Ocan's as they continued to the rest. PW2 testified that his house, that of Obemu Albert, Otwing-Cwinyi Albert, Jawiambe and many other houses were burnt. PW5 testified that A3 gathered clothes that had been put out to dry, threw them inside the house and set it on fire. PW6 Obemu Albert too testified that his house was burnt down. Although in the seven counts it was alleged that houses belonging to Okumu Malisters in count 3, Jawiambe Moses in count 4, Obemu Albert in count 5, Otwing-Cwinyi Albert in count 6, Ocan Wilson in count 7, Afoyocan Maurine in count 8, and Warom Charles in count 9, there is no evidence before court in relation to the house of Okumu Malisters in count 3 and that of Afoyocan Maurine in count 8. All the accused denied this and although their counsel refuted evidence relating to this element, I find that the prosecution has proved beyond reasonable doubt that the houses mentioned in counts; 4, 5, 6, 7, and 9 were set on fire. It has not proved that the houses mentioned in counts 3 and 8 were set on fire.

The second ingredient requires proof that the fire was set unlawfully and wilfully. This means that there must be proof that the fire was set deliberately, without justifiable cause. The word *wilfully* is defined in the *Black's Law Dictionary* as '*voluntary and intentional, but not necessarily malicious*'. The word unlawful is defined in the same dictionary as '*violation of law, an illegality*'. Unlawful is also said to *include moral turpitude*. This is proved by evidence which establishes that the accused either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so.

In *Regina v G and R* [2003] 3 WLR 1060, [2004] 1 AC 1034, [2004] 1 Cr App R 21, [2003] 4 All ER 765 (HL) the appellants, young boys, had set fire to paper and thrown the lit papers into a wheelie bin, expecting the fire to go out. In fact substantial damage was caused. The House of Lords was asked whether a conviction was proper under the section where the accused had given no thought to a risk of damage, but because of his characteristics he might not have seen the danger if he had thought about it. It was held Lord Bingham of Cornhill that:

In any statutory definition of a crime, “malice” must, as we have already seen, be taken, not in its vague common law sense as “wickedness” in general, but as requiring an actual intention to do the particular kind of harm that in fact was done..... For it is essential to arson that the incendiary either should have intended the building to take fire, or, at least, should have recognised the probability of its taking fire and have been reckless as to whether or not it did so.

Recklessness was addressed in the case of *Commissioner of Police v Caldwell [1982] AC 341*, the accused got drunk and set fire to the hotel where he worked. Guests were present. He was indicted upon two counts of arson. He pleaded guilty to one count but contested the other, saying he was so drunk that the thought there might be people never crossed his mind. Lord Diplock held that;

Mens rea is, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the *actus reus* of the offence; it cannot be the mental state of some non-existent hypothetical person.....a person charged with an offence..... is reckless as to whether any such property would be destroyed or damaged if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.....It presupposes that if thought were given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognising the existence of the risk and nevertheless deciding to ignore it.

In the instant case, intent or knowledge that the assailants wanted destruction of the houses can be inferred from the fact that destruction of the houses was the net end of the act committed. The intention or knowledge that the assailants were likely to cause destruction of the building is to be gathered from the attending circumstances. When the first house was set on fire, it created an obvious risk that property would be destroyed or damaged and whoever did so, either did not give any thought to the possibility of there being any such risk or recognised that there was some risk involved and nonetheless went ahead to do it. The act was repeated in respect of the rest of the houses. Either way, I am satisfied that the prosecution has proved beyond reasonable doubt that fire was set unlawfully and wilfully to the houses mentioned in 4, 5, 6, 7, and 9.

The last ingredient that was required to be proved in respect of all the counts is that each of the accused participated in committing the offences with which they are indicted. This is achieved by adducing direct or circumstantial evidence, placing each of the accused at the scene of crime not as a mere spectator but active participant in the commission of the offences. The evidence implicating each of the accused must be considered separately considering that even though charged jointly, their criminal responsibility is individual.

In this regard, PW2 Ismael Haruna, PW3 Afworoth Maureen, PW4 Warom Charles and PW5 Jawiambe Morris, all claimed to have recognised the three accused. Although the events occurred during daytime, I caution myself regarding the reliability of evidence of visual identification made by each of the witnesses. This is more importantly so considering that each of the accused has raised the defence of alibi which they are under no obligation to prove but rather the burden lies on the prosecution to disprove it (see *Uganda v. Bitarinsha John and another [1975] H.C.B.140* and *Sekitoleko v. Uganda [1967] E.A 531*).

It is trite law that to sustain a conviction, a court may rely on identification evidence given by an eye witness to the commission of an offence. However, it is necessary, especially where the identification is made under difficult conditions, 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. Before convicting solely on strength of identification evidence, the Court ought to warn itself of the need for caution, because a mistaken eye witness can be convincing, and so can several such eye witnesses.

I have considered the chaotic and violent nature of the attack and whether this could have hampered correct identification. I have nevertheless found that PW2 knew A1 and A2 before the incident. Although he had never spoken to them, he used to see them at the trading centre where he ordinarily shopped. PW3 saw A1 for the first time on the day of the attack and had never seen the other two accused before. She however saw A1 in close proximity as he raised a panga to cut her. PW5 saw A3 gather his clothes that had been put out to dry, throw them inside the house and set it on fire. PW4 knew only A1 and A2 before the attack. They used to pass time together

during their free time. In *Kizza Francis v. Uganda [1983] HCB 12*, when evaluating evidence of identification, the court found that because the accused was known to the complainant for long time and offence was committed in bright moonlight in open space, the circumstances were favourable to correct identification. In the instant case, the offences were committed in broad day light, out in the open, in close proximity of the identifying witnesses who had ample opportunity to see the accused since it was a prolonged attack and some of the witnesses knew the accused before that date. I am satisfied that the evidence of identification is free from the possibility of error. The evidence places each of the accused squarely at the scene of crime as an active participant in one or another of the counts.

Although the evidence does not connect each and every accused to each and every count, I have considered the doctrine of common intention provided for by section 20 of *The Penal Code Act*. Under that section, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence. The accused before me set out in conjunction with one another to unlawfully and forcefully evict the victims from land they claimed to be theirs in respect of which they saw the victims as trespassers. That houses situated on the land would be set on fire and property of the victims stolen was a probable and foreseeable consequence of the prosecution of that unlawful purpose. Consequently, each of them is deemed to have committed the offences proved by evidence to have been committed during that unlawful transaction.

In the final result I find all accused not guilty of the offence of Arson c/s 237 (a) of *The Penal Code Act* in respect of counts 3 and 8 and they are accordingly acquitted in respect of those counts.

I however find each of the accused guilty in respect of counts 1 and 2 and each of the accused is accordingly convicted of the offence of Aggravated Robbery c/s 285 and 286 (2) of *The Penal Code Act* in respect of counts 1 and 2.

I also find each of the accused guilty in respect of counts 4, 5, 6, 7, and 9 and each of the accused is accordingly convicted of the offence of Arson c/s 237 (a) of *The Penal Code Act* in respect of counts 4, 5, 6, 7, and 9.

Dated at Arua this 16th day of January, 2017.

.....
Stephen Mubiru,
Judge.

24th January 2017

2.28 pm

Attendance

Ms. Ngayiyo Sharon, Court Clerk.

Ms. Jamilar Faidha, State Attorney, for the prosecution.

Mr. Richard Onencan for the convicts on State Brief, absent.

The three convicts are present in Court.

SENTENCE AND REASONS FOR SENTENCE

Upon the accused being convicted of the offence of Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*, in respect of counts 1 and 2 although she had no previous record of conviction against any of the three convicts the learned State Attorney prosecuting the case, Ms. Jamilar Faidha prayed for the deterrent sentences, on grounds that; the maximum penalty for the offence is death, the offence is rampant in the region and there is need to deter other potential offenders. The victims of the offences lost valuable property. Some of them sustained injuries which inflicted a lot of pain and loss of time while nursing the wounds. He also prayed that the convict be ordered to compensate the victims, the value of the property stolen.

As regards the convictions for the offence of Arson c/s 237 (a) of *The Penal Code Act* in respect of counts 4, 5, 6, 7, and 9, she submitted that the convicts adopted unlawful means of settling a land dispute. As a result of the offences, the victims were left homeless. They were traumatized when they saw their houses and property go up in flames. The convicts deserve a deterrent sentence to serve as a lesson to the public not to take the law into their own hands.

In response, the learned defence counsel Mr. Richard Onencan prayed for lenient sentences for all three convicts on grounds that; although convicted of serious offences, they are all first

offenders and remorseful. They all have wives and children to look after. They have been on remand since 21st August 2015. The offence of Aggravated Robbery is not rampant within the region as manifested by the fact that there are only a couple or so of such offence on the current Criminal Session Cause List. A1 is 34 years old, A2 is 49 years old while A3 is 27 years old. Both A1 and A3 are relatively young persons, capable of reform. A2 is very weak and suffers from a swollen back and knee. A3 suffers from a chest pain. They all deserve lenience. In their respective *allocutus*, A1 prayed for a lenient sentence while A2 and A3 maintained their innocence.

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 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 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 a deadly weapon was used, the offences involved some pre-meditation or planning, and there was gratuitous degradation of both victims which included cutting PW3 with a panga and shooting PW4 with an arrow. These were grave and life threatening, in the sense that death a very likely consequence of the convict's actions. 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.

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.

I have considered the fact that a deadly weapon was used, the offence involved some level of pre-meditation or planning, and there was gratuitous degradation of both victims which included gratuitous degradation of both victims which included cutting PW3 with a panga and shooting PW4 with an arrow. These circumstances are sufficiently grave to warrant a deterrent custodial sentence. It is for those reasons that I have considered a starting point of thirty five years' imprisonment.

The seriousness of this offence is mitigated by a number of factors; the fact that all the convicts are first offenders, two of whom A1 and A3 are relatively young persons, at the age of 34 years, and 27 years respectively, still capable of reforming and becoming useful members of society. They all have children and families to look after. The severity of the sentence they deserve has been tempered by those mitigating factors and is reduced from the period of thirty five years, proposed after taking into account the aggravating factors, now to a term of imprisonment of twenty nine years.

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 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.

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 mathematical deduction by way of set-off. From the earlier proposed term of twenty nine years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convicts,

the convicts having been charged on 21st August 2015 and kept in custody since then, I hereby take into account and set off one year and six months as the period the convicts have already spent on remand. I therefore sentence the accused to a term of imprisonment of twenty eight (28) years and six (6) months, in respect of count 1 and to a term of imprisonment of twenty eight (28) years and six (6) months, in respect of count 2.

It is mandatory under section 286 (4) of the Penal Code Act, where a person is convicted of Aggravated Robbery c/s 285 and 286 (2), unless the offender is sentenced to death, for the court to order the person convicted to pay such sum by way of compensation to any person to the prejudice of whom the robbery was committed, as in the opinion of the court is just having regard to the injury or loss suffered by such person. Although there was evidence that PW4 lost various items of clothing, their value was not established in evidence. I am therefore unable to order any compensation in that regard. I was as well not provided with evidence on basis of which to order compensation for the injuries suffered by both PW3 and PW4, so I do not make any order of compensation in that regard. The evidence led during the trial sufficiently established that PW2 Ocan Wilson lost six goats and one pig valued at Shs. 600,000/=. I find this amount to be a reasonable assessment. None of the convicts challenged this evidence and I do not have any reason to doubt these values. PW2 Ocan Wilson is therefore entitled to compensation of shs. 600,000/= as the value of the livestock stolen from him.

As regards the offence of Arson, *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013* do not provide any guide. However, in *Musiita Moses v. Uganda, H.C. Criminal Appeal No.55 of 2014*, the court having considered that Arson is an offence that carries a maximum sentence of life imprisonment and should not be taken lightly, upheld a sentence of four years' imprisonment in respect of a herdsman found guilty of setting one hut on fire.

In the instant case, the convicts set multiple houses on fire for which reason they were convicted in respect of counts 4, 5, 6, 7, and 9. Having considered both the aggravating and mitigating factors already adverted to above, I consider a sentence of five (5) years' imprisonment to be appropriate punishment. Each of the accused is sentenced to a sentence of five (5) years' imprisonment in respect of counts 4, 5, 6, 7, and 9

In the final result, for the avoidance of doubt, I sentence the convicts to the following terms of imprisonment;

Count 1: Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*;

- A1. Omirambe Jimmy twenty eight (28) years and six (6) months
- A2. Oyeny Manuel twenty eight (28) years and six (6) months
- A3. Omirambe David twenty eight (28) years and six (6) months

Count 2: Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*;

- A1. Omirambe Jimmy twenty eight (28) years and six (6) months
- A2. Oyeny Manuel twenty eight (28) years and six (6) months
- A3. Omirambe David twenty eight (28) years and six (6) months

Count 4: Arson c/s 237 (a) of *The Penal Code Act*;

- A1. Omirambe Jimmy five (5) years
- A2. Oyeny Manuel five (5) years
- A3. Omirambe David five (5) years

Count 5: Arson c/s 237 (a) of *The Penal Code Act*;

- A1. Omirambe Jimmy five (5) years
- A2. Oyeny Manuel five (5) years
- A3. Omirambe David five (5) years

Count 6: Arson c/s 237 (a) of *The Penal Code Act*;

- A1. Omirambe Jimmy five (5) years
- A2. Oyeny Manuel five (5) years
- A3. Omirambe David five (5) years

Count 7: Arson c/s 237 (a) of *The Penal Code Act*;

- A1. Omirambe Jimmy five (5) years
- A2. Oyeny Manuel five (5) years

A3. Omirambe David five (5) years

Count 9: Arson c/s 237 (a) of *The Penal Code Act*;

A1. Omirambe Jimmy five (5) years

A2. Oyeny Manuel five (5) years

A3. Omirambe David five (5) years

All the sentences in respect of counts 1, 2, 4, 5, 6, 7, and 9 listed above are to run concurrently. Each of the convict is to compensate PW2 Ocan Wilson in the sum of Shs. 200,000/= within a period of three (3) months from the date of this judgment in default whereof any of the defaulting convicts is to serve an additional sentence of one year's imprisonment.

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

Dated at Arua this 24th day of January, 2017.

.....
Stephen Mubiru
Judge.