

UGANDA / JUDGMENT

Uganda v Ocaya (Criminal Case No. 0048 of 2014) [2017] UGHCCRD 9 (10 January 2017)

[2017] UGHCCRD 9

COURT

HC: Criminal Division (Uganda)

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Criminal Case No. 0048 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL CASE No. 0048 OF 2014

UGANDA PROSECUTOR

VERSUS

OCAYA TERENCE ACCUSED

Before: Hon Justice Stephen Mubiru.

SENTENCE AND REASONS FOR SENTENCE

When this case came up on 15th December 2016, for plea taking at the beginning of the criminal session, the accused was indicted with two counts of Aggravated Robbery c/s 285 and 286 (2) of The *Penal Code Act*. In the first count, it was alleged that the accused, together with others still at large, on 4th December 2012 at Kikaya village in Nebbi District, robbed one Mohammed Salim of cash Ss. 3,500,000/= (three million five hundred thousand shillings only) and two mobile phones and at or immediately before or after the said robbery, used a deadly weapon, to wit a gun, on the said Mohammed Salim. In the second count, it was alleged that the accused, together with others still at large, on 4th December 2012 at Kikaya village in Nebbi District, robbed one Afayo Caesar Collins of cash Ss. 350,000/= (three hundred and fifty thousand shillings only) and two mobile phones, ATM card, driving permit, a watch and ignition key and at or immediately before or after the said robbery, used a deadly weapon, to wit a gun, on the said Afayo Caesar Collins.

When the case was called, the learned State Attorney, Mr. Emmanuel Pirimba reported that he had successfully negotiated a plea bargain with the accused and his counsel. The court then allowed the State Attorney to introduce the plea agreement and obtained confirmation of this fact from defence counsel on state brief, Mr. Onencan Ronald. The court then went ahead to ascertain that the accused had full understanding of the implications of a plea agreement and its consequences, the voluntariness of the accused's consent to the bargain and appreciation of its implication in terms of waiver of the constitutional rights specified in the first section of the plea agreement. The Court being satisfied that there was a factual basis for the plea, and having made the finding that the accused made a knowing, voluntary, and intelligent plea bargain, and after he had executed a confirmation of the agreement, went ahead to receive the agreement to form part of the record. The two counts were then read and explained to him whereupon he pleaded guilty to each of the counts.

The court then invited the learned State Attorney to narrate the factual basis for the guilty plea, whereupon he narrated the following facts; on 4th December 2012, the two complainants left Arua Town aboard motor vehicle Registration Number UAQ 669 M, a Toyota Corolla, on their way to Nebbi to supply drugs. At the border between Panyimur and Boro Parish, Onencan Alfred suddenly jumped out of the bush onto the road dressed in army uniform and fired six bullets, two on the ground and four directly at the complainants. The driver stopped whereupon the accused and others still at large ordered the occupants out of the car and ordered them to lie down. The accused together with his accomplices searched the complainants. They picked two mobile phones belonging to Mohammed and one phone belonging to Afayo, shs. 350,000/=, an ATM Card, an identity card, driving permit, watch and ignition key belonging to Afayo Ceaser. From Mohammed Salim they stole shs. 3,500,000/= and two mobile phones. The accused and his accomplices then ordered the complainants to drive away as they fled into the bush.

On 11th December 2015 information reached the Panyimur Army Detach indicating that Onencan Alfred and others were involved in a robbery. Onencan Alfred was arrested and he revealed that the accused now before court had participated in the robbery. The soldiers and army officers proceeded with Onencan Alfred and handed him over to the police Panyimur Police Station with instructions to have the accused arrested and recover the gun. Onencan Alfred led the police officers to the home of the accused from where they recovered the gun which had been kept at the home of the mother of the accused. They also recovered two magazines; one loaded with fifteen live rounds and the other twenty three live ammunitions. They also recovered two hand grenades, two plain army jackets and one army raincoat. All these were confirmed to belong to Onencan Alfred who was an army deserter. The exhibits were handed over to the military police. The two suspects were medically examined and found to be of sound mind and were charged accordingly. Police form 24A in respect of the accused together with the exhibit slip in respect of the items recovered from his mother's home, were tendered as part of the facts.

Upon ascertaining from the accused that the facts as stated were correct, he was convicted on his own plea of guilty for the offence of Aggravated Robbery c/s 285 and 286 (2) of the *Penal Code Act*, on both counts. In justification of the sentence of ten (10) years' imprisonment proposed in

the plea agreement in respect of each count and order of compensation of Shs. 3,500,000/=, the learned State Attorney adopted the aggravating factors outlined in the plea agreement which are that; - the offences are rampant in the region and attract a maximum penalty of death on conviction. A deadly weapon was used in the commission of the offences and the complainants survived death narrowly. The complainant lost valuable property at the hands of the accused and he deserves a deterrent sentence.

In his submissions in mitigation of sentence, the learned defence counsel adopted the mitigating factors outlined in the plea agreement which are that; - the accused is a disabled person as a result of a polio attack during childhood, he has readily pleaded guilty and has no previous conviction. He is a first offender and has a wife and was looking after twelve children. He is remorseful and apologetic for what he did. In his **allocutus**, the accused apologised for his actions, he asked the court for a lenient sentence, because he has twelve children, some of whom are orphaned children of his dead brother, to look after and he is disabled in one leg since childhood. He has been on remand for five years. The complainants were not available in court to make their victim impact statements.

The offences for which the accused was convicted are punishable by the maximum penalty of death as provided for under section 286 (2) of the **Penal Code Act**. However, this represents the maximum sentence which is usually reserved for the worst of the worst cases of Aggravated Robbery. I do not consider this within the category of the most extreme cases of Aggravated Robbery. I have considered the extremely grave circumstances specified in Regulation 31 of The **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** that would justify the imposition of the death penalty. The attack involved the use of a gun, he was part of a group or gang, the offence appears to have been committed as part of a premeditated, planned or concerted act, and the rampant nature of the offence in the area or community. Although death was a very likely immediate consequence of the offence, considering that shots were fired directly at the complainants, since there was no direct injury inflicted on any of the complainants, I have for that reason discounted the death sentence.

Where the death penalty is not imposed, the next option in terms of gravity of sentence is that of life imprisonment. Some of the aggravating factors prescribed by Regulation 31 of the Sentencing Guidelines mentioned above would justify the imposition of a sentence of life imprisonment. However, for reasons stated later in this sentencing order, I do not consider the sentence of life imprisonment to be appropriate in this case.

Although neither the death penalty nor a sentence of life imprisonment has been imposed, the circumstances in which the two offences were committed are sufficiently grave to warrant a deterrent custodial sentence. I have reviewed the proposed sentence of ten years' imprisonment in light of the **The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**. 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 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.

According to **Ninsiima v Uganda Crim. Appeal No. 180 of* 2010*, 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. A Judge can in some circumstances depart from the sentencing guidelines but is under a duty to explain reasons for doing so.

I have also reviewed current sentencing practices for offences of this nature. In this regard, I have considered the case of *Uganda v Ongodia, H. C. Crim. Sessions Case No. 21 of 2012* where the High Court sentenced a UPDF soldier convicted of aggravated robbery to 15 years' imprisonment. He was a first offender who admitted the offence on arrest, pleaded guilty on arraignment and had spent a period of 5 years on remand. In *Kusemererwa and Another v Uganda C. A. Crim. Appeal No. 83 of 2010*, the Court of Appeal substituted a sentence of 20 years' imprisonment that had been imposed upon each of the appellants with one of 13 years' imprisonment, on grounds that it was manifestly excessive. In light of the aggravating factors, I have adopted a starting point of thirty (30) years' imprisonment.

From this, the convict is entitled to a discount for having pleaded guilty. The practice of taking guilty pleas into consideration is a long standing convention which now has a near statutory footing by virtue of regulation 21 (k) of **The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013**. As a general principle (rather than a matter of law though) an offender who pleads guilty may expect some credit in the form of a discount in sentence. The requirement in the guidelines for considering a plea of guilty as a mitigating factor is a mere guide and does not confer a statutory right to a discount which, for all intents and purposes, remains a matter for the court's discretion. However, where a judge takes a plea of guilty into account, it is important that he or she says he or she has done so (see **R v Fearon [1996] 2 Cr. App. R (S) 25 CA**). In this case therefore I have taken into account the fact that the convict readily pleaded guilty, as one of the factors mitigating his sentence.

The sentencing guidelines leave discretion to the Judge to determine the degree to which a sentence will be discounted by a plea of guilty. As a general, though not inflexible, rule, a reduction of one third has been held to be an appropriate discount (see: **R v Buffrey (1993) 14 Cr App R (S) 511**). Similarly in **R v Buffrey 14 Cr. App. R (S) 511**). The Court of Appeal in England indicated that while there was no absolute rule as to what the discount should be, as general guidance the Court believed that something of the order of one-third would be an appropriate discount. In light of the convict's plea of guilty, and persuaded by the English practice, because the convict before me pleaded guilty, I propose at this point to reduce the sentence by one third from the starting point of thirty years to a period of twenty years' imprisonment.

The seriousness of this offence is mitigated by a number of factors. The mitigating factors as provided by Regulation 32 of the Sentencing Guidelines which are relevant to the instant case are; the convict appears to have played 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, there was no injury or harm occasioned on both victims of the offences, he is remorseful and publicly expressed it in court, he physically disabled in one leg and has considerable family responsibilities. The severity of the sentence he deserves for those reasons

has been tempered and is reduced further from the period of twenty years' imprisonment, proposed after taking into account his plea of guilty, now to a term of imprisonment of fifteen years' imprisonment on each count.

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 19 (nineteen) years' imprisonment arrived at after consideration of the mitigating factors in favour of the convict, he having been charged on 17th December 2012 and has been in custody since then, I hereby take into account and set off the four years as the period the accused has already spent on remand.

Having considered the sentencing guidelines and the current sentencing practice in relation to offences of this nature, and the time he has already spent on remand, I would have imposed a sentence of 11 (eleven) years' imprisonment. Considering the disparity of only one year between the sentence I would have imposed and that proposed in the plea agreement, I hereby accept the submitted plea agreement entered into by the accused, his counsel, and the State Attorney and in accordance thereto, sentence the accused to ten (10) years' imprisonment, in respect of Count One. I further sentence the convict to serve ten (10) years' imprisonment, in respect of Count Two. Both sentences are to run concurrently.

Section 286 (4) of the Penal Code Act, enjoins the court to make an order of compensation provided that before making such an order, there must be evidence before Court as to the loss suffered by the person to whom the compensation is to be paid. In this case, the convict has admitted having robbed Shs. 3,500,000/= from Mohammed Salim, which has never been recovered. The accused in addition is therefore to compensate the complainant Mohammed Salim, in the amount of Shs. 3,500,000/=. Having been convicted and sentenced on his own plea of guilty, the convict is advised that he has a right of appeal against the legality and severity of this sentence, within a period of fourteen days.

Dated at Arua this 10th day of January, 2017.

Stephen Mubiru, Judge.

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