

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 45 OF 2011

ELINEO MUTYABA
APPELLANT

VERSUS

UGANDA
RESPONDENT

***(Appeal from the decision of His Worship Omodo Nyago
Joseph Chief Magistrate dated 1st August 2011 in Makindye
Criminal Case No. 1793 of 2008)***

HON. LADY JUSTICE MONICA K. MUGENYI

JUDGMENT

Elineo Mutyaba (the appellant) was, on 12th November 2008, arraigned for the offence of criminal trespass contrary to section 302(b) of the Penal Code Act. On 27th July 2011 he was re-arraigned for the offences of criminal trespass contrary to section 302(b) of the Penal Code Act and malicious damage to property contrary to section 335(1) of the Penal Code Act. It was alleged that in April 2008 the appellant unlawfully entered onto the complainant's premises with intent to intimidate, insult or annoy her. Furthermore, on 5th August 2008, the appellant is alleged (together with others still at large) to have wilfully and unlawfully damaged a variety of household properties belonging

to the complainant. The appellant pleaded not guilty to both counts.

At the trial the gist of the prosecution evidence was that on 18th December 2005 and 28th February 2006 the complainant (PW1) purchased 2 plots of land at Ggaba Mission – Katogo Zone upon which she built 20 rental rooms. The appellant was a live-in partner with the complainant between July 2007 and April 2008. This relationship allegedly ceased when the accused sent the complainant and her children off the premises in April 2008.

The appellant denied the allegations against him and gave evidence on oath in which he contended that sometime in November 2007 he had bought the land in contention from the complainant's mother, a one Janat Namujuzi, and therefore he was legally in occupation of the premises. 3 witnesses adduced evidence in support of the defence. In a nutshell, DW1 attested to having built 20 rental units for the accused on the land in dispute; while DW2 and DW3 attested to having been witnesses to the alleged sale agreement(s) between the accused and the purported vendor, Janat Namujuzi. However, the latter 2 witnesses' signatures did not appear on the alleged agreements and each gave conflicting accounts on the balance that they allegedly witnessed the accused pay in purchase of the disputed land. While DW2 testified that the balance was Ushs. 500,000/=, DW3 affirmed that it was Ushs. 1,000,000/=.

The trial magistrate convicted the appellant on both counts as charged, and sentenced him to 4 months imprisonment on the first count and 2 years imprisonment on the second count, both sentences to run concurrently. In a Memorandum of Appeal dated 9th August 2011 the appellant appealed against both conviction and sentence on the following grounds:

- 1. That the learned Chief Magistrate erred in law and fact when he convicted (and) sentenced the appellant**

to custodial sentence without giving the appellant the option of a fine due to the appellant's advanced age.

- 2. That the learned Chief Magistrate erred in law and fact when he failed to evaluate the evidence on court record and thereby reached a wrong decision which occasioned a miscarriage of justice.**
- 3. That the learned Chief Magistrate erred in law and fact when he ordered the appellant to pay the complainant compensation for damaged household properties and rent collected by the appellant, when the same was not prayed for by the prosecution.**

It is pertinent to recast the law applicable to first appeals such as the present one. Section 16 of the Judicature Act, Cap 13 confers upon the High Court appellate jurisdiction in respect of decisions from magistrates courts. Section 204(1)(a) and (2) of the Magistrates Courts Act (MCA), Cap. 16 confers upon any person aggrieved by the decision of a Chief Magistrate or Magistrate Grade 1 a right of appeal to the High Court, and such appeal may be on a matter of fact as well as a matter of law.

The powers of an appellate court in an appeal from a conviction are laid out in section 34 of the Criminal Procedure Code (CPC) Act, Cap. 116. Section 34(1) enjoins an appellate court considering an appeal against a conviction to allow the appeal if it thinks that the judgment is unreasonable or cannot be supported having regard to the evidence; entails a wrong decision on any question of law *if the decision has in fact caused a miscarriage of justice*, or on any other ground if the court is satisfied that there has been a miscarriage of justice. In any other case (save on the foregoing basis) the appellate court is enjoined to dismiss the appeal. Section 34(1) thus renders the upholding of an appeal from a conviction *prima facie* conditional upon the incidence of a miscarriage of justice, save for instances where an appeal is grounded on a judgment being unreasonable

or incapable of support having regard to the evidence on record, where on that basis alone such appeal may be allowed. However, the proviso to section 34(1) enjoins an appellate court to dismiss an appeal, the likely success of the point raised therein notwithstanding, if it considers that no substantial miscarriage of justice has *actually* occurred.

In the case of **Bogere Moses & Another v. Uganda Supreme Court Criminal Appeal No. 1 of 1997** it was held:

“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.”

Further, learned Counsel for the appellant referred this court to the cases of **Uganda v. George William Ssimbwa Supreme Court Civil Appeal No. 31 of 1995** and **Kifamunte Henry v. Uganda Supreme Court Criminal Appeal No. 10 of 1997** in support of his submission that a 1st appellate court had a duty to rehear the case, reconsider the material evidence and give it (evidence) a fresh and exhaustive scrutiny. The duty of court to rehear and reconsider material evidence was restated 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 respectfully identify with that position.

In the present appeal, as a preliminary point, counsel for the respondent raised the issue of the late filing of the appellant's written submissions and prayed that the present appeal be dismissed for want of prosecution as provided by section 44(2) of the Criminal Procedure Code (CPC) Act. While it is true that submissions for the appellant were filed out of time, so too were those in respect of the respondent. This court might have considered dismissing this appeal for want of prosecution if the respondent had filed their submissions in time. As it is, they did not. In the interests of justice, I am inclined to accept both sets of submissions. It would be unjust to visit the inefficiencies of legal counsel upon their clients. I now revert to the substantive appeal.

In his written submissions learned counsel for the appellant reduced his grounds of appeal to 2 issues:

- 1. Whether the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on the court record (ground 2)**
- 2. Whether the learned trial magistrate erred in law when he sentenced the appellant to imprisonment for 4 months and 2 years concurrently on the respective counts coupled with an order to pay to the complainant compensation for the damaged household properties. (grounds 1 and 3)**

I propose to consider the grounds of appeal in the same order.

Ground No. 2: *Whether the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on the court record*

Learned counsel for the appellant addressed the issue on the basis of the 4 issues framed before the lower court, which were as follows:

- i. Whether the accused entered upon the premises of Namatovu Fatuma (the complainant) without her permission.***
- ii. Whether he remained there with intent to intimidate, annoy or insult her.***
- iii. Whether household items of the complainant were wilfully destroyed.***
- iv. Whether it was the accused who participated in their destruction.***

It would appear to me that the first issue that was framed by the trial court was redundant. The appellant was charged with criminal trespass contrary to section 302(b) of the Penal Code Act. Section 302(b) reads as follows:

“Any person who having lawfully entered into or upon such property (property in the possession of another) remains there with intent to intimidate, insult or annoy any person or with intent to commit any offence, commits the misdemeanour termed criminal trespass and is liable to imprisonment for 1 year.”

Permission to enter onto the premises in question does not appear to be in issue in the criminal trespass envisaged in section 302(b) of the Penal Code Act. The said provision of the law would appear to be premised on the fact or presupposition of an alleged offender ‘*having lawfully entered into or upon such property.*’ What would, in my view, be in issue would be whether the complainant does have possession of the property, and whether an alleged offender, having lawfully entered upon the said property, ‘*remained there with intent thereby to intimidate, insult or annoy any person.*’ Accordingly, I shall proceed to

determine whether indeed the complainant had possession of the property in question; and if so, whether or not the appellant, having entered onto the said property, did in fact remain there with the intent to intimidate, insult or annoy the complainant or indeed any other person.

I have carefully re-considered the evidence on record with regard to the complainant's alleged possession of the land in question. The complainant attested to having bought the disputed plots of land from PW2 and PW3, both of whom confirmed these sale transactions and thus corroborated her evidence. She furnished copies of the sale agreements in respect of the same plots in court and they were admitted on the court record. She testified that she and the accused had lived together from 2007 until April 2008. The fact that the complainant occupied the premises was corroborated by DW1 who testified that the complainant and the appellant used to live together in Katogo Zone. For ease of reference I reproduce his evidence on this issue:

"I know the accused. He used to reside in Katogo Zone around 2009. And he is still there. He was (there) since 2007. One day Namatovu (complainant) called me from my home. They were putting up with the accused ... They continued to stay together until they had a misunderstanding in 2008."

Further, a sketch plan of the premises in contention tendered in evidence as Exhibit P3 described the premises as being located in Ggaba Mission Zone – Katogo area. This exhibit was never contested by the defence. I find that the foregoing evidence did establish that the complainant did have lawful possession of the premises in question.

Appellate Counsel argued that the trial magistrate did not give any plausible reasons for not relying on the evidence of DW3

with regard to the ownership of the said premises. He further argued that the trial magistrate also ignored the evidence of DW1 on the question of the appellant's interest therein.

It is trite law that trial courts are required to consider the evidence of both the prosecution and the defence before arriving at a decision. See **Bogere Moses & Another v. Uganda Supreme** (supra).

In the present appeal, I find that the trial magistrate did consider both sets of evidence (prosecution and defence) prior to arriving at his decision. This is evident in pages 2 - 4 of his judgment. At page 4 of the same judgment the learned trial magistrate proceeded to give his reasons for rejecting the evidence of DW3. I reproduce his conclusion:

“On the so called sale agreement itself, the (accused) claimed that Fatuma (the complainant) lost his copy and he obtained a photocopy from the (LC) Chairman’s copy because he had no original of his, which he claimed he left in his file and the matter was adjourned. He returned with a photocopy of the photocopy produced by the Chairman. This clearly showed that these two people were liars and manufactured a sale agreement of land outside their area. This court is accordingly convinced beyond any shadow of doubt that the disputed land belonged to the complainant and not the accused.”

The LC Chairman in reference in the above text was in fact DW3. I therefore disallow Counsel's argument, and find that the trial magistrate did consider the prosecution and defence evidence and gave his reasons as to why he upheld the former over the latter evidence. Further, DW1's evidence that learned counsel complained was not considered by the appellant was, in a nutshell, evidence of construction work that the witness

allegedly undertook for both the complainant and appellant. This evidence did not prove that the appellant owned the disputed premises. It only pointed out his contribution to the development of the premises. It is not even clear whether this was physical or monetary contribution as the witness did not indicate how he was paid him for his services.

Having carefully re-considered the evidence on record, I uphold the learned trial magistrate's decision that the accused did not have any right of ownership over the premises in question. On this issue, as quite rightly submitted by learned counsel for the respondent, even if permission to enter onto the disputed premises were deemed to be in issue, the evidence of the complainant was that she and the appellant were engaged in a mutual relationship between 2007 until April 2008. Thereafter, the appellant was no longer welcome to the premises. In the present appeal the question of permission to enter onto the disputed premises (or the lack thereof) would appear to be tied in with the second issue herein to wit whether or not the appellant remained on the disputed premises with intent to intimidate, insult or annoy the complainant or indeed any other person.

On this issue counsel for the appellant argued that his client and the complainant lived peacefully together between 2007 - 2008 and therefore the appellant's presence on the premises was lawful. He further argued, presumably as justification for the appellant's presence on the premises, that despite their misunderstandings the appellant never left the premises but rather when the dispute was referred to the RDC he ruled in his favour.

With utmost respect to counsel the evidence on the record does not appear to entirely support this argument. The complainant testified that she did live with the appellant between 2007 and April 2008 but after he purported to evict her from her property,

had asked him to leave the premises and he declined to do so. I reproduce her evidence in that regard:

“Before I went to hospital I had no problem with the accused but when I came back and found he had thrown out my properties I did not talk to him. I did not get any explanation from him. I asked him to leave but he refused. The accused has never left to date. He is even collecting rent from tenants.”

Clearly therefore the appellant had outlived the welcome that had been hitherto extended to him. Similarly, whatever permission of entry that was hitherto applicable to him had expired. He was asked to leave but he declined to do so and insisted on remaining on the premises. PW4 corroborated the evidence of the complainant on the appellant’s continued stay on the disputed premises. I am therefore satisfied that the appellant did in fact remain on the said premises. The question is whether or not he did so with intent to intimidate, insult or annoy the complainant or indeed any other person.

Learned counsel referred this court to the case of **Kigorogolo v. Rueshereka (1969) EA 426** on what constitutes intent to intimidate, insult or annoy. In that case it was held as follows:

“The intent referred to in the section is ‘to commit an offence’ or to ‘to intimidate’ (meaning to overawe, to put in fear by a show of force or threats or violence) or ‘to insult’ (meaning to assail with scornful abuse or offensive disrespect) or to annoy (meaning to molest).”

I would point out that, in my view, the meanings attributed the terms – intimidate, insult or annoy – is not in any way conclusive, but is quite instructive. To determine their applicability to the

present appeal a re-consideration of the conduct attributed to the appellant is pertinent.

On this issue the complainant testified thus:

“I was in hospital when the accused chased away my children claiming that he had bought the place. ... When I came back he also chased me away. He threw out my property.”

PW4, the complainant’s son, testified as follows:

“The accused came with army men then after with rowdy boys and they evicted our tenants. And we all run away that night. We went to the police and we were told the RDC had given the accused the plot. ... Following day the accused came and took mother to police. We all did not sleep at home. The following day we found all our properties missing and the house locked. He chased us away and is the one sleeping in them. He went into hiding until he was arrested. He currently stays in the house. He evicted all our tenants and put in his. The rent is collected by the accused. Now I stay in Kyaggwe. Our mother and siblings stay in a rented house. He evicted tenants in July 2008.”

Contrary to the position expounded by learned counsel for the appellant, PW7 corroborated PW4’s evidence on the presence and participation of the appellant in the eviction exercise that took place at the complainant’s premises. She testified as follows:

“I know the complainant. (S) he was our landlord from January 2007 to April 2008. I was staying as tenant in Namatovu’s (complainant’s) houses. I would pay Namatovu. In 2008 April Mr. Mutyaba (accused) came

and told us that the wife was not educated and that payments should be by receipt and not by paper ... which the wife was giving. When we refused he chased us from the houses in July. Mr. Mutyaba brought rowdy boys to destroy our property. All our documents that prove payment and voters registers were lost. On the night I was thrown out it was in July when me (n) came and called out room (n)umbers at 5.00 am. If you would refuse they would kick the door and throw out items."

In his defence, the appellant denied having been present when the complainant was evicted from the disputed premises. On his part, DW3 conceded that the said evictions did take place on the instructions of the RDC. Indeed, the RDC's letter to that effect was admitted on the trial court's record and does corroborate the evidence on record with regard to the approximate timing (date) of the evictions, as well as DW3's evidence that he acted on the orders of the RDC. This letter originated from the office of the Deputy RDC Kampala – Makindye Division, was dated 15th July 2008 and requested the Ggaba LC I Chairman to remove the tenants in the complainant's houses.

I have carefully evaluated the evidence on record. I do note that the appellant's denial of participation in the alleged actions was only in respect of the complainant's eviction. His evidence was silent on whether or not he was present during the eviction of the tenants and children, and yet the complainant testified that on the day her children were chased away she was in hospital. She thus avers that her eviction and/or arrest took place on a different day from the earlier evictions and property destruction. This piece of evidence was corroborated by PW4 who testified that he and his siblings were made to run away from their home a day before their mother was taken to police. Presented with corroborated prosecution evidence viz uncorroborated

statements from the defence, I find the prosecution evidence cogent and credible. I therefore am satisfied that the appellant did participate in the evictions complained of.

With regard to the appellant's intentions, clearly the appellant evicted the complainant's children and tenants well aware of the complainant's claim to the premises and in full knowledge that the eviction of her children and tenants was bound to cause her anguish and annoyance. The complainant asked him to leave the premises but he opted to remain there, much to her chagrin hence her lodging a complaint with the office of the RDC. By employing the services of rowdy young men in the eviction exercise, in addition to the security personnel provided by the office of the RDC, the accused did overawe his victims and put them in fear by a show of force. Indeed PW4 testimony that he and his siblings abandoned their home during the eviction exercise would be attributable to this apparent show of force. I therefore find that the appellant did remain on the disputed premises with intent to (and did in fact) intimidate and annoy the complainant, her children and tenants. I am satisfied that he was rightly convicted for the offence of criminal trespass contrary to section 302(b) of the Penal Code Act, and do uphold the conviction.

I now turn to issues 3 and 4 pertaining to the offence of malicious damage to property. I propose to determine these 2 issues together.

This court noted a procedural issue with regard to the arraignment of the appellant for the offence of malicious damage to property. As stated in the trial magistrate's judgment, initially the appellant had been arraigned for the sole offence of criminal trespass contrary to section 302(b) of the Penal Code Act but later in the proceedings the offence of malicious damage to property contrary to section 335(1) of the Penal Code Act was added. The record of proceedings (p. 38) indicates that the

appellant was re-arraigned under an amended charge sheet dated 27th July 2011 after the prosecution had closed its case and he (the appellant) and another defence witness had testified.

Section 132(1) of the MCA provides for the alteration of a charge by way of amendment or by addition of a new charge, provided that the court '**is satisfied that no justice to the accused will be caused thereby.**' Where such alteration is made section 132(2) places a duty upon the court to re-arraign the accused in respect of the altered charge; entitles an accused person to recall prosecution witnesses, and confers upon such accused person '**the right to give or call such further evidence on his or her behalf as s/he may wish.**' Section 132(5) places a duty upon the court to inform such accused person of his/ her right to re-call prosecution witnesses and/or additional defence witnesses, as well as the accused's right to an adjournment.

In the case of **R. v. Pople (1951) 1 KB 53 at 55** it was held:

"The responsibility for the correctness of an indictment lies in every case upon counsel for the prosecution and not on the court. No counsel should open a criminal case without having satisfied himself on that point. If in his opinion the indictment needs amendment, the necessary amendment should be made before the accused are arraigned and not, as in this case, after all the evidence for the prosecution has been called. There may well be amendments which would properly be made at the beginning of a trial which would be oppressive and embarrassing to the accused if made at the close of the case for the prosecution." (*emphasis mine*)

In the case of **Abdullah Chengo v. Republic (1964) EA 122 at 125** it was held:

“In the present case the amendment was made, not at the close of the case for the prosecution, but after the close of the defence and it took the form of the substitution of an entirely new charge for a more serious offence. ... It is difficult to see how it could have been made ‘without injustice’ to the appellant, notwithstanding the magistrate’s compliance with the provisos to that subsection.” (emphasis mine)

In the present appeal the record does not illustrate that the trial magistrate discharged the duty placed on him by section 132(5) of the Penal Code Act. The appellant was not informed of his right to recall any prosecution witness for cross examination on the new charge; his right to call additional defence evidence (including his own) or indeed his right to an adjournment. Given that at that stage of the trial the appellant had already testified it would, in my view, only have been fair and just to advise him of his right to adduce further evidence in his defence as envisaged under section 132(2)(c) and 132(5) of the Act, and accord him the opportunity to do so. Further, it would have underscored the fairness of the trial had the appellant been informed of his right to re-call prosecution witnesses as provided under section 132(2) (b).

Article 28(1) of the 1995 Constitution underscores accused persons’ right to a fair trial. This entitlement is echoed in **Ayume, F. J, ‘Criminal Law and Procedure in Uganda’, Law Africa Publishing, 2010 reprint at p.81** it was stated:

“The proviso to this section is obviously to ensure that the accused is not embarrassed as a result of the amendment and that he has a fair trial.”

In the present case, the dictates of a fair trial would entail the appellant having the right to re-call prosecution witnesses for cross-examination on the newly preferred charge of malicious

damage to property, as well as defending himself on the same charge. Such right should have been duly explained to him as by law required. I therefore find that the trial magistrate's omission to discharge the duties placed upon him by the legal provisions cited above constituted a constitutional infringement upon the appellant's right to a fair trial and thus occasioned a miscarriage of justice. I therefore overturn the appellant's conviction on the second count of malicious damage to property contrary to section 355(1) of the Penal Code Act. Given that I had upheld the appellant's conviction on the first count, ground 2 of this appeal succeeds in part and fails in part.

Grounds No. 1 and 3: *Whether the learned trial magistrate erred in law when he sentenced the appellant to imprisonment for 4 months and 2 years concurrently on the respective counts coupled with an order to pay to the complainant compensation for the damaged household properties.*

The appellant was sentenced to 4 months imprisonment for the first count of criminal trespass and 2 years imprisonment for the second count of malicious damage to property. In addition to the 2 years imprisonment, the appellant was ordered to pay compensation to the complainant for the loss suffered as a result of the damage to her property. Having reversed the appellant's conviction for malicious damage to property, this court shall not consider the sentence and orders in respect thereto but rather restrict itself to the sentence in respect of the upheld conviction for criminal trespass.

Section 302(b) of the Penal Code Act prescribes a maximum penalty of 1 year imprisonment for the misdemeanour of criminal trespass. The section makes no alternative provision for a fine. In **Odoki, B. J, 'A guide to Criminal Procedure in Uganda', LDC Publishers, 2006 (3rd Edition) at p.164**, deterrence was advanced as one of the objectives of sentencing. It was stated:

“Individual deterrence aims at giving the offender such an unpleasant treatment that through fear of repetition of punishment he/she does not repeat his/her criminal conduct.”

In the same book at p.17, ‘extreme old age is taken as a mitigating factor in that generally the courts are reluctant to send a very old man or woman to prison.’

The present appellant was sentenced to four months imprisonment on this count on 1st August 2011. In imposing that sentence the trial magistrate explicitly referred to the appellant’s advanced age as a mitigating factor. I therefore find no reason to fault this sentence and do accordingly uphold it. Therefore, grounds 1 and 3 of this appeal do succeed in so far as they pertain to the offence of malicious prosecution, but fail with regard to the offence of criminal trespass.

Be that as it may, given that the appellant was, on 21st December 2011 released on bail pending hearing of his appeal, he did inadvertently the 4 month sentence in respect of the offence of criminal trespass. In the final result therefore, I do allow this appeal in part with the following orders:

1. That the appellant be and is hereby discharged of the 2 year sentence for the offence of malicious damage to property, the conviction of which has been reversed.
2. That this court having upheld his conviction and sentence for the offence of criminal trespass the appellant, with immediate effect, vacates the premises that were in question before this and the lower court and returns the possession thereof to the complainant forthwith.
3. That having served the 4 month imprisonment term in respect of the offence of criminal trespass for which he was convicted in the trial court, which conviction is hereby

upheld, the appellant be and is hereby immediately discharged of that sentence.

Monica K. Mugenyi
JUDGE

27th February, 2012