

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT NAKAWA
CRIMINAL APPEAL NO. 10 OF 2006

MATOVU HAMIDU ::::::::::::::::::::APPELLANT

VERSUS

UGANDA::::::::::::::::::RESPONDENT

BEFORE HON. JUSTICE GIDEON TINYINONDI:

JUDGMENT

In his reasons for sentence the learned Chief Magistrate, Mpigi
Chief Magistrate's Court stated:

“A₁ has been acquitted on counts I, II, III and IV and
convicted jointly with A₂ on counts 5, 6, 7 and 8
the Court is now sentencing A₁ on count V to 12
months imprisonment and also count VII to 12

months imprisonment. All the custodial sentences to run concurrently”.

CHIEF MAGISTRATE

19/12/2005.

Order

Accused 1 ordered to stop further trespass and restrict himself to the 5 acres to avoid repeated acts of trespass.

Order

It is further ordered that A₂ reports to this Court for sentencing by 18/01/06. Right of appeal explained.

CHIEF MAGISTRATE

19/12/2005.

The law regarding conduct of a first appeal was repeated in LUWERO GREEN ACRES Ltd VS. MARUBENI CORPORATION: CIVIL

APPEAL 19/95 reported in "1977 SUPREME COURT JUDGMENTS" P 72. I complied with it in dealing with this appeal.

I will start with two observations. First, the memorandum of appeal adopted before me by Counsel mentions that the 1st Appellant was sentenced to a caution and five currency points.....and "the 1st Appellant was convicted of two counts of threatening violence and sentenced to twelve months imprisonment."

The memorandum of appeal thus adopted does not rhyme with the court record aforequoted. This is because nowhere in the learned Chief Magistrate's sentence is there mention of "a caution and fine of five currency points."

Moreover in the entire proceedings before me neither of the two Counsel alluded to the sentences of "caution and fine of 5 currency points."

Secondly, although the memorandum of appeal mentions two Appellants throughout, the lower court record is not complete in that it does not disclose that the 2nd Appellant ever reported for sentencing on 18/01/2006 as ordered or any other subsequent date. Again neither Counsel alluded to this omission.

This is how I will wriggle out of this apparent confusion.

First, I hold that there is no appeal before me by the 2nd Appellant because the lower court record before me does not show the 2nd Appellant has ever been sentenced. Second, there is no appeal before me by the 1st Appellant against the sentences of “a caution and fine of 5 currency points” since they are not borne out by the lower court record before me.

I now revert to the memorandum of appeal as adopted. It is my considered view that I start with ground number two because it appears to transcend the width and breadth of counts III, IV, V and VIII in the charge sheet and the rest of the grounds of the appeal. The common ingredients in the four charges are “the intent”,

“without colour of right” and “willful occupation by the Appellants of the land of and without the consent of the Complainant”.

PW₁ testified, inter alia, that he bought ten acres from Asuman Muwonge about 30/07/2004. Asuman Muwonge had inherited this land from his grandfather, Asuman Kalundu (deceased). The land had a certificate of title. Before buying he visited the land and it was “an empty chunk of land where A₁ and A₂ were neighbours.” Form 4 (the transfer form) was to the effect that there was no incumbrance on the land or any kind of third party claim. When eventually he brought surveyors to survey his land A₁ obstructed them. When PW₁ wanted to know why, A₁ and his father told PW₁ that:

“they had their acres and that I would not survey until they surveyed off their 5 acres. I offered my surveyor to survey for them their 5 acres. Their 5 acres were surveyed off first. This (survey) included all their homesteads areas for graves and their homes. My 10 acres were surveyed later”.

In 2005 PW₁ sent his workers to clear the land for ploughing.

He found A₁ making bricks on it. A₁ told PW₁ he could not vacate because this was his Kibanja.

PW₂, Asumani Muwonge, testified as follows. He inherited land from his late grandfather Asuman Kalundu. He sold ten acres of it to PW₁. The late Asuman Kalundu had also given 5 acres of his land, adjacent to PW₂'s land, to Ali Musoke. A₁ obtained the 5 acres of Ali Musoke's land. There were no bibanja holders on the ten acres he sold to PW₁. A₁ and A₂ were neighbours to the said ten acres for ten years. He knew the boundaries after he sold and a survey was carried out.

PW₃, Bruhan Bukenya, testified as follows. A₁ was his son and A₂ was his daughter-in-law. Ali Musoke was his father. Asuman Kalundu was his brother. Ali Musoke got 5 acres of land and bequeathed it to him and he in turn gave it to the accused persons. PW₃ did not know where PW₂ got his land from. PW₂ sold his land to PW₁. There were trees and other crops on that land

sold to PW₁. The accused persons used to cultivate and were still cultivating there since 1981. The Kibanja goes through PW₁'s land. PW₃'s 5 acres were surveyed for him by PW₁. PW₂ sold his Kibanja to PW₁ but part of that Kibanja was PW₃'s and was not bush. It was true the accused wanted compensation before vacating the land sold to PW₁.

PW₄, Mastulla Bukenya, testified that she was Asuman Kalundu's daughter, PW₂ was her brother's son. The accused were her village neighbours PW₂ acquired 10 acres of land from PW₄'s father, Asuman Kalundu. PW₂ then sold the ten acres to PW₁.

A₁ was son of Bruhan Bukenya. Bruhan Bukenya was one of Asuman Kalundu's beneficiaries. He got 5 acres which he in turn gave to A₁. PW₄ went to the land when it was being surveyed. Parts of the land had potatoes, cassava and elephant grass and bricks while the rest was bush. The potatoes and elephant grass belonged to Bruhani Bukenya. PW₁'s land did not belong to the accused. She was signatory to the sale agreement. At the time

of making the sale agreement there were no claimants of bibanja on that land. Before surveying for PW₁, A₁'s land was surveyed first. The said bricks were outside the 5 acres Bruhani Bukenya gave to A₁. Bruhani Bukenya told A₁ to fill up to cover the holes since the land was outside his. Bruhani Bukenya undertook to remove his potatoes and cassava. {PW₅, Yusuf Gitta's evidence regarding threats by A₁ directed against PW₁'s workers was hearsay. I ignored it}.

PW₆, Bijja Mohammed told that PW₁ employed him in March 2005 to slash his land together with Peter Nfuko. They did not complete the work because A₁ stopped them on their third day at the site. On 07/03/2005 A₁ came to the site with two cows. He held a machete and a stick. He gathered the cows together. He then asked them who authorized them to slash. They told him it was Gitta. A₁ then told them that if they wanted peace they should not slash anymore. When they failed to leave, he angrily told them to move away. They left the site. He followed them.

PW₇ No. 231562 Kyaligonza testified that after PW₁ reported a case of threatening violence (to the CID headquarters) PW₇ participated in the investigations. This evidence closed prosecution case.

DW₁, Matovu Abdul Hamidu, testified as follows. Prosecution evidence was mostly lies because some of the witnesses were not residents of Bujjuko where the land in dispute was situate yet he had lived there all his lifetime. He owned two bibanjas - one inherited from their grandfather (Kalundu) and the other bought with their own money. PW₂ had sold his own and their Kibanja. He did not know the relationship between his father and Kalundu. He did not know if his father inherited any part of Kalundu's land. He got his land from his father who in turn had obtained it from Ali. The land he occupied had never been surveyed.

His father was never given land but his (DW₁'s) grandfather was. DW₁'s father was aware that PW₂ was going to sell his Kibanja to PW₁. They advised their father to call PW₂ and ascertain whether he was going to sell the part where their Kibanja was. All people

were against PW₁ because he had money. DW₁ had never made even a single brick on PW₁'s land. DW₁ refused to leave the land because he owned a Kibanja there.

DW₂, Mariam Naziwa, testified that the allegations against her were lies. One Sam & Tito came and dug holes in her beans garden when she asked who gave them authority, they replied it was PW₁. She told them to stop and wait for her husband. They left. The allegation that she threatened them with a hoe was false.

In cross-examination DW₂ testified. She started cultivating the land in dispute 15 years ago when she got married. She, however, did not know how her husband acquired it, though she found him there.

DW(3?) Rashid Kayabula testified that the accused persons were village mates. He had lived there (Bujjuko) since 1983. The Kibanja in dispute (originally) belonged to Bruhani's father but he gave it to Bruhani. It was eventually occupied by NRA generals

before they moved to take over Kampala. It was on this Kibanja that A₁ was given a portion. The Kibanja for Bruhani measured 10 acres but not 5 as stated by Bruhani PW₃. DW₁ also cultivated it having been given by Bruhani. The accused also cultivated on it. The Kibanja was part of PW₁'s. If PW₁ told DW₁ to vacate he would oblige. PW₂ sold to PW₁.

DW(4?), Mukobwa Musa told he was resident of Bujjuko and neighbour of accused. The accused had occupied the Kibanja in dispute for a very long time. He did not know the part which PW₁ bought. He could not tell where PW₁ bought, nor where the accused were claiming to be their Kibanja.

After thoroughly evaluating the whole evidence, evidenced by my own summary of it, I find that the Appellant's defence of claim of right does not stand. My reasons for so holding are briefly:

- a). When PW₁ was about to buy the land in question he made a search and Form four showed "there were no encumbrances on the land or any kind of third party claim".

b). When PW₁ went to survey his land A₁ and his father raised objection. So PW₁ offered to survey off their land first. Their five acres included their homesteads and graves. His ten acres were surveyed later.

This PW₁'s evidence was not contradicted. It was in fact corroborated by that of PW₂ who sold the land in dispute to PW₁. He told that there were no bibanja's on the ten acres he sold to PW₁ and that A₁ was the neighbor to this land for the previous ten years.

When I evaluated the evidence of PW₃, I found it contradicting the evidence of the rest of the prosecution witnesses. He told lies when he said he did not know where PW₂ got the land from and later agreed that PW₁ surveyed for him his (PW₃'s) part. He did not at this stage point out that the survey left out part of his land which he later gave to A₁. Where PW₃ told that PW₂ sold his (PW₂'s) Kibanja to PW₁ but that part of what PW₂ sold to PW₁ was PW₃'s land is a contradiction of his whole evidence after stating that his part was surveyed off first. It is a contradiction which can

only be explained on account of bias for his son, A₁. Furthermore at the close of his evidence PW₃ brings out the issue of compensation saying that when and if A₁ is compensated, he will then give vacant possession. This claim has no foundation DW₁'s evidence brings out to the fore the grudge he and other village mates have against the Complainant. He states that part of the Kibanja PW₃ gave him is part of PW₁'s land. Yet as I have pointed out above PW₃ tells that PW₁ caused a survey of PW₃'s land before survey his (PW₁'s) and that PW₃ did not complain then. Above all DW₁'s evidence reeks of a grudge rather than genuine claim of right. He states:

“Waninda is rich and has money. That is why all people are against him because he has money.”

For the above reasons ground two of the appeal fails. With the collapse of this ground, ground one also fails.

Ground three of the appeal succeeds. For one thing, the learned Chief Magistrate did not state under what law he made the order. For the other, though the learned State Attorney cited S. 92 (1)

(c), (4) (6), the order envisaged under the section is not the same as the one the lower court issued. In the circumstances I direct the Deputy Registrar to investigate the matter and if he finds that the convict is still occupying the Complainant's land a warrant envisaged in the section of the law issues accordingly.

To conclude, the appeal stands dismissed, and the conviction of A₁ and sentence of imprisonment upheld. In addition a warrant will issue, if found necessary.

Gideon Tinyinondi

JUDGE

19/12/2005.