THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CRIMINAL APPEAL N0. 12 OF 2 09 (Arising from criminal case N0. NAK –CO-603 of 2006)

1. **MUWANGA ANGELO :::::::::::::::: APPELLANTS**
2. **NSUBUGA GERALD**

VERSUS

UGANDA :::::::::::::::::

RESPONDENT

JUDGMENT OF HON. MR. JUSTICE JOSEPH MURANGIRA

The appellants, **Muwanga Angelo** (hereinafter called the 1st appellant) and **Nsubuga Gerald** (hereinafter called the 2nd appellant) being dissatisfied with the judgment of Her worship Nabafu Agnes appealed to the High Court against her judgment and decision whereby they were convicted of the offence of Malicious damage to property contrary to section 335 (1) of the Penal Code Act, sentence to 12 months imprisonment, and each appellant ordered to pay the complainants Shs. 5,000,000/= (five Millions shillings) in compensation of the victims of the crime.

Hence this appeal against Uganda, (hereinafter called the respondent). The respondent is represented by the Department of Director of Public Prosecutions as by law required.

The facts of the case as they can be gathered from the record of appeal are that the 1st and 2nd appellants were charged on two counts with criminal trespass and Malicious damage to property contrary to sections 302 (a) and 335 (1) of the Penal Code Act, respectively. The appellants pleaded not guilty to both charges. The respondent called two prosecution witnesses who testified against the appellants. The appellants gave evidence in defence, but never called any witnesses to testify on their behalf. The trial Magistrate was Her Worship Agnes Nkonge. And Her Worship Nabafu Agnes wrote the judgment, after the former had been transferred to Entebbe Chief Magistrate's Court, at Entebbe.

The trial of the appellants started in mid 2006 and after a prolonged trial, the appellants were acquitted of the offence of **criminal trespass**; but convicted of the **offence of**

malicious damage to properly contrary to section 335 (1) of the Penal Code Act, sentenced to 12 months imprisonment, and each appellant ordered to pay Shs. 5, 000, 000/= to the victims of the crime as compensation for their loss caused as the result of the damage to the suit property described in the charge sheet.

The appellants, who are represented by Simon Tendo-Kabenge Advocates, filed this appeal based on the following grounds; that:-

1. The learned Magistrate erred in law and in fact when she held that the prosecution had proved the offence of malicious damage to property beyond reasonable doubt against both appellants.
2. The learned Magistrate erred in law and in fact when she held that the evidence of PW2 was not hearsay and she thereby relied upon the said evidence to convict the appellants.
3. The learned Magistrates erred in law and in fact when she failed to properly evaluate the evidence on record and the defences of the appellants and thereby convicted the appellants.
4. The learned Magistrate erred in law and in fact when she ordered the appellants to pay compensation to the complainant yet she had not resolved the issues of ownership of the land in question, and the damage to land had not been proved by the complainant.

It should be noted that Counsel for the appellants never made prayers in the Notice of appeal nor in the Memorandum of appeal. It is the law and practice that every Notice of Appeal which commences a criminal appeal has to state the prayers to wrap-up the grounds of appeal, to give the effect of the appellant's prayers for allowing the appeal, to quash the conviction, set aside the sentence and order, and acquit the appellants. However, this anormally was never raised by the respondent and I treat that anormally as a mere technicality as emphisaged in Article 126 (2) (e) of the Constitution. Such anomalies do not cause miscarriage of justice to any party to the appeal.

Counsel for the appellants and that of the respondent filed Written Submissions for and against the appeal. The appellants' counsel argued grounds 1 and 2 together, grounds 3 and 4 separately. And the respondents' Counsel argued all the grounds of appeal together.

In his submissions, Mr. Waninda Fred, Principal State Attorney, Counsel for the respondent raised in his submissions some complaints about the record of appeal; that:-

> ***"First of all, the record of proceedings as prepared by the appellants is materially misleading court. Page 1 has a charge sheet dated 1st September, 2006, with one accused person, Nsubuga Gerald. Yet on 5th September 2006, the prosecution applied and tendered in court an amended charge sheet where Kaggwa Sebiney and Angella Namuli Stood Surety for the second accused person.***
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> ***The failure by the appellants to include this amended charge sheet on the record of proceedings in our view is deliberate and intended to mislead court. On this point alone, the respondent submits that the record of proceedings is not proper or complete and we invite court to direct a proper record of proceedings be prepared by the Deputy Registrar so that it is availed to the respondent for preparation of its case.***
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> ***Secondly, the appellants in their submissions alluded to defence exhibits. The said exhibits have not been made part of the record of proceedings. Even the index the appellants' record of appeal, makes no reference to the said exhibits.***
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> ***We humbly submit that this is also done deliberately to deny the respondent a fair trial as facilities and opportunities are not accorded to the respondent, by denying the respondent material exhibits. Moreso, the respondent has been given a very short notice to make a reply to the submission made on 6th May, 2006 and filed in Court."***

Unfortunately, counsel for the appellants never made a reply to such complaints. Such complaints could be taken as admissions on the part of the appellants. The appellants had the right of reply, but their counsel informed court that he did not intend to make a reply and closed the appellant's submissions.

However, with due respect to the Senior Principal State Attorney, the respondent is the one who tendered in court an amended charge-sheet on 5th September 2006. Logically, therefore, a copy of the same amended charge sheet must be on his prosecution file. Thus, there would not be any cause for an alarm as alluded to by counsel for the respondent. His submission in that regard is misplaced.

It should be noted, further, that an appeal from the Judgment and decision of the Magistrate Grade 1 or Chief Magistrate, when the record is incomplete, the respondent is enjoined to make a supplementary record of appeal; and files it in court. In this instant appeal, counsel for the respondent never bothered to prepare a supplementary record of appeal whereby he could have included the amended charge sheet of 5th September 2006 and the defence exhibits.

Furthermore, the respondent/State should have gone the trial court or this to court to peruse the original Court file before making any reply to the submissions by the appellants to enable it look at the said amended charge sheet and the defence exhibits. That was not done by counsel for the respondent. Therefore, he should not transfer any blame to any person. He is to blame for his failure to prepare a supplementary record of appeal.

Consequently, Counsel for the respondent/State is complaining that the respondent was given a very short notice to make a reply to the submission made on 6th May 2009 and filed in court. This complaint was raised by Mr. Paul Lakidi, a State Attorney with the respondent on 15th June 2009, and the same was overruled. On court record, there is an affidavit of service, sworn by Baale Jackson of C/o M/s Simon Tendo-Kabenge Advocates, P.O Box 30330, Kampala Uganda, which inter alia reads:-

> ***"4. That the staff in the registry asked me for the copies of the Notice of Motion and the record of appeal which were taken to the State Attorney and from there they were signed. (Copies of the stamped pages of the record of appeal and Notice of Motion attached)."***

In his Written submissions, that were filed in court on 22nd June 2009 counsel for the respondent never challenged the said affidavit of service. Therefore, there was proof of

service of the record of appeal which contained among other records, the appellants' arguments. The respondent had enough time to prepare for its response to the appeal. Wherefore, I am of the considered opinion that the Principal State Attorney's arguments, quoted hereinabove do not hold any water of justice. I, therefore, agree with the submissions of Mr. Simon Tendo-Kabenge of 15th June 2009 in open court to the extent that the respondent, through it's counsel intended to delay justice. And such blatant lies by counsel for the respondent caused injustice to the appellants. In the result, the respondent's complaints are dismissed with the contempt they deserve.

I, now turn to consider the merits of the appeal. I am considering grounds 1, 2 and 3 together because they do overlap when considering the evaluation of the evidence on record. I will treat ground 4 separately. And then conclude with the findings and orders that will embody the decision of the court.

It is trite law that the duty of the first appellant court, among other things, is to re-evaluate the record of the proceedings so as to make its own findings and conclusions in the case. This court has a duty to review the entire evidence on record including that which it may decide to admit, re-evaluate it and to make its own findings of fact. I should note here, that, in doing so however, I must give allowance for the fact that I did not have the opportunity which the trial Magistrate had, of seeing the witnesses testify and observe their demeanours. In this regard, this court must give great weight to the impression of the trial court as to where credibility lies based on the demeanours and the manner the witnesses gave evidence.

However, in this instant appeal, the Magistrate, Her worship Nabafu Agnes who wrote the judgment being appealed against by the appellants did not hear any witness testify in court against the appellants, nor did she hear the defence witnesses. Therefore, she did see the Witnesses testify in court. According to the record of the lower court, the trial Magistrate was Her Worship Nkonge Agnes. She should have written the judgment in the case. There is no reason given, according to the record of appeal why she never wrote a judgment in the case she had heard. The practice in such instance is that trial Magistrates ought to write and pronounce a judgment in all trials that are conducted before them. This

practice should always be observed by all Magistrates; unless the trial Magistrate is no longer in service of the Judiciary or, she is indisposed for one reason or the other.

The guist of grounds of appeal 1, 2 and 3 is that the learned Magistrate is being critised for her failure to consider the evidence on record and hence came to the Wrong conclusion, when she convicted, the appellants of Malicious damage to property. The learned Magistrate when resolving issue number 2, of whether the accused persons (appellants) willfully and unlawfully damaged or destroyed any property on the land in question, she stated in her judgment; that:-

> "***For issue N0. 2, court has observed that making of changes in property at hand despite the contentious admitted to be in existence by both parties makes a case of malicious damage beyond reasonable doubt against the accused persons established by the prosecution. Such changes whether physically on the property or in the land Registry are considered unlawful hence since they were done at the will of the accused persons without resolution of the contentious matter in a court of competent jurisdiction (Land court) at the detriment of the complainants such acts are found to be malicious and indeed damaged the property at hand as it did not remain the same after the above changes which are not justified by the accused due to a lot of contradictions on their side of the story. The prosecution has proved this beyond reasonable doubt."***

With due respect to the learned Magistrate her findings on count 2 of malicious damage to property by the appellants are not supported by law and evidence on record. The prosecution was under the law required to prove beyond reasonable doubt the following ingredients of the offence Malicious damage to property contrary to section 335 (1) of the penal Code Act;

(a) The property belonging to the complainant was damaged or destroyed.

(b) That the said property was damaged or destroyed through willful and unlawful actions.

(c) That the property in issue was damaged or destroyed by none other than the accused persons in the dock.

According to the record of appeal at **page 8,** PW1, the complainant and the purported owner of the suit property, did not adduce evidence pointing to the guilt of each of the appellants. PW1, Micheal Tempora Bisase, gave evidence that he does not know A2. (2nd appellant) And A1 (1st appellant) claims to be the owner of the suit land. At **page 9, lines 4 and 5 of the record of appeal,** PW1 states that:

"The accused are selling off some part of the land, and also demarcating it. Their agents have taken some Murram off."

PW1 did not mention in his evidence who damaged the property in issue. PW1, on **page 9 lines 23 and 24 of the record of appeal**, stated that he does not know A2. That he has no case against A2. That A2 is in court because he is on the Land Title. At **page 10, line 25**, PW2, Francis Xavier Mugisha gave evidence that he does not know A2. He knows A1 as a village-mate. PW2 at **page 11 line 8 of the record of appeal** testified that on 13th April 2006 he got information from his farm Manager, one Sempebwa, that A1 had bought some sterling people and were extracting marrum. On the same **page line 11**, Pw2 stated that A2 claimed the land to be his, that is why he was arrested. Then at same page **line 25**, he said in cross-examination that he has never seen A2.

The only two prosecution witnesses' evidence does not show that it is the appellant's who were extracting marrum from the suit property. A2 (2nd appellant) was exonerated from the crime by PW1 and Pw2. There is also no evidence on record to pin down the 1st appellant with the offence of malicious damage to property belonging to PW1. PW2 stated in his evidence that the agents of A1(1st appellant) were the ones extracting murram, from the suit land. And that he got that information from Sempebwa, his farm Manager. Sempebwa was not called as a prosecution witness. And as such the information purportedly to have come from Sempebwa and testified by PW2 amounts to hearsay. The trial court should not have relied on it. Otherwise there is no evidence to link the damage of the suit property with the appellants. From the prosecution evidence on record, the trial learned Magistrate also is taken to have erred in law and fact when she held that the appellants had a case to answer. The appellants would have been acquitted at that stage. That failure by the trial magistrate clearly shows that she never bothered to look at the entire prosecution witness's evidence on record to ascertain whether there was a case to answer or not. Her ruling that there was a case to answer leaves a lot to be desired.

Further, the offence the appellants were convicted of requires that the property damaged or destroyed must be of the complainant. On **page 10, line 1 of the record of appeal**, PW1 gave evidence that he sold the land to Mugisha, but that Mugisha never got a title. That was during cross-examination. Then on the same **page 10, lines 13 and 14 of the record of appeal**, PW1, in re-examination, stated that he no longer has interest on the land because the accused took it, hence no caretaker other than Mugisha he sold it to.

According to the amended charge sheet, the particulars of offence state that the property (land) is the property of Micheal Tempora Bisase (PW1). The evidence of PW1 is very clear. The property in issue is not his. Therefore, the first ingredient of malicious damage to property as charged was never proved by the prosecution. And if there is any dispute the same could be between the appellants and other persons, other than the complainant Micheal Tempora Bisase. He must be acting for someone else. Otherwise, he (PW1) did not have any cause to complain against the appellant to the Police at Jinja Road Police Station, Kampala.

In her judgment, the learned Magistrate stated that:-

> ***".....above changes which are not justified by the accused due to a lot of contradictions on their side of the story."***

By stating the way as she did, she shifted the burden of proof to the accused persons (appellants) which is an err in criminal law. It is the law in criminal proceedings that the burden of proof is always on the prosecution. However, still her finding is not backed by evidence. The learned Magistrate never weighed the defence case. At **page 17** of the record of appeal, the 1st appellant denied having committed the offence charged. The 1st appellant also put up a defence that he owns a Kibanja which is found partly on block 185 plot 575 and Block 407 and Block 185 Plot 441. At the same **page 17** of the record of appeal, the trial court admitted the agreement by which the 2nd appellant bought a kibanja, as exhibit D1. At **page 18** of the record of appeal, the 1st appellant stated that he is in occupation of his above mentioned Kibanja. Then at **page 19** of the record of appeal the 1st appellant testified that he knew A2 as the owner of Block 185. And that on 13th April 2006, the said land was for (A2) 2nd appellant. The 2nd appellant, at **page 24** of the record of appeal, testified that plot 575 belongs to him and not PW1.

The evidence of the defence clearly shows that the appellants put up the defence of **a claim of right** over the suit property. I, therefore, agree with the finding of the learned magistrate in her judgment, at page 3, last paragraph, when she stated that;

> ***" Issue N0. 1 involves resolution of ownership of the land in question which she has no criminal jurisdiction, hence court will not waste time to ponder on the same as both prosecution and the accused contend on ownership of the same."***

The learned Magistrate agreed and observed the appellants claims over the suit land. At that point, the learned Magistrate should have invoked the defence of claim of right and discharged the appellants of the offence that they were convicted of. **Section 7 of the Penal Code Act** provides the defence of the claim of right. It reads:-

> "***A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."***

With such defence, even if there was to be evidence of damage to property, which is missing in this instant appeal, the learned Magistrate should not have found the appellants guilty of the charged offence. Consequently, and most important, for the fact that the learned Magistrate acquitted the appellants of the offence of criminal trespass on the property in issue, the element of "**willfully and unlawfully**" which is one of the ingredients of the offence of Malicious damage to property was done away with. Hence the offence of malicious damage to property could no longer stand as against the appellants (accused persons). The evidence of PW2 as regard to the information that was allegedly obtained from one Sempebwa was therefore hearsay. This is because Sempebwa was not called to come and testify on behalf of the prosecution.

Wherefore, grounds 1, 2 and 3 of appeal are answered in the affirmative in the following terms:-

(a) The learned Magistrate erred in law and fact when she failed to properly evaluate the evidence on record.

(b) The learned Magistrate erred in law and fact when she held that the prosecution had proved the offence of malicious damage to property beyond reasonable doubt against the appellants.

(c) The learned Magistrate erred in law and fact when she held that the evidence of PW2 as regards to the information that was allegedly obtained from one Sempebwa was not hearsay.

Lastly, I now deal with ground 4 of appeal. At **page 6 of the Judgment**, the learned Magistrate ordered for compensation of the Victims a sum of shs, 5,000,000/= for the loss caused to them as result of the damage as per the court's assessments. First of all, the court never assessed the said loss. There is no evidence on record to show that the complainant (PW1) suffered any loss.

In my findings, herein in this judgment, the suit land/property did not belong to PW1. Rather, the one who is claiming the suit land is PW2; but he was not the complainant in the criminal case. PW2 came in the case as a prosecution witness. Wherefore it was wrong for the learned Magistrate to award compensation of shillings 5, 000,000/= against each of the appellants in favour of PW1 and PW2. Therefore, the 4th ground of appeal succeeds.

In the result, I allow the appeal, quash the conviction, set aside the sentence of 12 months imprisonment and set aside the order that was ordering compensation of Shs. 5, 000,000/= to the victims of the alleged crime.

Accordingly each appellant is acquitted of the offence of malicious damage to property contrary to section 335 (1) of the Penal Code Act. They are set free unless held on other lawful charges.

Further, the complaints and the evidence from the prosecution clearly show that the appellants (accused persons) ought to have been acquitted at the stage of a no case to answer. However, they were subjected to unjustified trial, convicted and sentenced to imprisonment. The entire trial in the lower court and the actions of the alleged victims (PW1 and PW2) violated the appellants' rights to freedom. In that regard, the complainant, PW1 is hereby ordered to compensate each appellant in the sum of

Shillings 10,000,000/= (ten Million) for the loss and damage arising out of unlawful arrest, false detention at the police, malicious prosecution , and unlawful imprisonment for the period they have spent in prison while serving their respective sentences.

I so order.

Dated at Nakawa this 1st day of September, 2009

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JOSEPH MURANGIRA

JUDGE