

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

CRIMINAL APPEAL NO. 048 OF 2011
(Arising from Njeru Criminal case No. 255/2010)

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- A1. ASEGA NICKSON**
- A2. AFIMANI BENARD**
- A3. ANGYO JIMMY**
- A4. TUMUSIIME RONALD**
- A5.**

10

OCHIMA
PETER :::::::::::::::::::::::::::::::::::::::::::::::::::::::APPE
LLANTS

15

VERSUS

UGANDA:::::::::::::::::::::::::::::::::::::::::::::::::::::
::::::RESPONDENT

20

BEFORE: THE HON. JUSTICE GODFREY NAMUNDI

JUDGMENT

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The five appellants were charged, tried and convicted of two Counts namely:

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- (1) Malicious damage to property contrary to section 335 (1) of the penal Code Act.
- (2) Theft contrary to section 254 (10 and 261 of the Penal Code Act.

The Appellants were alleged to have committed the offences on the night of 27/10/2010. The prosecution relied on the evidence of three prosecution witnesses one of whom
5 claimed to have been at the scene and identified the Appellants committing the offence. The Appellants raised alibis which the trial Court disbelieved as being inconsistent and contradictory.

10 The Appellants raised 5 grounds of Appeal as follows:

1. That the learned trial Magistrate erred in law and fact when he failed to evaluate the evidence on record and arrived at the wrong conclusion that the Appellants were guilty and yet the evidence on
15 record was not sufficient to convict the accused persons as charged.

2. That the learned trial Magistrate Grade 1 misdirected himself when he based his Judgment wholly and substantially on the evidence of one
20 identifying witness, whose evidence required corroboration.

3. That the trial Magistrate erred in law when he
25 convicted the Appellants for the offence of Malicious Damage to Property c/s 335 (1) of the

Penal Code Act without first having the Charge sheet amended and the Appellants being required to take a fresh plea to the new charge in accordance with Section 132 M.C.A.

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4. That the learned Magistrate erred in law and fact when he reached a wrong finding that the offence created under Section 335 (1) of the Penal Code Act was minor and cognate to the offence under Section 335 (2) of the penal Code Act.

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5. That failure to amend the Charge sheet caused a substantial miscarriage of justice in sentencing the Appellants.

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A perusal of the record and Judgment of the trial Court reveals that the main contention in this appeal is the participation of the accused/Appellant in the two offences charged, the other ingredients in each of the offences having been established as proved. Under Count No.1 the ingredients for an offence of **Malicious damage are:**

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- (i) Damage or destruction to property.
- (ii) Malicious, willfully or unlawfully damage/destruction.
- (iii) Participation of the accused.

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Under Theft, the prosecution must prove the following ingredients:

- (i) Whether there is property capable of being stolen.
- (ii) Theft of property.
- 5 (iii) Participation of accused.

As mentioned before, the only ingredients that need to be addressed are those of participation of the Appellants, the other ingredients having been proved.

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Ground NO.1 - Evaluation of evidence:

The main argument for the Appellants is that the evidence against the Appellants was concocted because the Appellant and the complainant PW1 had a running land dispute. First
15 that the evidence of PW1 in respect of the events of 27/10/2010 was hearsay. The evidence of those events was actually provided by PW2 who claims to have been at the scene.

20 It is submitted for the Appellants that the Magistrate shifted the burden of proving the alibis set up by the accused on the accused. That once the accused sets up the defence of alibi, then the prosecution has the duty/burden to produce evidence to discredit the said alibi. Reference was made to
25 the case of **Uganda Vrs. Dusman Sabuni (1981) HCB 1.**

It is submitted that whereas DW1 (Appellant No.1) testified that he was at his home at Nakibizi, corroborated by the evidence of his wife DW6 that her husband reached home at 6.00pm, the Magistrate found that it takes only 20 - 30
5 minutes' walk from Nakibizi to the scene of crime at Namwezi and hence DW1 could have committed the offence.

That this was as opposed to the evidence of DW6 that the distance from Nakibizi to Namwezi is about 4 kilometers and
10 it requires a bicycle or public means/transport between the 2 places.

The Magistrate also disbelieved the alibi of DW2 who stated that he stopped sleeping in DW1's house at Namwezi when
15 its door locks were broken and this was corroborated by the evidence of DW3.

DW3 only used to go back in the morning to look after the goats. DW4's alibi was disbelieved when he claimed he
20 never herd what transpired at night on 27/10/2010 when he slept in a house only 150 metres away while DW5's alibi was that he was at work and came back home later. The Magistrate held that there was no evidence that DW5 was at work at the material time.

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For the State/Prosecution, it was submitted that the accused were clearly placed at the scene of crime by PW2. That the alibis were concoctions.

- 5 Considering the law on **Alibi**; it is trite law that the accused does not have to prove his alibi. Rather it is the prosecution that must produce evidence to disprove the alibi and this duty/burden does not shift. Ref: **Uganda Vrs. Mac Dusman Sabuni (1981) HCB 1.**

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A perusal of the Judgment however indicates that the Magistrate went to great lengths to find fault with the alibis rather than looking at the strength of the prosecution evidence discrediting the said alibi. Criminal guilt is
15 established on the strength of the prosecution's evidence and not on the weaknesses in the accused's defence.

It is my finding that the Magistrate was wrong to consider the weaknesses in the alibis rather than the strength of the
20 prosecution evidence.

I have also considered other aspects of this case.

The Investigating Officer in his evidence claims on following
25 the footsteps, they went up to A1's house where they found posho droppings on the verandah and a half sack of 50kg of

posho in the house. There was no other corroborative evidence to support the tracking of the posho/droppings. No photographs of the scene were taken, there was nothing to show that the posho came from the burnt/destroyed house. The other piece of evidence was that some of the stolen property was found about 100 metres away from the house of Appellant No.1 in the bush.

There is no evidence whether the Appellant No. 1's house was the only one in the vicinity and why the Investigating Officer concluded that the recovered property being 100 metres from A1's house meant that he was responsible. Why was no effort taken to secure forensic evidence e.g. finger prints evidence to connect the accused to the crime?

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I find that the evaluation of the evidence by the Magistrate was wanting in that he made the wrong conclusions therefrom.

20 **Ground No. 2 - Identification:**

It is submitted for the Appellants that the Magistrate was wrong to rely on the evidence of only one identifying witness. The evidence on record is that the witness PW2 met the 4 accused 2 - 5 on his way to the shops in the evening and they threatened him. Later when he came home, he found people at the scene with hammers, bows

and arrows, and torches. They broke into the house and carried away items. He then ran away and boarded a Taxi, borrowed a phone from a passenger and called his Boss. This evidence is challenged as being suspect. I agree, why
5 did he not make an alarm? Why did he not report to the nearest local authorities? Why did he not use his own phone to call since he claims he took it for charging? Why did he not report the threats against him by the accused people to his Boss at the time he met them especially as they
10 threatened to cut him? And why did he go back to a place where he was in imminent danger of being killed, now that he had been threatened.

What was the source of lighting apart from the torch light?

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The Magistrate apparently based his findings on the fact that the accused and this witness were known to each other so it was easy to identify them at night.

20 Given the observations above and the background that A1 and PW1 had a land dispute it is very dangerous to rely on the uncorroborated evidence of PW2. **(Ref: Yowasi Serunkuma Vrs. Uganda SCCA 8/89)**. The incident must have taken a very long time given the quantity of the
25 property that is alleged to have been stolen. If at all PW2 is

truthful, he had ample opportunity to inform the local authorities to intervene and arrest the situation.

I accordingly find Ground 2 substantive. The conviction of
5 the accused people based on the evidence of the PW2 was wrong and led to a miscarriage of justice.

Grounds No. 3, 4 and 5:

10 It is submitted that the Magistrate was wrong to substitute and convict on Section 335 (1) of the Penal Code Act instead of 335 (2) without first having the Charge sheet amended in accordance with Section 132 M.C.A.

15 Further that the offence under Section 335 (1) is not a minor and cognate offence to that in Section 335 (2).

Firstly, I do not see the miscarriage of justice caused to the Appellants since the offence under which they were
20 convicted carries a lower sentence (5 years) as opposed to life imprisonment in the earlier Section 335 (2).

Secondly, it is not true that the offences under each of the sections cited are independent and distinct from each other.
25 The Magistrate in convicting the accused found that Section 335 (1) was a minor and cognate offence to Section 335 (2).

It is submitted that a minor and cognate offence refers to a lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and
5 it is of the same class or category. I find this description very appropriate to the 2 offences in Sections 335 (1) and 335 (2) of the Penal Code.

A part from the means/implements causing the damage, (an
10 explosive under Section 335 (2) the ingredients for the 2 offences are the same. I find that the Magistrate properly addressed the law in respect of Ground 3, 4 and 5. This appeal however succeeds on Grounds No. 1 and 2.

15 The Magistrate failed to properly evaluate the evidence and reached a wrong conclusion, and he was wrong to convict on the evidence of a single identifying witness without any corroboration.

20 The Judgment, conviction and sentence of the 5 accused people is quashed and set aside. The Appellants are acquitted of the 2 Counts as a consequence.

25 **Godfrey Namundi**
JUDGE

15/04/2015