THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CRIMINAL APPEAL NO.70 OF 2019

(ARISING FROM BUSIA MAGISTRATES COURT CRIMINAL CASE NO. 604/2019)

ABOTH CHRISTINE :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

[1] This is an appeal against the conviction and sentence passed by the Chief Magistrate of Busia at Busia delivered on the 10/12/19.

[2] The facts of the case are that the complainant **Naula Teopista** was operating a mobile money business in Busia Town under the business name, **Natural investment**.

[3] The complainant had employed the Appellant/accused to operate her business. On the 3/7/19, the complainant went to the Appellant and requested for a sum of 186,700 k.c. The appellant told her that the mobile money line, Safari com. Mpesa 048562 had been blocked with the money on it. The complainant with the help of a one **Abdallah Yusuf** (PW_4) confirmed with Safari com, Kenya, that indeed the mobile money line in question had been blocked for 3 months. It was nevertheless unblocked but there was no mobile money on it. It had zero balance.

[4] The appellant allegedly confessed that she used the money. When she failed to pay it back, the complainant reported to police. The appellant was arrested, charged, tried, convicted and sentenced to a fine of

6,534,500 Ugx an equivalent of **186,700 k.c** and in default, to serve **36 months imprisonment**.

[5] The appellant being dissatisfied with the above decision, lodged the instant appeal on the following grounds as contained in her memorandum of appeal.

(i) That the learned trial Chief Magistrate erred in law and fact when she failed to evaluate the evidence on record thereby occasioning a miscarriage of justice.

(ii) That the learned Chief Magistrate erred in law and fact when she convicted the appellant for the offence of theft without any proof in respect of the agent line No. 048562 where 186,700k.c had been deposited thereby leading to a miscarriage.

(iii) That the learned trial Chief Magistrate erred in law and fact when she convicted the appellant for the offence of theft without any documentary evidence showing a record of transactions on the agent line No. 048562 thereby occasioning a miscarriage of justice.

On appeal, the appellant sought leave of court to add the 4th ground of appeal;

(iv) That the learned chief Magistrate erred in law and fact when she imposed a harsh and illegal sentence.

<u>The duty of the appellate court</u>

[6] In **OKWONGA ANTHONY V UGANDA CRIMINAL APPEAL NO.20/2000(CS),** the duty of the appellate court was outlined as to rehear the case and to reconsider the material evidence before the trial court. It must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. This is to re-evaluate all the evidence on record and come to its own conclusion; **PANDYA V R (1957) E.A 336**.

Determination of the Appeal.

[7] This court will proceed to resolve the 1st to the 3rd grounds of the appeal together because they all relate to the evaluation of evidence.

[8] Counsel for the appellant submitted that the prosecution failed to adduce evidence to prove who was the owner of the money alleged to had been stolen. Secondly, that there was no documentary evidence from Safari com. showing that there was money on the agent line No. 048562 at the time of the commission of the offence, and lastly, that the sentence to a fine of **Ugx 6534,500 (186,700 k.c)** in default of **36 months imprisonment** was illegal and it was contrary to **Section 180 M.C.A.**

[9] On the other hand, Mr. Semakula for the respondent justified the trial Chief Magistrate's findings and conviction of the appellant because on arrest, the appellant confessed receiving the money and using it and that there was evidence that the money belonged to the complainant.

[10] In evidence, as correctly found by the learned Chief Magistrate, it is a fact that the complainant, **Naula Teopista** (PW_1) operated a mobile money business using Safari com. No.048562 under a business name **Natural Investment** and had employed the appellant to operate that business on her behalf. The appellant in her defence admitted this fact and during cross examination admitted further that the 186,700k.c was for the complainant. This, I find as sufficient evidence and proof that the complainant was the owner of the money that was allegedly stolen.

[11] The issue however is whether there was money amounting to **186,700k.c** on the **Safari com-mpesa mobile money agent line 648562** at the time the appellant was operating it on behalf of the complainant and that the accused stole it.

[12] The evidence of the complainant is that on 3/7/19, she went to the appellant and demanded for all the money that was on the Safari com. Mpesa the appellant was operating which was amounting to 186,700 k.c. That the accused told her that the line had been blocked with the money on it and therefore, it could not be accessed. With the help of **Abdallah** (PW_4), it was confirmed that indeed, the line had been blocked by Safari com. Again, with the help of PW_4, the line was blocked but it was found that there was no money. It had zero balance.

[13] On her part, in her defence, the appellant insisted that by the time the line was blocked, it had the 186,700k.c.That she gave the line to a one **Bogere** to take it to Safari com. so as to unblock it. That is when it was found that there was no money on the line. According to the complainant, it is the said **Bogere** and **Abdallah** who had sold to her this Safari com. Mpesa line.

[14] In the above circumstances, I find that it was incumbent upon the prosecution to disapprove the appellant and show that indeed, at the time, the Safari com. line in question was blocked, this amount of money, 186,700 k.c was on the line. By doing that, then the prosecution would have proved that before the Safari com-Mpesa line in question was blocked, the appellant had diverted the money to her personal use, hence theft since the money did not belong to her. The prosecution would have proved this by securing a print out of the transactions on the Safari com-Mpesa line 048562 which would clearly show when the money was deposited and at what stage is disappeared. Had the learned trial Chief Magistrate considered this aspect of evidence, she would have arrived at a different conclusion that there is doubt that the appellant stole the money in question. The learned trial Chief Magistrate failed to properly evaluate evidence on record, she only relied on the unsubstantiated evidence of **D.C Ogwal Patrick** (PW_3) who claimed that the appellant confessed to stealing the money and that the

charge and caution statement to that effect was obtained by **D/P Emuru John** who neither testified nor had the said charge and caution statement exhibited and admitted in evidence to pin the appellant.

[15] Besides it is the evidence of **Ogwal Patrick** (PW_3) that on arresting the appellant, the appellant was heavily pregnant, "her pregnancy had progressed" and therefore, it is my view to safe guard herself, she had no option but to promise to sort out the matter with the complainant so as to secure the police bond. This did not amount to a confession that the appellant committed the offence.

[16] As regards whether the sentence was harsh and illegal, I have been able to appreciate the argument and submission of counsel for the appellant on how he has applied **Section 180 M.C.A.** It provides that where a fine is imposed by a magistrate's court under any law in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, the court passing sentence may in its discretion-;

direct by its sentence that in default of payment of the fine, the offender shall suffer for a certain period of imprisonment ordered by court in respect of the non-payment of any sum of money adjudged to be paid by a convict. However, this shall be on such terms as in the opinion of the court will satisfy the justice but shall not exceed in any case the maximum fixed by the following scale;

Amount	Maximum period
Not exceeding 2000/=	7 days
Exceeding 2000/= but not exceeding 10,000/=	1 month
Exceeding 10,000/= but not exceeding 40,000/=	6 weeks
Exceeding 40,000/= but not exceeding 100,000/=	3 months
Exceeding 100,000/=	12 months

17] It is clear from the above provision of **section 180 M.C.A** that the maximum default period of imprisonment for a fine exceeding Shs.100, 000/=, is 12 months term of imprisonment.

In this case, the trial Chief Magistrate sentenced the appellant to 36 months term of imprisonment, in default of payment of the fine of 6,534,500/=.

[18] Whereas the sentence of a fine of Ugx 6,534,500/= (186,700k.c) is permissible and was therefore not harsh considering the subject matter of the offence, the default sentence of 36 months imprisonment was and is illegal in so far as it exceeded the maximum punishment of imprisonment provided for under the Magistrates Court Act Cap 16. The maximum punishment of the offence in default of payment of a sum **exceeding 100,000/= is 12 months imprisonment** and indeed the default sentence of **36 months imprisonment** that was imposed was manifestly illegal.

[19] In conclusion, the appeal in the premises succeeds, the conviction is quashed and the sentence is accordingly set aside, the appellant is to be set free unless she has other lawful pending charges to hold her in prison.

Dated at Mbale this 5th day of February, 2021.

Byaruhanga Jesse Rugyema

JUDGE.

5/2/21

Appellant present

Semakula for the Respondent

Wamimbi for the Apellant

Masola: Clerk

Court: Judgment delivered in the presence of the above.

Byaruhanga Jesse Rugyema.

JUDGE.