THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBNARARA

HCT-05-CR-CN-0021-2005

(Arising From BUS-00-CR-CO-0532-2004

ISH. CRB No. 1881/2004)

NIGHT CHRISTINA MUGISHA…… APPELLANT

VERSUS

UGANDA ……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

This is an appeal against the judgment of the Grade 1 Magistrate at Bushenyi delivered on 21st April 2005 whereby the appellant was convicted of malicious damage to property, contrary to section *335* (1) of the Penal Code Act and sentenced to 1 years imprisonment. The same appellant was ordered to pay Shs. 7,000,000/=, as compensation for the burnt car, to the complainant. The appeal is against conviction and sentence as well as the aforementioned order for compensation.

The grounds of appeal appear as follows:

The learned Magistrate Grade I erred in law when he convicted the Accused person when the prosecution had not proved the case against the accused person beyond reasonable doubt.

The learned Magistrate Grade I erred in law to convict the accused person when he was in doubt that the accused had not committed the offence.

The learned Magistrate Grade 1 erred in law when he shifted the burden onto the accused to prove her innocence.

The learned Magistrate Grade 1 erred in law when he manifestly exhibited bias against the Accused which hindered him to determine the case fairly leading to gross miscarriage of justice.

The learned Magistrate Grade I erred in law when he did not comply with the mandatory provisions of S. 128 of the MCA which failure occasioned miscarriage of justice.

The learned Magistrate Grade 1 erred in law when he allowed Px4 and Px5 in a manner that offended the law and practice of tendering in documents and receiving evidence which prejudiced the accused and caused a miscarriage of justice.

The learned Magistrate Grade 1 erred in law when he admitted inadmissible evidence which occasioned a miscarriage of justice.

The learned Magistrate Grade 1 erred in law when he did not properly evaluate the evidence before him leading to wrong conclusions which occasioned a miscarriage of justice.

The learned Magistrate Grade 1 erred in law when he ordered the accused to refund Shs. 7.000,000/= to the complainant which amount was arbitrarily determined by the trial Magistrate with no evidence adduced regarding the value of the motor vehicle which occasioned serious miscarriage of justice.

The learned Magistrate Grade I erred in law when he turned himself into a witness.

The sentences imposed and order of compensation were excessive in the circumstances.

I must observe at the outset that this being the first appellate court it is incumbent upon it to reconsider and evaluate the evidence involved and come to its own conclusion, of course bearing in mind the fact it never saw the witnesses as they testified. I refer to *R vs Pandya* [1957] EA 336.

Grounds I and 2 of the Memorandum of appeal were argued together. They both state that the appellant was convicted when the case against him had not been proved beyond reasonable doubt. The relevant Section 335 (1) of the Penal Code Act reads:

‘Any person who willfully and unlawfully destroys or damages any property commits an offence and is liable, if no other punishment is provided, to imprisonment for five years.’

The last three paragraphs of the judgment of the trial Magistrate merit extraction since they go to the heart of His Worship’s decision. That part of the judgment reads:

‘It may not have been translated but I agree it carried the meaning message that this was an example of the calamity which would befall the accused because he had refused to accede to the desires of the accused. I read and understood it. This letter’s presence at the scene would prove that either the accused was at the scene to burn the vehicle, or that she gave it to her accomplices to put at the scene at the time they set fire to the vehicle.

I am satisfied that prosecution proved its case beyond reasonable doubt. The accused burnt the vehicle to hurt the complainant who had refused to continue with their affair.

She needs not to have been at the scene. She probably hired mercenaries. I find her GUILTY and CONVICT her under S. *335* (1) PENAL CODE ACT, as charged “Malicious damage to property”.’

From the above extract it is clear the evidence on which the conviction was based was not direct. It is circumstantial exclusively and in such an event the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. Before drawing the inference of the accused’s guilt from the circumstantial evidence court ought to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. See Simon Musoke v R [1958] EA 715. I have considered the fact that for quite some time relations between the appellant herein and the complainant were stormy. There is evidence that there had been written communications in the past between the two persons. One such communication was said to relate to an apology by the appellant. Sadly neither this communication nor the one found at the scene of crime was translated into the court language. I note also that the document found at the scene, like the one said to relate to apology, is not dated. No evidence was led to show that whatever threat there could have been in the document found at the scene related to the event that took place when the vehicle was burnt and not to some other event in the past. One has to

bear in mind the fact that the document bore no date and that no evidence is available of how the document found its way to the scene of crime. The trial Magistrate observed that possibly someone other than the appellant conveyed the document to the scene of crime. I do not find it beyond possibility that even if the document found at the scene was authored by the appellant herself it could have related to an event other than that which happened and the document could have been placed at the scene by some other person without even the knowledge of the appellant. In the circumstances there is no way the prosecution proved beyond reasonable doubt that the appellant was involved in the burning of the motor vehicle. Ground 1 and 2 of appeal succeed.

With regard to ground *3* of appeal the learned trial magistrate related to the credibility of the accused person in that court. Court was entitled to believe or not to believe the defence of the accused person and I find nothing mentioned in that respect. This ground should fail as I find nothing in it which compromises the burden of proof as laid down in *Woolmington vs DPP* [1935] AC 462 and other cases relevant to the subject.

Ground 4 states that the decision of the trial court was grounded in bias. While it is true the trial Magistrate at page 4 of the judgment recorded his observations of the demeanour of the appellant, as he is entitled to do, it is not evident that he was biased, not to mention that his decision was not influenced by bias. This ground cannot be sustained also.

Ground 5 of the memorandum was not argued and was apparently abandoned.

Regarding grounds 6 and 7 of the memorandum the manner in which the exhibits Px4 and Px5 were tendered was irregular. Nevertheless they were of little significance by themselves and did not affect the outcome of the case. I find ground 6 as well as ground 7 succeed.

Ground 8 of the memorandum of appeal is highly speculative. I find no cause to fault the findings of the trial magistrate in so far as they were relating to the determination of the handwriting expert. However the learned Magistrate was in error as suggested by ground 10 of the memorandum of appeal where he went the extra mile to determine similarity in the handwriting. This role was aptly played by the handwriting expert.

Finally I must relate to ground 9 and ground 11 of appeal. I agree with the appellant that there is no basis for the trial Magistrate to determine that the price of the burnt out car was Shs. 7,000,000/. Consequently there is no basis for that amount to be visited on the appellant as compensation. As for the sentence handed down to the appellant of 1 years imprisonment I would not regard it as excessive where a proper conviction existed given that the maximum sentence for the offence is five years. Of course, given my finding earlier in this judgment all this is now moot.

This appeal is allowed and the conviction is quashed while the sentence and order for compensation are both set aside.

P. K. Mugamba

Judge

2nd February 2006