

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**CRIMINAL DIVISION**  
**HCT-00-CR-CN- 010/2021**

Arising out of WAK-06-C0 125/2018

**KIWANUKA RICHARD:::APPELLANT**

**VERSUS**

**UGANDA:::RESPONDENTS**

**BEFORE HON. JUSTICE TADEO ASHMWE**

**JUDGMENT**

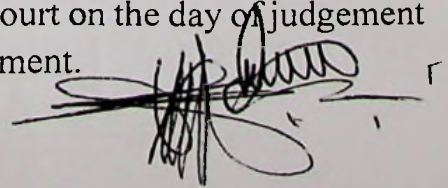
This appeal arises from Judgement and orders of his worship Baligeya Moses Mufumbiro a magistrate grade one.

The background of this appeal is that the accused person was charged with 2 counts of threatening violence contrary to section 81(a) of the PCA and 1 count of malicious damage to property contrary to section 335 for the PCA.

At the trial, the appellant raised a defence of a bonafide claim of right which was disregarded by the trial magistrate and found the appellant guilty of the offence of malicious damage to property, convicted and sentenced him to two years imprisonment.

The appellant being dissatisfied with decision of the trial magistrate appealed to this court on the following grounds; -

1. That the learned trial magistrate erred in law and in fact when he failed to properly evaluate evidence on record and came to a conclusion that led to a miscarriage of justice.
2. That the learned trial magistrate erred in law and in fact when he relied on hearsay evidence from PW1 the accused s father which was not corroborated by any other witness in convicting and sentencing the appellant.
3. That the trial magistrate erred in fact and in law when he enhanced the sentence from the original 1 year pronounced in court on the day of judgement to 2 years in the typed signed and certified judgement.



At the hearing, the appellant was represented by counsel Kabali Ezira while the Respondent was represented by Adong Harriet holding brief for Tukamushaba Amelia, a state attorney.

Both Counsel filed written submissions that are on record and I shall consider them in this appeal.

The appellants counsel abandoned ground 3 and opted to argue the first 2 grounds in the order they were formulated.

### **ARGUMENTATION OF GOUNDS**

On ground one the appellants counsel argued that the trial magistrate did not only fail to evaluate the evidence but did not evaluate it at all citing the judgement on the record. That the magistrate did not allude at all to the evidence of the accused/appellant who put forward a defence of honest claim of right in the disputed property which in his opinion relates to determination of civil rights that cannot be determined in a criminal matter as was stated in the case of **okellow Oris Atama and anor vs Uganda SC.CR.App 53/13..** That failure to consider the defence evidence led to a miscarriage of justice. He relied on the cases **WEPUKHULU NYUNGULI VS UGANDA** and **EZIRA SEBUWUFU VS UGANDA** to support the above position and invited court to find merit in ground one of this appeal.

He further cited section 7 of the penal Code Act and stated that one cannot be held criminally liable for entering on land which she honestly believes to be theirs, has knowledge and proof of the same interest.

On ground two, counsel for the appellant submitted relying on section 59(a) of the evidence act and the case of **APEA MOSES VS UGANDA** that hearsay evidence is generally not admissible subject to exceptions. He faulted the trial magistrate in this case for relying on evidence of PW1 which in his view was hearsay evidence and not corroborated by any independent evidence.

In reply, the learned state attorney agreed that the trail magistrate did not evaluated the evidence on record and did not consider the ingredients of the offence of malicious damage to property in the judgement but argued that this did not cause a miscarriage of justice. In her view, this court is under duty to evaluate the evidence on record and make its own finding relaying on the authority of **KIFAMUNTE HENRY VS UGANDA**. She invited court to consider evidence of PW1 an d PW3 and DW1 to find that the appellant had maliciously damaged the property of PW3 acquired by purchase and confirmed by PW1.



On ground 2, the state attorney argued that PW1s evidence is not hearsay as it was corroborated by PW5 a police officer who visited the scene and found the crops damaged and that DW1 participated in the said damage. That PW1 testified in matters of fact which should not be ignored.

### **Duty of the first appellate Court.**

It is settled law that the duty of the first appellate Court is to re-evaluate the evidence on record of both parties, subject it to fresh scrutiny and come to its own conclusion. See **Kifamunte Henry vs Uganda supreme Court Criminal Appeal NO. 10 of 1997**

Further court in **Pundya VR 1957) EA** stated that the appellate court cannot excuse its self from the fact weighing conflicting evidence and drawing its own inference and conclusion, although it bears in mind that it has either seen nor heard the witnesses and should make due allowances.

Therefore, in criminal cases, prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift and the accused can only be convicted on the strength of the prosecution case and not because of any weaknesses in his defence, (See **Ssekitoleko v. Uganda [1967] EA 531**). This court will be guided by the above position of the law.

### **RESSOLUTION**

**GROUND 1 That the learned trial magistrate erred in law and in fact when he failed to properly evaluate evidence on record and came to a conclusion that led to a miscarriage of justice.**

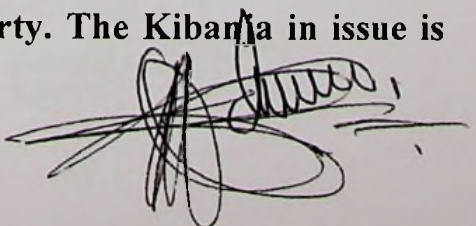
From the court record, the appellant was charged, tried on three counts but was only convicted and sentenced on the count of malicious damage to property. It was alleged that the appellant maliciously damaged the property of Nalugwa Betty.

Prosecution led evidence to show that the damaged property belonged to pw3 and that the appellant was the one responsible relying on the evidence of 5 witnesses.

From the lower court record, the appellant in his evidence as DW1 raised a defence of an honest claim of right and testified that;

**“I have never destroyed the complainant’s property. The Kibanja in issue is mine”**

**Section 7 of the penal code Act** is to the effect that; -



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

In this case as I have already stated, the appellant carried out activities on land believing that the land belonged to him.

From the above evidence on court record, I have no doubt that the facts before the lower court constitute a land dispute which gives rise to a question or issue of determining civil rights of the parties before a meaningful criminal proceeding can commence.

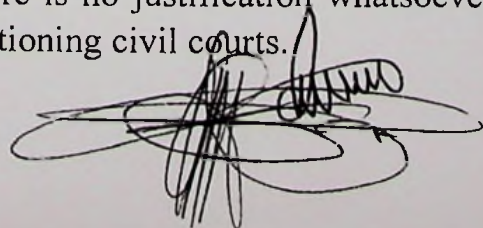
In the case of **Joseph Agenda Vs Uganda HCT-00-CR-CM 003 of 2011** court brought out the distinction between civil and criminal proceedings where it was held that *"there is a clear distinction between civil and criminal actions. The civil proceedings determine the civil litigants' civil claims or liabilities and the standard of proof is on the balance of probabilities. There is a public interest in the criminal proceedings and the required standard of proof is beyond reasonable doubt. The civil proceedings are individualistic in nature while the criminal proceedings are public in nature."*

In this case, the subject matter is a Land dispute where each party is claiming ownership. These are not rights that can be determined in criminal proceedings in my view.

Courts have over time decided that "criminalizing land disputes is an abuse of court process and perverts the course of justice". In **Okello Oris Atana & Another vs. Uganda Cr. App 0035/2013**. Court stated as follows.

*"issues of land should not be confused with criminal issues. Claim of ownership is a civil right that ought to be allowed to be proved in a Civil Court and should never be criminalized as this would amount to persecution. Land matters have been criminalized and courts of law are convicting accused persons who have a Constitutional right to claim what truly belongs to them".*

I entirely agree with the above decision. There is no justification whatsoever for criminalizing civil matters when we have functioning civil courts.

A handwritten signature in black ink, consisting of several overlapping loops and a final flourish extending to the right.



I find that evidence adduced before the trial court in Criminal Case No. 136/2017 was an attempt to solve ownership of land in a criminal case. The criminal case from which this appeal arises should never have been sanctioned.

The criminal case was purely a civil matter disguised as a criminal one.

I therefore agree with counsel for the appellant that the trial magistrate erred in law and in fact when he failed to consider the defence put forward by the appellant.

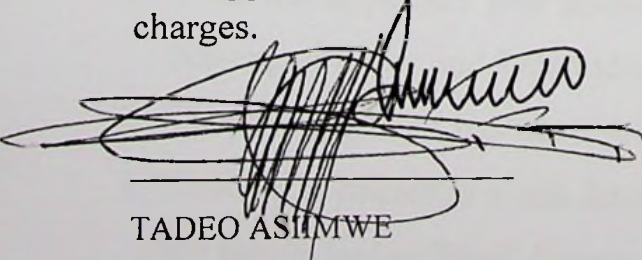
Secondly the magistrate's failure to consider and evaluate the defence case is grave error which makes the entire decision wrong hence occasioning a miscarriage of justice.

A close scrutiny of the evidence for both parties on record shows that the appellant clearly had an honest claim of right over land which the trial magistrate ignored in his judgement. Therefore, ground 1 succeeds.

As regards ground 2, evidence of PW1 was not direct evidence. It was evidence of known facts about ownership of land. The facts about damage to property were clearly hearsay and did not fall under the known exceptions. From the record, the witness was simply stating facts relating to the kibanja ownership and not a witness to the damage of the property in issue. There is no way his evidence could be used to convict the appellant which the trial magistrate did. I agree with appellant's counsel that there was no evidence to lead to the conviction of the appellant in this case. I equally find the evidence on record insufficient to warrant a conviction. Therefore, ground 2 has merit and it succeeds as well.

In conclusion this appeal has merit and the same is hereby allowed. The conviction and sentence against the appellant are hereby quashed and the sentence of the appellant substituted with an acquittal.

The appellant should be set free immediately unless held on any other lawful charges.



TADEO ASIMWE

JUDGE

7/04/2021.