

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 101 OF 2019
(ARISING FROM MAKINDYE CRIMINAL CASE NO. 974 OF
2019.

NAKIMERA RACHAEL ::::::::::::::::::::::::::::::::::: APPELLANT
VERSUS
UGANDA ::::::::::::::::::::::::::::::::::: RESPONDENT

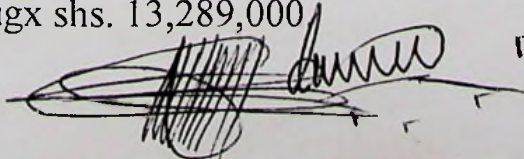
BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

JUDGMENT

Introduction.

This appeal arises from judgement and orders of the learned Magistrate Grade 1 of Mkindye, Okuumu Jude Muwonge.

The appellant (convict) was charged with the offence of theft Contrary to Sections 254 (1) and 261 of the Penal Code Act, Cap. 120, Laws of Uganda. The appellant was tried, convicted and sentenced to four (4) years imprisonment, and a compensation of ugx shs. 13,289,000



The appellant being dissatisfied with the whole judgment, conviction and sentence, appealed to this court on the following grounds;

That the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby occasioning a miscarriage of justice,

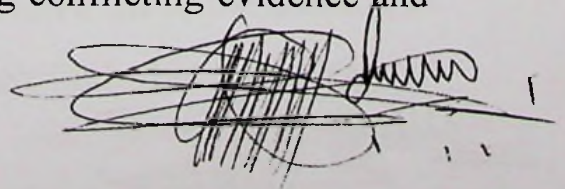
That the learned Trial Magistrate erred in law and fact when he gave a harsh and Excessive Sentence.

At the hearing, the appellant was represented by counsel Oonyu Vincent while Nakato Lydia holding brief for Jacqueline Akawo for DPP represented the respondent. Both counsel filed written submissions and made oral Highlights of their submissions which I shall consider in this judgement.

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 of 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.

In criminal cases, the 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**).

RESSOLUTION

GROUND 1: That the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record thereby occasioning a miscarriage of justice.

On ground one above, the appellants counsel submitted that the appellant in her defence clearly stated that the complainant locked her room as she went to work and that she only used to hear from the complainant that her brother a one mike used to steal her money. That the appellant clearly admitted that she gave A2, and A3 the money recovered from them but also stated the source of the money to have been a one mike who was making sexual advances to her. She further submitted that the trial magistrate in his judgement did not consider the evidence of the defence as to grudges amongst the parties which could have led to the framing of the appellant. On that basis he prayed that court finds that the judgement

was arrived at erroneously and therefore be set aside and conviction be set aside.

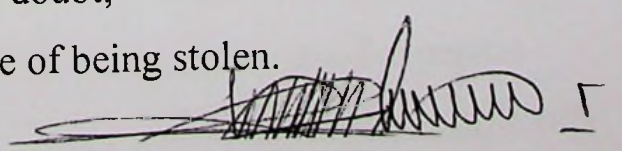
In reply the learned state attorney submitted that prosecution proved beyond reasonable doubt that the appellant was a maid at a house of PW1 and left un ceremoniously while PW1 was taking a shower. That she found her bag containing the items in the charge sheet missing and the appellant was nowhere to be seen. That the appellant was later tracked and searched and was found with a long Black wig, a pair of baby socks, a nicker, and lipstick which the complainant identified to be hers. That A2 and A3 both testified that the appellant gave them 50 Euros and 3 Yuan noes which were recovered from them. She finally prayed that court finds that prosecution led sufficient evidence to prove the case of theft against the appellant beyond reasonable doubt and invited this court to uphold the conviction and sentence.

Section 254 (1) of the Penal Code Act, defines the offence of theft: -

As a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."

From the above definition, Prosecution was under duty to prove the following ingredients beyond reasonable doubt;

1. Whether there was property capable of being stolen.

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2. Whether the property was fraudulently taken away.
3. Whether there was an intention to permanently deprive the owner of its use.
4. Whether the accused person participated in the commission of the crime.

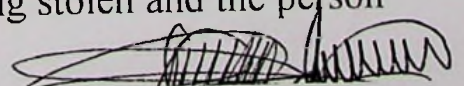
Section 2 (w) of the Penal Code Act, Cap 120; is to the effect that “Property” includes everything animate or inanimate capable of being the subject of ownership.”

Further, **Section 254 (2) of the Penal Code Act,** states *that a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents; Whether it is taken for the purpose of conversion or whether it is at the time of the conversion in the possession of the person who converts it.*”

In addition, **Section 254 (6) of the Penal Code Act,** states that *a person shall not be deemed to take a thing unless he/she moves the thing or causes it to move.*”

In this case from the lower court record, it was the evidence of PW1 and PW2 that on the 3rd of August 2019, PW1 found her bag containing 3000 dollars, 300 Euros, 400 Yuan, a bill of lading, a passport and mobile phone missing from her bed room. That up to date most of valuable items are still missing.

This court is therefore agrees with the trial court’s finding that the properties that went missing were capable of being stolen and the person



who took them did so fraudulently with an intention depriving the owner of their use.

What is left for this court to determine is whether there is sufficient evidence on record to prove beyond reasonable doubt that the appellant participated in the alleged theft.

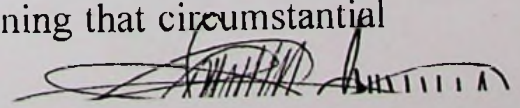
I perused the court proceedings and the judgment of the lower Court and it shows that the trial magistrate relied on circumstantial evidence of conduct to convict the appellant as there was no direct evidence to the alleged theft.

Byaruhanga Fodori vs. Uganda, S.C. Crim. Appeal No. 18 of 2002; [2005] 1 U.L.S.R. 12 at p. 14, the Supreme Court of Uganda spelt out that:-

"It is trite law that where the prosecution case depends solely on circumstantial evidence, the Court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

The Court must be sure that there are no other co-existing circumstances, which weaken or destroy the inference of guilt. (See S. Musoke vs. R. [1958] E.A. 715; Teper vs. R. [1952] A.C. 480)."

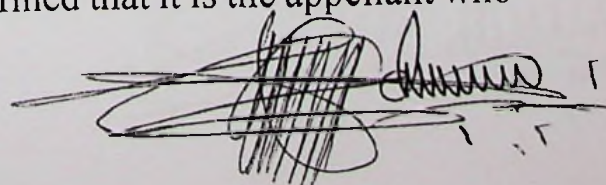
In addition to this, in the case of ***Tindigwihura Mbahe vs. Uganda S.C. Crim. Appeal No. 9 of 1987***, Court issued a warning that circumstantial



evidence must be treated with caution, and narrowly examined, because evidence of this kind can easily be fabricated. Therefore, before drawing an inference of the accused's guilt from circumstantial evidence, there is compelling need to ensure that there are no other co-existing circumstances which would weaken or altogether destroy that inference.

From the above cited cases, it is the duty of this court to re-evaluate the evidence on the lower court record and confirm that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

PW1 testified that on the fateful day she went to the bathroom leaving her bag in the bedroom with the door open. That on return she found her bag containing 3000 dollars, 300 Euros, 400 Yuan, a bill of lading, a passport and mobile phone missing from her bed room. That she equally found the appellant who was her maid missing and her phones off. That she was finally tracked and arrested and on arrest she was found with some of the properties to wit; - a long black wig, lipstick and baby stockings that belonged to PW1. That the appellant led them to A2 and A3 who she confirmed she gave 50 Euros and 3 Yuan. This money was indeed recovered from A2 and A3 who also confirmed that it is the appellant who gave it to them the money recovered.

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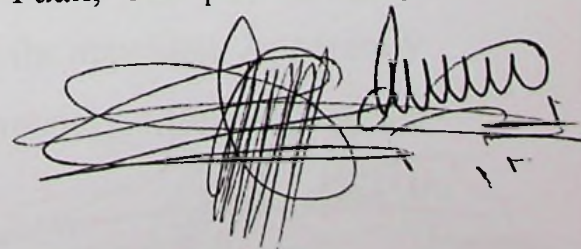
PW2, Micheal a brother of PW1 with whom she stayed with in the house corroborated evidence of PW1 on the missing items, the disappearance of the maid and recovery of the mentioned items from the appellant, A2 and A3 respectively.

PW3 Muganza Eriza testified that he tracked the appellant (Racheal) and found her in a local bar and rushed her to Gaba police station. That the appellant Racheal told her that she only took 170,000/= from PW1's bag.

This was confirmed by PW4 a police officer attached to Gaba police station testified that she searched the home of the appellant's sister where the appellant resided and recovered a black long wig, baby stockings and lip stick which the complainant confirmed the be hers. That the appellant confirmed that she stole 170,000/= which she gave to her boyfriend A2 and her boyfriend's brother A3.

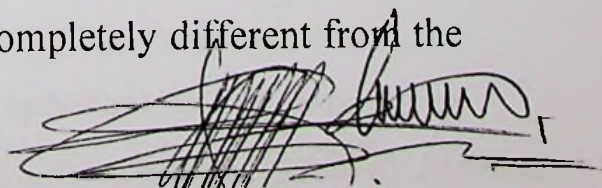
That they proceeded to the boyfriend's house where they recovered 50 Euros from Duncan A2 and 3 Yuan from Joshua A3. That A2 and A3 confirmed that they got the said money from the appellant.

PW5 the investigating officer corroborated the evidence of PW4 and confirmed the recovery of 50 Euros and 3 Yuan, one pair of baby stockings and one pair of lipstick.

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On the other hand, the appellant testified in the lower court as DW1 and stated that she was working as a house maid of a complainant and that on the fateful day she left the complainant's house when the complainant was in her bedroom sleeping. That before she left the complainant always complained that her brother Michael steals her money. That by the time the appellant left the complainant's house, she was not at good terms with the complainant as the complainant thought that she was sleeping with her husband. That she was also not in good terms with the said Michael as the said Michael constantly made sexual advancements to her. That however Michael used to give her money so she could accept to love him. And that on the fateful morning she left without telling anybody because Michael tried to rape her and she decided to leave considering everything that was going on in the house. In cross examination she confirmed that she got the money she gave A2 and A3 from Michael.

The above evidence leaves court with number of unanswered questions. The appellant was charged with theft of a bag containing 3000 dollars, 300 Euros, 400 Yuan, a bill of lading, a passport and mobile phone. However, the items recovered from the appellant were 50 Euros and 3 Yuan, one pair of baby stockings a black wig and lipstick which the complainant claimed to be hers. In his judgement the trial magistrate heavily relied on the recovered items to convict the appellant. Apparently the items recovered from the appellant are completely different from the ones in the charge sheet.

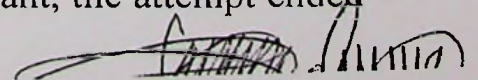


Even if it were true that the items recovered from the appellant belonged to the complainant, this would be a different charge all together and not evidence enough to convict the appellant on the present charge sheet before the trial court.

Further, although the appellant in her plain statement at police stated that she stole 170,000/=, in her testimony in court she denied the same arguing that he as told by police to mention it. The said money was not recovered and there was no explanation given by police officers who edified inn court for their failure to recover it together with the other items mentioned in the charge sheet. What was recovered was 50 Euros, 3 Yuan, one pair of baby stockings a black wig and lipstick which are completely different from the alleged 3000 dollars, 300 Euros and 400 Yuan in the charge sheet before the trial court. The items in the Charge sheet did not bear Unique feature so as to be identifiable as the stolen properties in this case

In addition to the above, the appellant gave an explanation as to the source of the money that was recovered from A2 and A3 to be a one Michael a brother to the complainant who was luring her in to a love affair which she resisted.

The inculpatory facts and evidence in this case do not completely point to the guilt of the appellant as there are other co-existing circumstances, which weaken or destroy the inference of guilt. These include the presence of Michael in the homestead, the claim of the money by the appellant, the existing bad relationship put forward by the appellant, the attempt ended



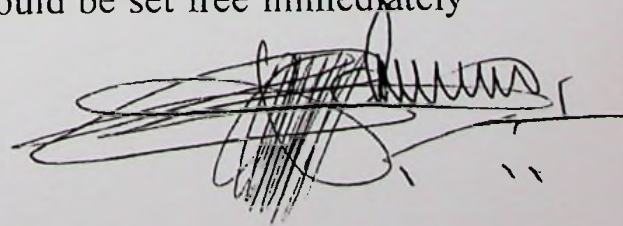
love relation between the appellant and Michael and the discrepancy between the recovered properties and those mentioned in the charge sheet. The circumstantial evidence that was led by the prosecution in this case was the weakest in nature and required corroboration by independent evidence which I find lacking in this case.

The trial magistrate seems to have relied largely on the evidence of prosecution and failed to weigh the evidence of the defence.

With the above un answered questions, I find that the evidence that was led in the trial court was insufficient to sustain a conviction therein and the trial magistrate failed to properly evaluate the evidence on record and wrongfully convicted the appellant on the basis of suspicion hence occasioning a miscarriage of justice.

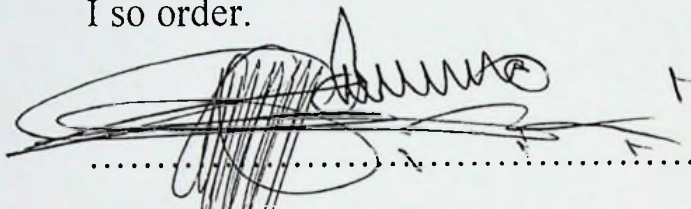
I do not find it necessary to resolve the 2nd ground as this ground determines the entire appeal.

In conclusion, I find merit in this appeal, and consequently set a side conviction, sentence and compensatory orders against the appellant in Makindye Criminal Case No.974 of 2019. The appellant's conviction is hereby substituted with an acquittal. She should be set free immediately unless held on other lawful charges.

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I order that the items which were exhibited on court record be returned to the appellant as her property.

I so order.

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Tadeo Asimwe

JUDGE

26/3/2021