

IN THE HIGH COURT OF UGANDA AT SOROTI

CRIMINAL APPEAL NO. 7 OF 2014

**(ARISING FROM MAGISTRATE GRADE ONE COURT OF KUJU CRIMINAL CASE
299 OF 2010)**

OKWERO DAVIDAPPELLANT

V

UGANDA.....RESPONDENT.

JUDGMENT BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

The appellant through Oyoit & Co. Advocates appealed the decision of HW Baligeya Moses Mufumbira Magistrate grade one dated 12th February 2014 sitting at Kuju on six grounds that i will refer to later in the judgment .

The duty of an appellate court is to re-evaluate the evidence adduced in the lower court and arrive at its own conclusions bearing in mind that the trial magistrate had an opportunity to observe the demeanour of witnesses.

The appellant was charged with simple robbery c/s 285 of the penal code. It was alleged that the accused person and others still at large on 39th April 2010 at Opirai village Amuria district armed with sticks robbed Atim Jessica of four cows, four goats and fourteen chicken property of Atim Jessica and before the robbery did use actual violence on the said Atim Jessica. He was convicted of stealing cattle c/s 264 of the penal code.

The prosecution had a duty to prove that the appellant stole property and immediately before or at the time of the stealing, or immediately after, threatened the complainant or used actual violence on the complainant.

The evidence of prosecution witnesses shows that on 28.4. 2010 at about 9 am , PW2 Echecku Julius, PW3 Asio Teddy and PW4 Acen Christine saw the appellant , one Stephen and other people untie cows, goats and chicken from the home of the complainant. PW2 Echecku was responding to an alarm when he identified the appellant.

While It is apparent from the record that PW2 Echecku and PW 4 Acen Christine are neighbours of the complainant, PW3 Asio Teddy lived about 4 miles from the complainant's home. Her testimony is therefore suspect as it does not show how she came to be at the home of the complainant that morning.

Otherwise the other two witnesses Echecku and Acen corroborated each other's testimony in as far as the appellant was at the scene of crime on the morning of 29.4.2010 and drove away cows, goats, and chicken property of the complainant.

From the evidence of the complaint PW1 Atim Jessica, she was not at home when her livestock and chicken were taken away but on her return at about midday, she found her four cows, eight goats and 15 chicken missing.

In light of the foregoing, i find that the trial magistrate properly evaluated the evidence and arrived at a correct conclusion.

Counsel for the appellant filed written submissions that i have carefully considered. Counsel for the respondent did not file written submissions which should have been filed by 8.5.2014.

The first ground of appeal is that the trial magistrate failed to scrutinise and evaluate the evidence on record thereby arriving at a wrong conclusion.

The second ground is that the trial magistrate erred in law and fact to hold that the appellant was properly identified at the scene.

Both of these grounds were handled together by counsel for the appellant. Counsel submitted that the trial magistrate relied on evidence of witnesses who did not properly identify him. He singled out PW1 Atim, and PW3 Asio. In my evaluation of the evidence i found that PW3 could not be relied on as an eye witness because she lived some four miles from the scene and she did not explain how she came to be at the scene. As for PW1 Atim, i found that she did not witness the theft as she was not at home. However, i found that PW2 Echeke and PW4 Acen properly identified the appellant as the theft took place during broad daylight and both knew the appellant.

Counsel also made reference to a paragraph in the judgment of the trial magistrate that he interpreted to mean that the trial magistrate found that the witnesses did not identify the appellant.

I find that counsel has imputed an erroneous meaning to what the trial magistrate meant. The trial magistrate was merely making reference to counsel's submissions that witnesses did not properly identify the witnesses to which the magistrate disagreed.

Counsel also made reference to the fact that the offence took place in April 2010 and appellant was charged in August 2010. I find no reason to fault the prosecution especially when the principle that a crime abates only when the suspect dies.

Counsel also submitted that the omission to call the investigating officer as a witness was fatal.

The prosecution determines the witnesses to call or leave out. If counsel felt that the investigating officer ought to testify, counsel should have applied to the magistrate to call the investigating officers in exercise of his powers under section 100 of the MCA. Counsel cannot be heard to complain after the event.

Ground one and two fail.

Ground three is that the trial magistrate erred in law and fact to hold that the appellant was properly identified at the scene of crime. This ground has been dealt with by grounds one and two.

Ground four is that the trial magistrate erred in law and in fact to deny the appellant his constitutional right to be represented by counsel. Counsel complained the right was denied at the time of sentencing when the appellant was sentenced to 24 months imprisonment.

While i agree that sentencing is part of the trial, at this stage, counsel's attendance is not critical provided the trial magistrate hears the convict in mitigation.

The record of proceedings does not show that the appellant was heard in mitigation. I find merit in this ground.

Ground five is that the decision of the trial magistrate has occasioned a miscarriage of justice. I find no merit in this ground as the trial magistrate properly evaluated the evidence.

Ground six is that the sentence of 24 months imposed is harsh and uncautionable. The word 'uncautionable' is neither found in the English dictionary nor Osborn's law dictionary. I will therefore ignore it.

On this ground, as i have found that the appellant was not heard in mitigation, i shall not belabour it.

I accordingly dismiss the appeal. Since i have found that the appellant was not heard in mitigation, i will conduct mitigation proceedings immediately after the reading of this judgment.

DATED AT SOROTI THIS 27TH DAY OF AUGUST 2014.

HON. LADY JUSTICE H. WOLAYO