THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

CRIMINAL APPEAL No. 0015 OF 2017

(Arising from the Grade One Magistrate's Court at Koboko in Crim. Case No. 175 of 2017)

GWOLO JACKSON alias MUGAGA ……..……..…..……..… APPLICANT

VERSUS

UGANDA ……..……..……..……..……..…… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The appellant was on 21st March 2017 charged with one count of Theft C/s 254 (1) and 261 of *The Penal Code Act*. It was alleged that during the month of October 2016 at the Central Cell in Koboko, the appellant stole shs. 10,590,000/= the property of Lt. Col. Clement Sasuk Michael. When the charge was read to him, the trial court recorded the proceedings of the day as follows;

> **Court:** Charge read and explained to the accused in Kakwa
>
> **Accused:** It is not true. PNG
> It is true I have 2,600 dollars of his that I have not picked from Congo yet. It is true.
>
> **State:** facts are that in the month of October 2016 at Central Cell in Koboko Town the accused person was supposed to hand over [the] complainants money obtained through selling the complainant's motor vehicle. [The] accused paid money less by shs. 10,590,000/= without giving any explanation to [the] complainant ...and did not give back the money. He was arrested and charged.
>
> **Accused:** It is true
> **Court:** PG is entered. Accused is convicted.
> **State:** No previous conviction. In addition to any other penalty, I pray court makes an order of compensation
> **Convict:** I want to pay back his money. I request for two weeks.
>
> **Court:** adjourned to 11th April 2017 for sentencing

When the case came up again on 11th April 2017 for sentencing, without affording the appellant any opportunity to mitigate sentence, the trial magistrate decided as follows;

> The money involved is huge. [The] convict has also lied to court to delay sentence. I sentence the convict to serve four years in prison. I also order that he pays shs. 10,590,000/= in compensation to [the] victim.

The appellant is dissatisfied with those proceedings and has appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred both in law and fact in not properly recording the plea of guilty thus occasioning grave miscarriage of justice to the accused person.
2. The learned trial magistrate erred in law and fact when he passed a harsh sentence.

Submitting in support of the appeal, counsel for the appellant Mr. Buga Muhammed Nasur argued that the plea of guilty was not properly entered since the facts do not disclose the elements of the offence. The magistrate initially entered a plea of guilty and then changed it to a plea of guilty thereby convicting the appellant. He prayed that the resultant conviction be quashed and the sentence set aside without any order for a retrial.

In response, the learned Senior Resident State Attorney, Ms. Harriet Adubango opposed the appeal and argued that although the record of proceedings appears to be confusing and the plea was faulty, a re-trial should be ordered.

According to section 204 (3) of *The Magistrates Courts Act*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a magistrate's court except as to the legality of the plea or to the extent or legality of the sentence. Having been convicted on his own plea of guilty, the appellant by challenging the manner in which the plea was recorded, is in essence appealing the legality of the plea..

The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in *Adan v. Republic, [1973] EA 446* where Spry V.P. at page 446 stated it in the following terms:

> When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded.

It is incumbent upon a trial Court when recording a plea to be meticulous in ensuring it first that the charge is read and explained to the accused in the language hr or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see *Kakooza Micheal v. Uganda [1996] HCB 23*).

For a charge under sections 254 (1) and 261 of *The Penal Code Act,* it is necessary that the facts of the offence should specify; - the existence of a valuable item capable of being stolen, possession of that item by the complainant at the material time, the asportation of that item without the consent of the complainant or claim of right, the intention to permanently deprive the complainant of that item and that it is the accused who did this.

In the instant case, although shs. 10,590,000/= is a valuable item capable of being stolen if it is in specie (cash), the facts as narrated by the prosecutor do not disclose that the money was in the possession of the complainant Lt. Col. Clement Sasuk Michael in the month of October 2016 when it was allegedly taken by the appellant. The facts instead disclose that the appellant was given a vehicle to sell on behalf of the complainant and hand over the proceeds to the complainant. Although he apparently sold off the vehicle, he did not remit all the proceeds to the complainant and still owes the complainant shs. 10,590,000/=. With all due respect the facts do not disclose the offence of theft and the trial magistrate misdirected himself when he convicted the appellant of Theft C/s 254 (1) and 261 of *The Penal Code Act* on that set of facts.

The gravamen of the offence of theft is the taking of property belonging to another out of his or her possession without his or her consent or a lawful claim of right in doing so, with an intention to permanently deprive the person in possession. The offence requires factual possession of the item at the material time by the person from whom it is alleged to have been stolen as distinct from a legal right to possession. Factual possession signifies an appropriate degree of physical control over the item. Property will be regarded as belonging to any other person having possession or control of it. It is the reason why a person may be liable for theft of their own property if it is deemed to be in the possession or control of another. For example in *R v. Turner (No 2) [1971] 1 WLR 901*, the accused took his car in to a service station for repairs. When he went to pick it up he saw that the car was left outside with the key in. He took the car without paying for the repairs. He was found guilty of theft of his own car since the car was regarded as belonging to the service station as they were in possession and control of it.

In the instant case, the facts do not disclose that Lt. Col. Clement Sasuk Michael had any degree of exclusive physical control over the shs. 10,590,000/=, during the month of October 2016 when

it was allegedly stolen by the appellant. Instead, the facts disclose that the complainant expected to receive that money from the appellant following an arrangement by which the appellant was entrusted with a car to sell on behalf of the complainant, and remit the proceeds of sale to the complainant. Those facts suggest the offence of Stealing by an agent C/s 271 (c) or (e) of *The Penal Code Act*, but certainly not the offence of theft. In the result, the facts as narrated by the prosecution not having been in unison with the offence charged, the plea was equivocal and cannot sustain the conviction. Therefore the appeal succeeds, the conviction is quashed, sentence set aside and the appellant discharged.

Where a conviction is quashed and sentence set aside, the question always follows as to whether there should be a re-trial. It is a basic principle of constitutional law, that no person may be twice placed in jeopardy, that is, put on trial with the possibility of conviction and punishment, for the same criminal offense. According to article 28 (9) of *The Constitution of the Republic of Uganda, 1995*, a person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence, is not to be tried again for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

In cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order of a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. In the instant case, having found that the facts as narrated by the prosecution are not in unison with the offence charged, a retrial cannot be ordered but since the appellant has been discharged and not acquitted, he may be tried for an appropriate offence.

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Stephen Mubiru
Judge
26th July 2017