

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 29 OF 2011**

MUHWEZI ANTHONY ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

*(Arising from Buganda Road Court Criminal Case No. 760 of 2010)*

**Hon. Lady Justice Monica K. Mugenyi**

**JUDGMENT**

This Criminal Appeal arises from the judgement and orders of a Magistrate Grade 1 of Buganda Road Court in Criminal Case No. 760 of 2010. The appellant, Muhwezi Anthony, served as the complainant's accountant in a company referred to as Dem Investments Limited, a money lending office. He and his co-accused, Joram Kahesi, were alleged to have stolen Ushs. 48.5 million and USD \$ 10,000 from Dem Investments Limited. Ushs. 24.6 million and USD \$ 6,000 was subsequently recovered from the appellant's wife. The outstanding monies were never recovered. The appellant was subsequently charged with 3 counts as follows:

- I. Breaking into a building with intent to commit a felony contrary to section 298 of the Penal Code Act.
- II. Theft contrary to section 254(1) of the Penal Code Act.
- III. Conspiracy (with Joram Kahesi) to commit a felony contrary to section 390 of the Penal Code Act.

The appellant was acquitted of the offence of conspiracy to commit a felony, but convicted of counts I and II, and sentenced to 1 year and 3 years imprisonment respectively, the sentences to run concurrently. The appellant was also ordered to compensate the complainant for the loss suffered but the specific amount to be paid in compensation was not stated in the judgement. Aggrieved by both conviction and sentence, the appellant lodged the present appeal.

The Memorandum of Appeal detailed four (4) grounds of appeal as reproduced below:

1. **The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record thereby arriving at a wrong decision.**
2. **The learned trial magistrate erred in law and fact when he ruled that the charge and caution statement (attributed to A2) was properly taken.**
3. **The learned trial magistrate erred in law and fact when he concluded that indeed Ushs. 48,500,000/= and USD \$ 10,000 was stolen by the appellant without proof of its existence.**
4. **The learned trial magistrate erred in law and fact when he relied on the (existence of) the above money to convict the appellant, which money was not exhibited or proved in court.**

Mr. Joseph Luzige appeared for the appellant while Ms. Rachael Bikhole represented the respondent. Learned counsel for the appellant argued grounds 1 and 2 together and similarly argued grounds 3 and 4. I propose to determine grounds 1, 3 and 4 together, and conclude with ground 2.

Mr. Luzige referred this court to the cases of **Kifamunte Henry v. Uganda Supreme Court Criminal Appeal No. 10 of 1997** and **Pandya v. R. (1957) EA 336** in support of his submission that a 1<sup>st</sup> appellate court had a duty to re-evaluate all the evidence on record and come to its own conclusion, bearing in mind that it did not see the witnesses testify. On ground 1, learned counsel argued that the learned trial magistrate improperly evaluated the evidence when, relying on speculation, he held the alleged break-in to have been an ‘inside job’ in the absence of evidence that proved that a duplicate key was used in the alleged break-in or that the appellant was culpable therefore, as purportedly held by the trial court. Learned counsel further argued that the trial court did not consider the appellant’s evidence that he had never kept the company’s keys, and the prosecution had not discharged its burden of proof in respect of the offences in issue in so far as it neither proved that the allegedly stolen money had in fact been in the safe, nor did it prove that the said money was recovered from the appellant’s wife nor indeed was the said money exhibited in court.

Learned State Counsel, on the other hand, supported the findings of the trial magistrate and contended that the prosecution had duly proved the offences of breaking in with intent to commit a felony and theft, the appellant was properly placed at the scene of crime and was rightly convicted of the said offences. Ms. Bikhole argued that proof of the first count was sufficiently discharged by the evidence of PW2 to the effect that although the appellant was not authorised to keep the office keys, he wrongfully kept the keys to the Director’s office where the office safe had been kept, informed her of the disappearance of money from the safe but did not inform their boss, which conduct Ms. Bikhole considered incriminatory and inconsistent with the appellant’s innocence. With regard to the second count, Ms. Bikhole argued that the evidence of PW1,

PW2, PW3 and PW4 had sufficiently proved the incidence of theft of Ushs. 48.5 million and the appellant's culpability therefor.

The legal basis for first appeals to the High Court is enshrined in section 16 of the Judicature Act, Cap 13; section 204 of the Magistrates Courts Act (MCA), Cap 16, and section 34 of the Criminal Procedure Code (CPC) Act, Cap 116. Section 16 of the Judicature Act and section 204(1)(a) and (2) of the MCA mandate the High Court to hear first appeals from decisions of Chief Magistrates and Grade 1 Magistrates on a question of fact or law.

The duty of a first appellate court is detailed in the case of **Bogere Moses & Another v. Uganda Supreme Court Criminal Appeal No. 1 of 1997** as follows:

**“A first appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses and should, where available on record, be guided by the impression of the trial judge on the manner and demeanour of the witnesses. What is more, care must be taken not only to scrutinise and re-evaluate the evidence as a whole, but also to be satisfied that the trial judge had erred in failing to take the evidence into consideration.”** (emphasis mine)

This duty on 1<sup>st</sup> appellate courts is further clarified in the case of **Okwonga Anthony v. Uganda Supreme Court Criminal Appeal No. 20 of 2000** as follows:

**“(It) has a duty to rehear the case and to reconsider the material evidence before the trial judge. It must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”**

I do bear this in mind as I proceed to re-evaluate the evidence on record.

**Grounds 1, 3 and 4:**

*The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record thereby arriving at a wrong decision; when he concluded that indeed Ushs. 48,500,000/= and USD \$ 10,000 was stolen by the appellant without proof of its existence, and when he relied on the above money to convict the appellant, which money was not exhibited or proved in court.*

Count I for which the appellant was convicted entails the offence of breaking into a building with intent to commit a felony contrary to section 298 of the Penal Code Act. The provision reads as follows:

**“A person who breaks and enters a schoolhouse, shop, warehouse, store, office or counting house ... with intent to commit a felony in it, commits a felony and is liable to imprisonment for five years.”**

This offence denotes the ingredients of 'breaking a designated building', 'entering the said building' and 'the intention to commit a felony therein'. Ms. Bukhole referred this court to the definition of 'breaking' stipulated in section 294(1) of the Penal Code Act. The provision reads:

**“A person who ... opens by unlocking, pulling, pushing, lifting or any other means any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, is deemed to break the building.”**

Learned Counsel further referred this court to the definition of the ingredient of entering into a building provided in section 294(2) of the Penal Code Act as follows:

**“A person is deemed to enter a building as soon as any part of his or her body or any part of any instrument used by him or her is in the building.”**

In the present appeal it was the prosecution's case in the trial court that on or about the morning of 17<sup>th</sup> September 2010 a safe in the director's office was found open and Ushs. 48,500,000/= and USD \$ 10,000 had been removed from it. The prosecution evidence further indicated that the door to the director's office was not broken but, rather, had been opened using the office keys. This was the sum effect of the evidence of PW1, PW2 and PW3. I find that the opening of the office door to access the safe is sufficient proof of the ingredient of breaking an office within the precincts of sections 298 and 294(1) of the Penal Code Act.

On the question of whether whoever broke the office did in fact enter it and, more so, with the intention to commit a felony, I revert to the circumstantial evidence that was adduced before the trial court. It was the evidence of PW1 and PW2 that on the eventful day the office safe was found open and some sums of money there from was discovered missing.

Blackstone's Criminal Practice (1999) at p.1874 states:

**“Circumstantial evidence is evidence of relevant facts, i.e. facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence.”**

Halsbury's Laws of England (supra) states:

**“Since many crimes are committed in secrecy, it is inevitable that in a criminal trial, direct proof of guilt is often lacking and a great deal of the evidence is indirect and circumstantial. ... In the absence of evidence directly proving the facts in issue, the defendant may even be convicted solely on circumstantial evidence.”**

In the present appeal I find that it can be reasonably inferred from the open safe and missing money that whoever broke the office did in fact enter it with the intention of creating the felony of theft. I therefore find that the offence of breaking into a building with intention to create a felony contrary to section 298 of the Penal Code Act was duly proved by the prosecution.

The question then is whether or not the appellant was responsible for the proven offence. On this issue, the appellant denied responsibility for the break in or having had custody of the company's keys. However, PW2 testified quite categorically that the appellant had kept the keys to the main door where the safe was kept, and ordinarily kept the keys to the director's office and the main door, while she kept the keys to the safe, which, at the time, she had lost. Clearly proof of the appellant's participation in the offence of breaking in depends on circumstantial evidence.

In **R. v. Kipkering Arap Koske & Another (1949) 16 EACA 135** it was held:

**“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt.”**

In the present appeal the circumstantial evidence is that someone opened the door to the room where the safe was kept, entered it and opened the safe. The appellant had the keys to that room. This evidence is incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of the appellant's guilt. I therefore would not fault the trial magistrate's conviction of the appellant on the first count.

With regard to the second count of theft, having found that the open safe and missing money raise the reasonable inference of a break in with intent to commit the felony of theft, the question is whether the said felony was in fact committed and, if so, by whom.

The appellant denied responsibility for the alleged theft and contended that it had not been proved that the missing money had, in fact, been in the open safe. However, PW2 did testify that the appellant had kept the keys to the main door where the safe was kept; he ordinarily kept the keys to the director's office and the main door, while she kept the keys to the safe, which, at the time, she had lost. It was the prosecution case that the money that had been stolen from the safe was Ushs. 48.5 million and USD \$ 10,000 and Ushs. 24.6 million and USD 6, 000 was subsequently recovered from the appellant's wife. This was attested to by PW1 and PW3. There was no eye witness to the alleged theft but the prosecution sought to rely on the foregoing circumstantial evidence.

The legal definition of theft is set out in section 254(1) of the Penal Code Act. It entails the fraudulent dispossession of another of something that is capable of being stolen, and which item the dispossessor has no claim of right over.

Further, the case of Sula Kasiira v Uganda Criminal Appeal No.20 Of 1993 (Supreme Court) recognised asportation as an ingredient of the offence of theft. In that case, the following position from Halsbury's Laws of England, Vol. 10, 3<sup>rd</sup> Edition, paragraph 1484 was cited with approval:

**“There must be what amounts in law to an asportation (that is carrying away) of the goods of the prosecutor without his consent; but for this purpose, provided there is some severance, the least removal of the goods from the place where they were is sufficient, although they are not entirely carried off ... The offence of larceny is complete when the goods have been taken with a felonious intention, although the prisoner may have returned them and his possession continued for an instant only.”**  
*(emphasis mine)*

In the case of Bogere Moses & Anor vs Uganda (supra) evidence of recent possession of stolen property was held to raise a very strong presumption of participation in the stealing and if no innocent explanation was provided as to how the holder thereof came to be in possession of stolen goods, such evidence was even more dependable than that of an eye witness. For ease of reference I reproduce the holding:

**“It ought to be realised that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing so that if there is no innocent explanation of possession, the evidence is even stronger and more dependable than the eye witnesses evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable while the later solely depends on the credibility of the eye witness.”**

In the present case, I find for a fact that money in the sum of Ushs. 24.7 million and USD \$ 6, 000 was recovered from the appellant's wife to whom the police was referred by the appellant himself. This was attested to by PW1 and PW3. The appellant did not specifically deny this position; neither did he furnish any self-exonerating explanation as to how his wife came to be in possession of the same. The only explanation as to how she did come into such possession was provided by PW1 and PW3, as well as a confession that the appellant subsequently retracted, that he stole the money from the safe and gave some of it to a friend, who later passed it on to his wife. I do revert to the retracted confession later in this judgment but, for present purposes, find that the prosecution did prove that the appellant's wife was in possession of part of the money stolen from the safe. I find it reasonable to conclude from the foregoing evidence that money was indeed stolen from the safe on or about the 17<sup>th</sup> September 2010, and the appellant participated in that theft.

Having found that both counts against the appellant were sufficiently proved by the prosecution, I cannot fault the trial magistrate's conviction of the appellant on the same. In the result, ground 1 of this appeal must fail. Further, although the specific sum of money that was stolen from the

safe was not exhibited by the prosecution, having found that the money that was recovered from the appellant's wife had been stolen from the said safe, the incidence of theft has been proved. Therefore grounds 2 and 3 do not succeed.

**Ground 2:** *The learned trial magistrate erred in law and fact when he ruled that the charge and caution statement (attributed to A2) was properly taken.*

Mr. Luzige, for the appellant, argued that the alleged confession by the appellant was procured by torture and, therefore, the trial court's reliance on the retracted confession was in error. For the prosecution, it was learned counsel's submission that, having conducted a trial within a trial to determine its admissibility and found it to have been legally and properly recorded, the trial court rightly relied upon the appellant's confession.

In the case of **Amos Binuge & Others vs. Uganda Crim. Appeal No. 23 of 1989** (Supreme Court), it was held:

**"It is trite law that when the admissibility of an extra-judicial statement is challenged then the objecting accused must be given a chance to establish, by evidence, his grounds of objection. This is done through a trial within a trial. ... The purpose of the trial within a trial is to decide, upon the evidence of both sides, whether the confession should be admitted."** (*emphasis mine*)

In the present case the record of proceedings confirms that the trial magistrate did indeed conduct a trial within a trial, pursuant to which he admitted the appellant's confession in evidence. Although the confession was admitted on the court record, the appellant hereby denies its validity, as he is well entitled to do. The question is whether or not the trial magistrate wrongfully relied on the retracted confession to convict the appellant.

In the case of **Tuwamoi vs Uganda (1967) EA 84** it was held:

**"A trial court should accept any confession which has been retracted or repudiated with caution and must, before founding a conviction on such a confession, be fully satisfied in all circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."**

In that case it was further held:

**"If the court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the**

**weight to be placed on any confession that has been admitted. In assessing the confession the main consideration at this stage will be, is it true?"** (*emphasis mine*)

In the case of **Matovu Musa Kassim v Uganda Supreme Court Criminal Appeal No.27 of 2002** the learned Justices of the Supreme Court evaluated the reliability of a repudiated confession as follows:

**“Before his trial, the appellant made a detailed statement disclosing facts and events which only a person who was an active participant and eye witness to much of what occurred on the night of the murder could have been familiar with. It is true that at his trial, he gave sworn evidence in which he repudiated the confession. However, a number of factors exist to discredit any claim that his repudiation, in any way, affected the facts and events he disclosed. We have already observed that the story he told could only have been known by a person who had actively participated in the incidents of the crimes. The appellant’s contention that he was framed has no grain of truth in it.”**

In the present case the confessions in issue entailed detailed disclosures on how the present theft transpired. The disclosures entailed facts that only a person who was an active participant in the theft could have been familiar with. On the basis of the decision in **Matovu Musa Kassim v Uganda** (supra), such disclosures would underscore the authenticity of the confession, as well as its reliability to secure a conviction. As a matter of good practice and prudence, trial courts will only act on a confession if it is corroborated in some material particular by independent evidence accepted by the court. However, such corroboration is not necessary in law and the court may act on a confession alone if it is satisfied, having due regard to all the material points and surrounding circumstances, that the confession cannot but be true. See **Tuwamoi v Uganda** (supra).

In the present case, at p.3 of his judgment, the trial magistrate considered the confession viz the evidence as follows:

**“On further examination of the prosecution evidence, especially the charge and caution statement made by A1 which this court found to be correctly obtained, the accused is pinned beyond reasonable doubt; there is no possibility of any other person having broken into the office. The other witnesses corroborate this, especially the evidence of PW4 who administered the charge and caution statement. PW3 also corroborates (this) evidence in her evidence where investigations showed A1 stole the key from PW2 and used it to break into the safe and still the money.”**

From the foregoing passage, I find that the trial magistrate did consider all the evidence before him and all the circumstances of the case and assessed the confession to be true. I, too, have carefully re-evaluated the evidence on record and am satisfied that the appellant’s confession cannot but be true. In the result, ground 2 of the appeal must fail. In the final result therefore, with due respect, I find no merit in this appeal. The appeal stands dismissed.



**Monica K. Mugenyi**  
**JUDGE**

**13<sup>th</sup> July, 2012**