THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
HIGH COURT CRIMINAL APPEAL CASE NO. 0014 OF 2008

KIZITO RONALD………………..……………………………………APPELLANT

VERSUS

UGANDA…..………………………………………………………….RESPONDENT

Before: Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

This judgment is in respect to an appeal of the above named appellant preferred against a decision of a Senior Magistrate Grade 1 (His Worship Mr. Boniface Wamala) dated 16th December 2005. Under that decision the learned trial Magistrate convicted the appellant of theft of a sum of shillings 5,000,000/= contrary to sections 254(1) and 261 of the Penal Code Act (Cap. 120). He sentenced the appellant to pay a fine of shillings 500,000/= or in default thereof to serve a term of 18 months in prison. In addition, the said Magistrate made an order under section 197 of the Magistrates Courts Act (Cap. 16) requiring the appellant to pay a sum of shillings 4,200,000/= as compensation to the complainant.

The above decision, sentence and order aggrieved the appellant. Therefore, he appealed against them; and in his Memorandum of Appeal dated 13th February 2007 the appellant sought this Court's orders overturning the said decision and setting aside the sentence and order that followed that decision.

However, before this Honourable Court goes into the merits of the appeal it will lay out the evidence that the learned trial Magistrate had before him as he made the above decision. Court will begin with the State's evidence, which is briefly as follows:

Sometime in March 2005 one George William Kanyike (PW3) obtained a loan of shillings 5,000,000/= from Pride Uganda Microfinance. He kept the money at his home in Masanafu near Kampala; and traveled upcountry. In his absence, the appellant and another man called Ssebavuma (who were both related to Kanyike's family) visited Kanyike's home. They duped Kanyike's wife (Cissy Kanyike i.e. PW4) into giving them the above sum of money. This took place in the presence of Betty Namaganda (PW5) - a house-maid to the Kanyike family. Later on in the day, when Kanyike rang home his wife told him about the incident. Kanyike was surprised because he had not authorized the appellant and Ssebavuma to collect the money from his home. Therefore on returning to Kampala, Kanyike confronted the appellant in respect of the above sum of money. The appellant promised to refund the money, but ultimately failed to honour his word. Kanyike reported the matter to the police. In turn, the police arrested the appellant and Ssebavuma. While in police custody Ssebavuma confessed that he and the appellant got the

above sum of money from Kanyike's wife. He further explained that the appellant kept the biggest portion (i.e. a sum of shillings 4,200,000/=) and gave Ssebavuma only a small portion (i.e. a sum of shillings 800,000/=) that he used to purchase a few household goods. Eventually, the police took the appellant and Ssebavuma to the Magistrate's court where the State charged and prosecuted them for theft.

In his defence the appellant denied having received a sum of shillings 5,000,000/= from Kanyike's wife in March 2005. In addition, he questioned whether Kanyike had the capacity to possess such a huge sum of money.

After considering the evidence on record the learned trial Magistrate was satisfied that the appellant was guilty of the offence of theft contrary to sections 254(1) and 261 of the Penal Code Act (Cap. 120). Therefore, he convicted and sentenced the appellant accordingly; and hence the appeal herein.

DECISION

The appellant appealed the judgment of the lower court on the grounds that the trial Magistrate failed to evaluate the evidence on record, failed to consider discrepancies and contradictions in the State witnesses' evidence, and relied on a confession which was retracted, to the effect of reaching a wrong conclusion.

Be that as it may, this Court finds that there are two issues underlying the above grounds of appeal. The first and most vital issue is whether the State proved beyond reasonable doubt that the appellant committed a theft against George William Kanyike. In considering this issue, the second, less significant issue of whether the trial Magistrate properly admitted a retracted confession and gave it the appropriate weight once it was admitted is also addressed.

With regard to the first issue, the appellant's counsel (Mr. Kalule) cited the case of **Abdu Ngobi v. Uganda, Criminal Appeal No. 10 of 1991,** which states that: *"The proper approach…is to consider the strength and weakness of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has raised a reasonable doubt. If the defence has successfully done so, the accused must be acquitted."* This reasonable doubt standard is aptly described in **Miller v. Minister of Pension [1947] (2) All ER 372**, which states that the prosecution proves its case beyond reasonable doubt only where the evidence against the accused is so strong that the possibility in his favour can be dismissed with the remark, *"Of course it is possible but not in the least probable"*.

In order to be able to assess the State's evidence properly, it is vital to understand what amounts to theft under our law. According to section 254(1) of the Penal Code Act (Cap. 120) a "*person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing"*. However, section 254(2) of the Penal Code Act (Cap. 120) further distinguishes that in the case of taking money, a person is deemed to have fraudulently taken it where he or she does so with *"an intent to use it at the will*

of the person who takes or converts it, although he or she may intend afterwards to repay the amount to the owner."

Thus in order to justify the conviction of the appellant in the lower court, the State must show that the evidence they presented to that court proved the following things beyond reasonable doubt:

(a) that in March 2005 Kanyike, at his home, had a sum of shillings 5,000,000/= that was capable of being stolen;

(b) that the appellant participated in fraudulently taking the above sum of money; and

(c) that the appellant had no claim of right to the said sum of money.

With respect to whether in March 2005 Kanyike, at his home, had a sum of shillings 5,000,000/= that was capable of being stolen the lower court relied upon the testimonies of Kanyike (PW3), his wife (Cissy Kanyike i.e. PW4), and Namaganda (PW5). According to Kanyike and his wife, Kanyike had obtained a sum of shillings 5,000,000/= from Pride Uganda Microfinance in order to purchase a parcel of land. Namaganda further supported this claim by testifying that she saw Mrs. Kanyike handling a large amount of money on the day that the appellant allegedly went to Kanyike's home.

The learned trial Magistrate stated that Kanyike, his wife, and Namaganda struck him to be honest witnesses because of their demeanour, and that their testimonies were sufficient to support the claim that Kanyike did in fact have a sum of shillings 5,000,000/= at his home in March 2005. However, because of the relationship of these witnesses to one another, a high risk of collusion renders their testimonies suspect. Kanyike and his wife, as husband and wife, have an incentive to collude in order to protect their shared interest; and Namaganda has a stake in delivering a testimony consistent with that of her employers. During her cross-examination, Namaganda even declared: *"I have never been disobedient to my boss. I cannot annoy my boss if he told me to be against you."*

While the risk of collusion is not in itself sufficient to completely discredit the three witnesses referred to above, there is a reason for concern that the State relied primarily upon their evidence to make the determination that Kanyike did in fact have a sum of shillings 5,000,000/= at his home in March 2005. It is troubling that no documentation of a loan from Pride Uganda Microfinance was ever presented to the lower court. A loan of such a high amount would certainly not have been given to Kanyike without some contract of repayment. Furthermore, the fact that the State did not give any reason for this lack of documentation weakened their position and raised questions as to whether such a loan was ever made. It was especially important for the State to corroborate the existence of the loan from Pride Uganda Microfinance because the State failed to provide evidence that Kanyike would have had the capacity to have a sum of shillings 5,000,000/= otherwise.

Kanyike did not provide bank statements, and during his cross-examination he could not even estimate the range of his capital. The State instead attempted to substantiate the claim that

Kanyike had a sum of shillings 5,000,000/= at his home by using a confession that Ssebavuma allegedly made while in police custody. That confession was to the effect that in March 2005 Ssebavuma and the appellant went to Kanyike's home and took a sum of shillings 5,000,000/=. Ssebavuma later retracted the above confession, alleging that it had been extracted from him through torture. The trial Magistrate held a *'trial within a trial'* and admitted the confession after finding that the confession did not support Ssebavuma's torture claims.

Since Ssebavuma is not a party to the appeal herein this Court is reluctant to discuss *"the trial within a trial"* that resulted in the admission of the retracted confession; and, in turn, led to the conclusion that Ssebavuma participated in the alleged theft. It will, however, suffice to say that this Court questions whether the value and weight that the learned trial Magistrate gave to the above confession insofar as it related to the appellant was appropriate.

Firstly, the learned trial Magistrate appears to have treated the above confession as if it were a confession from the appellant, and given it too much weight against the appellant. Secondly, according to **Ezera Kyabanamazi v. R. [1962] EA 309** statements not made under oath are not considered *"accomplice evidence."* Consequently, they cannot be the basis for a conviction; and can only be taken into consideration to support an otherwise substantial case against an accused person. Based on the foregoing, this Court finds that Ssebavuma's retracted confession is not sufficient to support Kanyike, his wife and Namaganda's testimonies as against the appellant.

All in all the State did not prove beyond reasonable doubt that in March 2005 Kanyike, at his home, had a sum of shillings 5,000,000/= that was capable of being stolen. For that reason, it follows that the State also failed to prove that the appellant participated in fraudulently taking the alleged sum of money without a claim of right on it.

While the appellant also raised the issue of inconsistencies in the State witnesses' testimonies insofar as the date of the alleged theft was concerned, this Court finds that it is unnecessary to consider the validity of this point in light of the above arguments in favour of the appellant.

In conclusion, this Court finds that the learned trial Magistrate erred in convicting the appellant of the offence of theft contrary to sections 254(1) and 261 of the Penal Code Act (Cap. 120). Therefore it has no choice, but to quash the conviction and set aside the sentence. It is so ordered. Court further orders that if the appellant paid any money in respect of the fine or order of compensation such money must, without delay, be refunded. In short, the appeal herein has succeeded.

E. S. Lugayizi
(Judge)
25 / 7 / 2008

Read before: At 12.14 p.m.

Mr. Bwanika Andrew for the appellant

Ms. Tumuhise for the DPP

Ms. P. Nsaire c/clerk

E. S. Lugayizi
(Judge)
25 / 7 / 2008