THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL No 95 OF 2019

(Arising from Kira Magistrates Court Criminal Case No 780 of 2019)

BARASA HASSAN :::::::::::::::::::::: APPELLANT

vs

UGANDA :::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant, **Barasa Hassan** filed this appeal against the judgment, orders and sentence of **HW Aciro Joan,** Magistrate Grade I Kira Magistrates Court, who convicted him on a charge of Theft c/ss 254 (1) and 261 of **the Penal Code Act (PCA)** and he was sentenced to 4 years imprisonment and ordered to pay compensation of 10,850,000/-.

The background to this appeal is that on the 30th of November 2018 the appellant was produced before the Magistrates Court at Kira where a charge of Theft c/ss 254 (1) and 261 of **the Penal Code Act (PCA)** was read to him. He pleaded not guilty.

The prosecution case was that PW 1 - Lwanga Charles, the complainant, run a shop selling second hand children's shoes on Kamuli Road in Kireka. In the year 2016 he

employed the appellant to run the shop. When the complainant did a stock taking in February 2017 he discovered 585 shoes were missing. The appellant told Lwanga, in the presence of PW 2, Vincent Ssemwogerere, that he had used the proceeds from the sale of the shoes to enable him facilitate travel abroad. That a reconciliation of sales revealed that the shoes taken were worth ten million eight hundred thousand shillings (10,800,000/-). That the appellant did not ever refund the stolen money. It was stated that the accused told PW 2 that he hoped to refund from abroad. The matter was reported to the police on the 21st of November 2018. The shop was visited and photographed by a Police Officer. The photographs were tendered as PE 1. The appellant also recorded a charge and caution statement where he stated that someone had persuaded him that he could take the appellant abroad to work. So he used the proceeds of the sales to process his travel hoping to pay back from overseas.

The accused denied the charge. He stated that he was a businessman dealing in fish. That he also had a neighbour called Ian whose phone screen got damaged. That once when the appellant was going to his home in Busia, Ian requested him to take the phone to Kenya and have the screen replaced. The appellant went to Busia on the 17th of November 2019. On his way back there was a call on Ian's phone where a man called Charles rang and asked to meet him. That he met Charles who was in the company of four other men. They said Ian had stolen money and asked the appellant to take them where Ian was. That they tortured the appellant and took him to Kireka Police where, under torture, he was made to sign documents. The appellant said he did not know Charles.

The learned trial magistrate believed the prosecution case and convicted the appellant as above.

The appellants being dissatisfied with the conviction and sentence of the trial court filed this appeal with 7 grounds namely,

1. The learned trial magistrate erred in law and fact by failing to properly evaluate the evidence on record thereby occasioning a miscarriage of justice.

2. The learned trial magistrate erred in law and fact by being biased against the appellant thereby leading to an abortion of justice.
3. The learned trial magistrate erred in law and fact by holding the matter in conjecture and perfunctory manner thereby arriving at a wrong decision.
4. The learned trial magistrate erred in law and fact to convict and sentence the appellant without the evidence of the complainant on record.
5. The learned trial magistrate erred in law and fact by failing to record some of the evidence during in cross examination of the prosecution witnesses

The appellant prayed that this Court:

i. Allow the appeal
ii. Set aside the conviction and sentence of the appellant
iii. Acquit the appellant
iv. And in the alternative order a retrial

Submissions

The parties filed written submissions which are on record.

This Court reminds itself that as a first appellate court, it has a duty to subject the evidence to a fresh scrutiny and come to its own conclusions, bearing in mind that it has not seen the witnesses testify (**Kifamunte Henry V Uganda SCCA NO. 10 of 1997** unreported).

It is trite that the onus is on the prosecution to prove all the elements of the offence the appellant was charged with to a standard beyond reasonable doubt.

Grounds

I will handle the grounds jointly, as the complaint is that the learned trial magistrate did not evaluate the evidence properly. That if she had, she would have found that the evidence was insufficient and acquitted the appellant.

The appellant's submission is that there was no evidence of his employment with the complainant. In addition that the allegation that there were goods worth 10,800,000/- is unfounded as there was basis laid to establish the value of merchandise in the complainant's shop. In any event the testimony that there were 1000 shoes in the beginning and 600 pairs missing when the stocktaking was done is unrealistic. It was said the shoes sold for between 10,000/- and 45,000/-. That there was no record of the stocktaking produced as evidence. The other complaint was that the appellant was denied bail in the lower Court. It was also argued that the prosecution case was riddled with contradictions which included saying that a whole year passed before the case was reported to the police, where the exact location of the shop was and who actually did the stocktaking, was it PW 1 or PW 2? That the conviction of the appellant was based on suspicion rather than on the strength of the evidence adduced.

That the trial magistrate ignored the appellant's defence stating that he had never worked for the complainant. That the charge was intended to extort money from the appellant.

The respondent supports the decision in the lower court and prays the appeal is dismissed. That the trial magistrate properly evaluated the evidence and found that PW 1 owned a shop in which the appellant as an employee and stole 585 pairs of shoes. That the stock taking was done in presence of the appellant who did not challenge this aspect during the hearing. On the absence of a stocktaking record, the respondent states that the appellant did not dispute the fact that it was done and admitted it in his charge and caution statement which was relied on by the trial magistrate. It was also submitted that this court should ignore the contradictions pointed out as being minor and can all be explained. Regarding the Charge and caution statement, at trial the appellant stated the basis of his objection was the order in which his names were written namely: that he was Hassan Barasa not Barasa Hassan. That the trial magistrate after considering the evidence concluded that it was not necessary to carry a trial within trial before she allowed the statement.

This Court will do a re-evaluation of the evidence.

The appellant was charged with the offence Theft c/ss 254 (1) and 261 of **the Penal Code Act.**

Section 254 (1) stipulates that,

> 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.

Section 261 is the penal section. It states,

> Any person who steals anything capable of being stolen commits the felony called theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment not exceeding ten years.

The elements of the offence of theft in this case are:

1. Property (something capable of being stolen)
2. Fraudulent conversion
3. (Participation) By the accused

1) With regard to the first element, the appellant argued that there was no proof of a shop or merchandise in form shoes. In this case there were pictures taken by PW 3 of a shop full of shoes and exhibited as PE 1. This evidence of the shop was not challenged at any stage during the trial. The cross examination was confined to challenging the employment if any of the appellant by PW 1. A failure to cross examine on a material aspect of evidence leads to an inference that it is accepted as true. In these circumstances PW 1 and PW 2 both stated that the appellant was employed by the complainant. That there were shoes for sell in the shop. The appellant submitted that the stock taking was not proved. I agree that the stocktaking book was not produced. However it is not the stock taking book that would prove that there were shoes. A court evaluates evidence as a whole. Here the nature of cross examination again is pertinent. There was no challenge at any stage of the

testimony challenging the existence of a shop or its stock. The appellant also stated that he was only arrested for being in possession of one Ian's phone. In light of a lack of a specific challenge I find that there was a shop with shoes. That the shoes belonged to PW 1.

For that reason there was property in the shop which belonged to the complainant. The first element was accordingly established.

2) Fraudulent conversion

In section 254 (2) of **the Penal Code** provides in the case of money, an intent to use it at the will of the person who takes or converts it, although he or she may intend afterwards to repay the amount to the owner, and "special owner" includes any person who has any charge or lien upon the thing in question or any right arising from or dependent upon holding possession of the thing in question.

Fraudulent conversion in the offence of theft was considered in the case of **R vs Burns [1958] E.A. 142** where the court held,

> ". . . conversion was defined by Atkin, J., as he then was, in *Lancashire and yorkshire Ry. Co. v. MacNicoll*.
>
> (1) "Dealing", he said, 'with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.'
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> "This definition was approved by Scrutton, L.J., in *Oakley v. Lyster*.
>
> (1) "Atkin, J., goes on to point out that, where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner."

In the instant case, a shop attendant or salesperson is a special owner, holding the goods for purposes of making sales for the business which is owned by the proprietor. If that attendant makes sales and put the proceeds to any other use other than to hand over to the owner or to the benefit of the business, then that is conversion. He has dealt with the goods in a manner inconsistent with the rights of their owner.

The evidence adduced is that it was intended that money would be paid back it was used. The fact of that intention is immaterial and does not exculpate the perpetrator.

3) Participation

The appellant denied participating in the in this offence. That he was not an employee. The onus on the prosecution was to place the appellant at the scene. The appellant stated that he was only arrested because he had a phone that belonged to one Ian.

The prosecution relied on a charge and caution statement. The appellant stated that the statement was not recorded in the language in which it was stated. In this case the officer who recorded this charge and caution told the Court that he and the appellant spoke in Luganda. Then during the trial the appellant that he objected to the statement because it bore the names Hassan Barasa and yet his names were Barasa Hassan.

The statement was admitted by the trial magistrate after due consideration of the objection. This court notes that the paramount consideration when determining whether a charge and caution statement should be admitted is whether there was violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made (see Section 24 of **Evidence Act**).

In the case of **Haji Makubo Nakulopa vs Uganda SCCA 25 OF 2001** the Supreme Court held that,

> We wish to point out that a trial within trial is conducted when a confession statement is objected to on such grounds as that the appellant was tortured or induced for the purpose of making the confession statement.

This holding emphasises the provisions of Section 24 of **the Evidence Act** cited.

This Court has examined the record and agrees with the trial magistrate. The statement was properly admitted as the only challenge made was the order the names of the suspect were written.

In that statement the appellant admitted taking the money.

Secondly the testimony of PW 1 and PW 2 both show that there was a stock of shoes in the shop which was taken by the appellant.

The appellant states in view of certain contradictions then this evidence is unreliable.

Uganda Vs. Sowedi Ndosire (l988-90) HCB 46 states that the law on inconsistencies and discrepancies is that grave inconsistencies or contradictions unless satisfactorily explained or reconciled will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies and contradictions will not normally have that effect unless they point to deliberate untruthfulness

I have examined these contradictions. None are material as they do not go to the root of this case. There is no challenge to the presence of the appellant at the scene or the conversion of the proceeds of the sale of the shoes to his own use.

The appellant therefore admitted converting the shoes. That evidence is corroborated materially by the evidence of both PW 1 and PW 2. It is also true that on its own, the evidence is sufficient to sustain the element of participation of the appellant.

In the circumstances, I find that the appellant is the one who as shop keeper had custody the shoes, that he sold them, that he used the proceeds for the purpose of facilitating his travel abroad.

That establishes the participation of the appellant as the 3rd element of the offence.

For the above reasons this court finds that the appellant was guilty of theft of the shoes.

In the result, all the grounds fail.

This appeal stands dismissed and the convict and orders of the trial Court confirmed.

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Michael Elubu

Judge

14.6.2021