

The appellants were charged with theft Contrary to Sections 254 (1) and 261 of the Penal Code Act. It was alleged that on 18<sup>th</sup> January, 2013 at Kireeba, Zirombe in Luwero District, the three accused persons (appellants) stole 70 kgs of coffee valued at Shs. 315,000/=, the property of Nantege Sarah.

The prosecution (respondent) adduced evidence against each accused person. Each accused person gave evidence on oath and denied the charge in total. The accused persons called witnesses who testified on their behalf.

In her judgment, the Trial Magistrate , Her Worship, Namata Harriet Nsibambi Magistrate Grade 1, at the Chief Magistrate's Court of Luwero at Luwero. She found the appellants guilty of the charged offence and convicted them accordingly. Each accused person was sentenced to a fine of Shs.150,000/= or to 4 (four) months imprisonment in default. The Trial Magistrate also gave the following orders:-

- i. That accused persons shall compensate the complainant Shs. 200,000/= for the coffee they took.
- ii. The accused persons shall not use the complainant's Kibanja again.

The appellants were aggrieved by the conviction, sentence and the said orders. Hence this appeal.

### **3. Memorandum of appeal.**

3.1 The appellants' appeal is based on the following grounds of appeal, that:-

- a) The learned Trial Magistrate relied on the evidence of a one Magero who never testified in Court and arrived at a manifestly wrong decision.
- b) The learned Trial Magistrate wrongly convicted the appellants of the offence of theft yet the prosecution miserably failed to adduce evidence beyond reasonable doubt that 70 Kgs of coffee valued at Shs. 315,000/= was stolen by the appellants.
- c) The learned Trial Magistrate reached an erroneous finding that the land on which the coffee is found belongs to Nantege Sarah yet prosecution failed to adduce evidence to prove this fact beyond reasonable doubt.
- d) The learned Trial Magistrate miserably failed to correctly assess the evidence on record and wrongly held that the appellants were found harvesting coffee which belonged to the complainant.

- e) The learned Trial Magistrate erred in law and fact when she wrongly usurped the powers of a Civil Court to order the appellants to leave the complainant's Kibanja yet she had not ascertained the boundaries of the alleged Kibanja.
- f) The learned Trial Magistrate wrongly ordered the appellants to pay compensation to the complainant yet the quality and the value of the coffee had not been proved by the respondent.

3.2 The appellants proposed that:-

- a) The appeal be allowed.
- b) The conviction be quashed.
- c) The sentence be set aside.
- d) A consequential order that the money paid by the appellant as fine and compensation be refunded to them by whoever took them from them.

#### **4. Consideration of the appeal.**

4.1 When this appeal came up for hearing, both Counsel for the parties opted to file written submissions. In his written submissions, Mr. Luyambi Thomas argued grounds 1 and 2 of appeal separately, grounds 3, 4, 5 and 6 of appeal together. Whereas, Counsel for the respondent Ms. Jacquelyn Okui, in her written submissions, she argued ground 1 of appeal alone, grounds 2,3 and 4 of appeal together; grounds 5 and 6 of appeal separately.

4.2 In his submissions, Counsel for the appellants criticized the judgment and the findings of the Trial Magistrate in support of all the grounds of appeal. he prayed that the appeal be allowed, the conviction quashed, the sentence and the orders of the Trial Magistrate be set aside. He further prayed for a refund of the fine and compensation back to the appellants.

4.3 In her submissions in reply, Counsel for the respondent argued in support of the Judgment, sentence and orders of the Trial Magistrates. She too, evaluated the evidence on record and criticized the appellants' Counsel's written submissions. She

prayed that the appeal be dismissed. And that the conviction, the sentence and the consequential orders be upheld.

#### 4.4 Consideration of the appeal by Court.

This is the first appellate Court. In the case of Mohamed Mukasa and Another –VS- Uganda SCCA No.27 of 1995, it was held that:-

**“It is the duty of the first appellate Court to treat the evidence on record as a whole, subject it to a fresh and exhaustive scrutiny and to draw its own conclusions, though bearing in mind that it never saw or heard the witness testify in the witness box.”**

Therefore, my duty as the first appellate Court is to consider and analyse whether the Trial Magistrate considered the strength and weaknesses of the prosecution and the defence, weighed the evidence as a whole, applied the burden of proof as always rests upon the prosecution and decided whether the defence raised a reasonable doubt in the prosecution case.

In this appeal, I will handle grounds 1, 2, 3, 4 and 5 of appeal together, then grounds 6 of appeal separately.

#### **Grounds 1,2,3,4 and 5 of appeal.**

These four grounds of appeal all relate to the evaluation of evidence.

On grounds of appeal all relate to the evaluation of evidence.

On ground 1 of appeal, the appellants are faulting the Trial Magistrate that she wrongly relied on the evidence of one Magero, who never testified in Court and arrived at a manifestly wrong decision.

I re-evaluated the evidence as a whole on Court record, considered the judgment of the Trial Magistrate, and I am satisfied that the Trial Magistrate never relied on the evidence Magero in her judgment to convict each accused person. In the result, ground 1 of appeal

must fail. On this ground the Trial Magistrate was unfairly faulted by Counsel for the appellants.

On grounds 2 of appeal; the Trial Magistrate is being criticized by Counsel for the appellants that she wrongly convicted the appellants of the offence of theft that yet the prosecution miserably failed to adduce evidence beyond reasonable doubt that 315,000/= was stolen by the appellants.

From the evidence of both the prosecution and the defence, it is clear that the accused persons were found picking coffee from the land near their local church. From the testimonies of PW3 Ssebirumbi Godfrey, PW5, Jowalia Sseguya, DW1, Owire Nicholas, DW2, Bikandema John, DW3 Kilamusi Vincent, DW4 Sperito Kiroli, DW5, Ahamad Mukasa Mabikke and DW6, James Kakwenza, the appellants claimed an interest in the coffee, which they honestly believed to belong to their church on whose Kibanja it was located. The evidence of the prosecution did not disapprove that claim of right beyond reasonable doubt. In this regard, the appellants had raised in their respective evidence a defence of colour of right.

In the case of Joseph Ogola –vs- R [156] 29 KLR 174, whereby the facts of the case are: The police took away a bicycle unlawfully without colour of right. It was held, that :

**“Colour of right is an honest belief in a state of facts, which if they existed would be a legal justification or, excuse for the accused’s conduct.”**

In defence, further, the appellants claimed that the Kibanja where the coffee is growing belongs to their church. Thus, Trial Magistrate should have seen that the appellants claimed a right of ownership of the coffee. This is a defence against a criminal charge. Under section 7 of the Penal Code Act, Cap.120, it reads:

**“7. Claim of right.**

**A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to property was done in the exercise of an honest claim of right and without intention to defraud.”**

From the evidence of the prosecution, the complainants and the church, both have a Kibanja in the same location. There is thus a possibility that the said coffee trees are found on the Kibanja that belongs to the appellants' Church. Hence whether the coffee that was harvested by the appellants belonged to the complainant was never proved beyond reasonable doubt by the prosecution.

In her judgment at page 8 paragraphs 4 and 5, the Trial Magistrate observed that:

**“Paragraph 4:**

**I have considered the evidence on record vis-a-vis the ingredients of offence of theft.**

**Paragraph 5:**

**It is clear that there is a land dispute between the complainant and the Church where the accused persons are members. This land dispute can only be settled in Civil Court. From the evidence on record it is clear that both the Church and PW1 were given a Kibanja but it is not clear the extent of the Kibanja given to any one party. Both claim the coffee plantation was given to them, and both claim to have harvested coffee for over 10 years even during the life time of Muzei Kayondo.”**

The above stated finding should have disposed of the matter in favour of the appellants. The prosecution failed to rule out the possibility that the coffee belong to the Church. This is my considered opinion there is no way the Trial Court/Magistrate could say that the appellants were dishonest in any way by harvesting the coffee from the Kibanja, they verily believe belonged to the Church.

Again on further scrutiny of the evidence as a whole, there is no evidence to show that the coffee was found exclusively on the complainant's (PW1) Kibanja. From the evidence, it is possible that the coffee is on the church's Kibanja. The contradictions in the testimonies of the complainant (PW1), who claimed that she was given three (3) acres, and PW5, Tawelia Sseguya who gave evidence that PW1 was given one (1) acre, strengthens my argument.

Furthermore, the Trial Court never visited the locus in quo of the disputed Kibanja to establish the exact location of coffee and the boundaries of the Kibanja claimed by both the complainant (PW1) and the Church. It was therefore wrong for the Trial Magistrate in her Judgment to make a finding that the land on which the coffee is found belongs to the complainant, Nantege Sarah. The prosecution failed to adduce evidence to prove beyond reasonable doubt that the land (Kibanja) on which the coffee plantation is located belonged to the complainant and not the Church.

The ownership of the disputed Kibanja can only be resolved in a Civil Court. The complainant is free to file a Civil Suit in Court against the legal representatives of the Church. Otherwise, it was wrong on the part of the Trial Magistrate to hold that the appellants were found harvesting coffee that belonged to the complainant (PW1).

In the result, I answer grounds 1,2,3,4 and 5 of appeal in the affirmative.

On ground 6 of appeal, having faulted the Trial Magistrate on grounds 2, 3, 4 and 5 of appeal, I hold that there was no basis on which the Trial Magistrate based herself to order the appellants to pay compensation to the complainant.

From the evidence on record, the coffee was recovered from the appellants by the arresting police officer. The same Coffee that was allegedly recovered from the appellants was never exhibited in Court. The coffee is not a perishable commodity, it would have returned to the complainant (PW1). In that respect, there would be no need for the Trial Magistrate to order for compensation by the appellants to the complainant Shs. 200,000/= allegedly for the coffee they took. From the evidence on record, the coffee was recovered by the police, was never exhibited in Court and as such it is still in the hands of the prosecution. In the premises, I answer ground 6 of appeal in the affirmative.

## **5. Conclusion.**

In closing, considering all the entire evidence as a whole on the Court record, the submissions by both Counsel for the parties, the law applicable and my own analysis of the entire case, I hold that this appeal has merit. Accordingly, therefore, judgment is entered for the appellants in the following terms:-

- i. The appeal is allowed.
- ii. Conviction against each accused is quashed. Each accused/appellant is acquitted of the offence of theft Contrary to Section 254 (1) of the Penal Code Act. Each accused/appellant is set free.
- iii. The sentence of a fine of Shs. 150,000/= or 4 (four) months imprisonment against each appellant is set aside.
- iv. The order of compensation of Shs. 200,000 by the appellants to the complainant (PW1) is set aside.
- v. (a) The money paid as a fine by each appellant shall be refunded to them by the Government of Uganda, which received the payment within thirty (30) days from the date of this judgment.
- (b) The complainant (PW1) shall refund to the appellants the money she received from them in terms of compensation, within 14 (fourteen) days from the date of this judgment.

Dated at Kampala this 15<sup>th</sup> day of December, 2015.

**Joseph Murangira**

**Judge.**



**THE REPUBLIC OF UGANDA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.93 OF 2015**

**(Arising from Luwero Criminal Case No. 95 of 2013)**

**1. OWIRE NICHOLAS**

**2. BIKANDEMA JOHN**

**3. KALAMUSI VINCENT**

.....

**APPELLANTS**

**VERSUS**

**UGANDA**

.....

**RESPONDENT**

**REPRESENTATION**

15/12/15

Mr. Charles Bwiso Senior State Attorney for state.

The accused persons are in Court un presented.

The matter is for judgment.

Ms. Lillian Kagaso the Clerk and

Hajjati Nakibuuka Mariam the interpreter are in Court.

**Court:** Judgment is read to the parties in open Court.  
Right of Appeal is explained.

**Joseph Murangira**  
**Judge.**