THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CR-SC-272-2013

UGANDA.....PROSECUTOR

VERSUS

A.1 NDYABAHIKA COLLINS SOMANI *aliias* JOHN BULLER
A.2 BYARUHANGA RONALD.....ACCUSED

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Accused persons **Ndyabahika Collins Somani alias John Buller** and **Byaruhanga Ronald**, are charged of stealing a vehicle c/s 254 and 265 of the Penal Code Act.

It is alleged that N**dyabahika Collins Somani alias John Buller** and **Byaruhanga Ronald** on the 22nd day of April 2013 at Protea Hotel in Mbale District, stole a vehicle registration number UAG 479 D Toyota Corola Blue in colour valued at shs. 8,000,000/= the property of **Mwebingwa Makai**.

The accused persons denied the charge.

The prosecution has the burden to prove beyond reasonable doubt that the following ingredients existed.

1. That there was theft of a motor vehicle that is that there was property capable of being stolen.
2. That the property was fraudulently taken away by the culprit.
3. That the intention was to permanently deprive the owner of its use.
4. That it is the accused who carried out the theft.

Both the prosecution and defence, agreed that ingredients 1, 2 and 3 were sufficiently proved by the prosecution. The defence only contested ingredient 4, on participation of the accused persons.

I will briefly outline the evidence and the law on ingredients 1, 2, and 3 so as to lay a basis for assessing the position on ingredient No.4.

1. Whether there was property capable of being stolen.

Resident State Attorney referred to section 253 (1) of the Penal Code Act, which when correctly interpreted includes a motor vehicle as movable property capable of being stolen. There was evidence of PW.1, PW.2, PW.3, PW.4, PW.5, PW.6, PW.7, PW.8, showing that a motor vehicle No. UAG 479D, had been hired by a one **John Buller** who later disappeared with it. This ingredient was sufficiently proved.

2. Whether the property was fraudulently taken away by the culprit.

The Resident State Attorney, referred to section 254 (6) of the Penal Code Act, to argue that once the property in question is moved by the culprit, the slightest removal will suffice. From evidence on record of PW.1- PW.9, it has been sufficiently prove that when the said **John Buller** drove away the vehicle, it has never been recovered. Evidence proves that there was asportation with fraudulent intention. The ingredient was hence proved.

3. Whether there was intention to permanently deprive the owner of its use.

Referring to section 254 of the Penal Code Act Resident State Attorney argued that this deprivation covers both the general and special owner. Evidence on record shows that when the man who hired the car did so, he was to return the vehicle after use, however the vehicle was never returned till now. The intention was therefore to permanently deprive the owner of its use (see evidence of PW.1-PW.9). The ingredient is sufficiently proved.

4. Whether accused persons were the culprits.

This ingredient was opposed by the defence as not proved. Defence counsel argued that, PW.1, PW.2, and PW.3 dealt with a person called **John Buller not Ndyabahika** (A.1). further that PW.1 interacted with **John Buller** for only three (3) minutes which was not ample time for proper identification.

Secondly he argued that there was no direct evidence against A.2. he faulted State for not tendering the police statements of admissions for A.1 and A.2.

He further argued that no motor vehicle was recovered with any of the accused persons.

He further argued that Numbers 0771675555 and 0773187794 were not for the accused persons, and their numbers were 0752200900 (for A.1) and 0703200900.

A.2 said his number is 07002445436 which are registered in their names and do not appear in the print out.

He further pointed out accused denied all allegations on the print out and also denied the phones that were involved in the theft.

He concluded that evidence did not place the two accused on the scene. He advised prosecution to look for **John Buller**. He asked court to believe A.1's denial of the photographs and passports exhibited and find that they do not belong to accused.

The Resident State Attorney both in submission in chief and cross reply, referred court to the evidence on record, which he categorised as both direct and circumstantial, and argued that A.1 was directly identified by **PW.2 Babirye**- during day time when he checked in, she physically interacted with her and A.1 handed in his identification documents PE.1 (Liberian Passport) and also signed the Registration form (PE.2). PW.2

referred A.1 to P.3 for hire of the car. PW.3 physically transacted with A.1 during day time. A.1 again handed in the Liberian Passport similar to the one given to PW.1, and also gave his Driving Permit (PE.8). The witness issued a receipt tendered as PE.9 after A.1 paying shs. 200,000/=.

The transactions between PW.3 and A.1 were concluded in the presence of PW.4 and PW.5. All these witnesses physically saw and identified A.1 as the person who took the motor vehicle in issue. They squarely placed accused at the scene of crime. Resident State Attorney, argued that there was therefore no case of mistaken identity.

In the case of ***Abdalla Nabulere v. Uganda [1979] HCB 77***., it was held that the conditions which are sufficiently safe to ensure that identification is free from possibilities of mistake are:

1. Sufficiency of light.
2. Distance between witness and culprit.
3. Time spent with culprit.
4. Familiarity of witness with the culprit.

From the evidence on record, as correctly reviewed by the State Attorney the witnesses for the State (PW.1, PW.2, and PW.3, were dealing with A.1 at close range. PW.2 and PW.3 dealt with A.1 as a customer. They looked at him. Spoke to him, exchanged information with him in PE.1, (Passport), PE.2 (Registration Form), PE.8 (Driving Permit), PE.9 (Pay Receipt). All these are activities which allow the customer and service provider good eye contact, and communication, close distance and close interaction.

I do not therefore believe the defence that there was any insufficient conditions for identification to raise possibilities of mistaken identity.

Regarding the evidential value of the circumstantial evidence raised against A.1 and A.2, Resident State Attorney referred court to the case of ***Tumuheirwe v. Uganda CA 124 [1967] EACA***, which holds that circumstantial evidence is very often the best evidence proving the fact with the accuracy of mathematics. He referred to the evidence on record to conclude that A.1 and A.2 were the culprits.

A review of this evidence shows that contrary to what the defence states, this evidence as led through PW.6, PW.7 and PW.8 giving details of how the police was able to arrest A.2, using information provided by A.1, and the evidence of the phone trucking as detailed by **PW.7 Namara Robinson**- are too accurate to have been a set up or coincidence.

I have found for a fact, and do believe the evidence of the prosecution in its details by PW.7 that, No.07793400536 which the caller used at Protea when checked out on the print out data from MTN exhibited as PEX15, was last used in Phone SR No. 3541680228865643 for Phone Nokia 1200, in which three other sim cards (numbers) had been inserted. The No. 0771675555 was at that time the only active number. This number was found to have been used in Mbale on 22.04.2013 and left on 23.4.2.103; and went back to Nanyama. When the analysis of other correspondents with this number was made. Four frequently called numbers were singled out. One of them was 0782162241 belonging to **Cpl Balabala Moses** of Luzira Prisons. **Balabala Moses** who identified for PW.7, the owner of 0771675555, which later led to the arrest of A.1 as per evidence of PW.7 and collaborated by PW.6, and PW.8.

The phone Nokia 1200- was recovered from A.1 on arrest; exhibited as PE.10. A.1 was also found with Exhibit II a Sudanese passport with his photograph. He was found with several sim cards including the one bearing No. 0771675555 found in the phone which had been used to call Protea Hotel on the day the caller booked. The card was used by A.1 to call A.2 when he was under arrest leading to the arrest of A.2. The sim is inside

Exhibit 10 and was received in court as part of Exhibit 10. A.1 was found with a total of 10 sim cards- 2 of GEM TELCO (Kenya), one Safaricom (Kenya, 2 Airtel Uganda, 2 Mango (Uganda), one Orange (Uganda), one (Unclear)- all tendered as PE.12 for the prosecution.

Upon arrest of A.2 on information received from A.1, two mobile phones were recovered from him in which A.2 was using line no. 0773187794 which is the line on checking the call data had appeared in Mbale on 22.04.2013 and left via Tororo on 23.04.2013 and went to Katuna. The number from there called Rwanda based numbers from time it left Mbale to Katuna. It crossed Uganda on 25.4.2013 and returned Uganda on 1.5.2013. PW.7, stated the evidence on the print out showed that the user of this line travelled with the phone to Mbale on the day the car was stolen. This was the very phone exhibited with same SR No. 353548059519174 found with A.2 on which A.1 called him. The phone was admitted as PEX.13.

The above evidence when checked out against the exhibits (print out), (Phone SR Numbers), (Phone lines), is found to tarry. It has an accuracy of mathematics with it, that fits in well with the earlier direct evidence as given by PW.1, PW.2, PW.3 and PW.5. The evidence of the hone tracker (PW.7) is well collaborated by the evidence of the investigating officers (PW.8) who explained that A.1 revealed that A.2 sold the car in Rwanda. Also PW.6 clarified that he had agreed with A.1 and A.2 that they buy him a vehicle in exchange for freedom.

The recovered Sudanese Passport on A.1, with names **Ahamad Sali**, (Ex.11), and the photocopy of the same found in the bag recovered from the Hotel received as PE.2, PE.3, and P.4, P.5 and 6, and the ATM recovered from the Hotel Room bearing the name "**Ndyabahika**" exhibit as PE.7, are found to be relevant pieces of evidence which when pieced together leave no doubt in the mind of court that **John Buller, Ahamed Salila**

Hamaida, Ndyabahika Collins, are all a reference to the same person. The photographs are all the same, the features, and the physical alignments.
Any reasonable person is able to recognise them as the true likeness and photograph representation of "A.1" calling himself now **Ndyabahika Collins Somani**.

The above evidence when considered alongside the defence by both accused impresses me as more truthful and reliable than the defence. I do not believe A.1's evidence that all photographs exhibited in court do not refer to him. I do not believe A.1 when he denies having led the police to the arrest of A.2. I do not believe his defence of an existing land dispute with **PW.6 (Makayi**). The evidence by A.2 is equally unbelievable, as he was unreliable and contradictory in explanations offered to questions in cross-examination. There was evidence from PW.7 which destroys his defence and squarely places him at the scene of crime. Some of the offending exhibits used in committing the crime were found with him (the phone and line) and he could not sufficiently explain why.

Both accused have been showed by evidence on record to have carried out a common intention as provided for under section 20 of the Penal Code Act.
R v. Tabulayenka S/o Kiirya and Orders 1943 10 EACA, holds that common intention may be inferred from presence of accused at the scene, actions, omission to disassociate oneself from the crime.

I agree with Resident State Attorney that though A.2 was not seen at Protea, he was shown by evidence to have been in Mbale as part of a common intention (scheme) to steal.

For all evidence above, I do find that the participation of A.1 and A.2 in this crime has been proved by the prosecution beyond all doubt.

I therefore agree with the opinion of the assessors that both accused are liable and ought to be convicted as charged.

I find that both accused are guilty of the charge and do hereby convict them accordingly. I so order.

Henry I. Kawesa

JUDGE

27.08.2014

27. 08.2014

Accused present.

Chekwech Justine for State.

Mutembuli for accused present.

Resident State Attorney: Matter for judgment.

Court: Judgment communicated in open court in presence of all parties as above.

Henry I. Kawesa

JUDGE

27.08.2014

Resident State Attorney:

The two convicts are found guilty. The offence attracts a maximum penalty of seven years. Considering the circumstances, court should consider the value, and the prevalence of the offence. Convicts had premeditated mind to steal. They are not remorseful. The matter was before Magistrates then they rejected

A.1 is not a first offender. Under CRB 208/07/2008 was (720/2009- Jinja G.1). convicted sentenced to a fine of 4.8 million or 2 years imprisonment. Judgment delivered on 28. June.2009, where a car was stolen in similar circumstances.

A.2 is a first offender. They need a deterrent sentence that will save the public from acts like this. We pray for a custodial penalty. We also pray for a compensation order. The car had never been recovered.

Henry I. Kawesa

JUDGE

27.08.2014

Mutembuli:

We pray for leniency contrary to the submissions. A.1 is a first offender. No case number is given save a CRB. No evidence exists. Let him be treated as a first offender. Section 257 maximum sentence is 7 years. Both convicts have been on remand for over 15 months they have learnt. Court should consider that period. A.1 is married with 5 school going children; who need his care.

A.2 is a young man married with two children has learnt and is in position to reform. In lower courts they were seeking justice. Convicts are ready to compensate the complainant for the lost vehicle. We pray that court considers a fine instead of imprisonment.

Alloctus:

A.1: I have cancer. I pray to be released so that I compensate complainant.

A.2: I am remorseful, I am ready to compensate the complainant. I have changed. I plead for an option of fine.

Henry I. Kawesa

JUDGE

27.08.2014

Court: Let sentence be provided at 2:00p.m, after studying all matters raised in allocutus.

Henry I. Kawesa

JUDGE

27.08.2014

Sentence and Reasons

Section 265 of the Penal Code Act provides that upon conviction, a person who steals a motor vehicle is liable to imprisonment for seven years.

I have listened to the mitigations raised and the submission by Resident State Attorney regarding the said accused persons.

Given the gravity of the offence committed and the amount of preparation and acumenship depicted in the commission of this crime, the court agrees with Resident State Attorney, that it is an offence perpetuated with an intention to defraud many other would be victims. Society needs protection. Crime is a vice that Government does not handle with kid gloves. Aim of punishment is to deter further crime, protect society from such repeat of criminal acts and offer change to the criminals to reform.

Given the nature of this offence, court can only achieve the above results from a custodial penalty as provided for in the provisions of section 265.

Also section 126 of the TIA, provides that Court can make an additional order of compensation on top of a given sentence.

For the above reasons and taking into account periods spent on remand, each convict is sentenced to a custodial period of 5 years. With an order of compensation to the complainant of shs. 4,000,000/= (four millions) each.

I so order.

Henry I. Kawesa

JUDGE

27.08.2014

Later: Afternoon:

Accused present.

Mutembuli for accused present.

Resident State Attorney absent.

Court: Sentence pronounced.

Henry I. Kawesa

JUDGE

27.08.2014