THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CRIMINAL APPEAL NO. 058 OF 2013

[Arising out of Criminal Case No. 233 of 2012 at Wobulenzi C/M]

JUUKO IBRAHIM

==========APPELLANT

VERSUS

UGANDA==========

=RESPONDENT

JUDGMENT

This is an appeal from the Judgment of the Magistrate Grade 1's Court at Wobulenzi by Her Worship Kaitesi Kisakye Mary, in Criminal case No. 223 of 2012 delivered on 7th/08/2013 wherein the Appellant and others at large were charged with theft contrary to Section 254(1) and 261 of the Penal Code Act. The Appellant was tried and convicted and sentenced to a Fine of 500,000/= or to serve 12 months imprisonment in default. He was further ordered to pay 12,000,000/= as compensation to the complainant.

The brief facts of this case are that the Appellant being the Manager of Wobulenzi Central Market at Wobulenzi Town Council in Luwero District and others at large was alleged to have stolen properties of a one Kwagala Esther Mugaya from her shop at Wobulenzi Central Market. He was prosecuted and convicted of the same offence hence this Appeal against both the conviction and sentence.

The Appeal is premised on four grounds which include the following:-

1. The Trial Magistrate erred in law when she failed to properly evaluate the evidence and hence arrived at a wrong decision.

2. The Trial Magistrate erred in law when she relied on hearsay evidence to convict and sentence the Appellant.
3. The Trial Magistrate erred in convicting the Accused/Appellant in absence of any incriminating evidence in support thereof.
4. Magistrate erred in law having held that the Appellant never participated but then convicted him.

The Appellant was represented by KMT Advocates while the Respondent was represented by Kwezi Asiimwe a State Attorney.

Counsel for the Appellant argued grounds 1 and 3 together. He argued that there was no evidence brought by any of the prosecution witnesses implicating the Appellant for the offence of theft. He stated that out of the 5 witnesses, it is only the 2nd witness who testified having seen the Appellant come to the shop and ordering him to leave the same but did not testify seeing the Appellant break into the shop or lifting any of the alleged goods. He further stated that the complainant herself was just told of the alleged incident by PW4 and even PW5 testified that she did not see the Appellant anywhere in this transaction.

Counsel also argued that the Trial Magistrate failed to address her mind on the law on inconsistencies and contradictions thereby arriving at a wrong decision. He pointed out the fact that PW1 (The Complainant)'s evidence was full of contradictions like in relation to the time she received a call from PW4 and the time she went to her shop after getting the phone call from PW4 which was 3 pm on the same day. Counsel for the Appellant pointed out the fact that PW4 on the other hand contradicted this statement by stating that he could not get in touch with PW1 on the same day because her phone was off.

Counsel for the State on the other hand argued that the Trial Magistrate considered and evaluated the evidence of each witness and went ahead to resolve whether it incriminated the Appellant. Counsel referred to evidence of PW4 where he stated that he was ordered out of the shop by the Appellant

in company of two other men wearing Movit uniforms stating that they were going to guard the shop. According to the Trial Magistrate, this evidence was circumstantial leading to no other inference as to how the properties could have been taken other than by the Accused. In relation to the inconsistencies, Counsel argued that they were minor and did not go to the gist of this matter and therefore could be ignored.

I have read through the submissions by both Counsel and agree with both Counsel that it is the duty of the first Appellate Court to re-evaluate all the evidence and come to its own conclusion bearing in mind that it did not see the witnesses testify in the Court of first instance (See **KIFAMUNTE HE NRY VS UGANDA SUPREME COURT CRIMINAL APPEAL NO. 1 OF 1997).**

Having studied the evidence on record and the judgment of the Trial Magistrate, I find that the complainant PW1 testified that the Accused is the manager of Movit market and therefore in charge of Movit security guards found at the stall of the complainant.

PW4 Johnson who was employed by the complainant as a carpenter stated that the Accused told him to leave the shop but he refused to do so before PW1 returns since there were items in the shop but the Accused returned with two men wearing Movit uniforms who forced the Accused out of the shop to guard the shop.

PW1 also testified that she was denied access to her shop by the Accused until when Court made an order to allow the complainant remove her properties whereupon she found that majority of her properties valued at 14 million were missing.

I am in agreement with the Trial Magistrate on the fact that the evidence on record pointing to the Accused is circumstantial. The law on circumstantial evidence has been stated in a number of cases. The test to be applied was re-stated in the case of **Simoni Musoke V R [1958] EA 715** that "**in a case depending exclusively upon circumstantial evidence, the Court must find before deciding upon conviction that inculpatory facts**

were incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of guilt and also before drawing the inference of guilt the Court must be sure that there are no co-existing circumstances which would weaken or destroy the inference of guilt."

The evidence on record points to the fact that it was the Accused who was the last in control of the shop of the Complainant with the two guards at large before the property of the complainant went missing which clearly leaves no inference other than the fact that the Accused and the two guards at large took the missing property from the shop.

On the issue of inconsistencies, the case of **UGANDA V ABDALLAH NASSUR [1982] HCB** cited by the Appellant Counsel held that where grave inconsistencies occur, the evidence may be rejected unless satisfactorily explained while minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate untruthfulness.

In the case of **Uganda Vs ASP Aurien James Peter Criminal case No. 012 of 2010 (Unreported),** Justice Lawrence Gidudu stated that on the issue of credibility and inconsistency of witnesses the Courts have decided in a number of cases that a witness may be untruthful in certain aspects of his evidence but truthful in the main substance of his evidence. He further stated that a witness who has been untruthful in some parts and truthful in other parts could be believed in those parts where he has been truthful. Counsel for the Appellant pointed out the fact that PW4 was inconsistent on the issue of his age by stating in the Police Statement that he was 42 years old while he testified in Court that he was 32 years old.

Court hereby notes that this indeed is an inconsistence however it does not relate to the main substance of the case and so Court will hereby only focus on the evidence given by PW4 relating to the substance of this case. PW4 also testified that he was chased out of the shop by the Accused with two guards and tried to call the Accused but her phone was off till night time

that's when he managed to tell the complainant that he had been chased out of her stall. PW1 the complainant also testified to having received a phone call from PW4 at 11:00 a.m. This clearly reveals an inconsistence in the evidence of PW1 the complainant but not that of PW4 who puts the Accused at the scene of the crime.

Court therefore finds that this inconsistence does not go to the rest of the matter and hereby finds that ground 1 and 3 fail.

In relation to the 2nd ground, the Appellant argued that the Trial Magistrate relied on hearsay evidence to convict the Appellant. Counsel argued that the evidence of PW1 was hearsay she was told by the two Askaris that the Appellant had instructed them not to allow anybody touch the door or allow her access to the shop. Counsel argued that the complainant never saw the accused at the scene of the crime and that all her facts were hearsay and baseless. Counsel for the Respondent on the other hand pointed out the fact that all the witnesses stated that they did not see the Accused take the property but court found that although the evidence was not direct, it was circumstantial.

I am more inclined to agree with Counsel for the Respondent that indeed Court held and found the Accused guilty on circumstantial rather than direct evidence and therefore did not rely on hearsay evidence in convicting the Accused. Accordingly the 2nd ground hereby fails.

Counsel for the Appellant further argued in ground 4 that the Trial Magistrate erred in law having held that the Appellant never participated but then convicted him. Counsel referred to the testimonies of PW5 who stated that she never saw the Accused take any properties, PW4 the Investigating Officer who did not search the Accused's home or office to recover the stolen goods, PW3 who did not take finger prints of the Appellant or the guards and PW1 who stated not having seen the Accused but only two guards at the premises.

Counsel further pointed to the fact that the Trial Magistrate only pointed out the fact that there was no evidence to indicate that the stolen properties were found with the Accused and that it is not in all cases that stolen property is recovered. Counsel argued that the Appellant was convicted on the basis of circumstantial evidence which was overwhelming.

Having looked at the judgment of the Trial Magistrate, I find that she did find the Appellant guilty based on circumstantial evidence. She stated that the act of chasing PW4 from the shop and deploying guards at the shop to stop anybody from accessing the shop was not an act of an innocent party since property went missing from the same shop which was in possession of the Accused and the guards.

I find that considering the fact that PW4 identified the Accused as the person who chased him out of the stall and took possession thereof of the same with two guards, after which property went missing, this points to no other explanation other than the fact that the property was taken by the Accused and the two guards. Accordingly, I further find that ground 4 of appeal fails.

Having found that the grounds of appeal lack merit Court hereby finds that the Trial Magistrate did not error in law in convicting the Accused. Court however finds that since the Accused did not commit the offence alone but with two others who are at large, Court reduces the amount to be paid as compensation to 6 million shillings only.

.....

WILSON MASALU MUSENE

JUDGE

20/10/2014