THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 6/94

ORIG. JINJA MJ. 346/90

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

GASTAFASI MUSOKE ::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

This is an appeal by the DPP against the decision of Magistrate Grade I sitting at Jinja. The appeal is against the acquittal of the accused/respondent Gastafasi Mukose. It was apparently brought under the provisions of section 216(5) of the M.C.A, as amended by Decree 17/71 and section 331A of Criminal Procedure Act.

The accused/respondent was charged with 3 counts. Count one was for criminal trespass contrary to the provisions of section 286 of the renal Code Act; count two was for malicious damage to property c/s 316 of the Penal Code Act. The accused/ respondent pleaded not guilty and the hearing proceeded before magistrate Grade I who found him not guilty and acquitted him.

The DPP being aggrieved by that acquittal appealed against the acquittal and raised 7 grounds of appeal, which are as follows:—

(1) The learned trial magistrate erred in law and fact and misdirected himself and failed to evaluate the entire evidence on record which was overwhelming to support a conviction on all counts.

(2) The learned trial magistrate erred in law and fact and misdirected himself gravely in basing his decision on extraneous matter not supported by evidence before court.

(3) The learned trial magistrate erred and misdirected himself in law in holding that the merits of this case have mostly been civil

(4) The learned trial magistrate erred in law and fact in failing to avail the prosecution an opportunity to cross examine the defence witness no. I (DW1) despite the prosecution's express application to do so.
(5) The learned trial magistrate erred further and misdirected himself in law in holding that all the above offences presuppose respectively that there was an owner of the land trespassed on.
(6) The learned trial magistrate erred in law and contradicted himself gravely in holding that the final decision on this matter is from the RCII court of Wakitaka.
(7) The learned trial magistrate erred in law and fact and was manifestly biased in holding that there is no record on the court file to show that the civil matter had gone to the Chief Magistrate' s court and decided in the complainant' s favour.

The back ground of this case as may be gathered from the records of the lower court, is that sometime in 1960s the respondent was allowed by one Ephlan Luwangwa to stay in one of his rooms as a tenant but later on Luwangwa died and the widow (pW1) allowed the respondent to continue renting the same place. She also appointed him to be her agent in collecting rent from the other tenants but sometime in 1980s the respondent stopped accounting for the money which he was collecting and he declared that the deceased house were in fact his (respondent's) because he had bought then from the deceased before he died. The widow (Pw1) and her daughter (PW3) resisted that move and insisted that the property was theirs. The respondent then demolished one of the houses and carried away the iron sheets to his own place. The matter was reported to the RC1 court who did not resolve it to the satisfaction of the widow and her daughter, they went ahead to RC2 court where they also lost the case, they eventually abandoned the civil aspect of the tatter and reported the matter to the police who arrested the respondent and charged him with the three offences of criminal trespass, malicious damage to property and theft.

On the other hand the case for the respondent/accused in the lower court was that he bought a piece of land from the late Ephlan Luwangwa at 800/= and that by then there was no building at the site, he erected his own houses (2) but one of them was later on blown by wind and that is the one which he says the complainants were alleging was demolished. He removed the iron sheets and kept them. It was his case that the property upon which he is alleged to have trespassed, damaged and stolen was in fact his own property. The learned trial magistrate agreed with the accused and acquitted him hence this appeal.

Before, I proceed to deal with merits and demerits of this appeal there are 2 matters which require a brief consideration. Thu first is the inordinate delay which characterised this case. The accused first appeared in court on 19-6-1990 and by 19-7-1990 the case was ready for hearing but the hearing did not start until 21-10-1991 that is about one and a half years from the date the accuse appeared in court. The judgment was not delivered until 25-2-1994, which means the case took about 4 years to hear. This delay was uncalled for considering the fact that the prosecution was ready as far back as 19-7-1990.

The second matter which attracted my mind was the manner in which this case exchanged hands among the magistrates for unexplained reasons in most of the case it was first handled by Mrs. Kania who was set to hear it but later on when she realised that the firm of advocates where her husband works was handling the case she quite rightly in my view, withdrew from it and it was sent to the Chief Magistrate Mr. Oganga who handled it for quite some time and he passed it over to Mrs. Mwondha for unknown reasons but Mrs. Mwondha did not touch it at all instead it was rescheduled to Mr. Lubogo Magistrate Grade 1who heard the case. He also disappeared from the- scene for unexplained reasons. Thu case then found itself being handled by Miss. Kauma who heard only the case for defence after which she gave it up and gave the following reasons: “Much as I had wanted to complete this case, it is proving difficult for me because of the unnecessary adjournments. On several occasions the advocate is either unable to attend because he has to attend High Court or there is just failure of communication”. Judging from that explanation it would appear she gave up the case because she was fed up with the unnecessary adjournments. After that Mr. Muwata took over the case only for the purposes of submissions because Kauma gave up the case after the defence had closed its case so Mr. Muwata only received the submissions and wrote the judgment.

While it is lawful under section 142 of M.C.A. for one magistrate to take over a case from another it should not be as a matter of course for magistrates to keep on pushing part heard cases from one magistrate to another, everything should be done to avoid that situation happening and if it is necessary for a magistrate to take over from another magistrate reasons should be recorded. It should be pointed out here that under section 142 of the M.C.A. once a magistrate has taken over a case from another magistrate he or she should find out whether or not parties would like to recall any of the witnesses who had already testified before the previous magistrate which was not the case in the present case. Failure by the magistrates to comply with the requirement was however an irregularity which was not vital as it did not

materially prejudice the position of the accused/respondent who was represented by an eminent counsel in the court below.

I now turn to the real issues in this case. I start with the first ground of this appeal, Mr. Okwanga, who appeared on behalf of the appellant was of the view that there was over—whelming evidence to prove that the respondent had committed the offences of criminal trespass, malicious damage to property and theft. he argued that the evidence indicated that the accused was a tenant of the deceased and that although his initial presence on the land might have been lawful he became a trespasser the moment he refused to move out of the land, he also became a thief when he decided to remove the iron sheets and decided to carry then away and the act of removing the iron sheets itself amounted to malicious damage to property. It was his view that if the learned trial magistrate had properly directed his mind to the evidence on record he would have found the accused guilty and convicted him.

On his part Mr. Kania who appeared for the respondent both in the lower court and on appeal argued that the evidence as adduced in the looter court was not enough to rebut the accused's claim of right over the land. His argument was that the respondent/accused acquired good title to the land which he purchased and that prosecution had conceded that the RCII court had ruled that the land belonged to the respondent, he therefore contented that the trial magistrate was correct in holding that the RCII decision was final in absence of any appeal against it and that until that decision which was in favour of the respondent had been reversed by higher court the land remained the property of the respondent. Since the property belonged to the accused/respondent he could not be guilty of stealing his own property or maliciously damaging it nor could he commit trespass on his own land.

It is trite law that a court of 1st appellate jurisdiction has the powers to subject the evidence of the lower court to an exhaustive scrutiny and to evaluate such evidence then come to its own conclusion, bearing in mind that the trial court had the benefit of seeing the witnesses in the witness box and observing their demeanour a benefit which the appellate court does not enjoy: Williamson Diamond Ltd v Brown (1970) EA at page 2 and Dinkerrai Rankrishan Pandya v R (1957) EA at page 337-338. In the present case the appellant in the first ground in complaining very seriously that the trial court did not evaluate the evidence on record properly. I will try briefly to consider the evidence available and see whether this complaint is justified.

Prosecution called total of 4 witnesses in the manes of: Joy Kambedha (PW1) Stephen Augustus Basalirwa (PW2), Beatrice Nangobi (PW3) and D/sgt. Edward Etev (PW4). The first three witnesses testified that the accused was a mere tenant of the late Elphani Luwangwa but later on after the demise of that non the accused took over the house as his own, he demolished it, removed the iron shoots and converted them to his own use. The matter was reported to the RC courts who according to PWI they resolved the matter in her favour but the accused refused to leave the place but according to the evidence of PW3 the matter was in fact resolved by RC1 and RCII courts in favour of the accused/respondent. On his part the accused maintained that the house which he was alleged to have demolished was actually destroyed by the storm and it was his own house.

After considering the evidence as adduced by both sides in the lower court I am of the view, that the accused's claim of right under section 8 of the Penal Code Act was not destroyed by the available evidence, I quite agree with the view held by the learned trial magistrate and by the learnt counsel for the respondent that the courts of the RCI and RCII resolved that the accused owned the house which is the subject matter of this case and in absence of any appeal the Magistrate Grade I could not reverse that decision, to do so would amount to exercising jurisdiction not vested in him; it would have been worse still for him to say that the land did not belong to the accused which would have amounted to having 2 contradictory judgments, the one in the RC courts saying that the property belonged to the accused and then another one saying that the property belonged to the complainants. The existence of such decisions concurrently would have had disastrous legal consequences. The best way to solve the problem would have been for PW1 and PW3 to appeal against the decision of RCII a course which they did not take. It is my consideration view that the learned trial magistrate considered the evidence on record and came to the right decision. I find no merit in the first ground of this appeal.

Regarding the 2nd ground of this appeal, Mr. Okwanga argued that the learned trial magistrate based his decision on extraneous matters which were not supported by evidence. Mr. Kania however did not agree with the assertion, according to him the decision of the learned trial magistrate was based on the evidence as presented before him in court. After looking at the records of the lower court and judgment of the trial magistrate, I am inclined to agree with the view taken by the learned counsel for the respondent. The judgment of the lower court clearly shows that the decision of the learned trial magistrate was based on the evidence as adduced

by the parties in court, there might have been a few instances whore the learned trail magistrate might have made remarks or observations which were not supported by the evidence but such incidences were very minor and did not affect his general outlook of the case as a whole. The 2nd ground of this appeal cannot therefore be sustained.

On the 3rd ground of appeal Mr. Okwanga maintained that the learned trial was wrong when he held that the merits of this case were wholly based on civil case. It is true that the learned trial magistrate made a number of references to the civil case which had been adjudicated upon by RCI and RCII courts. Having locked At all the evidence I find the crux of the matter in this case was to be found in the case which was before the lower court of RCII this was so because the accused/respondent based his defence entirely on the clam of right and this defence could not be determined without taking into account what RCII court had said. As long a the decision of that RCII court subsisted and as long as it was admitted that the RCII court decided the issue of the house in favour of the accused there was no way the learned trial magistrate could have avoided referring to the civil aspect of this matter. His findings that his ha something to do with civil matters was a correct one, because in so doing he was simply saying that as long as the decision of the RCII was in existence the house which was the subject matter of both the civil case and criminal proceedings belonged to the respondent and for that reason the respondent could not have been found guilty of destroying-his own house and stealing iron sheets from his own house and trespassing on his own house. I find that all the references by the lower court to the civil case which was justified and that puts the 3rd ground of this appeal to an end.

The 4th ground of this appeal was that the learned trial magistrate did not avail persecution a chance of cross the respondent/accused. Mr. Okwanga argued that when the court resumed on 26-10-1992 the prosecution which had earlier applied for an adjournment to study the proceedings and then later on cross examine the accused was never given that choice to carry out the cross-examination and in his view that was a miscarriage of justice. The records do show that on 29-9-92 when the accused (now the respondent) gave his evidence he was not cross examined but the prosecutor informed the court he wished to study the proceedings and cross examine the accused at a later stage unfortunately when the court sat on the 28th October 1992 there was no mention anywhere of cross examination of the accused by the prosecution it would seem the prosecutor himself never reminded the court that he still wished to cross examine the accused or may be after studying the proceedings he decided to

abandon the cross examination altogether. What is clear however is that there is no record as to why he accused/respondent was never cross examined by the prosecution The law as contained in the M.C.A. which governs procedure of the trial in the magistrates courts does not stat that prosecution or any party to the case must cross examines any witness appearing or any party to the other side although section 124(3) says something about accused if such accused is not represented by an advocate. Failure to give a chance to one side to cross examine the other may be a source of miscarriage of justice. In the present case as we or not sure as to the real reason why prosecution never cross examined the accused I cannot say there was any miscarriage of justice much as I may say there might have been an irregularity is curable under section 165 of the Evidence Act. The prosecution has the greater share of blame in this matter as h did not on 28-10-1992 complain or raise the question of his voice this unfortunate situation would not arisen.

In those circumstances he fourth ground of appeal is rejected.

That leads me to the 6th grounds of appeal; since the 5th ground was abandoned by the appellant there is no need to deal with it. In the 6th ground of the appellant is complaining that the learned, trial Magistrate contradicted himself by holding that be final decision of this matter was in RCII court at Wakitaka. During the course of his argument Mr. Okwanga maintained that there was no evidence that this should have made its own decision on the evidence as adduced before it but should not have been guided by what was supposed to have happened at the RCII court.

Mr. Kania on his part argued that the decision of the learned trial magistrate was not based on what had happened in the RCII court but it was based on the evidence which had been orally adduced before him.

I have carefully examined the judgment of the lower court and the evidence on record and I feel that the allegation made by the learned counsel for the appellate is not baked up by the evidence on record. In the first place it is not true to say that there was no evidence before the trial court suggesting that the case had been before the RCII court. The evidence of PW2 and PW3 and that the defence witnesses especially DW1 and DW2 clearly shows that this matter was in fact handled by the RCII court. As for his allegation that the trial court should not have based its decision on what happen in the RCII court, I have already covered that matter when dealing with the 3rd ground of this appeal in this judgment, I can only emphasis

here that it was important for the trial court to refer to what happened in the court of RCII when deciding whether or not the defence of claim of right as raised by the accused was sustainable. I agree with the view expresses by the learned counsel for the respondent that the decision of the trial court was in fact based on oral evidence as adduced by both sides in that court, albeit guided by the decision of RCII court. I find nothing wrong in the trial magistrate having stated in his judgment that the ruling of the RCII court was final as long as it was not appealed against. It is not clear as to why that decision was not appealed against (failure appeal at times, but not always means the losing side is satisfied with the decision made against him/her). What the trial magistrate was trying to say in his judgment is that the validity of the RCII court remained binding until over ruled by an appellate court which in this case was the RCII court but the complainant never appealed to RCIII court which meant the RCII court decision remained the last decision on the matter. That disposes of the 6th ground of this appeal.

I must now turn to the 7th ant the last ground of this appeal, here the appellant is complaining that the trial court was wrong in holding that the Chief Magistrate had not handled the case and had resolved it in favour of the complainant, when in fact there was evidence that the natter was entertained by the Chief Magistrate who had written to the accused/ respondent stopping him from interfering with the property of the complainants. Mr. Kania in his reply to this complaint stated that there was no case entertained by Chief Magistrate in connection with this same matter and that the Chief Magistrate's letter was a mere administrative order which had no judicial effect. the evidence on record does not clearly indicate as to the circumstances under which the chief Magistrate came into the picture regarding the conflict between the respondent and the complainant; it would seem the Chief Magistrate was contacted by the complainants to request not to interfere with their peaceful and quite enjoyment of possession of what they believe to be their property.

With due respect I agree with Mr. Kania when he says that the Chief Magistrate's letter written asking the respondent to restrain himself from disturbing the complainants was a mere administrative approach to the matter but it was not a legal decision in any way since there is nothing suggesting that this letter was a result of an appeal by any of the parties to the Chief Magistrate. There was mention of letters of administration being granted by the Chief Magistrate to PW1 to administer the estate of Elphani Luwangwa. The respondent does not

seem to have seriously disputed that fact but it must be clearly pointed out that mere granting of letters of administration did not necessarily mean that the widow was not to be challenged as to the ownership of the property which she believed formed part of the estate of her late husband. The letters of administration simply gave the power to administer the property of her late husband subject to the right of anybody who had a claim to the part of that estate. I feel this ground of appeal like the previous ones cannon be sustained.

In all these circumstances I find that this appeal cannot succeed and it is accordingly dismissed with costs to the respondent.

Before I take leave of this matter, I would like to add my voice to that of the learned trial magistrate in his last part of the judgment where he said that the complainant should be advised to continue in the civil court from where she stopped and this decision should not be taken as confirming or disagreeing with the decision of the RCII court that decision should be tested in the appropriate court if the complainant so wishes. This decision should not also b treated as extinguishing any right available to the complainant to seek redress against the decision of the RCII court in any legally recognised way.

C.M. KATO
JUDGE
27/3/1995