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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CRIMINAL APPEAL NO.069 OF 2022**

**ARISING FROM CHIEF MAGISTRATES COURT OF NAKASEKE AT**

**NAKASEKE CRIMINAL CASE NO.044 OF 2021 AND 046 OF 2021**

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**SERUGO ANDREW-----APPELLANT**

**VERSUS**

**UGANDA-----RESPONDENT**

**BEFORE HON: JUSTICE ISAAC MUWATA**

**JUDGEMENT**

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This is an appeal against conviction and sentence, in which the appellant was charged and convicted by the learned Chief Magistrate of Luwero for the offence causing malicious damage to property contrary section 335 of the Penal Code Act. He was sentenced to six months in prison, a million shilling fine, and an order to compensate a one Male Richard, the complainant, for **shs. 71,000,000/= (Seventy-one million shillings)**

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He appealed on the following grounds;

- 1. That the learned Chief Magistrate erred in law and in fact when he convicted the appellant of the offence of malicious damage to property when the said offence was never proved beyond reasonable doubt**

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**2. That the learned Chief Magistrate erred in law and in fact when he imposed illegal sentences by way of imprisonment and fines upon the appellant**

He prayed for the appeal to be allowed and that he be released forthwith.

30 At the hearing, the appellant was represented by Counsel Kawanga George, while the respondent was represented by Ms. Macbeth Agumanaitwe. The parties agreed to prepare written submissions, which I have reviewed.

**Consideration**

35 The duty of this court as the first appellate court cannot be overemphasized. In the case of **Kifamunte Henry V Uganda, S.C criminal Appeal No. 10 of 1997** where court held that;

40 **“The first appellate court has a duty to review the evidence of the case, to reconsider the materials before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”**

Section 335 of the Penal Code Act with which the appellant was charged provides that;

45 **Any person who willfully and unlawfully destroys or damages any property commits an offence and is liable, if no other punishment is provided, to imprisonment for five years**

According to the preceding section, anybody who knowingly and unlawfully destroys or damages another person's property commits the offence of malicious damage to property.

50 To convict, the court must first be convinced that some property was destroyed; second, that a person destroyed the property; third, that the destruction was purposeful, and therefore proof of intent is required; and fourth, that the destruction was unlawful. **See: Simon Kiama Ndiagui vs. Republic (2017) eKLR.**

55 In this case, the prosecution had the burden of proving that the complainants owned physical property.

PW1, the complainant, informed the court that he purchased the land from Lumu Patrick and Serunkuma Timothy. The land was 50 acres in size and was acquired for Shs. 180,000,000/=. He also stated in court that he  
60 had the agreement and the certificate of title as proof of ownership.

The documents were tendered in and admitted without objection from the appellant and were accepted by the court. The complainant subsequently took custody of the property and began cultivating on it. PW1 said in court that he began cultivating bananas and coffee on a  
65 portion of the 50 acres he bought.

Ziwa James PW2, testified in court that he knew the accused and that he had information from a man named Simbwa Abbas that the accused was burning Mr. Male's crops. According to his testimony, he raced to the area where the banana and coffee crops were allegedly being burned and

70 spotted the appellant burning the crops. According to his evidence, the burnt acreage was around 3 to 4 acres.

DW1 further informed the court that the complainant had an interest in the properties in issue, specifically the titled property and the crops cultivated on it. DW2 also told the court that the complainant was the  
75 owner of the destroyed crops.

In his defense, the accused stated that the complainant farmed his crops on land belonging to DW3 a one Nakiboneka Justine measuring 26 acres, and so a claim of ownership to the land in dispute was obvious and should have been accessible to him. DW3 presented evidence that the contested  
80 crops were cultivated on her kibanja farm, where she was faithfully paying Busulu to her brother Lumu Patrick.

I have subjected the evidence on record to fresh scrutiny. I find that the evidence establishing the fact that the complainants owned the land and the crops thereto was proved beyond reasonable doubt

85 The second ingredient required proof that whoever destroyed that property, did so willfully and unlawfully. "**Willfully**" within the context of section 335 (1) of Penal Code Act means "intentionally as opposed to accidentally, that is, by an exercise of [one's] free will".

It is defined as "**voluntary and purposeful**, but not necessarily malicious" by Black's Law Dictionary. The act done does not have to be malicious in  
90 the sense of being motivated by vengeance or hatred toward a person, or malus animus, in the sense of the offender being driven by inappropriate

and indirect motivations. The prosecution is not required to prove malice in the sense of an improper motive. All that has to be proved is that a wrongful act was intentionally done, without cause or excuse. Mere knowledge that it is likely to cause loss to the owner of the property is sufficient. **See: Uganda v Gbonga & 2 Ors (Criminal Appeal 5 of 2015) [2017] UGHCCRD 101**

In this instance, the prosecution had to establish that the destruction was purposeful and willful. The culprit's motive and will can be demonstrated by the fact that he was aware that property damage would be a likely result of his unlawful conduct, yet nonetheless carried it out regardless of the repercussions.

PW2's evidence in this respect is critical; he informed the court that he discovered the accused burning the complainant's crops, and he also testified that the fields had been doused with a harmful chemical. PW4 the investigating officer's evidence also suggested that these crops had been doused with a hazardous chemical and were withering.

PW5, the Agricultural officer, testified that the crops had been harmed by a harmful chemical and were dying off. The findings were presented in court without objection from the appellant.

In this case there was ample evidence that the complainant's crops were destroyed and the person who destroyed them was the appellant. He went there knowing that the complainant had purchased that land and had cultivated his crops on it. His action was clearly unlawful. He took the law into his hands instead of following the lawfully laid down process of

resolving disputes. His contention that he was unaware of the land belonged to the complainant cannot be believed. He ought to have known that his actions could lead to destruction of the crops. If he took his action without caring whether or not damage was to be caused, he must have indeed to have willfully set out to damage the crops.

The last ingredient that was required to be proved is that appellant participated in committing the offence.

In *Wamunga v. Republic* (1989) KLR 424 it was held that,

**It is trite law that where the only evidence against an accused is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from the possibility of error before it can safely make it the basis of a conviction.**

PW2 testified before the trial court that he witnessed the appellant burn the crops, it was also the evidence of PW3 to the trial court that he saw Serugo, the appellant, set fire on the grass, which fire afterwards burnt down the coffee and banana gardens. PW2 and PW3 were likewise acquainted with the appellant, they knew him and had interacted with him.

It is also clear from the evidence and the appellant's earlier behavior during a meeting with PW3 and the accused wherein he vowed to stop any cultivation activities on the land in issue clearly he intended to unlawfully destroy the complainant's crops and spite the complainant as a result of the existing land dispute between them.

In the circumstances, I conclude that the learned Chief Magistrate properly evaluated the evidence and I cannot fault him. He made the proper conclusion based on the information presented.

Ground one is answered in the negative

145 **Ground 2**

It is now settled law, following several authorities by this court and courts above, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless,  
150 that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. **See: Kyalimpa Edward v Uganda SC Criminal Appeal No.10 of 1995.**

Under section 335 of the Penal Code Act a person convicted for causing  
155 malicious damage to property faces a maximum of five years in prison. The trial magistrate was persuaded by the appellant's deliberate destruction of the complainant's crops, and the sentence of six months cannot be taken as excessive. On the contrary, it was very lenient since the maximum sentence is a period for five years' imprisonment.

160 The learned trial magistrate could only be faulted for adding a one million shilling fine to the appellant's sentence. It is my considered opinion that if imprisonment has been imposed as part of the substantive punishment, the magistrate has no justification to include a fine as part of that

165 sentence, especially if he did provide for a default sentence on failure to  
pay the fine.

Accordingly, the fine of one million shillings imposed on the appellant is hereby set aside, however the term of imprisonment and the compensation order imposed on the appellant by the lower court is maintained.

170 I so order

Right of Appeal Explained.

**JUDGE**

**17/11/2022**

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