

5

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDENT AT KABALE**

**HCT-11-CRIMINAL APPEAL 0004 OF 2019**

**(Arising Criminal case KAB No. AA-0667 of 2015)**

**(Arising from Police CRB No. 1647 of 2015)**

10 **MASANYU ANDREW:..... APPLICANT**

**VERSUS**

**UGANDA:..... RESPONDENT**

**BEFORE: HON. JUSTICE SAMUEL EMOKOR**

15

**JUDGMENT**

This Appeal arises from the Judgment of the Magistrate Grade one delivered on the 02/07/2019 at Kabale Chief Magistrates Court whereby the appellant was convicted of the offence of Criminal trespass contrary to **Section 302** and malicious damage to property contrary to **Section 331(1)** of the **Penal Code Act**. The convict was  
20 sentenced to pay a fine of UgX 500,000/= on both counts.

The background of this Appeal is that the Appellant and the Complainant Mugisha Samuel are neighbours and their houses are adjacent to each other and the two share a wall with a shade that was destroyed by the Appellant on the 02/06/2015.

The Appellant was arrested and charged with the offence of Criminal trespass  
25 contrary to **Section 302 PCA** and Malicious Damage to property contrary to **Section 33(1) PCA**.

5 Aggrieved by the decision of the trial Magistrate the Appellant appealed to this Court on the following grounds:

- 1) **The learned trial Magistrate erred in law and fact when he held he changed (sic) the complainant's complaint of blocking the ventilator to damaging the shelter.**
- 10 2) **The learned trial Magistrate erred in law and fact when he failed to evaluate the ingredients of the offence of Criminal trespass and malicious damage hence occasioning an injustice on the Appellant.**
- 15 3) **The learned trial Magistrate erred in law and fact when he convicted the Appellant of the offence of malicious damage to property yet no property of the complainant had been damaged and totally ignored the Appellants Statutory defence of claim of right to property.**
- 4) **The learned trial Magistrate erred in law and fact when he sentenced the Appellant to a fine of UgX 500,000/= which fine was unreasonable and uncalled for in the circumstances of the case.**

20 The Appellant prays for the quashing of the conviction and sentence and setting aside of the Judgment of the lower Court.

The Appellant represented by Messrs Bikangiso & Co. Advocates filed written submissions while the Respondent despite being given ample time did not file a reply to the same.

25 **Grounds one:**

**The learned trial Magistrate erred in fact and law when he held he changed (sic) the complainant's complaint of blocking the ventilator to damaging the shelter.**

5 It is the submission of the Appellant’s Counsel that the complainant’s testimony did not include damage to his shelter and that the trial Magistrate only did this to support the charge of malicious damage which did not have any ground/base to stand. It is the contention of the Appellant’s Counsel that the trial Magistrate left the complainant’s complaint that took him to Court to wit “the Accused changed  
10 the shape of his original shade and the act blocked the fresh air and light that was entering his room through the ventilator”

**Ground Two:**

**The learned trial Magistrate erred in law and fact when he failed to evaluate the ingredients of the offence of Criminal trespass and malicious damage  
15 hence occasioning an injustice on the Appellant.**

On this ground Counsel for the Appellant submits that Court relied on the testimony of PW1 and PW5 which were to the effect that PW1 Samuel Mugisha bought 2 rooms from PW5 and this had nothing to do with the case.

It is the contention of the Appellant’s Counsel that the two testimonies never  
20 proved that Mugisha Samuel was in possession of the said shelter which the Accused reconstructed and that even PW5 never said that the said shade/shelter formed part of the rooms he sold to PW1 Samuel Mugisha.

Counsel further submits that according to the testimony of PW1 there is no property of PW1 that was entered upon by the Accused and that the complainant  
25 complained about the Accused building a shade that blocked light and fresh air from entering through the ventilator.

Counsel then poses a rhetorical question on whether fresh air and light is the property that the complainant was in possession of, Counsel also contends that it is clear that the shade belonged to the Appellant and that the old one having burnt,

5 the Appellant had all rights to reconstruct another one and that the complainant admitted that the shelter was not part of what he was sold and that he found it there. So the element of intimidation or annoying does not arise.

**Ground 3.**

10 **The learned trial Magistrate erred in law and fact it when he convicted the Appellant of the offence of malicious damage to property yet no property of the complainant had been damaged and totally ignored the Appellants statutory defence of claim of right to property.**

15 On this ground Counsel for the Appellant relies on **Section 7** of the **Penal Code Act** submitting that the Appellant was not criminally responsible since he pleaded a claim of right to the property.

**Ground 4:**

The learned trial Magistrate erred in law and fact when he sentenced the Appellant to a fine of UgX 500,000/= which fine was unreasonable and uncalled for in the circumstances of the case.

20 Counsel contends that since there was no property of the complainant that was damaged then the fine of UgX 500,000/= against the Appellant was unreasonable and uncalled for. Counsel prays that this Court upholds the Appeal, quashes the lower Court Judgment and its order of conviction and sentence and also orders refund of the UgX 500,000/= paid to the Appellant.

25 **Consideration:**

The duty of this Court as the first appellate Court is to review the evidence of the case to reconsider the materials before the trial Court and to make up its own

5 mind not disregarding the Judgment appealed from but carefully weighing and considering it.

**(See Kifamunte Henry versus Uganda SCCA No. 0010 of 1997).**

The Appellant before the trial Court was charged with malicious damage to property and this specifically was the unlawful destruction of a temporary shelter.

10 I have studied the lower Court record and will for emphasis reproduce the relevant provisions of the same. The complainant in this case **Mugisha Samuel (PW1)** testified that:

15 *“I know the accused person he is my neighbor. He is called Masanyu Andrew Mutuza, he demolished the shade and reconstructed then it blocked my ventilator such that I would not access light and fresh air to my room...”*

The complainant under cross-examination stated:

*“The case is blocking ventilator (sic) and threatening me but this was before this case”*

20 It would appear that the issue of the blocked ventilator was more of the central issue in this matter than the destruction of the shade. **PW2 Hamudu Mushi** testified as follows:

*“I went to the scene and confirmed that the accused person was blocking the ventilator. He was constructing a new shade”*

While **Kisigwa David (PW4)** in his opening testimony stated that:

25 *“The case is blocking the ventilator of the complainant”*

Evidence was also given by Biziaarenye Shafik (PW5) who sold the property to the complainant and he testified thus:

5        *“I received a phone call from the complainant telling me that the accused damaged the ventilators of the rooms the complainant bought from me by constructing a shade and the complainant could not access fresh air. I travelled and confirmed the same”*

10        I would agree with the submissions of the Appellant’s Counsel that the thrust of the complainant’s testimony and that of his witnesses would appear to be geared more to words the consequences of the newly constructed shelter than the fact that the previous shelter had been destroyed by the Appellant.

15        The trial Magistrate in his Judgment did not make reference to this central issue that the complainant and his witnesses repeatedly had drawn to the attention of Court but rather he approached his decision from the view point that the complainant was without any doubt complaining about the destruction of his shade whereas not.

The first ground therefore succeeds.

**Ground two:**

20        The ingredients of Criminal trespass contrary to **Section 302 penal Code Act** are essentially:

- i)        Possession of the property in issue by the complainant.
- ii)       Entry into the property by the accused.
- iii)      An intent to intimidate or annoy or commit a crime or offence.

25        The complainant according to the Court record in his examination in chief states that the shade is behind the wall of the Appellant and in front of the Appellant’s wall.

He also states that at the time of purchase of the lockups by himself and the Appellant the shade was not declared particularly as his nor that of the Appellant.

5 I have perused the sale agreement in Annexure A tendered to Court by the complainant and the same is indeed silent on the issue of the shade. The complainant in cross-examination admits that the shade was not part of what was sold to him.

The complainant goes ahead to describe the shade as no man's land between them.

10 The trial Magistrate interestingly in his Judgment drawing from the testimony of the complainant in PW1 makes a finding that the complainant owns the property/house tress passed upon by the Appellant and relies on the purchase agreement which was tendered in evidence and marked as Annexure A" and that this was corroborated by the evidence of PW5 who sold the house to the complainant.

15 The findings of the learned trial Magistrate are obviously not backed up by the record. As I have already indicated annexure "A" does not make reference to the shade it only deals with sale of the property whose description doesn't include the shade in issue. The issue of ownership of the property/house was also not in contention and the trial Magistrate erred in making a finding that the same was trespassed upon.

20 The evidence of PW5 who sold the house to the complainant relates to only sale of the 2 rooms which is not in issue with no mention of the shade. The trial Magistrate therefore erred in making a finding that the complainant was in possession of the property that was not in issue that being the house of the complainant.

25 The Prosecution having failed to prove that the complaint was in possession of property it therefore follows that the following two ingredients are rendered moot.

Ground two of the appeal therefore succeeds.

5 **Ground three.**

The Appellant in his testimony on record states that when he was making purchase of his property the shade was there and that the shade is being used by him as a display place for his stationary. He also testified that he could put the shade the way he wants because the land is his.

10 Counsel for the Appellant in his submissions is critical of trial Magistrate on the basis that he did not address the issue of claim of right raised by the Appellant. I have studied the Judgment of the trial Magistrate and would agree with the Appellant's Counsel that the trial Magistrate in his Judgment did not address the defence of claim of right put up by the Appellant which was central to his defence.

15 The defence of claim of right that the record clearly indicates as having been a plausible defence for the Appellant would have absolved him completely on the 2<sup>nd</sup> count of malicious destruction to property under **Section 7** of the **Penal Code Act** since there is sufficient evidence that tends to prove that the complainant lays no claim to the shade and that the same was exclusively being utilized by the Appellant.

20 I therefore make a finding that the trial Magistrate erred in not taking the defence of claim of right raised by the Appellant into consideration.

**Ground 4:**

I have studied the sentence passed out by the learned trial Magistrate and found that the same was passed omnibus with no attempt made to separate the sentences to  
25 address each count upon which the convictions were based.

I will for clarity reproduce verbatim the relevant parts below:

*“... in the premises the actions of the convict were uncalled for in the circumstances. I therefore sentence the convict to a fine of five hundred thousand (500,000/=) or in*

5 *default to one year imprisonment. The fine ordered will be turned into compensation and paid to the complainant two weeks from the date of this order...*”

The Court in **Mohammed Warsame versus R [196] 23 EACA** held that,

***“An omnibus sentence is unlawful. For every count on which a conviction is had, that there must be a separate sentence”***

10 The Court of Appeal also in **Adukule Natal versus Uganda CACA No. 0010 of 2000** held that:

***“It is trite law that every conviction must carry a sentence. The learned trial Judge should have pronounced a sentence on each of the counts. An omnibus sentence is illegal”***

15 The sentence of the trial Magistrate of a fine of UgX 500,000/= in default of 1 year imprisonment without clarifying on which counts the same was levied is therefore unlawful.

Ground four therefore succeeds.

20 In the final results I find the appeal to have merit. It is allowed and the conviction of the Appellant is squashed and the sentence set aside. An order is also issued for refund of the UgX 500,000/= paid by the Appellant.

Before me,

.....

**SAMUEL EMOKOR**

**JUDGE**

**14/09/2023**

25

**14/09/2023**

Appellant present

Rev Bikangiso for Appellant.

10 Ms. Julie Najjunju Senior State Attorney.

Clerk: Vianney

**Court:** Judgment delivered in open Court.

Before me,

15

.....  
**SAMUEL EMOKOR**  
**JUDGE**  
**14/09/2023**

20