THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 004 OF 2010

NALUME ARAMATHAN::APPELLANT

VERSUS

UGANDA:: RESPONDENT

[Appeal from the Decision of Mr. Birungi Herbert

(Magistrate GI) dated the 22nd January 2010

in Mukono Criminal Case No. 0027 of 2009]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arose from the decision of Mr. Birungi Herbert, sitting as the Grade I Magistrate at Mukono, in which he convicted the appellant on one count of theft of a motor vehicle contrary to s.254 (1) and 265 of the Penal Code Act, and sentenced him to 5 years imprisonment.

At the trial, the prosecution called 6 witnesses to prove its case against the appellant. The salient facts of the case were that the appellant was employed as a driver at Sugar Corporation of Uganda (SCOUL) in Lugazi. He was assigned to drive the Chief Executive Officer (CEO) of the Company, Mr. T. S. Sundaram in the car which was the subject of the crime, Land Cruiser Prado Reg. No. UAJ 703V. The case for the prosecution was that sometime in December 2008 the said Sundaram went to India on holiday. That after he left, in the night of 27/12/08, the appellant went to the SCOUL compound and drove the motor vehicle out of the compound but on his way out, two guards at the gate identified him. The guards said the appellant told them that he was on his way to pick up the CEO from the airport at Entebbe. He did not return to SCOUL that night and the motor vehicle was never seen again. He was arrested and charged with this offence.

In his defence the appellant claimed lack of knowledge of the crime. In his testimony he said that he last drove the motor vehicle when he took Sundram to the airport on 22/12/2008, after which he parked it and handed the car key over to one Sundagi. That he was later summoned and told that the motor vehicle was missing. His defence was that if he had stolen the motor vehicle he would have disappeared and not gone to work on the day following the theft.

The trial magistrate believed the testimonies of the 6 prosecution witnesses and convicted the accused person. He then appealed raising 4 grounds in his memorandum of appeal. First, the appellant complained that the trial magistrate failed to evaluate the evidence on record and came to a wrong decision. Secondly, that the evidence on the record was insufficient to convict the appellant and the offence was not proved beyond reasonable doubt. The third complaint was that the trial magistrate only considered the evidence adduced by the prosecution but did not consider the appellant's defence. Finally, the appellant complained that the sentence that the trial magistrate handed down to him was excessive and unwarranted in the circumstances.

At the hearing of the appeal, Mr. Benon Seryazi who represented the appellant addressed grounds 1, 2 and 3 of the appeal together and ground 4 separately. With regard to ground 1 he submitted that the standard of proof, which is beyond reasonable doubt, was not met in the evaluation of the evidence. He argued so because in his opinion the trial magistrate did not take into account the testimony of Balaba William (PW4) that on the morning following the theft, he (PW4) went to the scene of the crime and recovered an abandoned gun and an overcoat. Mr. Seryazi stated that it was his conjecture that the gun and jacket must have been abandoned by Kerry Rogers/John, the man who was on 27/12/2008 deployed to guard the residence from which the motor vehicle was stolen. He submitted that this was supported by the fact that there was evidence that the said Kerry disappeared and he was never seen again.

It was also Mr. Seryazi's submission that the trial magistrate ignored the testimony of PW4 that he received information that on 7/01/2009, the stolen motor vehicle was seen in Arua. Mr. Seryazi thus concluded that the trial magistrate's finding that the appellant was the last person seen driving the car was erroneous because it was not proved that the person who was seen driving the motor vehicle on 7/01/2009 was the appellant.

Mr. Seryazi went on to submit that PW2 lied when he testified that he saw the appellant drive the vehicle out of the SCOUL compound in the night of 27/12/08 because he had the motive of protecting his job. Mr. Seryazi also adverted to the evidence of PW5, the Chief Security Officer at SCOUL, that the policy of the company was that if a driver was driving a company vehicle out of the compound without a member of staff, it had to be checked. He then contended that in view of the fact that the CEO was not in the car that night, it ought to have been checked. Further that PW2 failed to check the motor vehicle in the night when it was stolen; and that even if he did, he was negligent when he did not establish who the second person in the motor vehicle was. That in view of this PW2 had a motive to lie about what happened in the night that the vehicle went missing. He relied on the decision in the case of **Stephen Oporocha v. U [1991] HCB 8** for the submission that once a witness has been shown to have a proven motive to tell lies against the accused, the evidence of that witness should be treated with caution and should not be believed unless it is corroborated. Mr. Seryazi was of the opinion that the testimony of PW3 ought to have been treated in the same manner because he too was a guard at the gate and he failed to identify the second person who he said was in the car with the appellant that night.

Mr. Seryazi further submitted that the trial magistrate failed to take the appellant's behaviour when he reported at his work place the day after the theft into account. Further that the trial magistrate did not take it into account that the appellant offered to record a statement at the police station soon after he was arrested. In his opinion all this pointed to the appellant's innocence.

Finally, Mr. Seryazi submitted that the trial magistrate did not take it into account that the appellant was not represented by an advocate. That as a result he did not challenge the evidence adduced by the prosecution. He relied on the decision in the case of **Rwahamuhisi Atanasi v. U [1976] HCB 162** where it was held that the fact that the accused did not cross-examine the prosecution witnesses in a manner which he/she should does not relieve the prosecution of its fundamental task of proving the case beyond reasonable doubt.

Counsel for the appellant did not offer any submissions on the ground that the trial magistrate considered only the prosecution evidence and omitted the testimony of the appellant. Neither did he offer any on its second limb that the trial magistrate based the appellant's conviction on the weakness of his case, rather than on the strength of the prosecution case.

With regard to the fourth ground Mr. Seryazi submitted that the appellant was a first offender but the trial magistrate did not take that into consideration. Further that the trial magistrate ought to have taken it into account that the appellant was not represented by counsel and that it was not proved that the car that was stolen had the value of shs 28m. He finally submitted that the sentence of 5 years in prison without the option of a fine was harsh and excessive in the circumstances. He proposed that if the appellant be found guilty, this court should reduce the sentence imposed on him to a caution.

In reply, Mr. Hamza Sewankambo (RSA) addressed the grounds of appeal in the same manner that counsel for the appellant did. With regard to grounds 1, 2 and 3 he submitted that there were three ingredients that had to be proved in order to discharge the prosecution's burden in the case. He submitted that the first two elements, i.e. the existence of something capable of being stolen and the fact of theft were not contested and he considered them proved.

With regard to the third ingredient which was the participation of the appellant, he submitted that it was proved by the testimonies of PW2 and PW3. Further that this was corroborated by the testimony of PW5 who detailed the security procedures at SCOUL. Mr. Sewankambo further submitted that the evidence adduced by the prosecution witnesses was confirmed by the appellant himself when he stated that it was not possible to drive the motor vehicle out of SCOUL without going through the check point (at the gate). That since the appellant was the last person seen driving the motor vehicle on the night that it went missing, the trial magistrate was correct when he came to the finding that he stole it.

Mr. Sewankambo further submitted that that fact that Kerry Rogers disappeared after the motor vehicle was stolen did not exonerate the appellant because he was positively identified as the person who took the motor vehicle. He thus reiterated that the trial magistrate properly evaluated the evidence on record and came to the correct finding and properly convicted the appellant.

With regard to the 4th ground of appeal, Mr. Sewankambo submitted that the trial magistrate had the discretion to hand down any punishment under the law. That given the maximum sentence and the value of the motor vehicle, a sentence of 5 years in prison was appropriate and it ought to be upheld.

On a first appeal the appellant is entitled to have the whole evidence submitted to fresh scrutiny so that the court weighs any conflicting evidence and arrives at its own conclusions {**Okero v.**

Republic [1972] EA}. In so doing an allowance should be made for the fact that the trial court had the advantage of hearing and seeing the witnesses {**Peters v. Sunday Post, [1958] EA. 424**}. I will therefore re-evaluate all the evidence on the record taking into account the points that have been raised in grounds 2 and 3 of the appeal, and articulated in the submissions by counsel, and then deal with ground 4 separately.

Grounds 1, 2 & 3

With regard to the compliant that the trial magistrate did not addressed PW4's testimony, it would be helpful to set out what he said. PW4 was Mwebare Ephraim, the branch manager of Premier Security Systems. He testified that on 27/12/2008 at 5.00 p.m., he booked a guard at the residence of the CEO at Villa Line, Plot No. 2 SCOUL Quarters. Further that in the morning of 28/12/2008 he did not find the guard at his posting but only found a gun and an overcoat. The garage was open and the CEO's motor vehicle was missing. He reported the matter to the Chief of Security at SCOUL and the police. Further that on the 7/01/2009, he received information that the missing vehicle had been intercepted at the boarder in Arua. That he travelled to Arua to try and identify the vehicle but he did not see it when he reached Arua and so it had not been recovered.

When he was cross-examined, PW4 told court that he had not seen Kerry (the guard at the CEO's residence) again. That he last called him on 28/12/2008. That the guards identified the appellant as the person who had driven the CEO's motor vehicle at 1.00 a.m. on the night that it went missing. That Kerry never reported to work again since the vehicle went missing and he had disappeared completely.

This testimony is not conclusive of anything save that the guard who had been assigned to the residence of the CEO disappeared in the same night that the motor vehicle did. It does not prove without a doubt that Kerry stole it, though it is circumstantial evidence that tends to point to his involvement in the theft. PW4's testimony must be evaluated in the context of the testimonies of the security guards at the gate (PW2 and PW3) who said they identified the appellant on the night of the theft, as well as the testimony of Balaba William (PW5), the Chief Security Officer at SCOUL.

Buluma James (PW2) testified that he knew the appellant as a driver with SCOUL. Further that on the night of 27/12/2008 he saw the appellant driving the stolen motor vehicle out of the SCOUL gate. The appellant informed him that he was on his way to pick up the CEO from Entebbe Airport.

PW2 said that there was an electric light on at the gate and he was able to recognise the appellant who he had known for about 3 months. That there was another person in the car with him that he did not recognise. That by the time he left his station at 6.00 a.m. the appellant had not returned with the vehicle.

When the appellant cross-examined him, PW2 said that the appellant did not sign in the record book because it was not a requirement that he does so. He explained that the guards did not have a record book for Cable Corporation (staff) but they sometimes signed in a private book when they were carrying luggage in the car. Further that all visitors to SCOUL were required to sign in the record book. Also that as guards they checked every vehicle that went through the gate and that in this particular instance he checked the motor vehicle but did not find any luggage in it. That he did not recognise the second person who sat in the m/v with the appellant but he wore a blue overall and a hat.

PW2's testimony suggests that the second person in the m/v was in disguise under the hat and that PW2 genuinely did not recognise him. There is no doubt from his testimony that he knew the appellant for a period of three months before the incident and that by the help of the electric light he was able to see him clearly. I think that because he knew him before and talked to him as an employee at SCOUL where he was in charge of security at the gate, he identified him by his voice as well when he told him that he was on his way to pick up the CEO from Entebbe Airport. The story was convincing especially because at the time the CEO was away.

Kakeeto Herbert was PW3 and he too was a guard at the SCOUL gate in the night the m/v went missing. He confirmed what PW3 said, save that he also stated that the second person in the car sat in the co-driver's seat. That when the appellant drove out he drove towards Kampala. In cross-examination by the appellant he too stated that appellant did not sign the record book because members of staff of SCOUL were not normally required to do so. Further that all vehicles (both visitors' and SCOUL's) which passed by the guards at the gate were recorded. That he also checked the m/v before it left but found no luggage. The testimony of PW3 corroborated that of PW2. To my mind it removed any doubt that the appellant was properly identified on the night of the theft.

The fact that the second person in the m/v was not identified was without any doubt because he was disguised by the hat on his head. It also suggested to me that the second man in the car was most

probably Kerry; for why would a security guard abandon his overcoat and gun except to prevent people that most probably knew him from identifying him? I came to the conclusion that Kerry removed his overcoat and left his gun behind and then put on a hat to disguise himself because his hooded face would not be seen. In fact any light would cast a shadow over his face to prevent anyone from seeing it. Kerry knew that at 1.00 a.m. at night the car would be checked at the gate. If he had remained in the overcoat that he had worn earlier and also carried his gun with him, the guards at the gate would have become extremely suspicious and prevented the car from going through the barrier. The fact that Kerry disappeared completely after the theft therefore does not create any doubt in my mind that the appellant drove the motor vehicle out of the compound that night.

However, it was argued for the appellant that PW2 and PW3 had improper motives. Further that they implicated the appellant because they wanted to protect their jobs because they were negligent when they failed to identify the 2nd man who was in the motor vehicle.

The common law recognised that, in certain cases, a trial judge was obliged to warn the jury about the dangers of acting on the uncorroborated evidence of particular classes of witness. Not only was the warning mandatory, it required the judge to adhere to a set formula which included use of the phrase “dangerous to convict” and obliged him to identify for the jury's benefit what evidence, if any, was capable of affording corroboration. The classes of evidence regarded as being inherently unreliable, were judicially identified as evidence given on oath by a child of tender years; evidence on behalf of the prosecution by an accomplice of the accused, and evidence by the complainants in cases of sexual misconduct. The rule included other evidence of witnesses who might appear suspect such as the testimony of a person who had a grudge or other personal interest in having the accused convicted. Self preservation, as is suggested in this case, fell under the later.

In England and Wales, the Criminal Justice and Public Order Act of 1994 abrogated the need for a trial judge to warn the jury of the dangers of acting on uncorroborated evidence in the circumstances stated above. The situation in Uganda today is not different because s. 132 of the Evidence Act provides that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

The requirement to find corroboration still exists with regard to witnesses of tender years because of the provisions of s.40 (3) of the Trial on Indictments Act though it has been abrogated by case law in complaints of rape (**Uganda v. Peter Matovu, Kampala H/C Criminal Session Case No. 146 of 2001**). In **Watete v. Uganda [2002] 2 EA 559**, the Supreme Court had occasion to discuss the necessity of corroboration and in that connection, the weight to be placed on the testimony of a witness who has a "purpose of his own to serve." Their Lordships re-stated the principles and then came to the conclusion about the motives of witnesses as follows:

> *"Whenever the court is evaluating evidence and assessing its credibility, all factors likely to colour, taint or in any way affect a witness's truthfulness or accuracy, must be carefully considered. The witness's motive for testifying, when evident, is one of such factors. Similarly, a witness's opportunity to observe what he claims to have witnessed, and a witness's experience on matters on which he gives opinion evidence, are factors that the court takes into consideration. All those and other factors, when applicable, assist the court to determine what weight and therefore, reliance, if any, to place on the witness's testimony. However, the legal requirement for a warning on the need for corroboration is in respect of accomplice evidence. What is akin to that is the requirement, which has grown in practice, and which has been pronounced on by this Court in many of its decisions, for the court to warn itself of the danger of convicting solely on identification evidence, especially of a single witness, where the circumstances were not favourable to correct identification. There is no legal requirement to treat a witness who has a purpose of his own to serve in a special way, though that purpose may be taken into consideration when assessing the witness's credibility."*

That being the position of the law, I could not agree with Mr. Seryazi's submission that the testimonies of PW2 and PW3 ought to have been treated with more caution that those of other prosecution witnesses. That aside, Mr. Seryazi did not show how he arrived at the conclusion that PW2 and PW3 were motivated to implicate the appellant. Moreover, the case of **Stephen Oporocha** cited by Mr. Seryazi was distinguishable from the instant case because in the former, there was evidence led by the defendant through the testimony of two witnesses which showed that the complainant had the motive to tell lies against the appellant. But in the instant case, save for the fact

that the vehicle was taken when they were on duty, there was no evidence led to show that PW2 and PW3 could have been implicated in its theft.

In addition to the above, the two witnesses were not shaken in cross-examination and they appeared to have carried out their duty as was required by the policies of SCOUL. Moreover, the appellant did not advert to any past relationship with them that may have motivated them to implicate him. That there was a second person in the motor vehicle whom they did not recognize is not of much consequence since they were confident that the motor vehicle was in the hands of an employee who allayed their fears about the reason for taking it out at 1.00 a.m. at night; he was on his way to the airport to pick up his boss who they knew was away at the time. Indeed the presence of the second person in the motor vehicle did not lessen the appellant's guilt because both witnesses unequivocally stated that they saw and properly identified him as the person that drove the m/v away.

In the event that my conclusions above about PW2 and PW3 are not acceptable due to the proposal that their testimonies ought to be taken with caution without other evidence to corroborate them, I thought that the testimony of Balaba William (PW5) would be helpful in that regard. Balaba was the Chief Security Manager at SCOUL. He testified that Mwebare (PW4) informed him about the missing vehicle on the morning of 28/12/2008. That he went to the residence of the CEO and confirmed that the vehicle was missing from the garage. Further that at the scene, he saw a gun and an overcoat that had been abandoned in the compound. That he also saw the appellant at the scene of the crime that morning but Mr. Sundagi (the General Manager Audit) was still in possession of the car keys.

In cross-examination by the appellant, PW5 stated that the appellant had been driving the CEO's vehicle for 5 months and he was the official driver of and the only person allowed to drive that specific motor vehicle. PW5 emphasised that their practice was that only one driver was attached to a specific vehicle and that therefore only the appellant was allowed to drive the CEO's motor vehicle. PW5 also stated that the guards were aware of this policy and if the m/v was being driven by any other person they would not have let him/her through the barrier. I was therefore fortified by the testimony of Balaba in coming to the conclusion that the appellant took the CEO's motor vehicle on the night of the theft because PW5's testimony corroborated the testimonies of PW2 and PW3 about the security routines at the gate.

I next considered the submission that PW4's testimony about the motor vehicle being seen in Arua on 7/01/2009 proved that the appellant was not the last person seen driving it. However, I was not persuaded that this piece of evidence contradicted PW2 and PW3's testimony that they saw the appellant drive the vehicle out of the SCOUL compound in the night of 27/12/2008. Though PW4 said he received information about interception of the vehicle in Arua, when he went to try and identify it he did not find it there. That part of PW4's testimony therefore only went to prove that the motor vehicle was lost and there was not a trace of it in spite of his vigilance to follow up any possible leads to its recovery.

I went on to address Mr. Seryazi's contention that the failure to strenuously challenge the evidence brought by the prosecution resulted from appellant's lack of legal counsel and should have been considered by the trial magistrate. The case of **Rwahamuhisi Atanansi (supra)** that was cited to support this submission did not in any way advert to the lack of representation by counsel though it *did* lay down the principle that where the accused does not cross-examine witnesses in a manner which he should, he does not relieve the prosecution of the fundamental task of proving its case beyond reasonable doubt. Moreover, lack of legal representation is not one of the factors that courts are enjoined to take into consideration when evaluating evidence. Though an accused person is entitled to legal representation, it is not a mandatory requirement in cases of theft. There was no evidence on record that the appellant was prevented from instructing counsel to represent him; he seemed to have chosen to go it alone, and that too was his right.

Going back to the issue of cross-examination, in the case of **Rwahamuhisi Atanansi (supra)** the facts were different from the facts at hand. The appellant had put up a story in his defence and the prosecution did not cross-examine him on it. The trial magistrate rejected the appellant's unchallenged explanation in a very summary manner without giving any reasons. The appellate court then found that he erred, quashed the conviction and set aside the sentence.

Applying the principles above to the instant case, the record shows that the appellant cross-examined all the witnesses that testified against him in some detail. However, their testimonies were not shaken at all. In his defence the appellant affirmed and stated that he had not seen the motor vehicle since 22nd December 2008. He denied involvement in the theft and said he was not there when it happened. However, when he was cross-examined about the possibility of the m/v having been taken out of the SCOUL compound through a route other than the main gate, he said that it was not

possible to drive the vehicle out of the factory without going through that check point. Mr. Sewankambo submitted that the later part of appellant's testimony confirmed the evidence adduced by the prosecution that appellant must have been the man who stole the motor vehicle.

On the other hand, Mr. Seryazi argued that the fact that the appellant reported to work the day after the theft pointed to his innocence. The appellant also testified that he could not have reported to work if indeed he had driven off the CEO's car in the night. He added that if that was the case, then he would have disappeared altogether. I was not convinced by this explanation in the appellant's testimony. It is not always that the thief disappears after the theft. Enough doubt about his involvement had been created by the abandonment of Kerry's overcoat and gun. Appellant may have assumed that this automatic lead, which in my view was only a red herring, would be to think that Kerry alone was involved because he took off never to be seen again. In spite of this, the testimonies of PW2, PW3 and PW5 strongly implicated him.

Given the testimony of the accused on cross-examination and the rest of the evidence on the record the trial magistrate came to his conclusions as follows:

> *"Accused's testimony therefore served to reinforce prosecution case that it is the accused who was seen driving motor vehicle registration No. UAH 307 on 27th December 2008.*
>
> *It was established therefore that the accused was the last person seen in possession of the missing motor vehicle Registration No. UAG 703V since no explanation was offered about the circumstances under which accused came to be in possession of the motor vehicle the presumption is very strong that he fraudulently took motor vehicle registration No. UAG 703V. See Lubinga v. Uganda [1983] HCB 6. His conduct amounted to stealing. I find him guilty."*

Although in the judgement the trial magistrate consistently referred to the motor vehicle as Reg. No. UAG 703V instead of UAJ 703V, I think that was a clerical error that is excusable because elsewhere on the record the vehicle was referred to as UAJ 703V.

Having reviewed the whole of the evidence on record, I came to the conclusion that there was sufficient evidence for the court to rely on and the trial magistrate considered both the evidence for the prosecution and the defence proffered by the accused. I therefore entirely agree with the trial magistrate's findings because indeed after the night in which PW2 and PW3 saw the appellant drive the m/v through the gate towards Kampala, it was not proved that any other person saw the motor vehicle again; so the owner thereof was deprived of it permanently. By the evidence on record therefore, all the ingredients of the offence of theft were proved beyond reasonable doubt. Grounds 1, 2 and 3 of the appeal therefore fail.

Ground 4

As to whether the sentence to 5 years in prison was excessive and unwarranted, the main contention was that the trial magistrate failed to take it into consideration that the appellant was a first time offender. It was also contended that the value of the motor vehicle stolen was not established in court and that the trial magistrate ought to have given the appellant the option of paying a fine. While awarding the sentence the trial magistrate observed:

> *"The value of the subject is very high and the vehicle has not been recovered. The accused therefore deserves to be punished heavily. The maximum penalty is seven years but the accused is a first offender (sic) he is sentenced to imprisonment of five years."*

The general principles on sentencing were re-stated by the Court of Appeal in **Sande Martin v. Uganda, Criminal Appeal No. 278 of 2003.** Sentencing is within the discretion of the trial judge. The appellate court will only interfere with the sentence passed by the trial court, if it is evident that the trial court acted on a wrong principle, or overlooked some material factors or the sentence is either illegal, or is manifestly excessive or so low as to amount to a miscarriage of justice. I have no doubt that the same principles apply to magistrates courts.

It is evident that the trial magistrate considered that the appellant was a first offender. The maximum sentence for theft of a motor vehicle is contained in s. 265 of the PCA as 7 years imprisonment and the provision gives no option of a fine. It was not shown that the trial magistrate breached any of the sentencing principles above. I therefore saw no reason to disturb the sentence that he awarded.

In conclusion, this appeal fails on all 4 grounds and it is hereby dismissed. The conviction and sentence are accordingly upheld.

Irene Mulyagonja Kakooza
JUDGE
19/08/2010