

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT MASINDI

CRIMINAL APPEAL NO. 0007 OF 2021

(Arising from Kagadi Magistrate Grade 1 Court, Criminal Case No. 169 of 2017)

1. MUHUMUZA JOHN
2. KAHWA IMERIDA
3. TUMWESIGE MICHEAL } APPELLANTS

VERSUS

UGANDA RESPONDENT

JUDGMENT

Before: Hon. Justice Byaruhanga Jesse Rugyema

[1] This is an Appeal from the Judgment, Conviction and Sentence by **His Worship Nsibambi Lwanga**, Magistrate Grade 1 in the Chief Magistrate's Court of Kibaale Holden at Kagadi in **Criminal Case No. HMA-01-169-2017**.

[2] **Facts of the Appeal**

The 3 Appellants/Accused Persons: **Muhumuza John (A1)**, **Kahwa Imerida (A2)**, and **Tumwesige Micheal (A3)** were charged with the offence of **Malicious Damage to property contrary to Section 335(i) of the Penal Code Act**. It was alleged that on the 30th July, 2017 at Kyabayaga village in Kagadi District, the 3 Accused persons wilfully and unlawfully destroyed the cassava garden of **Byamukam John**. The Accused persons/Appellants pleaded not guilty to the offence.

[3] It was the prosecution case that on the 30th July, 2017 at around 10.00 a.m., a one **John Businge** (Pw2) found the Accused

persons/Appellants spraying the Complainant's garden of cassava measuring about **4 bipandes**, an equivalent of approximately an acre. The said **John Businge** reported the incident to the Complainant (**PW1**), the Complainant also reported the matter to the area L.C. I Chairperson who in turn referred the matter to Police. The Police Investigator, **D/CPI Felix Nankunda** visited the scene on 6th August, 2017 and indeed found that the Complainant's garden of cassava was sprayed by a herbicide named as **Master Weed**. Consequent of the above, the Accused persons/Appellants were arrested and charged with the instant offence.

- [4] The Accused persons/Appellants are siblings of a one **Kamboye**, an uncle to the Complainant. The Appellants own a garden which shares the same boundary with that of the Complainant.
- [5] In their defence statements, **A1** and **A3** stated that they sprayed their garden which was bush that shares the boundary with the Complainant with herbicide as part of the preparation for cultivation. That in the course of spraying, the herbicide was inadvertently blown by wind to the neighboring complainant's garden of cassava and caused damage. That however, upon realizing that the herbicide had damaged the Complainant's garden of cassava, **A1** and **A3** looked for the Complainant in order to settle the matter but the Complainant preferred to report the matter to Police.
- [6] **A2** on her part denied participating in the commission of the offence, she pleaded alibi. That she was at her home when the incident occurred.

[7] The trial Magistrate on his part, found all the 3 Accused persons/Appellants guilty of unlawfully and wilfully without any justification spraying and destroying the cassava garden of the Complainant and convicted them as charged. He sentenced each of the Appellants to 12 months in prison and payment of compensation of **Ugx. 3,878,608/=** to the Complainant within 4 months' time upon being released from prison

[8] The Appellants were not satisfied with the conviction and sentence issued by the trial Magistrate and preferred an appeal to this Court on the following grounds as confirmed in the Memorandum of Appeal.

- 1. The learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence and defenses of the Appellants on record and, as a result, he came to the wrong decision to convict the Accused/Appellants of the offences brought against them by the Prosecution.**
- 2. The learned trial Magistrate erred in law and fact when he held that the prosecution had proved the commission of the offences brought against each one of the three Accused/Appellants beyond reasonable doubt.**
- 3. The learned trial Magistrate did not properly evaluate the defenses brought by each one of the three Accused and as a result, he came to the erroneous decision that the three Accused/Appellants are collectively guilty of the offenses brought against them.**
- 4. The learned trial magistrate erred in law and fact when he held that all the three Accused/Appellants had**

wilfully, unlawfully and without legal justification committed the offenses brought against them and, as a result, he came to the wrong decision to convict all the three Accused and sentence them harshly.

5. The learned trial Magistrate erred in law and fact when he sentenced each one of the Accused/Appellants to twelve months' imprisonment plus joint payment of pecuniary compensation to the Complainant of Ugx. 3,878,605=, which was excessive and harsh in the circumstances.

Counsel Legal Representation

- [9] The Appellants were represented by **Mr. James Byamukama** of **Ms. Byamukama, Kaboneke & Co. Advocates, Kampala** while the Respondent was jointly represented by **Ms. Akello Florence, Assistant DPP, and Ms. Catherine Nakaggwa, both of the Office of the Director of Public Prosecutions**. Both Counsel for the Appellants and Respondent filed their respective submissions as permitted by Court.

Duty of the 1st Appellate Court

- [10] In agreement with both Counsel for the Appellants and Respondent submissions, it is trite law that, this being a first appeal, the duty of Court is to review all the evidence and material presented to the trial Court and come up with its own independent findings; **Kifamunte vs Uganda; S.C. Crim. Appeal No. 10 of 1997**. This Court is therefore required to review all the evidence and materials adduced at the trial and make an independent finding on whether the prosecution proved each one of the accused persons guilty of the alleged offence to the required standard of proof bearing in mind that

it did not have the benefit of observing witnesses as they testified.

Consideration of the Grounds of Appeal

- [11] **Grounds of Appeal from 1-4** relate as to how the trial Magistrate evaluated the evidence before him while **ground 5** relate to the fairness of the sentence that was given by the trial Magistrate. As a result, **grounds 1-4** are to be jointly considered while **ground 5** is to be considered separately.

Grounds 1-4: Evaluation of Evidence

- [12] Counsel for the Appellants submitted while relying on **Asega & 4 Ors Vs Uganda, H.C. Crim. Appeal No. 48 of 2011** that in order to sustain a conviction on a charge of **Malicious Damage** contrary to **Section 335(1) of Penal Code Act**, the prosecution must prove the following ingredients of the offence beyond reasonable doubt:

- (i) **Destroying or causing damage to property**
- (ii) **The property belongs to the Complainant or other person**
- (iii) **The destruction or damage is done maliciously, wilfully or unlawfully**
- (iv) **Identification evidence confirming the participation of the Accused in the incident**
- (v) **The Accused does not have a legitimate defence or legal justification for his or her actions**

- [13] Counsel argued that the phrase **Maliciously, Wilfully or Unlawfully** in **S.335(1)** signifies intention or *mens rea* that the accused person destroyed or damaged the property in issue intentionally without any claim of right or legal justification; **Muhwezi Jackson Vs Uganda, H.C. Crim. Appeal No. 10 of**

2008. That if Court finds that the Accused had a legal defence or justification for his or her actions such as a claim of right under **S.7 of the Penal Code Act**, lack of intention to commit an offence under **S.8 of the Penal Code Act**, or mistake of fact under **S.9 of the Penal Code Act**, the offence is not proved. He therefore argued further that in this case, the Appellants admitted the fact that the Complainant's garden of cassava could have been damaged when they sprayed their own gardens with a herbicide in order to clear the bush for cultivation. That their own garden is adjacent to and shares common boundary with the garden of the Complainant. They however pleaded that this was not intentional. The herbicide was accidentally blown by the wind to the neighbouring garden of the Complainant.

- [14] According to Counsel, the aforesaid defence was consistent with the fact that, when the 1st and the 3rd Appellants realized that the spray had caused damage to the neighbouring garden of the complainant, they immediately went to him to apologise and settle the matter, but the Complainant preferred to report to Police.
- [15] Counsel for the Respondent did not agree. According to her, the Appellants were placed on the scene of the crime and it is not in dispute that they destroyed the cassava of the Complainant.
- [16] Upon perusal of the lower Court Judgment, I find that the trial Magistrate at **page 4 of the Judgment** rightly in my view addressed himself on the position of the law in the matter as follows:

“Under Section 335(1) of the Penal Code Act, the offence Malicious damage to property is committed by any person who wilfully and unlawfully destroys and damages any property belonging to another.

The Prosecution has a burden to prove beyond reasonable doubt that the property belongs to the Complainant and that the Accused persons wilfully and unlawfully destroyed the property in issue. 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 Arrow Smith v Jenkins (1963) 2 QB 561 ...

All that has to be proved in that a wrongful act was done, without cause or excuse. Mere knowledge that it is likely to cause wrongful loss to owner of the property is sufficient”.

See also **Regina Vs Pembliton [1874-80] ALL ER. 1163**

- [17] The trial Magistrate upon properly directing himself on the law, at **para 5 of the Judgment** proceeded to convict the Appellants as follows:

“The Accused(s) indeed sprayed the Complainant’s garden (cassava) as was testified to by Pw2.

There was no evidence of a legal justification for such conduct. The Prosecution therefore proved beyond reasonable doubt that the destruction was done wilfully and unlawfully. I therefore find that the Prosecution proved its case to the required standard. It proved that the accused wilfully and without any justification sprayed and destroyed the cassava garden of the Complainant. I therefore convict the Accused persons as charged”.

[18] Nowhere in the Judgment do I find that the trial Magistrate considered the defence of the Accused Persons/Appellants. The law required the trial Magistrate to properly consider and evaluate the defence evidence; **Richard Ogola v Uganda H.C.Crim. Appeal No. 28 of 92** reported in KLR [1992] III 65, and **Uganda v Omony Patrick H.C. Crim. Case No. 061 of 2017**.

[19] In the instant case, the Appellants raised the defence of claim of right and accident. It was incumbent upon the Police to investigate and verify the same. It was equally incumbent upon the Prosecution to adduce evidence to rebut such a defence during the trial. It is not in dispute that the Appellants had neighbouring gardens to the Complainant. The investigating officer **D/CPL Nankunda Felix** (PW3) did not bother to check if indeed the Appellants sprayed their gardens with herbicides and find out the possibility of wind blowing the herbicide to the neighbouring gardens of cassava of the Complainant. This would be by especially finding out the distance between the Complainant's cassava and the alleged sprayed bush in the Appellants' garden and the extent of damage. This would have rebutted the accused's defence of accident that vitiates wilfulness/intention to destroy the Complainant's cassava plants.

[20] It is not in dispute that the portion of land that comprised of cassava plants was in dispute and the matter was in Court as between the Complainant and or his father with the Appellants. This was revealed by the investigating officer **D/Cpl Nankunda** (PW3) at **p. 30 of the typed Court record** thus:

“Complainant told me that the part where cassava was is in dispute and the matter is in Court. That it is family land,

the suspects and Complainant are of the same family. They are disputing over that same part”.

- [21] It is clear from the above, that the but the evidence on record reveal that the Appellants had a plausible claim of right. In **Byekwaso Mayanja Sebalijja vs Uganda [1991] HCB 15**, it was held that:

*“In a case under **Section 315(1) of the Penal Code Act**, honest belief whether justifiable or not that the property is the Appellant’s own would negative the element of **mens rea**. The Appellants’ claim negated the element of **mens rea** requisite under the section. The circumstances of the case could not sustain consideration under the Section”.*

- [22] As a result of the foregoing, I do find that the trial Magistrate did not evaluate the defence evidence and in rebuttal thereof. The trial Magistrate did neither consider the Appellants’ defence of accident which exonerates an accused person from criminal responsibility for an act or omission that is not intended and occurred independently of his will and claim of right which negatives the element of *mens rea*, a requisite under **S.315(1) of the Penal Code Act**. The above omission by the trial Magistrate occasioned a gross miscarriage of justice and on this ground the conviction has to be quashed. The trial Magistrate wrongfully convicted the Appellants as he did not properly evaluate the evidence before him.

- [23] Lastly, the 2nd Appellant raised a defence of alibi. It was not investigated by Police and it was not challenged or rebutted by the Prosecution. The eye witness **John Businge** (PW2) testified merely seeing **A2** fetching water but not surely participating in the spraying of the herbicide. Her alibi was alluded to by her Co-appellants. **PW2’s** lone identification evidence required

corroboration (**Yowasi Serunkuma vs Uganda S.C. Crim. Appeal No. 8 of 89**) in view of the fact that the parties had an underlying Civil trial in Court and the ownership of the land in Court and therefore, being the father of the Complainant, could have had an axe to grind against the Appellants.

[24] Once **A2** raised the defence of alibi, it is trite that the accused bore no duty to prove it. The Prosecution had the burden to disprove alibi and place **A2** at the scene of the crime (**Uganda Vs Mac Dusman Sabuni (1981) HCB 1**) in which it failed to discharge.

[25] In the premises, grounds 1-4 succeed. As a result, it serves no purpose to consider the last ground of appeal regarding the fairness of the sentence. I accordingly quash the conviction of the Appellants. The imprisonment of 12 months and payment of compensation of **Ugx. 3,878,605/=** are set aside. Unless the Appellants are held on some other lawful charge, they are set free forth with.

Dated at Masindi this **11th day of October, 2022.**

Byaruhanga Jesse Ruggyema
JUDGE