THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 35 OF 2019

(ARISING FROM BUGANDA ROAD CRIMINAL CASE NO. 038 OF 2018.

BYABAGAMBI ALEX:::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

BEFORE: HON. MR. JUSTICE TADEO ASIIMWE

JUDGMENT

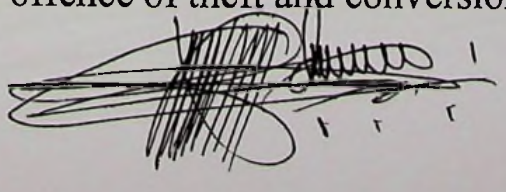
Introduction.

This appeal arises from Judgement and orders of the learned Magistrate Grade 1, Kamasanyu Gladys Musenze dated 27th February 2019.

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 one (1) year and ten (10) months imprisonment, and an order of compensation of a plot and house situate at Kawanda ward as partial compensation.

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

1. That the learned trial magistrate erred in law and fact by failing to evaluate all the material evidence adduced at the trial and reached an erroneous decision which resulted in to a miscarriage of justice.
2. That the learned Trial Magistrate erred in law and fact when she shifted the burden of proof from prosecution to defense.
3. That the learned Trial Magistrate erred in law and fact when she engaged in speculation and conjection to the prejudice of the appellant.
4. That the learned Trial Magistrate erred in law and fact when she failed to properly direct herself on the law and evidence in respect to the charge of theft.
5. That the learned Trial Magistrate erred in law and fact by holding that the accused person was not forced to sale and surrender his residential house to the complainant.
6. That the learned Trial Magistrate erred in law and fact when she arbitrarily, unfairly and in a manner imposed denying the natural justice and an order of compensation to take the accused's residential house without being heard.
7. That the learned Trial Magistrate erred in law and fact when she convicted the accused person of the offence of theft and conversion.

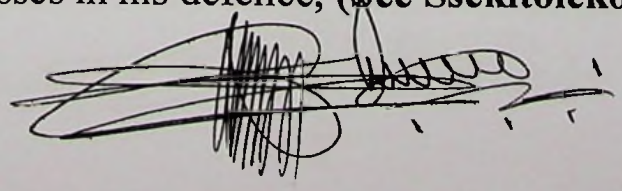


At the hearing, the appellant was represented by counsel Byarugaba John while the respondent was represented by Miss Nanziri Charlotte and MR. Wanamama Isaiah, state Attorneys from ODPP.
Both counsel filled written submissions and made oral Highlights of their submissions which I shall consider in this 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 f 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

In his written submissions counsel for the appellant argued ground 1,2,3 & 4 together, grounds 5&6 together and ground 7 separately while the respondent argued grounds 1,2,3,4& 7 together and 5&6 also together.

A close look at all the seven grounds shows that they all relate to courts failure to properly evaluate the evidence and the legality of the compensatory order. Therefore, this court will resolve grounds 1,2,3,4, &7 together since they all relate to evaluation of evidence. Grounds 5 & 6 shall also be resolved together since they relate to the compensatory order.

GROUNDS 1,2,3,4, &7

1.That the learned trial magistrate erred in law and fact by failing to evaluate all the material evidence adduced at the trial and reached an erroneous decision which resulted in to a miscarriage of justice.

2.That the learned Trial Magistrate erred in law and fact when she shifted the burden of proof from prosecution to defense.

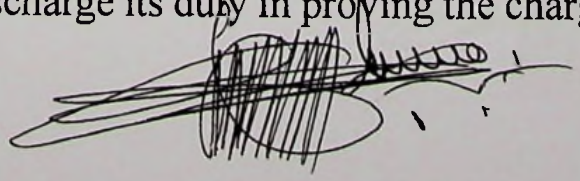
3.That the learned Trial Magistrate erred in law and fact when she engaged in speculation and conjection to the prejudice of the appellant.

4.That the learned Trial Magistrate erred in law and fact when she failed to properly direct herself on the law and evidence in respect to the charge of theft.

7.That the learned Trial Magistrate erred in law and fact when she convicted the accused person of the offence of theft and conversion.

On the above grounds, the appellants counsel faulted the trial magistrate for basing her decision on the evidence of PW1, PW9 and PE6 which a document showing the loss in the complainant's shop which was un accounted for to constitute theft of clothes without considering the defence evidence. That the resolution of the 2nd ingredient of the offence remained hanging and pre emptied the resolution of the 3rd ingredient of participation of the accused since the evidence of pw9 was to the effect that money was not accounted for and not stolen. That there was no evidence that the accused person participated in stealing of the said money. That the evidence on record alleges that the accused stole money for a number of years and that he was never charged.

In reply the learned state attorney submitted that he concedes to all the grounds of appeal for reasons that the trial magistrate relied on an audit report which was done without leger books, cash books of accounts, receipts, and Bank reconciliation slips. That there nothing to show that the appellant was appointed to any of the positions listed like shop attendant, store keeper, manager among others. He finally conceded that indeed prosecution at trial court didn't discharge its duty in proving the charge of theft against the appellant.



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.
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, the charge against the appellant was theft of UGX 114,180,000/= (one hundred fourteen million, one hundred eighty thousand shillings only.

Ideally, money is property capable of being stolen. However, it was the evidence of PW1 and PW5 the complaints that the said money was a result of an audit of their business which audit report revealed. That a loss of ugx 114180,000/= had been incurred.

On the basis of that background, it is clear that the property (money) that was allegedly stolen as per the charge sheet was not tangible money taken per say but rather loss incurred in the business in whatever way. As already stated, above per section 254 (6), *a person shall not be deemed to take a thing unless he/she moves the thing or causes it to move.* In my opinion, a loss incurred in a business cannot be said to be property capable of being stolen. It can only remain a financial loss which creates a civil liability rather than a criminal liability in the absence of concrete evidence that it was caused by theft.

Secondly, even if the alleged money was capable of being stolen, the way the total sum was arrived at is questionable. At the trial court, prosecution relied on an audit report PW6 done by PW9 to ascertain the amount stolen. However, it was the evidence of PW9 that he carried out the audit using

packaging lists and store ledgers. That however, the information from the store ledger was scanty and therefore used information of opening stock and closing stock in the packaging lists to ascertain the loss for a period of 2016-2017. It defeats logic that an audit would satisfactorily be done without ledger books, receipts and bank statements. No wonder the state attorney in this appeal conceded that it was practically impossible to carry out an audit with scanty information. Theft is a practical offence that involves taking of something tangible. The act of taking away must be evidenced and not assumed.

In fact, to put it clearly, once money is stolen, there is no need for an audit to find out the stolen money. One cannot be robbed or deprived of what he does not know. Therefore, once there is an allegation of theft of money and the certainty of such money requires an audit, prosecution is in a better position to consider a different charge rather than theft or consider a civil matter to avoid scenarios like this one.

In addition, even if the said money was capable of being stolen and the figure was arrived at correctly, the evidence on record questionable if it was actually stolen and if so who stole it.

What is clear is that a loss was incurred. However, the question of how and by who caused the loss remains un answered. The evidence of pw1, pw5 is that at the time the loss was incurred the accused person was employed as an office attendant responsible for sales and banking the money does not suffice. Although no such evidence of

employment/appointment beyond an office attendant was adduced to court, there was no evidence adduced to show that the accused was seen taking the money from the shop of the complainant. At least what is clear is that the alleged money did not go missing in just one day. It was over a period of time and there is no evidence to show that the accused had earlier been charged of a similar offence.

I find that the trial magistrate misdirected herself on the law and evidence on record hence occasioning a miscarriage of justice. Prosecution made the least attempt to even satisfy the first ingredient of the offence of theft.

In conclusion, 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. Grounds 1,2,3,4, &7 are answered in the affirmative.

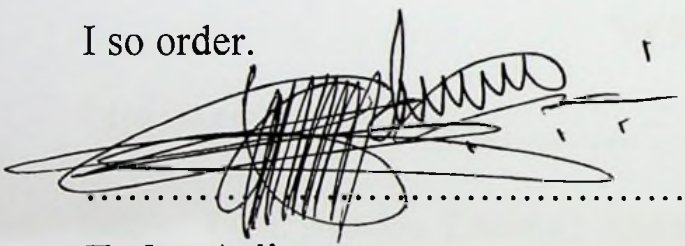
I do not find it necessary to resolve grounds 5 and 6 as the finding in the above grounds determines the entire appeal.

However, before I take leave of this appeal, I wish to state that although a magistrate grade one has powers to give compensatory orders under section 197 of the Magistrates Court's Act, he or she has no powers to execute such orders issued within the same sentence itself as was the case in the matter in which this appeal arises. It was grossly wrong for the trial magistrate to order for the sale of the accused's house as partial compensation in her sentence. She ought to have stopped at issuing the

orders and leave the execution process to take their course in separate applications to court.

In conclusion, I find merit in this appeal which is here by allowed. Consequently, the conviction, sentence and compensatory orders against the appellant in Buganda Road Criminal Case No.38 of 2018 are set aside. The appellant's conviction is hereby substituted with an acquittal.

I so order.



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Tadeo Asiimwe

JUDGE

30/05/2022