

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CR – CN – 0011 OF 2008

(Arising from FPT – 00 – CR – CO – 573 of 2006)

MOONLIGHT HERBERTAPPELLANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the conviction and sentence passed by His Worship Karemani Jameson Karemera, Magistrate Grade one at Fort Portal delivered on the 14/05/2008.

The Appellant was charged with the offence of Burglary and Theft Contrary to **Sections 295 (1) (a), (2), 254(1) and 261** of the Penal Code Act which he denied. The Appellant and others at large were alleged to have stolen UGX3.5 Million and 3 Nokia Phones valued at UGX 4.3Million. The accused was convicted and sentenced to a fine of UGX 500,000/= or to serve a one year imprisonment and pay compensation of UGX 3 Million to the Complainant.

The Appellant being dissatisfied with the above decision lodged the instant appeal whose grounds are;

1. That the learned trial Magistrate erred in law when he did not properly evaluate the evidence on record thereby arriving at a wrong conclusion.
2. That the learned trial Magistrate erred in law and fact when he failed to realize that the burden of proof as regards to the offence charged and convicted on was not dispensed with by the prosecution.
3. That the learned trial Magistrate erred in law when he evaluated Prosecution's evidence in isolation thus causing a miscarriage of justice.
4. That the learned trial Magistrate erred in law when he failed to find that Prosecution's evidence was not corroborated in a way that justified conviction and orders issued.

Representation:

Counsel Acellam Collins appeared for the Appellant. Written submissions were filed only by the Appellant.

Duty of the first Appellate Court:

As a first appellate court, this court will be guided by the principle of law as stated in **Pandya versus R. (1957) E.A. 336**, where it was re-emphasized that the duty of the first appellate Court is to review the evidence with a fresh scrutiny and come up with its own conclusion bearing in mind that it did not have the benefit of listening to the witnesses and take note of their demeanour.

Resolution of all the Grounds jointly:

I have had the benefit of perusing the record of proceedings and submissions of Counsel for the Appellant and I will go directly to the gist of the appeal.

Counsel for the Appellant stated that the gist of the grounds is that the learned trial Magistrate erred in law and fact when he found that the Appellant was in possession of a mobile telephone set that was part of the stolen items, thus, making him guilty of the offence as charged.

I will resolve all the grounds jointly since they all relate to the same thing.

In the instant case the trial Magistrate based his decision on the fact that the Appellant was found in possession of the stolen phone to convict him for Burglary and Theft to **Section 295 (1) (a), (2), 254(1) and 261** of the Penal Code Act.

The Complaint in the instant case was stolen from money worth UGX 3.5 Million and 3 telephone sets. He alleged that he had planned to travel to Nairobi where he made his purchases but had to postpone his journey because of his Grandmother's demise. On the 11/9/06 he removed UGX 200,000/= for burial arrangements and left the balance behind. On his return he found the balance and 3 phones missing.

The prosecution adduced its evidence through 5 witnesses and the Appellant never brought any witnesses. From the evidence adduced the Appellant was found to have used the stolen phone to make phone calls to the sister of the Complainant. This evidence was adduced in Court by PW2 who helped in the trucking of the phone. It was also adduced that the Appellant had sold off the phone to PW3's daughter. However, the said purchaser never testified in Court.

The prosecution witnesses were consistent in their evidence and maintained that the Appellant had a hand in the commission of the offence because he had used the phone before it was passed on to PW3's daughter. The stolen phone was admitted in Court as an exhibit.

Counsel for the Appellant submitted that finding the Appellant with the stolen phone did not mean that he had participated in the commission of the offence. True but one has to recount or give justifiable reasons. I therefore, disagree with all due respect because when evaluating evidence, one looks at all the surrounding circumstances, before, during and after the commission of the offence. In the circumstance the doctrine of recent possession would come into play.

Doctrine of recent possession:

The doctrine of recent possession is cardinal evidence especially in proof of offence against property like theft and robbery. The doctrine was well stated in the case of **Kasaija versus Uganda; Supreme Court Criminal Appeal No. 12 of 1991** as follows:-

“The doctrine of recent possession, a species of circumstantial evidence, is that if an accused is in recent possession of stolen property, for which he has been unable to give reasonable explanation, the presumption arises that he is either the thief or the receiver of the stolen goods, according to the circumstances. Hence once the appellant has been proved to have been found in recent possession of stolen property, it is for the accused to give reasonable explanation. He will discharge this onus on the balance of probabilities, whether the explanation could reasonably be fine, if he does so then an innocent possibility exists which negatives the presumption to be drawn from the other circumstantial evidence.”

Also in the case of **Bogere Moses and Another versus Uganda, SCCA No. 1 of 1997**, the Supreme Court had this to say:-

“It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witnesses evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness.”

Further, in the case of **Mbaziira siragi & Another versus Uganda [2007] HCB Vol. 1 HCB 9** the Supreme Court held inter alia that:

“The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a presumption of the fact that, that person was the thief or that that person received the goods knowing them to be stolen, unless there is a credible explanation of innocent possession. The starting point for the application of the doctrine of recent possession is proof of two basic facts beyond reasonable doubt, namely that the goods in question were found in possession of the accused and they had been recently stolen. In re-evaluating the evidence adduced against each appellant (accused) Court must consider it from two perspectives; namely whether the evidence proves that the found items (or any of the items) were stolen during the robbery in question, and whether any of the appellants was in possession of any of the found items.”

I find that in the instant case all the circumstantial evidence as was adduced in Court was sufficient to prove that the Appellant did participate in the commission as charged.

Counsel for the Appellant also contended that the ingredients of the offence were not proved by prosecution beyond reasonable doubt; I however disagree with all due respect. Though there was no direct evidence linking the Appellant to the commission of the offence, all the circumstantial evidence pointed to the fact that the Appellant participated in the commission of the offence. As it is circumstantial evidence was the best evidence in the instant case.

PW2 was very clear that after tracking the serial numbers of the stolen phones, it was found that A1 the Appellant had used one of the stolen phones to call the sister of the Complainant and PW4 who identified the number through the print marked PE4 and the number belonged to the Appellant. During cross-examination the Appellant did not deny his number and the print out was to accurate and detailed bearing both dates, time and telephone numbers.

PW3 was very clear that it is the Appellant who sold the very phone exhibited in Court to his daughter. I therefore, see no reason(s) whatsoever why there is this appeal.

It is therefore my considered opinion that the trial Magistrate evaluated all the evidence on record properly before coming to his conclusion, which conclusion I find was correct and no miscarriage was occasioned to the Appellant. All the prosecution evidence was corroborated, consistent, credible and reliable and even one of the stolen phones was recovered. The accused raised a defence of alibi; however, the prosecution ably placed him at the scene of crime and therefore discharged this burden beyond reasonable doubt.

This appeal therefore, lacks merit, a waste of court's time and an abuse of Court process. The appeal is accordingly dismissed. The decision of the lower Court is upheld. I so, order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK
JUDGE
28/09/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Acellam Collins for the Appellant.
2. James Court Clerk.

In the absence of Counsel for the Respondent and the Appellant.

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OYUKO. ANTHONY OJOK
JUDGE
28/09/2017