THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0027 OF 2007

(Arising from Buganda Road Chief Magistrate's Court at City Hall Criminal Case No. 1139 of 2006)

AMOOTI IMMACULATE:::::::::::::::::::::::::::::::::::: APPELLANT

VS.

UGANDA:: RESPONDENT

BEFORE HON. LADY JUSTICE C.A.OKELLO

JUDGMENT

The Appellant was tried by the Chief Magistrate's Court of Buganda Road on two counts for the offence of house breaking c/s 295 (1) of the Penal Code Act (count 1) and theft contrary to sections 254 (1) and 261 of the Penal Code Act. The particulars of offence in the 1stcount were that on or about the 7/7/2006 at Church Zone Area of Kamwokya in Kampala District, the appellant broke and entered the dwelling house of Nalongo Nambalisa Rose with intent to commit a felony therein. The particulars of the 2nd count alleged that on the 7/7/2006, at Church Zone Area of Kamwokya in Kampala District, the appellant stole shs.1,250,000/= the property of Nalongo Nambalisa.

The appellant denied the offences but was convicted on both counts and sentenced to six months imprisonment on each count; sentence was to run consecutively. This appeal is against her conviction.

The prosecution case was that the complainant, one Nalongo Nambalisa Rose (PW2), was residing in Kamwokya while working as Law Enforcement Officer with Kampala City Council. She used to leave home for duty at 7.00 a.m. and would return at about 9.00 p.m. Nalongo had children some of whom attended school from morning until 1.00 a.m. To enable the children gain access to her residence but not to her bedroom, Nalongo used to leave her front door key with Grace Mbabazi (PW1) her land lady and neighbour, with standing instructions to give it to her visiting relatives, especially her sisters, without informing or obtaining permission from her first.

On the 7/7/2006, Nalongo left the front door key with Grace Mbabazi. At about 9.00 a.m. Kiconco Juliet (PW3), a neighbour of both Nambalisa and Grace saw the appellant seated on the veranda of Nambalisa's house. Appellant talked to her - greeted and asked her the where about of Nambalisa's children and where her house key was. On learning of the children being in school and the key being with Grace Mbabazi, the appellant approached the latter whereupon she introduced herself as Nalongo's sister from the Village. She told Grace that she had left Nalongo in Town and that she was sent for the house key. Appellant then requested for the key that she used to enter the house. No one paid any further attention to her, but in the early afternoon, Nalongo's children returned from school only to discover their house and their mother's bed room open. They reported their findings to Grace Mbabazi. When Nalongo returned from work she discovered that shs. 1,250,000/= had been stolen from her bed-room. Nalongo reported the break-in and theft to Mr. James Kakooza the LC1 chairman (PW4) and later to the police. She and Grace carried out their own investigations that led to appellant being found and recognised by Grace at Nateete. The appellant was arrested from her work place on Nasser Road and charged with the two offences.

In her defence, the appellant denied knowing Nalongo; she further denied breaking into Nalongo's house or even visiting Kamwokya on the date of the offence. She also denied knowing PW1, PW2 and PW3. She testified that she was treasurer of a Micro-Finance organisation whose members met every Friday to transact business from 10.00 a.m. to 4.00 p.m. Such a meeting was held Friday 7/7/2006, she attended it though she was arrested for the offences and detained briefly on the 22/8/2006 before being released on Police Bond. She testified that on release, her house was searched for a green Kitenge without success.

The learned trial Magistrate rejected appellant's defence, she accepted prosecution evidence identifying the appellant as the person who broke and entered complainant's house and stole money from it. She convicted the appellant on the two counts and sentenced her to a consecutive term of six months imprisonment on each count. Appellant was ordered to pay Nalongo

compensation of Shs. 1,250,000/=, hence this appeal.

Three grounds of appeal were framed, Mr. Twijukye for the appellant argued the 1st and 2nd grounds together and the 3rd one separately. Mr. Badru Mulindwa, State Attorney for the respondent argued each ground separately. I turn to the arguments.

The 1st ground complained that the learned trial Magistrate erred in law and in fact by dismissing appellant's alibi, while the second ground was that the learned trial Magistrate erred in law and in fact by accepting evidence of identification.

On these grounds of appeal, the learned Mr. Twijukye submitted that evidence 0f1dentifying appellant as the person who broke, entered and stole from PW1's house was insufficient to sustain a conviction. Available evidence largely remained that of a single witness which was insufficient to sustain convictions for these reasons:

(i) There were no eye witnesses to the crime as none of the two principal witnesses (PW1 and PW2) saw appellant break and enter complainant's house.

(ii) Only one of the two Witnesses, Grace Mbabazi, identified the appellant at Nateete, Juliet Kiconco did not do so. Even then, no Police Officer was present at the identification. Besides, Juliet Kiconco's evidence was not tested in cross-examination as she was not re-called for further cross-examination by appellant's counsel. Therefore the trial court should not have relied upon her evidence to convict the appellant.

(iii) Prosecution did not discharge its legal burden of disproving appellant's alibi. In the circumstance the trial court should not have disregarded appellant's alibi. He cited the case of Frank Ndahabe vs. Uganda - Supreme Court Criminal Appeal No.3 of 1993 (unreported).

On the 1st ground Mr. Badru Mulindwa, the learned State Attorney, submitted that evidence of Ms. Mbabazi and Ms. Kiconco placed appellant at the scene of crime. He argued that appellant's defence was really not alibi because she did not specifically claim to have been conducting the business of Pride Micro Finance on the day of the offence. Her evidence concerned her routines on Fridays but not what she did on the 7/7/2006. On identification of appellant by Grace Mbabazi and Juliet Kiconco, Mr. Mulindwa submitted that both witnesses had opportunity to correctly identify appellant under conditions that favoured correct identification. Both noted appellant's attire on the day of the offence - a green Kitenge.

The judgment of the trial court dealt with identification at pages 5 to 6. The learned trial Magistrate reviewed the evidence of Ms. Kiconco concerning the time she saw the appellant and the conversation she had with her about custody of PW2's keys and whereabouts of her children. She further reviewed Ms. Mbabazi's evidence on identification before proceeding to analyze evidence of the two witnesses. At the end of her analyses, she concluded that appellant was properly identified and that there was no need to hold identification parade for identification of the appellant by PW1. The trial court added that PW1 did not identify appellant by co-incidence because on the one hand, there was evidence that PW2 who was a friend of one Gloria Mukasa told Gloria about keeping the stolen money in her house. There was also evidence on the other hand showing that Gloria and the appellant were close friends. The connections pointed to the appellant learning of the money through Gloria. In view of this evidence, Court rejected appellant's alibi finding that she was at the scene of crime when the offence was committed.

Having re-evaluated the evidence on identification, as the law requires a first appellant court to do; I am in agreement with the learned trial court's finding that the appellant's alibi was lie. I also agree that Mbabazi's and Kiconco's evidence was credible and placed appellant at the scene of crime. According to evidence before the trial court that I find credible, Ms Kiconco first saw the appellant sitting on the veranda of PW2's house not far from hers. The two talked greeted each other. Appellant later approached Kiconco to ask for PW2's children and the whereabouts of the keys to her house. It was Ms. Kiconco who told appellant where the keys could be found. All these happened in broad day light, I believe that she had ample opportunity to observe the appellant under conditions that favoured correct identification. She noticed appellant's dress and its colour; she also noticed that appellant had a black polythene bag when she arrived at PW1's home. She was definitely in a position to recognise appellant.

Grace Mbabazi equally had sufficient time and conditions to observe and correctly identify the appellant. It is her observation of the appellant at the scene of crime that enabled her to recognise and identify the appellant and appellant only from a group of Niigiina members at Nateete. It was the same observation that had earlier led her to clearing PW1's workmates from suspicion when she was led to her work place and the witness failed to recognise the culprit among them. Like Ms. Kiconco, PW1 observed that appellant was wearing a green kitenge attire on the day of the offence; the fact that the green Kitenge dress was not found on a search of the appellant's house was immaterial because both Ms. Kiconco's and Ms. Mbabazi's identification was based on physical build and appearance of the appellant; not so much on her attire which could be different at different times.

Failure to recall Ms. Kiconco for further cross-examination had no material effect on her evidence on identification. There is in fact no law generally providing for recall of witnesses for a second cross-examined (sections 136 and 137 of the Evidence Act). I note from the record of proceedings that the appellant cross-examined both PW1 and PW2 when she was defending

herself at the beginning of her trial. She made the choice to do so. She later engaged the services of counsel, but engaging the services of counsel later did not translate into a right to recall witnesses who had already testified and had already been cross-examined by herself. All in all, there was evidence placing the appellant at the scene of crime; her alibi was concocted and was rightly rejected by the trial court. These grounds of appeal fail.

On the 3rd ground, the learned Mr. Twijukye submitted that .prosecution evidence contained many inconsistencies that were not scrutinized by the trial court. He argued that court would have arrived at different conclusion had it considered the inconsistencies. The learned counsel enumerated the inconsistencies some of which are listed as follows:-

(1) Whether or not the screw driver was the instrument used in the break-in given the evidence of D/C Oluka Francis (PW5) that it was used to break the sitting room while other witnesses testified that it was used to break into the bed-room. Besides, as an exhibit, the screw driver was mishandled by prosecution witnesses. The incomplete chain of handling cast doubt whether it was used in the offence.

(2) The investigating Officer did not record statements from potential witnesses such as PW2's children one of whom was said to be 18 years old. None of these children took the initiative to report the crime to anyone till 4.00 p.m. and 6.00 p.m. Even then, PW1 and her husband did not inform PW2 of the offence, it was PW2 who discovered it later.

(3) The trial court did not consider the role of Gloria Mukasa in the offence, she knew about PW1's money; meaning that she should have been treated as a suspect in the offence.

On the third ground, Mr. Mulindwa submitted that the trial court ignored some evidence because it was irrelevant such as the evidence concerning the particular tool used to break into the house. What was important was the fact that the break-in occurred. Concerning witnesses not called as witnesses, the learned State Attorney submitted that the evidence of the 18 years old daughter of PW2 would not have been useful because she discovered the offence after its commission. That of Gloria Mukasa would not have advanced prosecution case given the fact that she was a friend of the appellant.

She was surety for appellants bail; it was not therefore likely that she could be a suitable witness for the prosecution.

There was certainly a mishandling of the screw driver that was tendered in evidence as there was no evidence of the police official who received it from PW4. Be that as it may, as the learned State Attorney stated the important element of the offence - the break in was proved by other evidence. It was not necessary to prove the instrument used to break in. The judgment of the trial court addressed the argument on witnesses not called by the prosecution. Concerning Gloria Mukasa, the learned trial Magistrate pointed out (at p4 of the judgment) that Gloria was appellant's friend. She alluded to the possibility that appellant could have learnt of PW2's money from Gloria. From these considerations, the learned trial Magistrate opined that Gloria would not have been a useful witness for the prosecution.

I agree with the learned trial court that Gloria, though a competent witness, would not have been a useful witness for the prosecution given her relationship with the appellant. In as far as PW2's daughter· was concerned, her evidence would have been useful as that of one of the first persons to discover the break-in. However, it should be noted that she and her siblings did not discover the theft; it was their mother who discovered the theft of her money when she checked her bed-room. As there was other evidence proving breaking of the front door, failure to call any of the children of PW2 was of no effect on the prosecution case; nor did it

occasion a miscarriage of justice to the appellant.

All in all the appeal fails. It is dismissed.

C. A. Okello

Judge

1.04.2008