THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CR-CN-001-2015
(ARISING FROM PALLISA CRIMINAL CASE NO. 112/2011)

KALEKYEZI ALEX…….…….……..APPELLANT
VERSUS
UGANDA……..…….…….…….RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant was dissatisfied with the judgment of his **Worship Kintu Imoran Isaac** where he found him guilty of theft of cattle contrary to section 261 and 264 of the Penal Code Act and sentenced him to two (2) years imprisonment.

The duty of a first appellate court is to review the evidence subject it to a fresh scrutiny and come to its own conclusions. The court must warn itself of the fact that it had no opportunity to watch the witnesses in court. (See *Pandya V.R (1957) EA 336).*

The prosecution has the burden to prove its case beyond all doubt. *Woolmington v. DPP (1935) AC. 462*.

In the lower court the prosecution called four witnesses, while the accused called three witnesses.
PW.1 Abodo Eseza told court she got information from a one Sunday that accused had stolen and sold 3 cattle of the 17 heads left by her late husband.
PW.2 Olebo Joseph received a complaint from PW.1 that accused stole the cows.
PW.3 Gwaso Frank told court he was a herdsman who received 14 cattle from the deceased for keeping.

PW.4 AIP Ejalu Richard investigated the case upon complaint by the widow (PW.1). He impounded 9 cattle and arrested the accused.

DW.1 Kalekyezi Alex (accused) explained how he gave 3 cows to **Yosefina**, and 14 cattle to another herdsman **Kamada Sunday**.

DW.2 Olwenyi Ivan testified about 3 cows he witnessed accused gave as follows one to Josephine, one died and one to a herdsman.

DW.3 Kamada John said that he was accused's herdsman. Police came and took away from him 14 heads of cattle.

In his judgment the trial Magistrate said accused did not produce contrary evidence to rebut the prosecution case that the exhibited cows were different from those from which the case arises (page 5- paragraph 1).

He further states at page 5 in paragraph 3 of his judgment that accused did not produce evidence to collaborate evidence that Josephine received one cow and one cow died.

With that analysis, the appellant's counsel attacked the assessment of the evidence by the learned trial Magistrate whereby he never analyzed the evidence by defence, but simply rejected it and made conclusions that were not supported by evidence.
I have examined all the arguments and in view of the evidence available I find from the onset that the learned trial Magistrate's assessment of the evidence on record was faulty.

A case of theft of cattle, needs evidence to prove the following ingredients.

1. That there was asportation of property.
2. That there was fraudulent intent to permanently deprive the owner of that property.
3. That it was the accused who committed the crime.

From evidence by the prosecution there is totally no evidence that shows that accused committed asportation, or had fraudulent intent to deprive.

The evidence of PW.1- complaint was found to be hearsay. (See page 5 PW.1 of the judgment). The court notes;

> " *Defence counsel submitted that testimony of PW.1 is hearsay. Yes. I agree with him. However testimony of PW.2- PW.4 is water tight against accused.…..*"

Having found PW.1 in hearsay, I do not see how watertight PW.2-PW.4's evidence is. PW.2 was told of the allegation by PW.1. PW.3 said nothing about the alleged theft. He only received 14 heads of cattle for keeping. PW.4 relied on what PW.1 told him and impounded the cows. Therefore the evidence of the prosecution was all hearsay and could not even satisfy the standard of *prima facie*.

The burden of proof is on the prosecution. The law is that an accused has no burden to prove his innocence.

In *Sulumani Oyo v. Uganda EACA Crim. App. 150 (1971)* (Unreported). It was held that:

> "*It is wrong approach to a decision in a criminal case in which the burden of proof remains on the prosecution throughout, and no finding as to credibility, guilt or fact should be arrived at until the evidence of both sides has been submitted to scrutiny. Such an approach implies that there is some sort of onus on an accused person to put forward an acceptable version such as to rebut a prosecution case already found to be true. No such onus ofcourse exists*."

The above approach is what the learned trial Magistrate used when he commented that the accused did not collaborate his evidence by calling proof to show that he gave out the animal to Josephine, and one died. The prosecution had the burden to call evidence in rebuttal.

In *Macharia v. R [1945] E.A. 193*, the High Court ruled that every defence however weak had to be considered. It was wrong therefore at page 5 of the judgment for the trial Magistrate to assess evidence casually and make comments like; "the evidence is not challenged substantially. It is not important to consider here the fact remains some animals belonging to the beneficiaries of the deceased were taken away by the accused and todate, they are nowhere to be seen."

The above is a very inconclusive finding in a case necessary of proof beyond doubt. It was therefore very unsafe for court to convict on such inconclusive evidence.

In *Kifamunte Henry v. Uganda Cr.A.10/97* the Supreme court held that;

> "*On the first appeal from a conviction by a Judge the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon*."

Where a trial court has erred the appellate court will interfere where the error has occasioned a miscarriage of justice.

Clearly in this case it's my finding that the trial Magistrate committed gross errors in assessing the evidence and thereby made a decision which led to a miscarriage of justice.

I therefore find that the appeal succeeds on all grounds raised under grounds 1-6. I didn't find evidence that some witnesses were rejected as stated in ground 7. That ground was not proved.

I therefore find that this appeal succeeds. The findings, judgment and sentence of the lower court is hereby set aside, and quashed. The accused should be set free and be set at liberty forthwith. I so order.

Henry I. Kawesa
JUDGE
30.07.2015