THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CR-CN-0017-2011
(Arising from Mbale Criminal Case No. MBA-00-CR-CO-759-2008)

1. **MALE JAMES**
2. **MWANDU SETH………..……………..……………APPELLANTS**

VERSUS

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

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

The appellants to wit **Male James** and **Mwandu Seth** were tried, convicted and sentenced by the Magistrate Grade I's court of Mbale on two counts.

In the first count, Male James was convicted for stealing from a motor vehicle c/s 267 (c) of the Penal Code Act. Prosecution had alleged that on 8th July 2008 at Oilibya Petrol Station washing bay in Mbale District, he stole $1950 the property of one **Mukwana Stephen** from motor vehicle Reg. No. UAG 781R.

In the second count **D/AIP Mwandu Seth** was tried and convicted for destroying evidence c/s 102 of the Penal Code Act. Prosecution alleged that the 2nd accused on 9th of July 2008 at Oilibya Petrol Station washing Bay in Mbale District

knowing that US dollars 1950 may be required as evidence in a judicial proceeding removed it with intent thereby to prevent it from being used as evidence.
In the learned trial Magistrate's omnibus sentence, he sentenced A.1 to 3 years on count I and A.2 to 3 years on count II. He further ordered the convicts to compensate the complainant US $ 1950 after serving sentence.

The convicts were dissatisfied with the decision of the learned trial magistrate and filed this appeal through M/s Nyote & Co. Advocates and M/s Wegoye & Co. Advocates.

In the memorandum of appeal, the appellants complained that:

(1) The learned Grade I Magistrate did not properly evaluate the evidence on record hence reaching a wrong decision.
(2) The learned Grade I Magistrate convicted the appellants when there was no evidence corroborating the existence of US $ 1950 in the motor vehicle.
(3) The sentences which were handed down against the appellants were harsh.
(4) The decision of the learned Grade I Magistrate occasioned a miscarriage of justice against the appellants.

It is prayed that this court orders that:

(i) The decision of the learned trial Magistrate Grade I convicting the appellants of the offence of stealing from a motor vehicle and destroying evidence be quashed and they be acquitted.
(ii) The sentences handed down against the appellants be set aside.

As a first appellate court this court is enjoined to subject the entire evidence adduced before the lower trial court to fresh scrutiny and re-evaluation to find if it reached the correct conclusions leading to the conviction of the appellants.
It is trite law that in criminal trials, the burden of proving all the ingredients of the offence charged rests on the prosecution throughout the trial. At no one time does this burden shift to the accused person. The standard of proof has to be beyond any reasonable doubt.

In their respective submissions both **Mr. Nyote** and **Mr. Wamimbi** for the appellants were of the unanimous view that prosecution did not prove the ingredients of the offences charged beyond any reasonable doubt. That there was no evidence to prove that the alleged stolen US $ 1950 existed at all in the complainant's car.

On the other hand, **Mr. Ayebare** the learned Resident State Attorney contended that he executed his duty satisfactorily and proved both counts the appellants were convicted of as required by the law.

In a trial for the offence of stealing from a motor vehicle c/s 267 (c) of the Penal Code Act, prosecution has to prove that:

(1) Theft occurred.

(2) What was stolen was part of the motor vehicle or is from any kind of vehicle.

In a trial for Destroying evidence contrary to S.102 of the Penal Code Act, prosecution has to prove that:

(i) The accused destroyed US $ 1950 knowing the same may be required in evidence in judicial proceedings.

(ii) The accused knew that the money would be used in evidence but removed it with the intent to prevent the evidence from being used in judicial proceedings.

I will deal with the grounds of appeal together.

After studying and re-evaluating the evidence as a whole I am inclined to agree with the submissions by both learned counsel for the appellants that the guilt of each of the accused persons was not proved beyond any reasonable doubt.

From the evidence adduced by the prosecution there was no clear evidence adduced to prove that indeed the appellant had $1950 in his car and whether the same was stolen by A.1 and or destroyed by A.2.

According to the testimony of **PW.1 Steven Mukhwana Nandula** he took his vehicle to A.1 for washing. Thereafter he paid 3000/= for the work done. After he drove his vehicle away to **Tuuka**'s shop at around 10:00A.M. When he checked the dashboard for the money in order to transact business he did not see it. It was US $ 1950. He drove back to the washing bay and asked A.1 about the money which he denied knowledge of. PW.1 rung police and one **Kwesiga** came and arrested A.1. He (PW.1) explained that he had got the money from a money changer called **Issah** at Malaba on 5.7.2008. Although PW.1 said he was going to use the money at **Tuuka**'s shop, in cross-examination he said he was going to buy goods from Kenya. That he went to Kenya on 7.7.2008 and the money was the balance on his expenditure in Kenya on 7.7.2008 and not exchanged for **Issah**. At

the same time PW.1 testified that he was going to keep the money in Hamber Store his other home.
This witness further contradicts himself in re-examination that when he went to Kenya, the money was at Busiu yet he said it was a balance of the purchases he did in Eldoret. That he was going to use it at Tuuka Stores.

I agree with **Mr. Nyote** that if this piece of evidence is critically looked at, it is difficult to believe and leaves a lot of doubt in mind if the witness knew where his money was stolen from or if he had it at all.

If the learned trial Magistrate had critically looked at this evidence from the key witness, he would not have convicted the accused persons. This should have led the learned trial Magistrate to ponder as to why PW.1 kept money in the dashboard of his car and at the same time leave the Keys with a car washer yet he is a businessman. Secondly why did he shift the money from one home to another and at the same time contradicts himself and claim to have got it as a balance of his spending in Eldoret Kenya yet he bought it from on **Issah**, a money changer. Why did prosecution not produce the said **Issah** to confirm that he indeed gave the PW.1 $ 1950 in exchange for local currency. Why is it a coincidence that **Issah** who works in Malaba was the one to ring PW.1 that his money had been recovered.

PW.1 also said the money was at Hamber Stores then Busiu when he went to Kenya but later claims it was a balance on purchases he made in Eldoret Kenya.
The police which handled the matter talked of $ 150 only which had been stolen by A.1. This was revealed by **PW.V No.34379 D/C Ocen Peter Enock** but in the charge sheet the figure was raised to $ 1950. Clearly, the above prosecution

evidence was glaringly contradictory and inconsistent to assist prosecution prove its case beyond any reasonable doubt. I cannot believe it. The evidence was not enough to prove that PW.1's car had in its drawer $ 1950 which could be used as an exhibit against the appellants. It is highly likely that this money did not exist. It was not proved that what A.2 picked at Oilibya washing bay was the money in question.

The prosecution evidence was not strong enough to disprove the defence denial of the offence.

It is more probable than not that A.1's wife came to him for keys of a wardrobe which he did not have. He suspected they fell at the Petrol Station during arrest. That is why A.2 went there to try and trace them. He failed to get the same on the first attempt. When he inquired from A.1 again he clarified that the keys could have fallen near the water metre. When A.2 went back he got the keys and handed them over to A.1's wife. This defence story is corroborated by DW.3 **Akurut Robinah** wife to A.1.

From the record, the learned trial magistrate relied on the evidence of identification parade to convict A.2 but the record does not show that the method of conducting an identification parade followed the rules. This evidence was received in the passing which made it unreliable to found a conviction. It appears A.2 was the only brown/bold headed person in the parade which included 18 year and 19 year old youths.

In my considered view there was no direct or circumstantial evidence to link any of the convicts to the offences they were tried and convicted of. I think the two were wrongly convicted.

Consequently I will allow this appeal.

I will quash and set aside the order of the learned Magistrate Grade I convicting the appellants on both counts. Each of the appellants will be acquitted and the sentences and orders of the trial Magistrate are hereby set aside.

The appellants will be set free unless lawfully held.

Stephen Musota

JUDGE

18.07.2012