

I note Counsel Abaine's submissions on appeal relating to evidence that "the call by the thief to the phone of the Accused after the withdraw was not possible as the phone had already been stolen." As rightly submitted by Learned Counsel for the Appellant, the money and the phone were not stolen by the Appellant. The items were not recovered from her nor found with her. Her explanation that the items were not stolen from her were never controverted. Ideally, therefore, her explanation stands. The possible offences against the Appellant could have been either conspiracy or negligence but then she could not conspire alone. Hassan Ssenyondo should have been tried for this charge to be plausible.

I agree that the Learned Trial Magistrate should have carefully evaluated the evidence before him. If he did, he would have realized that the initial charge of "theft" in respect of the Appellant was bad in law. It should have been set aside. [**See Uganda vs. Ochom John**]. Based on the evidence on record, theft was not proven beyond reasonable doubt. There is a gap in the evidence. Hassan was not prosecuted and Twikirize Silver who cashed the money was not tracked or arrested to enlighten Court about the circumstances of the theft. I therefore allow grounds 1 and 2. The Respondent submitted that the Appellant was rightly convicted by the lower Court since overwhelming evidence had been adduced in the lower Court to show that the Appellant was the one with the sole responsibility of manning the shop and was the one in possession of the stock. The learned state attorney left it to the discretion of the Court since the complainants have lost interest by virtue of compensation.

I am also cognizant of the Reconciliatory Note between the complainant Kaya Rajab for and on behalf of Mukama Atukwase Enterprises, Nakiwolo Hanifa, Counsel for the Applicant and the State Attorney, Nakawa in which an agreement was made to pay off the Four Million Uganda Shillings

(4,000,000/=). I note that Parties reached an agreement pertaining to the payment of the money. Mr. Kaya Rajab received on behalf of Mukama Atukwase Enterprises a down payment of UGX. 2,000,000/= (Two Million Uganda Shillings only) on 18th October 2013. It was agreed that the outstanding 2,000,000/= (Two Million Uganda Shillings only) will be payable within 2 (two) months from the date of the agreement to wit, 16th October 2013.

This matter related to monetary loss. The complainant has received part payment of the money. He has agreed to receive the other half in two (2) months time.

However, the Appellant being a Salesgirl who had the responsibility to keep the mobile phone which had the money should have been careful. She nonetheless caused a loss to the Company and has readily paid money towards settling that loss. She has committed herself to pay the rest of the money.

It would have been equitable to allow this Convict to pay a fine given the circumstances in which the theft occurred. In my opinion it was more of a case of negligence than theft.

The grounds of Appeal relating to contesting the payment of UGX. 4Million (4,000,000) has been overtaken by events as the Appellant has paid part of it. Hence that ground abates.

Concerning the imprisonment term, it would have been just and equitable to give the Appellant the option of fine. Hence ground 3 of Appeal is allowed.

In total therefore, this Appeal is allowed and the Conviction and Sentence for theft is hereby set aside.

Appellant is hereby acquitted.



Signed:

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Hon. Lady Justice Elizabeth Ibanda Nahamya

J U D G E

18th October 2013