THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

CRIMINAL APPEAL NO. 00 – CR – CN - 0014 OF 2021

(Arising from Nebbi Criminal Case No.00 - CR – CO- 0059 OF 2019)

OVURU MAGIDU ..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

BEFORE: Hon Justice Isah Serunkuma

JUDGEMENT

Introduction

The appellant was charged of criminal trespass contrary to Sec. 302(a) of the Penal code Act, before His Worship Kintu Isaac Imran, Magistrate Grade One Nebbi. The appellant denied the charge whereupon the case was heard and the appellant was on the 16th day of September, 2021 found guilty as charged and sentenced to one-year custodial sentence.

The Prosecution case was briefly that on the13th day of February, 2019 at Got Ali village in Nebbi District the accused entered into the home of Okumu Odongo with intent to intimidate the said Okumu Odongo.

The appellant denied having trespassed in the home of Okumu Odongo and in his defence stated that on the fateful day he was at the junction along Pakwach-Nebbi Highway on the junction of Wadelai where he sat on a culvert while waiting for his brother to pick him up.

During the trial, prosecution produced 4 witnesses to prove its case and the defence called 2 witnesses.

In his judgment the trial Magistrate found that the prosecution evidence was credible and not challengeable in material particular therefore worthy to believe. That the prosecution had proved its case and found the appellant guilty as charged.

Being dissatisfied with the decision, the appellant appealed against both the sentence and conviction on the following grounds;

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and wrongly convicted the appellant of the offence of criminal trespass there by occasioning the appellant a miscarriage of justice.

2. The learned trial Magistrate further erred in law and fact when he held that the prosecution evidence was credible and not challenged in cross-examination thereby occasioning the appellant a miscarriage of justice.

3. The trial Magistrate further erred in law and fact when he held that there was no inconstancies and contradictions in the prosecution case and that the case of ***Kazarwa Henry vs Ug; Sc. Crim Appeal No. 0017/2015*** *was not applicable in the circumstances thereby occasioning a miscarriage of justice.*

4. The learned trial magistrate erred in law and fact when he held that the defence case was inconsistent and contradictory thereby occasioning a miscarriage of justice.

5. The learned trial Magistrate erred in law and fact when he sentenced the appellant to one-year custodial sentence which was manifestly harsh and excessive thus occasioning the appellant a miscarriage of justice.

Representation.

M/S Donge & Co. Advocates represented the Applicant while the respondent was unrepresented in court and didn't file submissions.

Appellant's submissions.

It was submitted that at first appeal, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to rehear the case and reconsider the materials that were before the trial court and then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. The case of ***Kifamunte Henry Vs Uganda; SC Cr. Appeal NO.010/1997*** was relied on to support the submission.

Ground one:

The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and wrongly convicted the appellant of the offence of criminal trespass there by occasioning the appellant a miscarriage of justice.

Counsel for the appellant submitted that prosecution had a duty to prove that the appellant committed the offence as charged. Counsel relied on **Sec. 302 of the Penal Code Act Cap120** which creates the offence of criminal trespass and the case of ***Opio Enrico Vs Uganda; High Court Criminal Appeal No. 0010/2014*** which explains the ingredients of the offence. He stated that it was the duty of the prosecution to prove that the appellant entered the home of Okumu Odongo with intent to intimidate but failed to do so. That the prosecution was not able to put the appellant at the scene of crime as was described in the case of ***Bogere Moses Vs Uganda; SC Cr. Appeal No. 001 of 1997.***

Counsel further submitted that it was a misdirection for the learned trial magistrate to hold that the appellant was placed at the scene of crime, that is to say, the appellant's home yet the evidence adduced by the prosecution placed the appellant under a tree along Nebbi –Pakwach road and this was corroborated by the sketch plan P.EX1.That the accused on his part adduced uncontroverted evidence that he was at a culvert at the junction opposite the complainant's home and that this evidence was not challenged.

Counsel further submitted that it is trite law that failure to challenge material evidence by way of cross-examination means the evidence has been accepted as true. He went ahead to argue that it

was a misdirection for the court to hold that the appellant was at the scene of crime contrary to the evidence available on record.

He further argued that the learned trial magistrate stated in his judgement that the prosecution evidence was credible without stating why it was credible. That the prosecution did not produce any evidence of any intention for the appellant to intimidate the complainant or any other occupant of his home.

Counsel argued that the prosecution also failed to prove the second ingredient of criminal trespass and that the trial magistrate considered and accepted only the prosecution evidence in isolation of that of the defence thus his failure to evaluate evidence on record properly. That had the trial magistrate properly evaluated the evidence on record he would have found that the prosecution failed to prove the ingredients of criminal trespass and thus failed to prove its case against the appellant.

Counsel associated himself with the holdings in the case of ***Bogere Moses & Anor Vs Uganda (Supra)*** where the supreme court held that "*needless to say that the failure of the first appellate court to evaluate material evidence as a whole constitutes an error in law*". He concluded his submission by praying that this ground succeeds and be allowed by this Honorable court.

Ground Two:

The learned trial Magistrate further erred in law and fact when he held that the prosecution evidence was credible and not challenged in cross-examination thereby occasioning the appellant a miscarriage of justice.

Counsel submitted that in assessing credibility of a witness, consistency is relevant. That the prosecution did not adduce any evidence to establish the ingredients of trespass. Counsel further submitted that the trial magistrate accepted prosecution evidence without stating why it was credible. Counsel associated himself with the supreme court holding in ***Bogere Moses and Anor vs Uganda*** **(supra)** where it was held inter alia that *"their lordships did not show, and upon scrutiny of the evidence we do not find, any reason why the conflict in the evidence would be resolved in favor of the prosecution"*.

That there was overwhelming conflict in the evidence of the prosecution which was so fundamental as it went to the root of the case in that it cast a doubt as to whether the appellant entered into the complainant's home and which doubt ought to have been resolved in favor of the appellant. Counsel prayed that this ground succeeds.

Grounds Three & Four.

3.The trial Magistrate further erred in law and fact when he held that there was no inconstancies and contradictions in the prosecution case and that the case of Kazarwa Henry vs Ug; Sc. Crim Appeal No. 0017/2015 was not applicable in the circumstances thereby occasioning a miscarriage of justice.

4. The learned trial magistrate erred in law and fact when he held that the defence case was inconsistent and contradictory thereby occasioning a miscarriage of justice.

Counsel proposed to argue these two grounds together since the two relate to inconsistencies and contradictions. That the trial magistrate stated at page 2 of his judgement that he did not note any contradictions as had been noted by counsel in relation to the authority of ***Kazarwa Henry vs Uganda; Sc. Crim. Appeal. No. 017/18.*** That the testimonies of *PW1, PW2, PW3 and PW4* as a whole were inconsistent and contradictory to each other and the trial magistrate ought to have resolved the same in favor of the accused. Counsel cited the case of ***Nashaba Paddy vs Uganda [2001-2005] HCB 43*** where it was held that "*the law on inconsistencies and discrepancies in the prosecution case is that grave inconsistencies unless unsatisfactorily explained will result in the evidence being rejected while minor inconsistencies will be ignored*". Further to this regard counsel also cited the cases of ***Kato Kajubi Godfrey vs Uganda; SC. Crim. App. No. 020 of 2014*** and ***Kazarwa Henry vs Uganda; SC. Crim. Appeal No. 017/15***. Counsel concluded by praying that this honorable Court finds that the trial magistrate erred by overlooking the glaring inconsistencies and contradictions in the prosecution evidence and prays that ground 3 and 4 succeed.

Ground Five:

The learned trial Magistrate erred in law and fact when he sentenced the appellant to one-year custodial sentence which was manifestly harsh and excessive thus occasioning the appellant a miscarriage of justice.

Counsel submitted that according to paragraph 5 of **The Constitution Sentencing Guidelines for Courts of Judicature (Practice Directions) 2013**, the purpose of sentences is to promote respect for the law and maintain peace in society. That under paragraph 6 of these directions, some of the factors considered while sentencing is the gravity and nature of the offence.

According to section 302 the Penal Code Act Cap 120, criminal trespass is a misdemeanor which carries a maximum penalty of 1 year's imprisonment. That in the circumstances there were no aggravating factors to justify the imposition of the sentence. That the prosecution did not prove its case against the accused and that the appellant was punished for an offence he did not commit thus the sentence was unlawful. Counsel cited the cases of ***Okello Oris & Anor vs Uganda; HC. Crim. Revision No. 0035/2013*** and ***Rwabugande Moses Vs Uganda; SCCA No. 0025 of 2014.*** Counsel further submitted that the sentence of one year was manifestly harsh, excessive and illegal and should be set aside. That should this court find that the case is proved then a sentence of a caution on top of the three months the appellant served before his release on bail pending appeal would best serve the ends of justice.

Counsel concluded by praying that Grounds 1-5 be considered in successfully disposing off this appeal and that the judgment of the trial court, the conviction and sentence thereof be quashed, set aside and substituted with an order dismissing the case and acquitting the appellant with a declaration that the prosecution was malicious.

The prosecution did not file submissions in reply.

Analysis of court.

This being a first appeal, it is the duty of this court to rehear the case, reconsider the material evidence and subject it to fresh scrutiny. It must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. ***(See Uganda v George William Ssimbwa; SC. Criminal Appeal No. 031 of 1995; Kifamunte Henry v Uganda SC; Criminal Appeal No. 010 of 1997.***

Ground one

The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and wrongly convicted the appellant of the offence of criminal trespass there by occasioning the appellant a miscarriage of justice.

The offence of criminal trespass is provided for under **Section 302 of the Penal Code Act Cap120** that provides that any person who enters upon the property in possession of another with intent to commit an offence, intimidate, annoy or insult any person commits a misdemeanor termed criminal trespass and is liable to imprisonment for one year.

In criminal cases the prosecution bears the burden of proving to court beyond reasonable doubt all the elements of the offence necessary to establish the guilt of the accused. Any doubt in the prosecution case has to be resolved in favour of the accused person.

In order to prove that one is guilty of criminal trespass the following ingredients should be proved;

I. entry upon property in possession of another
II. Intent to commit an offence, intimidate, annoy or insult any person.

It was the prosecution's case that the appellant entered onto the home of the complainant with an intention to intimidate the complainant. The prosecution led evidence through *PW2, PW3 and PW4* who all testified that the appellant was seen sitting under a tree shade at the roundabout going to Kucwiny Center about 20 meters from the home of the complainant. Pw3 testified further that she did not see the accused going to the complainant's home.

Contrary to this the appellant testified in his evidence that he was seated at the culvert at the junction opposite the complainant's home. In his judgment the trial magistrate having analyzed the evidence of both the prosecution and the appellant held that the accused had been placed at the crime scene.

In my view after analyzing the evidence on record I find that indeed none of the prosecution witnesses saw the appellant going to the complainant's home. They all testify that the appellant was seen seated under a tree shade by the road.

I agree with counsel that by holding that the appellant was placed at the scene of crime the learned trial magistrate failed to properly evaluate the evidence on record and wrongly convicted the appellant of the offence of criminal trespass. This ground therefore succeeds.

Ground two

In submission of this ground counsel raised the issue of conflicting evidence of the prosecution thus I will resolve grounds 2, 3 and 4 together.

Counsel for the appellant contended that the trial magistrate accepted the prosecution evidence without stating reasons to why he believed it to be credible. That there was a lot of conflict in the prosecution evidence as a whole thus the same had to be resolved in favor of the accused. In the case of ***Oryem David Vs Omor Philip; HCCS No. 0100 of 2018*** where it was held that;

> *"It is trite law that grave inconsistencies and contradictions unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored."*
>
> *further*
>
> *What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e., essential to the determination of the case. Material aspects of evidence vary from case to case but generally in a trial, materiality is determined on a basis of the relative importance between the point being offered by the contradictory evidence and its consequences to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it related only on a factual issue that is not central or that is only collateral to the outcome of the case"*

On ground two, Counsel submitted that as per the prosecution evidence there was conflict as to whether the accused entered into the home of the complainant which goes to the root of the case and that the same ought to have been resolved in favor of the accused. Further while submitting on ground 3 & 4 counsel contended that there were glaring inconsistencies which were grave and go to the root of the case.

I have carefully perused the record and submissions on record and I accordingly find that indeed all the conflict and contradictions related to the point where the accused was seated. This is an

important element which either makes the accused guilty of trespass or not and failure to prove the same makes the appellant an innocent man. As such anything in evidence that brings doubt as to its existence should be keenly looked at positively in favour of the accused. As such issues 2, 3 & 4 are resolved in the positive.

Ground five

The learned trial Magistrate erred in law and fact when he sentenced the appellant to one-year custodial sentence which was manifestly harsh and excessive thus occasioning the appellant a miscarriage of justice.

Section 302 of the penal code Act Cap 120 provides for the offence of criminal trespass as thus;

"Any *person who-*

a) enters into or upon property in the possession of another with intent to commit an offence or intimidate, insult or annoy any person; or

b) having lawfully entered into or upon such property remains there with intent thereby to intimidate, insult or annoy any person or with intent to commit any offence,

commits the misdemeanor termed criminal trespass and is liable to imprisonment for one year."

In this provision the law is very clear as regards the sentence for the offence, however, the same can either be increased in case there are aggravating factors or lowered in case there are mitigating factors.

In the instant case the trial magistrate while sentencing held as follows:

> *"The offence of criminal trespass once proved against the accused persons is a misdemeanor and attracts a custodial sentence not exceeding 3 years. The convict is 46 years and while passing sentence, the court is alive to this fact. For the above reason, I shall sentence the convict to 1-year custodial sentence and believe this sentence is fair and just in the circumstances".*

It is the discretion of court to consider mitigating factors while sentencing however reason should also be given for giving a maximum sentence. And in order to meet the ends of justice

once mitigating factors are raised by the accused at sentencing then the trial court ought to give reason for rejection of the same.

The trial magistrate did not give adequate weight to the fact that the appellant was a first-time offender and was aged 47years which were mitigating factors and imposing a one-year custodial sentence was manifestly harsh and excessive.

It is well settled law that an appellate court will only alter a sentence imposed by a trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is illegal or manifestly low or excessive in view of the circumstances. *See Livingstone Kakooza Vs Uganda; Supreme Court Criminal Appeal No.017 of 193 [unreported] and Jackson Zita vs Uganda; Supreme Court Criminal Appeal No.019 of 1995.*

In conclusion this appeal is allowed, the judgment of the trial court, the conviction and sentence quashed and appellant is hereby acquitted of the offence.

I so order.

Dated and Delivered on this 31st day of March 2023.

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Isah Serunkuma
JUDGE