

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

CRIMINAL APPEAL NO. 054 OF 2014

5 (Arising from Nakifuma Criminal Case No. 197 of 2012)

- 1. OKUJUA DAVID**
- 2. BYEKWASO GEOFFREY**
- 3. BWABYE**

10 **ADEN**
APPELLANTS

VERSUS

15 **UGANDA**
RESPONDENT

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

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JUDGMENT

This Appeal arises out of the Judgment and Orders of the Magistrate Grade 1 Ms. Jolly Nkore sitting in the Chief
25 Magistrate’s Court Mukono at Nakifuma.

Therein she convicted the accused people/who are now Appellants on charges of;

- (1) Criminal trespass contrary to Section 302 of the Penal
30 Code Act.

(2) Malicious damage to property contrary to Section 335 of the Penal Code Act.

(3) Theft contrary to Section 254(1) and 261 of the penal Code Act.

5 They were sentenced to serve 2 years imprisonment on each Count all of them running consecutively.

The case for the prosecution was that the Appellants and others still at large on 21/9/2012 at Mayangayanga village in
10 Mukono District entered into the premises of Mudondo Jesca Nawegulo alias Namugwere and with intent to damage and steal, unlawfully destroyed the said house and stole properties therefrom valued at Shs.800,000/= and cash Shs.5,000,000/=.

15 The Memorandum of Appeal raised 3 grounds but in the written submissions by the Appellants' Counsel abandoned Ground No. 2 leaving Grounds No. 1 and Ground No. 3 which read as follows:

1. The trial Magistrate erred in Law and fact when she
20 convicted the Appellants on evidence which was full of contradictions and inconsistencies.

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3. The Judgment of the trial Magistrate was bad in Law as a whole and against the weight of evidence adduced at the trial.

5 The submissions by the Appellants' Counsel were mostly verbatim reproduction of parts of the testimonies by various witnesses which made it difficult to extract the faults the Appellants have found with the Judgment of the trial Magistrate.

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However, with difficulty, I was able to extract some points of contention therefrom.

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1. That the evidence of PW1 the complainant was **hearsay**, as she was never at the scene. That she was chased by the mob and she took refuge in a nearby school and therefore never saw what transpired at the scene of crime. That she therefore never identified the Appellants.

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2. That PW2 never identified the Appellants and that those she mentions as having seen were not arrested. That she is also not clear as to where she was hiding in order to see the attackers. That her testimony is full of lies and contradictions.

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3. That there were major inconsistencies and contradictions e.g.

(a) Differences in the dates as to when the actual destruction took place - PW1 talks of Friday 21/9/2012 and 28/9/2012.

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(b) PW1 states that she was attacked to avenge the death of Wayuba. Yet the first three prosecution witnesses stated that the said Wayuba was at the scene. That Wayuba was holding a small jerrycan. That all these are not minor inconsistencies. Reference was made to the case of **Oketcho Alfred Vrs. Uganda SCCA 24/2001** where it was held that major contradictions and inconsistencies should be resolved in favour of the accused person.

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4. That none of the prosecution witnesses placed the Appellants at the scene. There was only a single identifying witness who was mistaken about the identities and the circumstances were not favourable for positive identification. That this witness PW3 hid in an unfinished house with grass. She states that A3 Byekwaso was not there and that this is corroborated by PW2 but the said Byekwaso was still convicted. Reference was made to the case of **Abdalla Bin Wendo Vrs. R. (1952)20 EACA** regarding usual identification that no Court should

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act on such evidence unless all the possibilities of mistaken identity are eliminated.

5 5. The Arresting Officer never testified to prove that the Appellants were arrested at the scene of crime.

10 6. The trial Magistrate should have visited the scene to ascertain the distance between the hiding place of PW3 and the grass inside the unfinished house and the holes that enabled the witness to identify the Appellants.

In respect of Ground No. 2. It is submitted that all the witnesses i.e. PW2 and PW3 point to Sebaduka as the one who stole the Shs.5,000,000/= but the trial Magistrate went ahead and ordered that all accused/Appellants refund the money. That in any case, the evidence was circumstantial in respect of the Shs.5,000,000/=.

20 The learned Resident State Attorney Mr. Nkwasibwe filed written submissions in reply to the Appellants' submission. It is submitted that there were no inconsistencies and contradictions in the prosecution evidence. That PW1 was threatened by the Appellants and others who wanted to lynch her after she was called by the LC.1 Chairman for a meeting. 25 She left her Shs.5,000,000/= in the Shrine. The Appellants claimed she was a witch.

She left the meeting and the Appellants followed her and she had to take refuge in the School at Kanuyuki. That the evidence of PW2 and PW3 corroborated that of PW1 in that
5 they all knew the Appellants as village mates and they were clearly identified. PW5 also corroborated the evidence of PW1 – PW3 that the Appellants were part of the mob.

2. It is submitted that the evidence squarely placed the
10 Appellants at the scene and that they were properly identified.

Reference was made to the case of **Oketcho Alfred Vrs. Uganda SCCA 24/2001** where it was held that where the
15 inconsistencies are minor and not deliberate intended to deceive Court they should be ignored.

In regards to identification, the case of **Uganda Vrs. William Simbwa SCC 37/95** was cited. That case pointed out low
20 favourable conditions for identification are determined. These include the lighting, duration of the incident, whether the witnesses knew the accused persons before and the proximity that enables the witnesses to clearly observe the accused.

It is submitted that this incident took place in broad day light and the whole incident took a long duration all in favour of correct identification.

- 5 3. That the defences of alibi could not stand once the Appellants were clearly identified and placed at the scene of crime.

This Court in its Appellate capacity has the duty to review the
10 evidence before the trial Court, subject it to fresh scrutiny and may come up with its own findings. Ref: **R. Vrs. Pandya (1957) EA 336.**

I have looked at the evidence before the lower Court and the
15 Judgment of the trial Magistrate.

In the said Judgment, the Magistrate dealt with the ingredients of the offences and came to the conclusion that each of the offences had been proved to the required standard in criminal
20 cases.

She was satisfied that there was trespass and there was malicious damage and that there was theft on the strength of the evidence.

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She then dwelt on the participation of the Appellants. She was alive to the Law on Identification and relied on the case of **Uganda Vrs. George William Ssimbwa (supra)**. She was also alive to the dangers of relying on the testimony of a single
5 identifying witness. Ref: **Abdalla Bin Wendo & Anor. Vrs. R. (supra)**, and was satisfied that given the favourable conditions for positive identification, the evidence of PW2 and PW3 clearly placed the Appellants at the scene of the crime.

10 She also addressed the issue of contradictions and inconsistencies and was satisfied that they did not go to the root of the case.

The record reveals that the complainant was threatened by her
15 fellow village mates who wanted to lynch her on allegations that she was a witch.

They wrongly took the Law into their own hands and thought they had the authority to act as they did.

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There is no doubt that those at the scene were properly identified given that the incident took place in broad day light, perpetrated by people who were known to the witnesses.

25 The trial Magistrate also had the opportunity, unlike this Court, to observe the demeanour of the witnesses and clearly

decided the case after being convinced that the prosecution proved the 3 Counts to the required standards.

I find that this Appeal lacks merits and is dismissed. The
5 Judgment, convictions and sentences are upheld.

Godfrey Namundi

JUDGE

10 **13/2/2015**

13/2/2015:

Appellants present

Resident State Attorney Grace Nabagala

5 Court: Judgment read and explained.

Godfrey Namundi

10 **JUDGE**

13/2/2015