

- 1.) The learned trial Chief Magistrate erred in law and fact when she failed to evaluate evidence on record as a whole which occasional miscarriage of justice to the appellant.
- 2.) The learned trial Chief Magistrate erred in law and fact when she held that the offence of theft had been proved beyond reasonable doubt by the prosecution, yet not.
- 3.) The learned trial Chief Magistrate erred in law and fact when she held that the contradictions and inconsistencies in prosecution case are honest and not intended to deceive Court which occasioned miscarriage of Justice to the appellant.

- 4.) **The learned trial Chief Magistrate erred in law and fact when she sentenced the appellant to 3 years imprisonment without taking into account the period the appellant spent on remand.**
- 5.) **The learned trial Chief Magistrate erred in law and fact when she ordered the appellant to compensate unknown sums of money to the complainant which occasioned miscarriage of justice to the appellant.**

1.3 The appellant prays that:-

- a) **The appeal be allowed.**
- b) **The Conviction be quashed.**
- c) **The sentence be set aside.**
- d) **The order of compensation in trial Court's Judgment be set aside.**

1.4 The respondent opposed this appeal. And the respondent prayed that this appeal be dismissed.

1.5 The appellant was represented by Mr. Okwaling Moses from Legal Aid Project. Whereas, the respondent was represented by Ms. Nambuya Sarah Sheron, State Attorney from the Director of Public Prosecutions.

2. Resolution of the grounds of appeal by Court.

2.1 On 10th April, 2014 when this appeal came up for hearing, Counsel for the appellant, Mr. Okwaling Moses abandoned ground 4 of appeal. In that regard, therefore, ground 4 of appeal stands dismissed.

Counsel for the appellant argued grounds 1,2 and 3 of appeal together. Then argued ground 5 of appeal alone. He made oral submissions in support of this appeal. Counsel for the respondent, too, made her oral submissions in reply. And Counsel for the appellant thereafter made his submissions in rejoinder.

2.2 Grounds 1,2 and 3 of appeal.

2.2.1 In his submissions, Counsel for the appellant strongly criticized the whole decision of the trial Chief Magistrate in her judgment in support of the said grounds, largely rotate on the failure by the trial Chief Magistrate to evaluate the evidence. That the trial Chief Magistrate erred in law by holding that the prosecution had proved all the ingredients of the offence of theft. That the appellant was arrested in 2012 after nine (9) for matters when the keys of the store had been taken away from him. He referred to page 7, last paragraph of the judgment, pages 16, 17, 29 and 34 of the record of the proceedings of the lower Court for his proposition, that the trial Chief Magistrate failed to evaluate the evidence on record thus coming to a wrong decision.

He further submitted that the stock taking by the Accountant (PW5) and the complainants was done more than ten (10) months after the keys to the store have been taken away from the appellant. That during that period other employees had access to the store. That, therefore, one cannot rule out the possibility that other persons are not accountable for the loss. That other people had access to the store who included PW1, PW2 as well as PW2's brother. For the aforesaid submissions, Counsel for the appellant referred to **pages, 9 (line 14 from top); 20 (the 3rd last line xx by the accused from the bottom); 26 (2nd last line from the bottom in xxv); 42 (2nd paragraph)** of the record of the Court proceedings of the lower Court.

Counsel for the appellant, further submitted that the appellant was not in charge of all the stores of the complainants (PW1 and PW2) that yet the stock taking was done by PW5 and the complainants in the 2 (two) shops and three (3) stores. That the loss was occasioned when the appellant was not in charge of the stores in 2012. That it was wrong for PW5 to say that the appellant is accountable for the loss in all the stores and were erroneous. That the said items were recovered from his house in his absence as well as the items recovered from Swaibu's house. That none of the occupants of the houses where the items were recovered from signed on the exhibit slip as required by the Section 29 of the Police Act as amended.

Finally, on grounds 1,2 and 3 of appeal, Counsel for the appellant submitted that the prosecution did not discharge the burden of proof beyond reasonable doubt of the charge of theft against the appellant (accused). He prayed that the aforesaid grounds of appeal be allowed.

2.2.2 In reply, Counsel for the respondent, Ms. Nambuya Sarah Sheron, State Attorney, did not agree with the submissions by Counsel for the appellant. She, too, evaluated the parties' evidence on record and argued in support of the findings of the learned trial Chief Magistrate in her judgment. She prayed that, grounds 1, 2 and 3 be dismissed by this Court.

2.2.2 **Court.**

I have considered the submission of both Counsel for the parties. I hasten to add that the duty of the first appellate Court in an appeal is to re-evaluate the entire evidence on record and then comes to its own conclusions on the entire matter. In that regard, I perused, re-evaluated and analysed the evidence of both the prosecution and the defence in order to resolve grounds 1, 2 and 3 of appeal.

Further, I read the judgment of the trial Court and found that the trial Chief Magistrate did evaluate the evidence as a whole. In evaluating the evidence the trial Chief Magistrate had in mind the facts and evidence adduced by the prosecution and the defence. She looked at each ingredient of the offence of theft. At page 2, paragraph 4 of the judgment, the trial Chief Magistrate stated that:-

“The Court was duty bound to establish whether based on the facts and the evidence adduced by both parties; the following ingredients had been proved beyond reasonable doubt by the state to warrant a satisfactory conviction of the accused.

- 1) That the accused and others still at large took all the property listed in the charge sheet dated 27th September 2012, items valued at 731,895,200/=**
- 2) That in so taking the property, he and others still at large had the intention to permanently deprive the complaint of it.”**

In her judgment the trial Chief Magistrate considered the evidence of the prosecution and the defence witnesses before convicting the appellant. It is clear from the record of proceedings and the judgment of the trial Court, that items stolen belonged to the complainants (PW1 and PW2). They had at first employed the appellant as a cleaner and when he appeared trustworthy, the appellant was made in charge of the complainants' business (the shop referred to as phase 1 and the stores were at Yamaha centre).

I have re-evaluated the evidence on Court record; PW1, PW2, PW3 and PW4 in their respective evidence stated that the appellant was in full control of the keys. That wherever PW1 and PW2 could travel for business abroad the appellant was in charge of their business and that even he could bank the money on their behalf. PW1 had put a lot of trust in the appellant.

At page 8, 2nd paragraph of the record of the proceedings, PW1 (Cissy Buwembo Serunjogi) gave evidence that:-

“ The accused was in charge of my stores which are situated on JEMBA PLAZA along William Street. We store all our stock in two (2) stores one is on Yamaha centre building and the other on JEMBA PLAZA. The accused was also in-charge of opening the shop as well as the stores. He even kept the keys to both the shop and the stores. I also used to ask him to run errands for me like banking money.”

At pages 16, 2nd last sentences and 17, 1st paragraph of the record of the proceedings, in cross –examination by the accused, PW1 stated that:-

“2nd sentence:

After realizing that our stock had been stolen several people who gathered are the ones who informed us that you had already set up your own shop.

Last sentence of page 16 and page 17 1st paragraphs: When I removed the store keys from you, I never counted my stock and I even returned the keys to you without counting because I still did not believe that you could steal

from me. When I was going to China, it's you alone I left the keys with. I never left Albert in charge."

From the evidence on record, it is clear that PW1 returned the keys in question and that the appellant continued to carry out his duties with the full trust of his masters (PW1 and PW2) because they could not believe that the appellant could steal from them. The appellant continued with his duties until 22/5/2012, as is evidence at page 10, 1st paragraph and the last paragraph of the record of the proceedings. The consignment PW1 was interested in was that of 7/3/2012 (see page 11, 1st paragraph of the record of the proceedings of the trial Court.)

It is also interesting to note at page 11, 2nd paragraph; PW1 stated, that:-

"I confronted the accused as to why he had resorted to stealing from me. He knelt down in front of all the people who had gathered at my home including my sister Joan, Betty, Grace, Muzee George and my maid and he told us that it was true that he was taking out stock from the store and distributing it to several people. The first one was Juma, Walugembe, Swaibu."

At page 21, 1st paragraph, 3rd, 4th and 5th lines, PW3 stated that:

"I got the accused from the police cells for interrogation, he admitted before me that he had actually stolen TVs, DVDs, Woofers and had given them to Walugembe Julius, Juma Lukyamuzi and one called Swaibu."

From the evidence on record, the appellant admitted to stealing the said property of PW1 and PW2. The appellant never challenged in cross-examination the prosecution witnesses' evidence in examination in Chief. Again, on the same page 21, 2nd paragraph, the appellant himself took the police Officer to Swaibu's shop on market street where 15 TVs of different makes and sizes and other items were recovered and exhibited at Central Police Station, Kampala. When the investigating Officer (PW3) interrogated one Doreen, the latter revealed that the appellant was running an electric items' shop. The concealment of such fact by the appellant from his employers is not a conduct of an innocent person.

Further, it is also imperative to note from the Court proceedings that it is the appellant's wife who led the police to Segawa's home as is evidenced at page 22, 1st paragraph of the record of proceedings where some stolen items were recovered by the police.

Counsel for the appellant, Mr. Okwaling Moses, criticized the method the police used to recover the items stolen from the suspects including the appellant as being inconstant with Section 29 of the Police Act, Cap.303. I have perused the said Section 29 thereof, and I make a finding that the process of recovering the exhibits was in conformity with the law. The general principle in section 29 (1) of the Police Act, is that a Police Officer with or without a warrant can enter any premises and carry out a search if there is reason to believe that a crime has been committed or is about to be committed in that dwelling. In this particular case, the police was at the scene exercising or executing their duty, but one Segawa, according to the evidence of PW3, feared to come to face the police. It is also noted in this particular case that PW3 was officially on duty as an investigating Officer and his mandate was to investigate and make recovery of the items shown at page 22 of the record of proceedings. The actions of the Police that led to the recovery of the said exhibits was lawful. In that instance, I do not agree with the submissions by Counsel for the appellant.

Furthermore, I perused the entire judgment of the trial Chief Magistrate and I making a finding that the trial Chief Magistrate properly evaluated the evidence on record and made a proper analysis when she was resolving the ingredients of the offence of theft.

The issue of ownership of the stolen property was well handled by the trial Chief Magistrate. The evidence on record also shows that there was asportation. TV Sets and other items were carried by the appellant from PW's stores and shop to which the appellant was in-charge to the places I have referred to above. And after carrying the said items to other places, he concealed the fact, until he was arrested and interrogated by PW1 and the police, which means the appellant had intentions of depriving PW1 and PW2 of their property.

Consequent to the above, the trial Chief Magistrate properly dealt with the issue of the participation of the appellant in the Commission of the offence of theft. According to the available evidence on record, the appellant is the one who revealed his participation in the crime to PW1 and PW3. The appellant is the one who revealed his partners in crime (see pages 12 and 22 of the record of proceedings. At page 12, 1st paragraph, line 6, on the right, the appellant was the one dealing with one Albert. At page 13, 2nd paragraph, the appellant is the one who led the police to Albert's home and Swaibu's shop along Market Street. Then at page 22, 2nd paragraph, Albert Cook Sebugwawo was employed in this game of theft from PW1 and PW2 by the appellant. Then the people who the appellant, according to the evidence on record, had employed in the game of stealing from the complainants pleaded guilty to the charge in Court. There is no evidence of an accomplice in the prosecution case as alleged by Counsel for the appellant in his submissions.

On the issue of contradictions and/or inconsistencies that was raised by Counsel for the appellant in ground 3, I have re-evaluated the prosecution evidence on record and I could not see any contradictions or inconsistencies in the prosecution witnesses' evidence. If they are there at all, then they are so minor, that they cannot affect the justice in this case. The prosecution witnesses' evidence in cross-examination shows that the said witnesses did not contradict themselves. PW1, PW3 and PW4 for example their evidence both in examination in Chief and cross- examination shows that the appellant was the one in-charge of the shop, stores and the keys.

Further, PW6 at pages 37 and 38 of the record of proceedings clearly gave the evidence when she stated that the appellant would buy from her items for PW1 and not for himself. This witness was consistent with the evidence of the other witnesses. In sum total, I find that there are no inconsistencies or contradictions in the prosecution case that could create a doubt in favour of the appellant. In the result, I find that grounds 1,2 and 3 of appeal have no merit at all. They are accordingly dismissed.

I now turn to resolve ground 5 of appeal. In her judgment, the trial chief Magistrate during the sentencing process held that:-

“I Sentence him to three years imprisonment. In addition he is ordered to compensate the complainants for their loss in this matter.”

Counsel for the appellant in his submissions faulted the trial Chief Magistrate for granting an order for compensation of the unknown sums to the complainants. However, in her judgment at pages 6, last paragraph and 7, lines 1 and 2 from top, the trial Chief Magistrate held that:-

“P.6 last paragraph:

This was for the total imports for the shops owned by the complainant. But the loss in the charge sheet is specific to one shop which begs the question, how did PW5, the accountant arrive at the figure of Ug. Shs. 731,000,000/=?

As far as this Court could ascertain the initial charge sheet upon which accused was charged was more realistic, if one totalled all the recoveries through Page7, lines 1 and 3 :- the accomplice sources in relation to the merchandise as per the overseas receipts, the figure of UGX 30,000,000/= was not for fetched.”

According to the evidence of PW1 at page 12 of the record of proceedings in respect to the consignment of 7th March, 2012 the audit that was done by PW1, her sister and the appellant, the complainant, PW1, discovered the loss of UGX 30,000,000/= (three million Shillings). Upon which the appellant prayed for mercy from PW1 (see page 12 of the record of the proceedings). On that page 12, the appellant even offered his house at Bulange plus forgiveness. This aforesaid evidence is interpreted to mean that the appellant accepted the loss of Shs. 30,000,000/= (thirty million) that had been discovered by PW1.

It is also important to note that when PW5, the auditor came in to audit the accounts of the business of PW1 and PW2, he looked at all the invoices from abroad and came to the figure of UGX 731,805,000/=. As I have stated hereinabove in this judgment, the trial Chief Magistrate in disposing of this matter, she never considered the evidence of PW5 in totality. She analysed and qualified her findings on the question of the ascertained loss caused by the appellant to be UGX 30,000,000/= (thirty million). This amount of UGX

30,000,000/= (thirty million) was never disputed by the appellant, according to the evidence on record. In the circumstances, I find that ground 5 of appeal has no merit. It is accordingly dismissed.

3. Conclusion

3.1 In the result and for the reasons given hereinabove in this judgment, this appeal has no merit. It is accordingly dismissed. Wherefore, judgment is entered in favour of the respondent in the following terms and orders that:-

1. This appeal is dismissed.
2. The conviction and sentence of the lower Court are upheld.
3. The order for compensation is upheld. The appellant shall compensate the complainant the ascertained amount of UGX 30,000,000/= (thirty millions shillings only), plus interest on it of 30% per annum pursuant to Section 197 (1) of the Magistrates Court Act, 1970 as amended (MCA) Cap 16 laws of Uganda, from the date of the judgment of the lower Court until payment in full.
4. The ordered compensation of Shs. 30,000,000/= (thirty million shillings only) within 30 (thirty) days from the date of this judgment, failure of which the execution process shall issue in accordance with the law.
5. The properties that was found on the appellant and his accomplices in the crime and was exhibited in the lower Court be returned to the rightful owner, the complainant (PW1) pursuant to Section 201 of the Magistrates Court Act (MCA) (Supra).

Dated at Kampala this 30th day of April, 2014.

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Joseph Murangira

Judge

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO.22 OF 2013 (Arising from original Criminal Case No.59 of 2012)

TAMALE

DAVID :::APPELLANT

VERSUS

UGANDA :::

RESPONDENT

REPRESENTATION

The appellant is in Court:-

My Lawyer was here in the morning and he went away.

Ms. Nabirye Sarah Sheron, State Attorney for the respondent: I am ready to receive the Judgment.

Ms. Margaret Kakungulu, the Clerk is in Court.

Court: Judgment is delivered to the parties.

Right of appeal is explained to the parties.

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Joseph Murangira

Judge

30/4/2014