

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

AT NAKAWA

CRIMINAL APPEAL NO. 11 OF 2013

[Arising from Cr. Case No. 453/12 KIBOGA]

MUHIZI GODFREY:.....APPELLANT

VERSUS

UGANDA:.....PROSECUTION/RESPONDENT

BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Appellant, Muhizi Godfrey, was charged in the Chief Magistrate's Court of Kiboga with the offence of stealing cattle C/S 264 of the Penal Code Act. He was subsequently tried and convicted. The Appellant was sentenced to 5 years imprisonment and further ordered to compensate the complainant with 180 heads of cattle or their equivalent in monetary terms. He has now Appealed to this Court against both conviction and sentence.

The grounds of Appeal are as follows:-

1. That the learned Trial Magistrate erred in fact and in law when he conducted the trial of the Appellant on a defective charge sheet.

2. The Learned Trial Magistrate erred in fact and law when he failed to properly evaluate the evidence on record, thereby reaching on a wrong decision.
3. The Learned Trial Magistrate erred in fact and law when he convicted the Appellant based on circumstantial evidence and in disregard of his defence.
4. The Learned Trial Magistrate erred in fact and law when he sentenced the Appellant to 5 years imprisonment and a compensatory Order of 180 heads of cattle which was harsh and excessive.

The Appellant was represented by Allan Nshimye Mbabazi of M/S Nshimye & Co. Advocates, while the Respondent was represented by the Office of the Resident State Attorney, Nakawa. (Mr. Julius Tuhairwe). Both sides filed written submissions for purposes of speeding up the process.

The brief background facts were that the complainant, Byabagambi Francis, a District Natural Resource Officer, Kayunga District had a farm having 350 heads of cattle located at Budimbo village, Kapeke Sub-county, Kiboga District. The Accused was his Farm Manager. On or around 18th June, 2012, the complainant's cattle were found abandoned with nobody attending to them by one John Kato (PW4), a charcoal burner who rang the complainant and later took charge. John Kato is said to have counted the animals and found only 170 heads of cattle remaining. The complainant alerted Police of Kiboga.

In the meantime the accused, now Appellant and his family are said to have switched off their phones. However, in the course of investigations and search, one Mugisha (PW2) who was also a Porter on the farm was arrested. And upon interrogation, Mugisha revealed that it was Appellant Muhizi Godfrey and two others who drove 200 heads of cattle out of the Complainant's farm. They gave Mugisha Shs. 400,000/= and told him his work was terminated. It was also revealed that the Appellant transported Mugisha and his wife to Rwentobo in Western Uganda from where he proceeded to Rwanda.

The Appellant on the other hand denied the charges in the lower Court, claiming that the Complainant chased him on grounds that he had employed a Munyarwanda who was fighting his other workers. The Appellant's offence was also that the Complainant did not allow him to collect his 94 heads of cattle that were on the Complainant's firm. The Appellant's case was that when he reported the conduct of the complainant to Police, he found the complainant at Police, where upon he was arrested for theft of 180 heads of cattle.

In their written submissions, both Counsel for the Appellant and for the State reiterated that it is the duty of this Court, as the first Appellate Court to re-evaluate all the evidence on record and come to its own conclusion as was held in **Pandya Vs Republic [1957] E.A. 336**. That the duty was further clarified by the Supreme Court of Uganda in **Bogere Moses and Another Vs Uganda, Supreme Court Criminal Appeal No.1 of 1997** which stated:-

“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.”

It is also trite law that an accused person is convicted on the strength of the Prosecution case, and not on the weakness of the defence as had been held in **Israel Epuku S/O Achutu V.R. [1934] EACA 166.**

Bearing in mind the above Principles of law, I shall proceed to consider each of the four grounds of Appeal one by one. The first ground is that the Trial Chief Magistrate erred in fact and law when he conducted the Trial of the Appellant on a defective charge sheet. Counsel for the Appellant submitted that the charge sheet was defective as it breached the mandatory provisions of Sections 85 and 88 of the Magistrates' Courts' Act and thereby prejudiced the Appellant's fundamental right as enshrined in the Constitution. He added that instead of the charge sheet bearing Section 254 of the Penal Code Act which creates the offence of theft and lays down the ingredients of the offence that ought to be proved by the Prosecution, that the statement of the offence had "**stealing cattle C/S 264 of the Penal Code Act.**"

Counsel for the Appellant's submissions were that the mandatory provisions of Sections 85 and 88 of the Magistrates' Courts' Act were breached and embarrassed the Appellant in the preparation of his defence. And further that S. 264 of the Penal Code Act applies to sentencing after the accused has been found guilty under S.254 of the Penal Code Act. Counsel for the Appellant concluded that the Appellant was in effect already presumed guilty which was in breach of **Article 83 (3) (a) of the Constitution of the Republic of Uganda.**

In reply, Counsel for the State conceded that in practice, both Sections, one defining the offence and the other prescribing the sanction appear on the statement of the offence, that failure to do so was neither fatal nor did it make the charge sheet defective. He quoted the case of **Cosma S/O Nyadago V.R. [1955] 22 EAC A 450**, where it was held that in the statement of the offence, it was better to

specify the punishment, section of the offence and not the definition section in the ordinance. I have carefully considered the above submissions on both sides. For avoidance of doubt, Section 85 of the M.C.A. Provides:-

“Every charge shall contain, and shall be sufficient if it contains, a statement of the Specific offence, or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as the nature of the offence charged.”

And when it comes to framing of charges the provisions of Section 88 of the M.C.A are also mandatory. They include:-

“88 The following provisions shall apply to all charges and notwithstanding any rule of law or practice, a charge shall subject to this act, not be open to objection in respect of its form or content if it is framed in accordance with this Act –

- a) Account of charge shall commence with a statement of the offence charged, called the statement of offence.
- b) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the Section of the enactment creating the offence.”
(Underline emphasis mine).

The wording of the above provisions of the magistrates’ Courts Act are mandatory. Since the statement of the offence did not bear the Provision creating the offence of theft, the charge sheet statement was in breach of the mandatory Provisions of the Sections 85 and 88 of the Magistrates’ Courts Act. That left the Charge Sheet

and ingredients of the offence open to different interpretations and was therefore fatal and made the Charge Sheet defective. The Judgment in the then Tanganyika case of **Cosma S/O Nyadago V.R [1955] 22 E.A.C.A 450** quoted by Counsel for the State is distinguishable because the Court there did not eliminate the need to state the offence definition cause.

In any case, that was an old case of 1955. 16 years later in 1971, the practice in Uganda was clearly stated under the mandatory provisions of the statute, notably the magistrates' Courts Act, enacted by the Parliament of Uganda. The specific Provisions of the Magistrates Courts Act take precedence as provided in Section 88 relating to framing of charges and are mandatory. So the practice or law as was held in **Cosma S/O Nyadago V.R.** was overtaken by the Specific Provisions of the Magistrates' Courts Act which take precedence and apply in Uganda. Even Counsel for the State in his submissions admitted that both Sections, one defining the offence and the other prescribing the sanction appear in the statement of the offence. In the premises, and in view of what I have summarised above, I find and hold that ground one of Appeal must succeed.

I now turn to the second ground of Appeal relating to evaluation of evidence.

Counsel for the Appellant attacked the Trial Magistrate's finding in the 1st and 2nd paragraph of his Judgment where he stated: **"In short, He (accused) did not challenge the complainant's evidence that he had 350 heads of cattle at the farm by may 2012....."**

Then the learned Chief Magistrate concluded:-

"I have no reason to disbelieve the Complainant regarding the 350 heads of cattle as being the number of cattle he had on his farm by May 2012. If the head count of cattle by the time of the alleged incident in

June 2012, they were ranging from 170 as claimed by the Prosecution or 156 as claimed by the defence, then the difference were stolen. I do therefore find that the Complainant's cattle were stolen from his farm around May – June 2012.”

Whereas Counsel for the State submitted that the Trial Magistrate gave reasons why he found that the Appellant had committed the offence, all the same in my view the trial Court erred when he held that Accused did not challenge the Complainant's evidence that he had 350 heads of cattle. That was a breach of one of the fundamental Principles in our Criminal Justice System, notably that an accused person should not be convicted on the weakness of the Defence case, but on the strength of the Prosecution case, that was long settled in the holding in **Israel Epuku S/O Achutu V.R [1934] EACA 166** and more recently by the Court of Appeal of Uganda in **Akol Patrick & Others Vs. Uganda, Court of Appeal Criminal Appeal No. 60 of 2002.**

In that regard therefore, there was no proper evaluation of evidence. Counsel for the Respondent also submitted that failure by the Prosecution witnesses to state the exact date when cattle was stolen was a minor issue as the witnesses mentioned dates between 16th and 18th of June, 2012 and are within range.

With respect, I find and hold that contradictions in dates when the alleged theft of cattle took place is not a minor issue. For Prosecution witnesses to be found to have proved the case beyond reasonable doubt, they must not only be exact and consistent, but should not contradict themselves on dates when the alleged theft occurred. Their evidence would be guess work.

The other issue relates to the exact number of cattle allegedly stolen. Whereas PW1's evidence was that he had 350 heads of cattle, he goes ahead to state that it

was on 18/06/2012 a head count of cattle was effected and 180 were missing. PW4 and PW6 relied on by PW1 were not present during the alleged head count of the cattle on 18/06/2013. And PW2, Mugisha Emmanuel talked of 200 heads of cattle. So it was pertinent to find out the exact number of cattle allegedly stolen particularly since the Appellant/Accused then claimed that he also had his 94 heads of cattle on the said Farm. The contradiction between PW1 and PW2's evidence as to whether the alleged stolen cows were 200 or 180 is not minor as a difference of 20 cows is a lot. A close analysis and evaluation reveals that the Prosecution evidence on the last count of the head of cattle and exact number of cows on the farm and those stolen was contradictory and could not be taken to have assisted the Prosecution to prove the case beyond reasonable doubt.

In Alfred Tajar Vs Uganda Criminal Appeal No. 167 of 1969, It was emphasized that whereas minor inconsistencies and contradictions should be ignored, where they are deliberate untruths they may lead to rejection. In view of what I have outlined, and particularly when one considers the fabricated and falsified testimony of PW2, and other Prosecution Witnesses, I find and hold that the trial Magistrate did not properly evaluate the evidence. The second ground of Appeal therefore succeeds.

Ground No. 3 of Appeal is about circumstantial evidence. The trial Magistrate in the 3rd paragraph on page 5 of the Judgment held that the disappearance of the Appellant from the farm abandoning Complainant's cattle made him a suspect. However, from the evidence of the Appellant, DW1, he did not abandon the farm but was fired by his boss the Complainant. And that was corroborated by DW2, Nibisi and DW3, Ntagungira. That was a reasonable hypothesis which could not lead to inference of guilt. On the allegation by PW2 which the lower Court relied on that Appellant drove away the cows no date was mentioned and the explanation

could be that he was grazing. I therefore agree with learned Counsel for Appellant that if Appellant's evidence had been considered there is no way the trial Magistrate would have convicted the Appellant on circumstantial evidence. The submission by Counsel for the State that circumstantial evidence was overwhelming is hereby rejected. The third ground of Appeal therefore also succeeds.

The last ground of Appeal was that the sentence imposed by the Trial Magistrate was harsh, sentence of 5 years where maximum was 7 years. This was coupled with the order to compensate the Complainant 180 heads of cattle or their equivalent in monetary terms. Without going into much details, even Counsel for the State in his submissions conceded that the Prosecution did not lead evidence to justify the compensatory award.

Furthermore and as submitted by Counsel for the Appellants, S.198 (1) of the Magistrates Court Act on recovery of costs and Compensation requires that the sums allowed shall be specified. In other words, it has to be a stated amount of money. The order of compensation of 180 heads of cattle or their monetary equivalent was ambiguous. It was not stated whether the cows are local Ankole cows, Zebu, Mixed breed, Borans or Fresians. The hanging question is what type of cattle were they so as to assess the equivalent. The fourth ground of Appeal therefore also succeeds.

Having allowed all the grounds of Appeal, I find that the Appellant was not proved beyond reasonable doubt to have committed the offence of theft of cattle, having also been tried on a defective charge sheet. The Appeal is therefore hereby allowed, the conviction is quashed and the sentence set aside. The Appellant is to

be set free forth with unless he is being held in Prison on some other lawful charges.

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W. M. MUSENE

JUDGE

2/04/2014

01/04/2014

Appellant present.

Mr. Nshimye Allan for Appellant present.

Counsel for State absent.

Aida Mayobo, Court Clerk present.

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W. M. MUSENE

JUDGE

Court: Case adjourned to 2/04/2014 at 10:00 a.m.

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W. M. MUSENE

JUDGE

2/04/2014

Appellant present.

Tuhairwe Julius, holding brief for Kwezi, for State.

Mr. Allan Nshimye for Appellant.

Betty Lunkuse, Court Clerk present.

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W. M. MUSENE

JUDGE

Court: Judgment read out in open Court.

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W. M. MUSENE

JUDGE

2/04/2014

