

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL APPEAL No. 0014 OF 2015

(Arising from Paidha Grade One Magistrates Court Criminal Case No. 0062 of 2014)

A.1. ORIBI OPENJA BOSCO }..... **APPELLANTS**
A.2. JATHO OMIRAMBE ALBERT }

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The Appellants were on 7th May 2014 jointly charged before the Grade One Magistrate’s Court at Paidha with one count of Malicious Damage to Property c/s 335 (1) of *The Penal Code Act*. It was alleged that the two of them on 18th April 2014 at Mbunya village in Zombo District, they wilfully and unlawfully damaged eucalyptus trees, Cyprus trees, Pine trees and nursery beds all valued at shs. 26,000,000/=, the property of Oringi Galdino. Both were granted bail and the trial commenced on 10th February 2015 with the testimony of the complainant. Four other prosecution witnesses testified. The appellants then testified in their respective defence and did not call any other witness.

The prosecution case was briefly that the complainant bought two pieces of land of an aggregate acreage of twenty six acres at Mbunya village in Ayaka Parish, Zeu Sub-county in Zombo District from a one Melki. In the year 2013, he established a tree nursery bed and planted a variety of exotic trees named in the charge sheet, on that piece of land. In the year 2014, the two appellants together with other people began issuing him with threats to kill him claiming the land belonged to them. The complainant reported the threats to the police. On 17th April 2014, he found the two appellants quarrelling with his neighbour and they warned him that he would see what would happen to him the following day. On 18th April 2014, he received a call from a one

Okethi to the effect that his entire tree plantation had been decimated. Fearing that he would be attacked, he did not visit the scene until a week later when he went with the District Forestry Officer who took photographs of the scene.

P.W.2. Okethi Melki testified that the complainant purchased land from his father Ozelle Melki in the year 2013. The two appellants are brothers and his paternal uncles. On 17th April 2014 the first appellant found him working in the complainant's field and warned him that if the complainant did not stop activities on that land he would see what would happen. The first appellant also made reference to a dispute they had with the father of this witness over this land. At 10.00 pm that day, while on his way home, the witness found the first appellant had gathered the whole family at Ocamringa's home. When he got home, he had dinner and went to sleep. At around midnight, because dogs were barking incessantly, he came out of the house and stood outside. There was moonlight outside. He saw a large group of people led by the two appellants heading towards the complainant's tree plantation which was at a distance of about 300 metres away. The following morning, when he went to work, he found all the trees had been cut down, uprooted and the nursery bed trampled upon.

P.W.3. Odaga Jagi testified that on 17th April 2014 while drinking alcohol at a lady's place called Alia, the first appellant announced that he would kill the complainant because he was a Lendu and a government agent who had taken over their land and planted trees on it. He declared that he would send people to cut down the trees because the land belonged to his grandfather. The next day on 18th April 2014 when they went to the field, they found all the trees had been cut down. He estimated the acreage of the trees cut to be about 24 acres.

P.W.4. Oyeny Kermu Charles, the District Forestry Officer testified that the complainant went to his office on 14th May 2013 requesting him to visit a scene in Ayaka where his trees and a nursery bed had been destroyed, in order to assess the damage. He went to the two plots of land one was about six hectares and the other seven hectares. He found tree saplings that had been uprooted in both fields. He assessed the total loss occasioned at shs. 302,780,000/= He prepared a report of his findings which was tendered in court as exhibit P.1.

P.W.5. Oyeny Kermu Charles, the Zeu Police Station C.I.D Officer testified that he investigated the case after it was reported to him on 18th April 2013. He visited the scene of crime on 20th April 2013, took photographs of the scene, drew a sketch map and recorded statements of the complainant and witnesses. Based on the magnitude of the destruction, he was of the view that the appellants obtained assistance in causing the destruction.

In his defence, the first appellant denied having committed the offence and contended that he could not commit such a crime since he is the head of elders within the family of Jupajalebe clan. In his defence, the second appellant too denied the charges and contended he is a law abiding student, a Deputy Head Teacher at a secondary school fully aware of the implications of committing criminal offences. The land on which the offence was committed is part of the Jupajalebe clan 400 acre land of which 120 acres have illegally been sold off by the family of Ozelle. Part of that was sold to the complainant. At the time it was sold to the complainant, there was a suit in court against Melki Ozelle. He was no aware of the sale of this land to the complainant Galdino Oringi but he saw him planting trees on the land. The complainant's accusations were based on mere suspicion on account that this appellant is the Secretary of the clan. He could not have seen him and singled him out of over thirty people at night, in the dark and at a distance of over 500 metres. Despite their respective defences, the trial court was satisfied that the prosecution had proved the case against them beyond reasonable doubt. They were accordingly convicted and sentenced each to pay a fine of shs. 2,000,000/= and in default to serve nineteen months' imprisonment. In addition, they were ordered to pay shs. 30,000,000/= as compensation to the complainant.

Being dissatisfied with the decision, the appellants appealed both conviction and sentence on the following grounds, namely;

1. The learned trial magistrate erred in law and fact by finding that the prosecution has proved the case against the accused persons beyond any reasonable doubt, that the accused persons participated in the destruction of trees worthy twenty six (26) acres the property of PW1 Mr. Oringi Galdiono, valued at Uganda shillings 26,000,000/= (twenty six million shillings only), as required by law.

2. The learned trial magistrate erred in law by passing an illegal sentence which was beyond his jurisdiction when he ordered the appellants to pay a fine of Uganda shillings 2,000,000/= (two million shillings) or in default serve 19 (nineteen) months' term of imprisonment.
3. The learned trial magistrate erred in law and fact by ordering the appellants to pay an illegal and excessive and harsh compensation of Uganda shillings 13,000,000/= (thirteen million shillings) only, without any lawful justification.
4. The learned trial magistrate erred in law and fact when he ignored material lies, contradictions and / or inconsistencies in the evidence adduced by the prosecution witnesses, calculated to mislead court and relied on the same, thereby occasioning miscarriage of justice to the appellants.

At the hearing of the appeal counsel for the appellant, Mr. Jimmy Madira, argued grounds one and four together and thereafter grounds two and three together. In respect of grounds one and four, his argument was that the trial magistrate relied on the evidence of a single identification witness, PW2 to convict the appellants yet the conditions were not favourable to correct identification. None of the witnesses saw the appellants destroy the trees and the court relied on weak circumstantial evidence. There were contradictions in the evidence regarding the extent of damage caused which the court ignored. With regard to grounds two and three, his argument was that imposition of a fine of shs. 2,000,000/= was in excess of the sentencing power of the trial magistrate which is limited to shs. 1,000,000/= by section 162 (1) (b) of *The Magistrates Courts Act*. The damage caused was not proved strictly yet the trial court went ahead to award shs. 13,000,000/= without a proper assessment of the damage caused. He prayed that the appeal be allowed, the conviction quashed and the sentence set aside.

Submitting in opposition to the appeal, the learned Senior Resident State Attorney Ms. Harriet Adubango submitted that that the trial magistrate did not err in the way he evaluated the evidence and the conclusions reached thereafter were correct. The identifying witness knew both appellants very well, they passed by him in close proximity and he was able to identify them.

Although none of the appellants was seen destroying the trees, there was strong circumstantial evidence against them. The contradictions regarding the magnitude of the destruction were minor since the witnesses were relying on estimates of the size of the land rather than exact measurements. Regarding the order of compensation, she argued that the trial magistrate took into account all the relevant factors and had made a proper assessment of the appropriate award. She conceded to the fact that in imposing a fine of shs. 2,000,000/=, the trial magistrate exceeded his jurisdiction. She nevertheless prayed that conviction and order of compensation be upheld.

This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, among others, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”.

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

Grounds one and two of the appeal assail the manner in which the trial magistrate went about evaluation of the evidence before him leading to the decision he made. It is trite law that there is no set form of evaluation of evidence and the manner of evaluation of evidence in each case varies according to the peculiar facts and circumstances of the case (see *Mujuni Apollo v Uganda*

S.C. Criminal Appeal No.46 of 2000). An appellate court will not normally interfere with findings of fact by a trial court or will be slow to differ with the trial court and will only do so with caution and only in cases where the findings of fact are based on no evidence, or on a misapprehension of the evidence, or where the court below is shown demonstrably to have acted on wrong principles in reaching its conclusion. Being a rehearing, which requires the appellate court to evaluate the evidence itself and draw its own conclusions, the appellate court is not bound by the trial court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

Under section 335 (1) of *The Penal Code Act*, the offence of malicious damage to property is committed by any person who wilfully and unlawfully destroys or damages any property belonging to another. In the instant case, the burden was on the prosecution to prove that tangible property belonging to the complainant was wilfully and unlawfully vandalised and that each of the appellants participated in the wilful and intentional vandalising or damaging of that property. This therefore required proof of three elements; (a) tangible property belonging to the complainant was damaged or destroyed, (b) the said property was damaged or destroyed through wilful and unlawful actions, and that (c) the property in issue was damaged or destroyed by the accused.

The finding of the trial court that property belonging to the complainant, PW1, was destroyed was based on the testimony of the complainant himself who at page 16 - 17 of the record of appeal testified that he planted a variety of exotic trees on twenty six acres of land starting from the year 2013. At page 17 - 18 of the record of appeal he further testified that on 18th April 2014 he received a call notifying him that all his trees had been destroyed the previous night. After one week, he was able to visit the scene together with a District Forestry Officer whereupon he confirmed that indeed his trees had been destroyed. In his testimony at page 24 of the record of appeal, the District Forestry Officer testified that PW1 went to his office on 14th May 2013 complaining that his trees had been destroyed. Together with the complainant, he went to the scene where he found 26 acres of tree saplings and a nursery bed had been destroyed. He prepared a report of his findings dated 13th May 2013 which was tendered in court as exhibit P1.

The other prosecution witness PW2 testified at page 20 of the record of appeal that he was engaged by the complainant to be the in-charge of his tree planting project and that he indeed participated in planting the trees and maintaining the nursery bed. On the morning of 18th April 2014 when he went to the tree plantation, he found the trees had been destroyed. Some of them had been cut with pangas while others had been uprooted. PW3 too testified at page 22 of the record of appeal that when he went to the plantation on 18th April 2014, he found that all the trees had been destroyed. PW5 the Investigating Officer testified at page 26 that when he visited the scene on 20th April 2013, he found the seedlings had been destroyed. He took photographs of the scene which were tendered in evidence as exhibit P2 – P6.

In his defence at page 28 of the record of appeal, the first appellant did not address this element of the offence, having chosen instead to deny the accusation in its entirety. On his part, the second appellant at page 30 of the record of appeal admitted that he had witnessed the complainant planting trees on the disputed land but did not see the damaged trees. He repeated this at page 33 of the record of appeal. At page 32 of the record of appeal, he opined that it is the complainant and his witnesses who were uprooting their own seedlings. In his judgment at pages 5 to 10 of the record of appeal, the learned trial magistrate analysed the prosecution and defence evidence and came to the conclusion that the evidence taken as a whole had proved beyond reasonable doubt that the complainant's trees had suffered permanent physical harm, were impaired of their use, value or utility and thus rendered valueless.

I have subjected the same evidence to fresh scrutiny. I find that the evidence establishing the fact that the complainant owned a plantation of trees of varieties commonly used for timber was not challenged by the appellants in their cross-examination. The general thrust of their cross-examination of the prosecution witnesses was directed at the ownership and size of the land on which the plantation was established, rather than the existence of that plantation. As a result, evidence regarding the fact of destruction of the tree plantation was not discredited by cross-examination. However during the defence of the second appellant, he raised discrepancies in dates as between the alleged date of destruction, the date on which the District Forest Officer and the Investigating Officer visited the scene and the date appearing on exhibit P1. He contended that inconsistencies in the dates signified fabrication of evidence against him.

I have reviewed the judgment of the trial court and found that the trial magistrate did not advert to the conflicting dates in the testimony of some of the prosecution witnesses. Although in the charge sheet it was alleged that the offence was committed on 18th April 2014, and PW1 the complainant testified that he received a call from a one Okethi to that effect and P.W.2. Okethi Melki and P.W.3. Odaga Jagi testified that it was in the morning of 18th April 2014, when they found all the trees had been cut down, uprooted and the nursery bed trampled upon, P.W.4. Oyeny Kermu Charles, the District Forestry Officer testified that the complainant went to his office on 14th May 2013 requesting him to visit a scene in Ayaka where his trees and a nursery bed had been destroyed, in order to assess the damage. He also prepared a report of his findings which was tendered in court as exhibit P.1. which is dated 13th May 2013. P.W.5. Oyeny Kermu Charles, the Zeu Police Station C.I.D Officer testified that the case was reported to him on 18th April 2013 and he visited the scene of crime on 20th April 2013. The dates mentioned by P.W.4. and P.W.5. place the occurrence of the crime a year earlier than the date alleged in the indictment. This inconsistency was not put to the witnesses while on the stand. It was raised for the first time during the defence case. The witnesses therefore did not explain the inconsistency.

I have had the benefit of perusing the original, handwritten record of proceedings of the trial court and established that the dates are not a typing error that occurred during the process of certification of the record. I have construed these nevertheless as inadvertent slips on the part of the two witnesses considering that the inconsistency relates only to the year during which the two witnesses said the offence was committed. The inconsistency being explainable in that context, in my view the trial magistrate would have come to the conclusion he did, had he specifically considered it. I therefore find that despite that inconsistency, the evidence adduced at trial proved beyond reasonable doubt that property belonging to the complainant was destroyed.

The second ingredient required proof that whoever destroyed the tree plantation, did so wilfully and unlawfully. “Wilfully” within the context of section 335 (1) of *The Penal Code Act* means “intentionally as opposed to accidentally, that is, by an exercise of [one’s] free will” (see *Arrowsmith v. Jenkins*[1963] 2 QB 561). *Black’s Law Dictionary* defines it as ‘voluntary and intentional, but not necessarily malicious’. The act done need not be malicious in the sense of being motivated by spite or hatred against an individual, or *malus animus*, as denoting that the

perpetrator is actuated by improper and indirect motives. The prosecution is not required to prove malice in the sense of an improper motive. All that has to be proved is that a wrongful act was intentionally done, without cause or excuse. Mere knowledge that it is likely to cause wrongful loss to the owner of the property is sufficient.

In *Regina v Pembliton [1874-80] All ER 1163*, the accused was fighting in the street. He picked up a large stone and threw it at the people he had been fighting with. He missed and broke a window causing damage of a value exceeding £5. The jury convicted the accused, although finding that he had not intended to break the window. Quashing his conviction, the House of Lords held that the words ‘unlawfully and maliciously’ import the wilful doing of an intentional act. Intention could not be shown by proof of reckless disregard of a perceived risk.

In the instant case, before the court below the prosecution had to prove that the destruction was in fact intentional and wilful. The intention and will may be proved by the fact that the perpetrators knew that damage to the property would be the probable result of their unlawful act, and yet did the act regardless of such consequences. In this regard the complainant testified that when he visited the scene a week later together with the District Forestry Officer who took photographs of the scene, he found that his entire tree plantation had been decimated. P.W.2. Okethi Melki testified that when he went to work, he found all the trees had been cut down, uprooted and the nursery bed trampled upon. P.W.3. Odaga Jagi testified that on 18th April 2014 when he went to the field, he found all the trees had been cut down. P.W.4. Oyeny Kermu Charles, the District Forestry Officer testified that when he visited the scene he found tree saplings that had been uprooted in both fields. P.W.5. Oyeny Kermu Charles, the Zeu Police Station C.I.D Officer testified that he visited the scene of crime and took photographs of the scene. I have examined the photographs exhibited in court as exhibits P2 – P6 and they reveal a targeted cutting and uprooting the tree saplings since the bush around each sapling was left more or less intact. This is indicative of the fact that whoever cut or uprooted the saplings in fact intended to destroy them specifically or, in the alternative, that he or she knew that what he or she was doing would or might destroy them and nevertheless did what he or she did recklessly and not caring whether they were destroyed or not. There is no evidence of a legal justification

for such conduct. The trial court therefore did not err in finding that the destruction was done wilfully and unlawfully.

The last ingredient of the offence required the prosecution to prove that the tree saplings and nursery bed in issue were damaged or destroyed by the accused. The prosecution relied entirely on circumstantial evidence constituted by the following pieces of evidence; P.W.2. Okethi Melki who testified that on 17th April 2014, the first appellant found him working in the complainant's field and warned him that if the complainant did not stop activities on that land he would see what would happen. At 10.00 pm that day, while on his way home, the witness found the first appellant had gathered the whole family at Ocamringa's home. At around midnight, due to the incessant barking of dogs, he came out of the house and stood outside where with the aid of moonlight he saw a large group of people led by the two appellants heading towards the complainant's tree plantation which was at a distance of about 300 metres away. The following morning, when he went to work, he found all the trees had been cut down, uprooted and the nursery bed trampled upon. P.W.3. Odaga Jagi too testified that on 17th April 2014 while drinking alcohol at a lady's place called Alia, the first appellant declared that he would send people to cut down the trees because the land belonged to his grandfather. The next day on 18th April 2014 when they went to the field, they found all the trees had been cut down. The day of the incident, the appellants had written a letter, exhibit P.1, where they threatened to use any means possible to recover the land in dispute.

One aspect of the circumstantial evidence is that P.W.2. claimed to have recognised the appellants as part of the group that was seen headed in the direction of the tree plantation sometime after midnight. In *Wamunga v. Republic (1989) KLR 424* it was held at page 426 that,

It is trite law that where the only evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.

Each of the appellants raised the defence of alibi which they were not under any obligation to prove but rather the burden lay on the prosecution to disprove it (see *Uganda v. Bitarinsha John*

and another [1975] H.C.B.140 and *Sekitoleko v. Uganda* [1967] E.A 531). When examining such evidence, the court was required to evaluate the evidence having regard to factors that were favourable, and those that were unfavourable, to correct identification. The trial court did not advert to this at all in the judgment. I have nevertheless considered the factors that were favourable, and those that were unfavourable, to correct identification. The identification occurred at night. However, P.W.2 knew both appellants before the incident, there was moonlight outside and the appellants passed by his house. In *Kizza Francis v. Uganda* [1983] HCB 12, when evaluating evidence of identification, the court found that because the accused was known to the complainant for a long time and the offence was committed in bright moonlight in open space, the circumstances were favourable to correct identification. Similarly in this case, although the trial magistrate did not specifically advert to factors that were favourable and those that were unfavourable to correct identification, I am satisfied that based on the evidence available on record, the appellants' defences of alibi were disproved and the trial magistrate would have reached the same conclusion on a proper direction regarding the evidence of identification of the two appellants and their defences on the night the offence was committed.

Before convicting an accused of an offence depending entirely on circumstantial evidence, a trial court must direct itself on the requirement that before deciding to convict upon such evidence, the inculpatory facts should be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt of the accused (see *Ilanda s/o Kisongo v. R. (1)*, [1960] E.A. 780 and *Simon Musoke v. R* [1958] EA 715). It does not appear that the trial magistrate in this case specifically directed himself on this requirement. However in *Benjamin Sauzier v. R* [1962] 1 EA 50, the appellant appealed against his conviction of attempted arson. The appeal was dismissed but the appellate court commented upon the failure of the trial judge to direct himself expressly that, in a case depending exclusively upon circumstantial evidence, he must find, before deciding upon conviction, that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court held that although the judge had failed to give himself an express direction on circumstantial evidence, on the evidence which he had accepted he would have reached the same conclusion on a proper direction.

I have re-evaluated the circumstantial evidence adduced against both appellants in this appeal. The evidence established the following inculpatory facts; there was a land dispute between the clan to which the appellants belong and that to which the complainant's predecessor in title belongs. The family of Melki led by Ozelle Melki sold parts of the land to diverse people including twenty six acres which they sold to the complainant who proceeded to establish a tree plantation thereon. As a result of that dispute, the appellants on 16th January 2014 filed civil suit No. 2 of 2014 at the Grade One Magistrate's Court at Paidha as the first and seventh plaintiffs respectively, against four members of the family of Melki (see exhibit D.1). The appellants expressed their displeasure over sale of the land to the complainant by warning the complainant's employees working on the land. P.W.2. Okethi Melki said the first appellant found him working in the complainant's field on 17th April 2014 and warned him that if the complainant did not stop activities on that land he would see what would happen. P.W.3. Odaga Jagi too testified that on 17th April 2014 while drinking alcohol at a lady's place called Alia, the first appellant announced that he would kill the complainant because he was a Lendu and a government agent who had taken over their land and planted trees on it. He also heard him declare that he would send people to cut down the trees because the land belonged to his grandfather. At 10.00 pm that day, while on his way home, P.W.2 found the first appellant had gathered the whole family at Ocamringa's home. At around midnight, he saw a large group of people led by the two appellants heading towards the complainant's tree plantation which was at a distance of about 300 metres away. The following morning, when both P.W.2 and P.W.3 went to work, they found all the trees had been cut down or uprooted and the nursery bed trampled upon. On 18th April 2014 the appellants wrote a letter warning that "we shall therefore not sit back to see our land taken....we are ready to fight with (sic) any way possible....to desist from this act as may (sic) cause bloodshed of these innocent youths."

The circumstantial evidence established that the appellants were openly angered by the complainant's acquisition of the disputed land and his activities thereon. The day before, the first appellant was heard making oral and both appellants made a written open threat to take action against the complainant's and other undesirable people's activities on the land in a manner likely to result in destruction of the trees and cause bloodshed. A few hours before midnight they were seen gathered as a family opposed to the complainant's activities on the land. Around midnight,

they were seen leading a group of about thirty people in the direction of the tree plantation situated within a distance of about three hundred metres. The following morning the entire plantation of twenty six acres was found destroyed. I have found these incriminating factors to be incompatible with the innocence of the appellants and incapable of explanation upon any other reasonable hypothesis than that of their guilt. There are no coexistent facts which weaken the inference of the appellants' guilt which conclusion I find to be irresistible. Although the trial magistrate failed to give himself an express direction on this circumstantial evidence, I am satisfied that he would have reached the same conclusion on a proper direction. For all the foregoing reasons, grounds one and four of the appeal fail.

In grounds two and three, the appellants challenge the lawfulness and propriety of the sentence and order imposed by court. The circumstances in which an appellate court may interfere with the sentence of a trial court were specified in *Kiwalabye Bernard v. Uganda, S. C. Criminal Appeal No. 143 of 2011* where the Supreme commented as follows;

The appellate Court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed being manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle.....The Court may not interfere with the sentence imposed by a trial court simply because it would have imposed a different sentence had it been the trial Court. (See *Ogalo S/o Owou v. Republic (1954) 24 EACA 270*).

This court therefore may interfere with the sentence imposed by the trial court only if it comes to the conclusion either that; (i) the sentence is excessive, given the background of the appellant and the circumstances of the offence; (ii) the sentence is illegal; or (iii) there was an error in a principle of sentencing which resulted in an unreasonable sentence. If a sentence is manifestly excessive, that is an indication of a failure to apply the right principles (see *R v Ball 35 Cr App Rep16*). Regarding the sentence of a fine, section 162 (1) (b) of *The Magistrates Courts Act* limits the trial court's sentencing powers to sentences of imprisonment for periods not exceeding ten years or fines not exceeding one million shillings or both such imprisonment and fine. The

trial court therefore exceeded its sentencing powers when it imposed a fine in excess of one million shillings, rendering the sentence illegal. Therefore ground two of the appeal succeeds.

The third ground is to the effect that in imposing the order of compensation, the trial court erred by its failure to find that the damage caused was not proved strictly yet it went ahead to award shs. 13,000,000/= without a proper assessment of the damage allegedly caused. Section 197 of *The Magistrates Courts Act* confers discretion upon a trial court, in addition to any other lawful punishment, to order the convicted person to pay another person such compensation as the court deems fair and reasonable, where it appears from the evidence that, that other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit.

This power to award compensation is intended to reassure victims of crime that they are not forgotten in the criminal justice system. Criminal justice increasingly looks hollow if justice is not done to the direct victim of the crime. In some cases, the victims lack the resources to institute civil proceedings after the criminal case has ended. The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence.

There are obvious advantages of allowing one court to deal with the criminal and civil liability of damage caused by the offence such as; avoiding unnecessary litigation, by allowing one court to deal with both criminal and civil liability and thus secure just treatment for both the accused and the victim of the offence and saving the victim of the offence time and costs of recovering compensation or damages in a subsequent civil suit. It provides the victim with a speedy and inexpensive manner of recovering reparation. It requires no more of the victim than a request for the order. It can also be an effective means of rehabilitating the accused because this order quickly makes the accused directly responsible for making restitution to the victim. The practical efficacy and immediacy of the order helps to preserve the confidence of society in the criminal justice system.

Section 197 of *The Magistrates Courts Act* is a provision designed to accord civil justice to the victim within the criminal trial. By this provision, criminal prosecutions constitute a single proceeding, in which the criminal / civil line becomes blurred. For that reason, invoking this provision should be undertaken after careful consideration of whether or not there is no real danger of causing injustice in the criminal proceedings, since the discretion to award compensation must be exercised judiciously. A Prosecutor who desires the court to make such award needs to lead evidence relating to proof of the injury resulting out of the criminal act, and provide material to court during the prosecution case on basis of which the assessment of compensation will be made.

While the court has discretion to order compensation under this provision for damage caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit were instituted against him, he would pay substantial compensation. This means in practice that the court has to decide whether the criminal punishment is enough, or whether there is a need for compensating the victim who has suffered injury, in addition to criminal punishment which may be imposed on the convict. The victim claiming compensation must, however, establish that he or she has suffered some personal loss, pecuniary or otherwise, as a result of the offence, for which payment of compensation is essential, such as would be recoverable in a civil suit. Whether a victim who has suffered injury as a result of the commission of an offence would recover compensation in a civil suit depends very much on the nature of damage caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

For example in the Sudanese case of *Awad El Kad1 v. Mohammed Hussein Badran, (1925) S.L.R., Vol. 1, 274*, the appellant sued a group of fifty people for libel when they signed a petition which alleged he was not a suitable person to sit on the Traders Tax Assessment Board, which statement was defamatory of the appellant. He failed to recover compensation in a civil suit for defamation because the Court of Appeal was of the opinion that he did not suffer any special damages and could not be awarded general damages, because his character or reputation which was injured was sufficiently vindicated by criminal proceedings in which all signatories to the petition had been convicted and fined.

From the procedural perspective, the power to order compensation under section 197 of *The Magistrates Courts Act* is subject to the basic rules of a fair hearing. In order to afford an accused ample and fair opportunity to meet the claim for compensation, during the prosecution case, the court should hear prosecution evidence regarding this aspect as part of its case generally against the accused. That way the accused will have been given ample opportunity to reply or respond to evidence relevant thereto, and at the defence stage, to adduce such evidence as he or she may deem necessary, for rebutting the claim for compensation, or the assessment thereof. If this is done during and as part of the trial of the criminal liability of the accused, the court will at the same time have heard the evidence relating to proof of the damage resulting out of the criminal act and relevant to the assessment of compensation such that upon conviction of the accused, it will be in position at the same time to determine, assess and order compensation.

In the instant case, in considering grounds one and four of the appeal, I have found that there was ample evidence before court establishing that the complainant's tree plantation was destroyed. There was sufficient material before the trial court on basis of which the court came to its finding that the complainant had sustained material damage in consequence of the offence committed for which substantial compensation was recoverable in a civil suit. What was left for the court to determine was the quantum.

Whereas the power to impose fines is limited by sections 162 and 180, section 197 of *The Magistrates Courts Act* does not impose any such limitation. Just like the power to award general damages in civil proceedings, the power to award compensation appears to be at large but that jurisdiction cannot be exercised at the whims and caprice of a trial magistrate. There is nothing like a power without any limits or constraints. That is so even when a court may be vested with wide discretionary power, for even discretion has to be exercised only along well-recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity. Although I do not read the section as requiring exact measurement such as is expected in proof of special damages in a civil suit, since the provision is clearly not intended to be in substitution for the civil remedy, the court should be slow to make an assessment and award of substantial amounts as compensation without clear evidence of a definite amount by admission or other proof, otherwise it risks descending into purely civil consequences of the facts that

constitute a crime. Section 197 of *The Magistrates Courts Act* is not to be used *in terrorem* as a substitute for or reinforcement for civil proceedings.

It is true that on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence. But the special nature of orders for compensation requires that they be made only on the basis of evidence by admission or otherwise. The section does not spell out any procedure for resolving a dispute as to quantum; its process is, *ex facie*, summary but I do not think that it precludes an inquiry by the trial magistrate to establish the appropriate amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial. The trial magistrate should have been mindful of the fact that had the complainant been forced to undertake a civil suit to recover the sum, he would have been forced to prove his loss in a stricter manner and the fact that prospect of obtaining in a summary way from the court in exercise of its criminal jurisdiction an order of compensation equivalent to a judgment in a civil suit is an open invitation to resort to the criminal process mainly for the purpose of obtaining the civil remedy, especially in cases of crime against property committed by persons against whom a civil condemnation is likely to be of some practical value.

For that matter, an award of compensation must be reasonable. What is reasonable will depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the loss suffered the justness of claim by the victim, the ability of accused to pay and other relevant circumstances. This requires an inquiry, albeit summary in nature, to determine the paying capacity of the offender, unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that the first and the most effective check against any arbitrary exercise of discretion is the well-recognised legal principle that orders can be made only after proper evaluation. Evaluation brings reasonableness not only to the exercise of power but to the ultimate conclusion. Evaluation in turn is best demonstrated by disclosure of the reasons behind the decision or conclusion. In that case, an appellate court will have the advantage of examining the reasons that prevailed with the court making the order. Conversely, absence of reasons in an appealable order

deprives the appellate court of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own.

The criteria which a court must consider in determining whether an order of compensation should be made in addition to another sentence passed have been set out by the Supreme Court of Canada in *R. v. Zelensky*, [1978] 2 S.C.R. 940. There Laskin C.J. stated at p. 961:

The Court's power to make a concurrent order for compensation as part of the sentencing process is discretionary. I am of the view that in exercising that discretion the Court should have regard to whether the aggrieved person is invoking s. 653 (*in pari materia* with section 197 of *The Magistrates Courts Act*) to emphasize the sanctions against the offender as well as to benefit himself. A relevant consideration would be whether civil proceedings have been taken and, if so, whether they are being pursued. There are other factors that enter into the exercise of the discretion, such as the means of the offender, and whether the criminal court will be involved in a long process of assessment of the loss, although I do not read s. 653 as requiring exact measurement.

Laskin C.J. further observed that a compensation order should only be made when the amount can be readily ascertained, and only when the accused does not have an interest in seeing that civil proceedings are brought against him in order that he might have the benefit of discovery procedures and the production of documents. Obviously, though, neither the production of documents nor the examination for discovery will be of much, if any, significance if the amount owing to the victims is fixed and acknowledged. "Where the amount lost by the victims of the appellant's criminal conduct is admitted it would not be sensible to require them to incur the additional expense of undertaking civil proceedings to establish their loss, nor do I believe that it would assist in the appellant's rehabilitation to permit him to put his victims to this additional trouble and expense" (aptly stated by Martin J.A. in *R. v. Scherer* (1984), 16 C.C.C. (3d) 30, at p. 38). A victim of crime in a situation where the amount involved is readily ascertained and acknowledged by the accused should not be forced to undertake the often slow, tedious and expensive civil proceedings against the very person who is responsible for the injury. In such situations, it would be unreasonable to deny the practical necessity for an immediate disposition as to reparation by the criminal court which is properly seized of the question as an incident of the adjudication over the criminal accusation.

When ordering compensation in the instant case, the trial magistrate stated the reasons behind the quantum awarded as follows;

Each accused is a first offender but the offence of malicious damage to property is very rampant within the court's jurisdiction. In this particular case the accused acted high handedly like vandals. They mercilessly destroyed the trees of complainant (sic) causing him to suffer gross financial loss. The accused had better method of settling land dispute through local councillors and chiefs and the courts of law the practice must be deterred (sic)..... Accused should pay complainant (sic) the sum of shs. 13,000,000/= for the destruction caused to his trees, pines, Cyprus, Eucalyptus. In case the award of compensation is not adequate the complainant is free to file a civil suit against the accused.

Section 197 of *The Magistrates Courts Act* confers discretion upon a trial court, to order "such compensation as the court deems fair and reasonable". This requires that as long as the damage is financially assessable, the amount ordered should be proportional to the damage caused by the wrongful act. An important consequence of the principle of proportionality is that orders of compensation should not be punitive in nature. The amount determined by court should exclusively be aimed at remedying the damage caused through the wrongful act, and not conceived as an exemplary measure. The aim should be to redress only direct damage and loss resulting from the illegal act, leaving out those damages and losses which are too indirect or remote.

In assessment of the quantum, the trial court was of the view that the appellants "mercilessly destroyed the trees of complainant (sic) causing him to suffer gross financial loss." The court therefore appears to have taken a compensatory approach based on the principle of *restitutio in integrum*. But the quantum also appears to have been influenced by deterrent considerations discerned from the expression "The accused had better method of settling land dispute through local councillors and chiefs and the courts of law the practice must be deterred (sic)." It appears to me therefore that the amount assessed by court was not exclusively aimed at remedying the damage caused through the wrongful act, but was also conceived as an exemplary measure.

When the principle of *restitutio in integrum* is followed in making orders of this kind, the amount assessed by court should exclusively be aimed at remedying the damage caused through

the wrongful act and not as an exemplary measure. The aim should be ordering payment of a sum corresponding to the value which restitution in kind would bear, taking into account the ability of the accused to pay the compensation awarded. Unlike a civil court which when awarding general damages is bound to wipe out the legal and material consequences of the wrongful act by re-establishing the situation that would exist if that act had not been committed, irrespective of the defendant's ability to pay, a criminal court is required to take into account the ability of the convict to pay the compensation ordered, but remembering that such ability should not be the controlling factor in every case. A criminal court will therefore order compensation intended to re-establish the situation that would exist if that act had not been committed, to the extent of the convict's ability to pay. An order of compensation in a criminal trial is not necessarily full reparation for the damage occasioned. The criminal court may order partial restitution if it appears the damage caused is more than the convict will be able to pay. The requirement to consider the convict's ability to pay though does not necessarily require the court to order partial restitution. The court may, for example, order an indigent convict to pay a substantial sum in restitution after reviewing the convict's employment status, expenses, liabilities, and living situation.

For that reason, the trial court is not only required to assess the damage caused to the extent that it is financially assessable, but also to inquire into the paying capacity of the offender, unless the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. In determining whether to order compensation under section 197 of *The Magistrates Courts Act*, the trial court should consider; (a) the amount of the loss sustained by the victim as a result of the offense; and (b) the financial resources of the convict, financial needs and earning ability of the convict and the convict's dependents, and such other factors as the court deems appropriate, bearing in mind the consideration in *United States v. Mounts*, 793 F.2d 125 at page 128 where the court observed that "while a [convict's] ability to pay is a consideration in the determination of restitution . . . indigency is not a bar to an order of restitution."

United States v. Mounts, 793 F.2d 125, was an appeal from an order of restitution entered by the district court following the appellant's guilty plea on one count of a fourteen-count indictment. The appellant claimed on appeal that the district court erred in ordering restitution for the

victim's losses associated with thirteen counts of the indictment for which he did not plead guilty. The district court had found by a preponderance of evidence from the arraignment and sentencing proceedings, that the complainant was a victim who had sustained losses as a result of the appellant's criminal actions. With regard to count fourteen, to which the appellant pleaded guilty, the court found that the complainant had sustained a loss of US \$ 273, representing the cost of reinstating Monroe's lapsed life insurance policy. With regard to counts one through thirteen, the court found that Monroe had sustained a loss totaling US \$ 4,186, representing the total amount of the thirteen forged checks. The court ordered the appellant to pay restitution in the total amount of \$4,459, "or such lesser amount as shall be determined in the civil lawsuit now pending in the Wyandotte County District Court." On appeal, the court observed that such orders are intended to "restore the victim to his or her prior state of well-being' to the highest degree possible." The court relied on that compensatory purpose in rejecting a restrictive interpretation of the term "offense" that would exclude losses caused by criminal acts which were not alleged in the indictment and for which the appellant was not convicted, and stated;

In determining the amount of loss to a victim for purposes of awarding restitution, a district court is not limited either by the amount specified in the indictment or the specific transactions alleged in the indictment. Taking into consideration the evidence adduced at trial and the evidence presented in the sentencing phase of the case, a district court may order a defendant to pay restitution to any victim for the amount of loss sustained "as a result of the offense."..... the amount of restitution, however, must be definite and limited by the amount actually lost by the victims. The court must be able positively to identify each victim to whom restitution is due and, in addition, the defendant must be given the opportunity to refute the amount ordered. Finally, the amount of restitution ordered must be judicially established..... If "offense" is not restricted to the specific acts for which conviction was had or for which the defendant pleaded guilty, the fact that such acts are contained in the indictment and the defendant did not plead guilty to them does not automatically preclude them from becoming the basis of restitution..... an order of restitution [may be made] for losses incurred by the victim as a consequence of the defendant's criminal acts other than those for which a guilty plea was entered, when there is a significant connection between those other criminal acts and the crime for which a guilty plea was entered..... We therefore hold that when there is evidence that the defendant committed other criminal acts that had a significant connection to the act for which conviction was had or for which a guilty plea was entered, a sentencing judge may order restitution for losses resulting from such acts if the Government can

prove both that the defendant caused such losses, and the amount of such losses, by a preponderance of the evidence.

In the case before me, the record of the court below indicates that the trial court was presented with evidence of an assessment of the amount of the loss sustained by the victim as a result of the offense and some imprecise assertions regarding the financial resources of the appellants, their financial needs and obligations. There is evidence of P.W.6 at pages 24 to 25 of the record of appeal reading the magnitude of the loss incurred by the complainant. In assessing the quantum, the trial court did not expressly advert to this evidence. It was in respect of what this witness saw and assessed when he visited the scene on 13th May 2013. When considering the first and fourth ground of appeal, I came to the conclusion that the year 2013 was a mistake but was rather 2014. The offence was committed on 18th April 2014 and the witness visited the scene nearly a month later on 13th May 2014 yet he said he found the tree saplings were freshly uprooted. It is doubtful that the saplings would be “freshly uprooted” a month after the event. This part of his evidence is an exaggeration. When a court finds a witness to have been untruthful in some aspect, it may believe the rest of the evidence of that witness and reject the part containing lies, among other options (see *Uganda v. Rutaro [1976] HCB 162* and *Uganda v. George W. Yiga [1977] HCB 217*). I have chosen to reject that part of his evidence.

I however believe his evidence when he stated that about 14,443 saplings were uprooted and at a value of 20,000/= each, the complainant suffered a loss estimated at shs. 288,860,000/=. There were also 1,600 saplings still in the nursery bed and at a value of shs. 1000 each, the complainant suffered loss of shs. 13,920,000/= in that respect, hence a total of shs. 302,860,000/=. This is reflected in exhibit P.1. The appellants had ample opportunity to cross-examine this witnesses since this evidence was introduced entirely during the prosecution case. They had ample opportunity to reply or respond to it, and to adduce such evidence as they may have deemed necessary, in rebuttal thereof. They chose only to cross-examine the witness but did not adduce any evidence of their own regarding the values attached to the tree saplings to counteract the estimates made by this witness. Although this was an estimated loss with an unspecified margin of error, considering that the trial court ordered the appellants to pay shs. 13,000,000/=: a sum representing only approximately a fifth of the estimated total loss, in compensation to the damage caused by their offence, I have not found the sum to be disproportionate to the

magnitude of the loss estimated to have been occasioned to the complainant by the appellants' act. The deterrent considerations or undertone apparent in the reasons behind the order did not result in an entirely disproportionate sum.

I find that the trial court at sentencing did not have to make an inquiry into the amount of the loss sustained by the complainant as a result of the offense since the facts as emerged in the course of the trial were so clear about the magnitude of the loss that it was unnecessary to do so at sentencing. Therefore at sentencing, the trial court only needed to inquire into the financial resources of the appellants, their financial needs, earning ability, their dependants, and such other factors as the court would deem appropriate. Such information was necessary to enable the court make the determination of the amount of discretionary compensation or the manner of payment for any order of compensation, based on the resources of the appellants and their ability to pay compensation, although the court was not required to make findings of fact or conclusions of law on those matters. The burden of demonstrating their inability to pay compensation was on the appellants during their *allocutus*.

In his *allocutus*, the first appellant stated "I am an orphan and a weak person. So I pray for mercy. I have orphans to look after." On his part, the second appellant said "I am a teacher and Deputy Headmaster handling many students. I am a specialist in Statistical Geography both in Nebbi and Zombo Districts. Taking me away will make so many people to suffer. In our family I am paying [for] over ten children with so many dependants in the house helping about five aged sisters. I have ulcers and have to eat special food." Although an inquiry into the capacity of the convict to pay compensation should be done expeditiously, in a summary manner without turning the sentencing proceedings into the equivalent of a civil trial, proceeding largely on the basis of information rather than on the basis of evidence, I find the inquiry undertaken by the trial court in the instant case to have been inadequate. Although inadequate, yet it was sufficient and served the purpose of yielding information necessary for the determination of the quantum. Detailed financial information such as would be contained in a pre-sentence report in respect of the appellants was desirable but not mandatory. Furthermore, considering the fact that the amount ordered represents only a very small fraction of the total estimated loss incurred by the

complainant, I do not find that absence of detailed financial information in this case occasioned any miscarriage of justice.

In cases involving very large restitution orders, where common sense dictates that only a person of substantial means could comply, the trial court should be especially careful to document its consideration of the convict's ability to pay. When smaller restitution amounts are at issue viz-a-viz the magnitude of the damage caused, the appellate court will apply a less demanding standard on the issue of the trial court's consideration of the convict's ability to pay compensation. For example, in the case of *State v. Hunter*, 315 N.C. 371 (1986) an appellate court upheld a US \$ 919 restitution order, even though the trial court never expressly mentioned the convict's ability to pay. In the instant case, failure by the trial court to conduct a more robust inquiry into the paying capacity of the appellants, in light of the fact that the paying capacity of the appellants was only one of the considerations and not the paramount or decisive consideration, is not fatal to the award. Since the sum ordered is proportionate to the loss incurred by the complainant and the trial court took into account the appellants' demands on their respective resources, I have not found any reason to justify interference with the quantum ordered by the trial court.

In the final result, the appeal against the sentence of a fine succeeds. The fine imposed of shs. 2,00,000/= is hereby set aside and substituted with a sentence of a fine of shs. 1,000,000/= to be paid by each of the appellants, or in default thereof, a term of imprisonment of ten months' imprisonment. In the event that they have already paid the fine, it is ordered that a sum of shs. 1,00,000/= should be refunded to each of the appellants.

The appeal against conviction and the order of compensation fails and is accordingly dismissed. I observe that the order of compensation was not specific as to the amount each of the appellant is to pay in compensation. I hereby order each of the appellants to compensate the complainant in the sum of shs. 6,500,000/=. Otherwise the appeal stands dismissed.

Dated at Arua this 24th day of January 2017.

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Stephen Mubiru
Judge