

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 110 OF 2014**

**(ARISING FROM MAKINDYE CRIMINAL CASE NO. 990 OF 2013 OF  
BUGANDA ROAD COURT)**

**KIKONYOGO ROGERS ::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA**

**1. Introduction.**

The appellant is represented by Mr. Augustine Baganda from Mpegi, Kayondo & Co. Advocates. Whereas, the respondent is represented by Bwiso Charles, Senior State Attorney from the Directorate of Public Prosecutions.

**2. Brief facts.**

The appellant (accused) was charged with the offence of theft Contrary to Sections 254 (1) and 261 of the Penal Code Act, Cap. 120, Laws of Uganda. The appellant was tried, convicted and sentenced to five (5) years imprisonment, on 31<sup>st</sup> July, 2014 at Makindye Chief Magistrate’s Court by Her Worship Anyu Margaret, Magistrate Grade One.

The appellant was dissatisfied with the whole judgment, conviction and sentence, hence this appeal.

**3. This appeal is based on the following grounds; that:-**

- a) The learned Trial Magistrate erred in law and fact when she failed to fairly, justly and properly evaluate all the evidence on record thereby reaching wrong conclusion that occasioned a miscarriage of justice.
- b) The learned Trial Magistrate erred in law and fact when she found the appellant guilty and convicted him on the basis of evidence that was full of contradictions, gaps, discrepancies and inconsistencies which created reasonable doubt in favour of the appellant thereby occasioning a miscarriage of justice.
- c) The learned Trial Magistrate erred in law and fact when she convicted the appellant for theft of sale agreements rather than a charge of concealment which also would not otherwise stand.
- d) The learned Trial Magistrate erred in law and fact when she sentenced the appellant to 5 (five) years imprisonment, a sentence which was unduly harsh and manifestly excessive.
- e) The learned Trial Magistrate erred in law and fact when she disregards the appellant's evidence that the said sale agreements were not stolen but rather that the police held them for custody.

Wherefore, the appellant prayed that this appeal be allowed, the conviction be quashed and the sentence be aside. That in the alternative the appellant prayed for a retrial to be ordered.

4. **At the hearing, Counsel for the appellant abandoned ground 1 of appeal.** To that extent, ground 1 of appeal is hereby dismissed. He argued grounds 2,3,4 and 5 of the appeal. Counsel for the appellant argued the aforestated grounds together. On the other hand, Counsel for the respondent in reply argued the grounds of appeal separately in the order they are set out in the memorandum of appeal. In resolving this appeal, I will deal with each ground of appeal separately.

5. **Duty of the first appellate Court.**

It is settled law that the duty of the first appellate Court is to evaluate the evidence on record of both parties and come to its own conclusion. The appellate Court has to consider whether the Trial Court fairly and properly did evaluate the evidence of both the

prosecution and the defence in its judgment; and whether the prosecution proved its case against the accused beyond reasonable doubt.

Consequent to the above, I hasten to add that in all criminal cases, the prosecution bears the burden of proof. The standard of proof is that the prosecution has to do so beyond reasonable doubt. The accused has no duty to prove his innocence. The duty is on the prosecution to prove the charge or charges charged against the accused/appellant. If after the evaluation of the evidence on record, the Court finds doubt in the prosecution case, that doubt must be resolved in favour of the accused/appellant.

## **6. Resolution of the appeal by Court.**

### **Ground 2 of the appeal:**

The gist of this ground of appeal is that the appellant was found guilty and convicted on the prosecution evidence that was full of contradictions, gaps, discrepancies and inconsistencies, that which created a reasonable doubt in favour of the appellant thereby occasioning a miscarriage of justice. To support this ground, Counsel for the appellant submitted that the gaps and contradictions in the prosecution case are that PW1, the complainant, in evidence stated that the sale agreements were in a Bible when she came from Mukono to Namasuba, Kampala City. That yet PW3, says that these sales agreements were two (2) and not three (3) and that PW1 had a short memory. He further submitted that that is all on the discrepancies and gaps. In reply, Counsel for the respondent submitted that there are no any inconsistencies, contradictions, discrepancies and gaps in the prosecution evidence. He prayed that ground 2 must fail.

Counsel for the appellant did not in his submissions show this Court the discrepancies and inconsistencies in the evidence of the prosecutions. He even failed to show Court the missing gaps and Contradictions that he is alleging in ground 2, that exist in the prosecution evidence.

I evaluated the prosecution evidence on Court record, the evidence of PW1, PW2, PW3 and PW4 all stated that the appellant took custody of PW1's sale agreements without her

consent. PW1 in her evidence states that the appellant refused to surrender back to her the sale agreements on several occasions when she could demand for the same sale agreements, until in 2013, when she was assisted by PW3 and reported a case against the appellant at Katwe Police Station.

At page 1 of the lower Court's judgment, the Trial Magistrate considered the ingredients of theft. In her judgment, the Trial Magistrate, on proving whether the appellant stole the said sale agreements relied on the ingredients of the said offence of theft. May be, it would be prudent to reproduce Section 254 (1) of the Penal Code Act, that defines the offence of theft:-

**“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.”**

Is the sale agreements capable of being stolen? The answer is found in Section 2 (w) of the Penal Code Act, Cap 120; it reads:-

**“(w) “Property” includes everything animate or inanimate capable of being the subject of ownership.”**

**Then: “(dd) of section thereof valuable security “includes my document which is the property of any person, and which is evidence of the ownership of any property or of the right to recover or receive any property.”**

From the above interpretation of the above stated words, certainly the sale agreements are property and they are valuable security of PW1, the complainant. The Trial Magistrate at page 7, paragraph 4<sup>th</sup> of her judgment, properly and rightly referred to Section 2 of the Penal Code Act, Cap. 120.

Further, Section 254 (2) of the Penal Code Act, reads:-

**“ (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents:-**

**(a) An intent permanently to deprive the general or special owner of the thing of it.”**

Section 254 (4) of the Penal Code Act, reads:-

**“(4) When a thing stolen is converted, it is immaterial:-**

**(a) Whether it is taken for the purpose of conversion or whether it is at the time of the conversion in the possession of the person who converts it.”**

**Section 254 (6) of the Penal Code Act, reads:-**

**“(6) A person shall not be deemed to take a thing unless he/she moves the thing or causes it to move.”**

I perused the lower Court proceedings and the judgment of the lower Court, and it is my considered view that the Trial Magistrate handed and evaluated the evidence of both parties as a whole. From page 1 up to page 7, 3<sup>rd</sup> paragraph of the Judgment of the lower Court, the Trial Magistrate evaluated the evidence on record. She also considered the evidence of the defence. Her judgment shows that she agreed with the prosecution evidence and disagreed with the defence evidence.

The evidence of the Prosecution and that of the appellant (DW1) clearly shows that the appellant took possession of the sale agreements from PW1, the complainant, sometime in 1993, and refused to return the same back to PW1. PW3 and PW4 gave evidence that, PW4 found with the original sale agreement, Exh. PEX1 and a photocopy of the sale agreement of the other land, Exh. PEX3 with the accused. The said documents were exhibited in Court. Therefore, all the prosecution witnesses proved beyond reasonable doubt that the said sale agreements were in custody of the appellant. Wherefore, from definition of Section 254 of the Penal Code Act, and considering all the evidence on record, there is no reason raised by Counsel for the appellant upon which I should fault

the Trial Magistrate. I, again find that there are no any inconsistencies, contradictions, discrepancies nor gaps that were created in the evidence of the prosecution. In this regard, ground 2 of appeal must fail.

**Ground 3 of appeal.**

Counsel for the appellant submitted that, the appellant was wrongly charged and convicted on a charge which has no legal foundation. He argued that the appellant and the complainant are relatives who have been staying together for a long time. That because of that aforesaid, the appellant lawfully obtained the said sale agreements from PW1, the complainant in 1993 and that he had been keeping them.

In reply, Counsel for respondent does not agree. He submitted that the appellant was properly charged with the offence of theft.

In resolving ground 2 of appeal, hereinabove, I evaluated the evidence on record considered Sections 2 and 254 of the Penal Code Act and made a finding that the appellant was properly charged with the offence of theft. I, thus, in that regard reiterate my discussion and findings on ground 2. Wherefore, ground 3 of appeal also fails.

**Ground 4 of appeal.**

Counsel for the appellant submitted that had the Trial Magistrate considered and analysed critically the defence testimony, she would not have passed such harsh sentence. That the complainant is enjoying her stay on the law which is the subject of the said sale agreements. Counsel for the respondent in reply on this ground 4 does not agree. He supported the sentence that was passed by the Trial Magistrate.

Counsel for the appellant is faulting the Trial Magistrate that she erred in law and fact when she sentenced the appellant to five (5) years imprisonment. That the said sentence is unduly harsh and manifestly excessive.

The punishment for the offence of theft is enshrined in Section 261 of the Penal Code Act, Cap 120. It reads:-

**“Any person who steals anything capable of being stolen commits the felony called theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment not exceeding ten years.”**

I agree with Counsel for the respondent that the maximum sentence for offence of theft is ten (10) years; and that a sentence of five (5) years imprisonment is within the law.

On the other hand, I agree with Counsel for the appellant that owing to the fact that the property stolen by the appellant are sale agreements, one original sale agreement PEX1 was recovered from the appellant and exhibited in Court. And that there is also a photocopy of the sale agreement of the other land. And for the fact that the complainant, PW1, is enjoying her two pieces of land which are the subject of false sale agreements, the sentence of five (5) years imprisonment in the circumstances of this case would be excessive and harsh. In the case of Livingstone Kakooza Vs- Uganda Criminal appeal No. 17 of 1993, it was held that the appellate Court will only alter the sentence imposed by the Trial Court if it is manifestly excessive in view of the circumstances of the case. In that regard, therefore, ground 4 succeeds in part. The sentence of five (5) years ought to be reduced to measure with the circumstances of this case.

#### **Ground 5 of appeal**

Counsel for the appellant submitted that the implication of ground 5 is that the Trial Magistrate did not handle the evidence as a whole. That the Trial Magistrate disregarded the appellant’s evidence and that the Police held the said documents in custody.

In his submissions, Counsel for the appellant submitted that the conduct exhibited between PW1 and the appellant (accused) on Court record suggested that the appellant had no intention of stealing the sales agreements of his aunt (PW1). Counsel for the respondent in reply does not agree with the submissions by Counsel for the appellant. In his submissions, Counsel for the respondent supported the judgment of the Trial Court.

He argued that the Trial Magistrate considered the evidence of both the prosecution and the defence as a whole; and that the Trial Magistrate came to the right conclusion.

I perused the entire judgment of the Trial Court. From page 2 up to page 7, 3<sup>rd</sup> paragraph of the lower Court Judgment, the Trial Magistrate evaluated the evidence on record as a whole. From page 7, the last two paragraphs up to page 9 of the lower Court judgment, the Trial Magistrate discussed the evidence of both the prosecution and the defence. Thus, I do not agree with the submissions by Counsel for the appellant. The Trial Magistrate did not disregard the appellant's evidence on Court record.

At page 8, last paragraph of the lower Court judgment the Trial Magistrate stated:-

**“Likewise, I am not persuaded by the claim by the accused person that PW1, the complainant, Nambi voluntarily gave him the said two original sale agreements for safe custody in 1993, because if it were so, why then would Nambi come to Court to seek the recovery of the same? Why then would the accused person not voluntarily hand over the same to the complainant? Why would the accused person wait for one of the original sales agreements, PEX1, to be forcefully taken away from him by police?”**

Again, at page 9, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs of the lower Court judgment clearly shows that the Trial Magistrate considered the evidence of the appellant. Throughout the Trial in the lower Court, the appellant agreed that he was in possession of PW1's sale agreements. All the prosecution witnesses' evidence proved that the appellant was forcefully holding on PW1's property/sale agreements) without any claim of right. There is no way I would fault the Trial Magistrate on this ground of appeal. Hence, ground 5 of appeal also fails.

Wherefore, grounds 1,2,3, and 5 of appeal are hereby dismissed. Ground 4 of appeal succeeded in part. Considering the circumstances of the case and the submissions by Counsel in mitigation, the sentence is hereby reduced from five (5) years to 2 (two) years imprisonment; from the time of conviction and



sentence. The period the accused stayed on remand, if any, is taken into consideration when passing this sentence.

In closing, this appeal stands dismissed. The conviction is upheld. The sentence of five (5) years is set aside and substituted with the sentence of 2 (two) years imprisonment. The original sale agreement, PEX1 and the photocopy of the other piece of land, PEX3 be returned to the complainant for her safe custody. The Trial Court shall only retain on the Court record the photocopies of the said sale agreements. The original agreement of the other piece of land is taken to be irretrievably lost. However, in the event of it being found, the same would be returned to PW1, the rightful owner.

Dated at Kampala this 17<sup>th</sup> day of August, 2015.

**Joseph Murangira**  
**Judge**

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**APPELLANT**

**VERSUS**

**UGANDA ::**

**RESPONDENT**

**REPRESENTATION**

The appellant is in Court.

Ms. Namubiru Mariam from Mpagi, Kayondo & Co. Advocates for the appellant.

This matter is coming up for judgment and we are ready to receive it.

Mr. Bwiso Charles, Senior State Attorney for the Respondent. We are ready to receive the judgment.

Ms. Margaret Kakungulu, the Clerk is in Court.

Court: Judgment is delivered to the parties in open Court.

Right of appeal is explained.

**Joseph Murangira**

**Judge**