THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***Mpagi-Bahigeine, Engwau and Byamugisha, JJJA.***

CRIMINAL APPEAL NO 149/08

BETWEEN

MUHWEZI JACKSON::APPELLANT

AND

UGANDA::RESPONDENT

[Appeal from the judgment and orders of Kampala High Court Circuit (*Lugayizi J*) dated 2nd December 2008 in High Court Criminal Appeal No.10/08 arising out of Criminal Case No. 353/07 of the Chief Magistrate's Court of Buganda Road holden at City Hall]

JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court in the exercise of its appellate jurisdiction.

The appellant was charged with five counts of malicious damage to property contrary to section 334(4) of the Penal Code Act. It was alleged in the particulars of the charge that on 18th February 2007 at Ntinda Trading Centre Buye Central Zone in Nakawa Division Kampala District, the appellant willfully and unlawfully damaged houses and household properties of Nakiberu Harriet, Turyagumisiriza Nicholas, Kisule Jacob, Kiiza Annet and Asiimwe Rosette.

The facts which are material to this appeal are not in dispute. The appellant owns a piece of land in Ntinda Trading Centre comprised in Block 216 Plot 2897. He purchased the same from one Wasswa in 2000 or thereabouts. After the purchase one Nakiberu (PW1) started

getting notices to vacate the land otherwise she would be evicted. When she got the notices, she took them to the Administrator General who in turn wrote to the landlord not to evict her before compensation.

On 18th February 2007, people who were not identified came with a grader and demolished the houses which were on the appellant's land. The matter was reported to the authorities and the appellant was arrested and charged with malicious damage to property.

He denied the charges. The prosecution called a total of eight witnesses to prove the charges against the appellant. At the close of the prosecution case, the learned trial magistrate acquitted him of counts 2, 3, 4, and 5. She put him on his defence on count one.

He gave an unsworn statement in which he stated that he was in Kabale at the time when the offence was committed. The trial court disbelieved his alibi and convicted him. She sentenced him to pay a fine of shillings one million or a sentence of three years imprisonment. He paid the fine.

He appealed to the High Court against his conviction and sentence on the following grounds:

1. ***1.*** **The learned trial magistrate erred in law and in fact when she failed to properly evaluate the evidence on record and came to a wrong decision that the appellant had maliciously damaged the complainant's property.**
2. ***2.*** **The trial magistrate erred in fact and law when she convicted the appellant of the offence of malicious damage to property whereas there was overwhelming evidence on record that the appellant had a genuine claim of right of the land as the registered owner of the land where the property was.**
3. ***3.*** **The learned trial magistrate erred in fact and law when she sentenced the appellant to three years imprisonment or to pay a fine of Ug. Shs 1,000,000/= only which was excessive in the circumstances.**
4. ***4.*** **The learned trial magistrate erred in fact and law when she held that the prosecution had proved the commission of the offence beyond reasonable doubt.**

The appeal against conviction and sentence was dismissed. In addition, the appellate judge ordered the appellant to pay a sum of Ug. Shs 50,000,000/= to the complainant. He purported to make this order under the provisions of section 197(1) of the Magistrate Courts Act and section 34(2) (b) of the Criminal Procedure Code Act.

Being dissatisfied with the outcome of the appeal, the appellant lodged an appeal to this court.

The memorandum of appeal filed on his behalf contains 7 grounds:

1. **The learned justice of the High Court erred in law when he failed to subject the evidence on record to fresh and exhaustive scrutiny and evaluation thereby coming to a wrong decision, viz, confirming the conviction and sentence of the appellant and making as additional order of compensation against the appellant.**
2. **The learned justice erred in law when he failed his duty of re-evaluating evidence but instead treated the appeal as a civil suit and considered extraneous matters and evidence which was not on record and came to a wrong conclusion.**
3. **The learned justice erred when he confirmed the magistrate's decision that the appellant committed as offence of malicious damage to property.**
4. **The learned justice erred in law when he held that section 7 of the Penal Code Act did not protect the appellant when there was overwhelming evidence on record that the appellant had a genuine claim of right of the land as the undisputed proprietor thereof.**
5. **The learned justice erred in law when he treated the appeal as a civil suit and relied on wrong principles of law and came to a wrong decision.**
6. **The learned justice erred in law when he ordered the appellant to pay compensation to the complainant in the sum of Ug Shs 50,000,000/= which compensation had not been ordered by the trial court and which therefore not subject of the appeal.**
7. **Alternatively the justice erred when he ordered the appellant to pay compensation without any basis which compensation is harsh and excessive in the circumstances.**

The appellant prayed for the following orders:

1. **The appeal be allowed, conviction be quashed and sentence be set aside.**
2. **The order to pay compensation be quashed and/ or set aside.**
3. **In the alternative but without prejudice, if the order of compensation is compensation is confirmed, a lesser compensation sum be substituted.**
4. **An order that the fine paid by the appellant be refunded.**

When the appeal came before us for final disposal, Mr Maxim Mutabingwa, learned counsel for the appellant, argued grounds one, two and five together; grounds three and four together and then grounds six and seven together. In submitting on the grounds as he grouped them, Mr Mutabingwa stated that no evidence was led to prove that the appellant participated in the demolition or that he ordered someone else to do it. He was not seen at the scene of crime and all the witnesses agree to that. Learned counsel went on to submit that there is a letter on record directing the tenants on the land to vacate but there was no evidence that it was signed by the appellant. The second letter from Maka General Agencies which was ordering the tenants on the land to vacate, no one was called from Maka General Agencies to testify that they wrote the letter on behalf of the appellant. Furthermore, counsel submitted, the driver of the grader was not called to testify. He claimed that the only evidence against the appellant was that he was the registered owner of the land.

He referred to the judgment at page 5 where the learned appellate judge stated that there was a collection of strong circumstantial evidence implicating the appellant in the eviction of the complainant. He submitted that what the learned judge called circumstantial evidence is speculation.

On grounds three and four counsel submitted that the appellant had a claim of right as he is the registered owner of the property and therefore section 7 of the Penal Code Act protects him. He did not concede that the appellant committed the offence but stated that what is on the land belonged to him. He further stated that the section makes it a civil wrong and not a criminal offence. He cited the case of ***Byekwaso Mayanja Sebali v Uganda [1991] HCB 15*** where Bahigeine J (as she then was) held that an honest belief whether justifiable or not that the property is the appellant's would negative the element of mens rea under section 335(1) of the Penal Code Act.

On compensation, Mr Mutabingwa submitted that the appellate judge erred when he ordered compensation when the trial magistrate did not order any compensation and the state had not appealed. He further pointed out that the appellant's right to be heard was violated. It was his submission that before an order for compensation can be made there must be evidence that a person have suffered substantial loss. There was no basis according to counsel on which the compensation was made. He also claimed that it was excessive. He prayed that the order be set aside.

Ms Kajuga, the learned Principal State Attorney, did not agree. She submitted that the judge subjected the evidence to exhaustive scrutiny. She pointed out that there was sufficient evidence pointing to the involvement of the appellant in the commission of the offence. She further submitted that the fact that the people who carried out the demolition and those from Maka General Agencies were not called was not prejudicial as there was enough circumstantial evidence putting the appellant at the scene of crime.

On section 7 of the Penal Code Act, she submitted that it was properly interpreted by the appellate judge. She claimed that there was fraud on the part of the appellant since the complainant was a bonafide occupant and this fact was not contested at the trial. On the case of ***Byekwaso*** (supra) she stated that it can be distinguished on the facts. The appellant (Byekwaso) was a customary tenant and the complainant planted trees on the appellant's land without consent. The appellant uprooted them and he was charged with malicious damage to property.

She supported the order of compensation and argued that the learned judge did not err. She claimed that he had power to do so under section 34(2) (b) of the Criminal Procedure Code Act. She invited court to dismiss the appeal, uphold the sentence and the order of compensation.

In all criminal cases, the burden is on the prosecution to prove beyond reasonable doubt that the accused committed the offence with which he/she is being charged. This burden does not shift except in a few exceptional cases. It also the law of this land that a conviction can only be based on the actual evidence adduced and not on conjecture or fanciful theories – ***Okale &others v R [1965] EA 555.*** Furthermore a conviction is based on the strength of the prosecution case and not the weakness of the defence.

This being a second appeal ***rule 32(2)*** of the **Judicature (Court of Appeal Rules) Directions- S.I. No13-10** gives this court power to appraise the inferences of fact drawn by the trial court. This court does not have powers to subject evidence to fresh scrutiny unless it is clear that the first appellate court failed to perform its duty- See ***Kifamunte Henry v Uganda Criminal Appeal No.10/97(SC).***

The main issue to determine in this appeal is whether the appellant was implicated in the commission of the offence. Presence at the scene of crime can be actual or constructive. The prosecution case was that the appellant was the registered owner of the land in question and

the complainant had received letters purportedly first written by the appellant himself and the second one written on his behalf by an organization called Maka General Agencies. The prosecution asserted that it was the appellant who hired the grader and its driver. He was considered to have aided and abetted. This means that he formed a common intention with the driver of the grader to prosecute an unlawful purpose under section 20 of the Penal Code Act.

Section 19 of the same Act deals with principal offenders. It reads:

"(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it-

(a) ***every person who does the act or makes the omission which constitutes the offence;***

(b) ***every person who does or omits to do any act for the purpose of enabling or aiding another person in committing the offence;***

(c) ***every person who aids and abets another person in committing the offence."***

Although all the prosecution witnesses stated that they did not see the appellant at the scene of crime, the charge sheet was framed in such way as if the appellant was the one who actually committed the offence.

The learned trial magistrate in dealing with the participation of the appellant said:

"From the above evidence on record, it is clear and not in dispute that the accused is the registered owner of the land where the complainant's houses were demolished.

It was not disputed by the accused that he instructed Maka General Agencies to give notice to vacate to the complainant. The notice clearly states in the last paragraph that the complainant should expect no further warning if she does not vacate the premises in 7 days. This notice was tendered in court as part of the documents that the complainant took to the office of the Administrator General. The office of the Administrator General replied to the notice. The reply was among the contents of the file from the Administrator General's office tendered in court as PX 3.

The complainant stated that thereafter her houses were demolished without any further communication. Iam convinced from the above evidence that the houses were destroyed at the instruction of the accused person.

I find the evidence of the complainant so consistent, convincing and well corroborated with the records on the file from the office of the Administrator General. I find no reason to doubt the evidence of the complainant and PW7.

Much as the accused was not seen at the scene of crime, as submitted, Iam convinced he gave instructions to his agency to demolish the house."

The learned appellate judge in dealing with evidence implicating the appellant also relied on the threats to evict the complainant and the role of the Administrator General's office in trying to stop the appellant from evicting the complainant before compensating her. He concluded:

"In all, therefore, the above evidence sets up a collection of strong circumstantial evidence implicating the appellant in the eviction of Nakiberu from her kibanja and the destruction of the buildings thereon. In any case, when one considers all the important events preceding the said eviction (including Wasswa's demise in 2006- i.e Wasswa the former owner of the Mailo interest in question) this burning question inevitably comes to mind: Who else had interest in evicting Nakiberu from the said kibanja? The answer to that question is very simple; and it is this: No one else, except the registered proprietor of Mailo interest on which the kibanja was standing i.e. the appellant."

The learned appellate judge like the trial magistrate found that although there was no direct evidence implicating the appellant in what he called the eviction of Nakiberu from her kibanja and the destruction of all the buildings, the circumstantial evidence available irresistibly pointed at the appellant as the 'moving force behind the mayhem' to use his own words.

We consider this appeal to be one of those cases in which a second appellate court can interfere with concurrent findings of fact by the lower courts. We say so because both the trial court and the appellate court took erroneous views of the evidence in arriving at their concurrent findings.

The prosecution did not charge the appellant with having committed the offence with others who were still at large. The finding of the trial magistrate that the appellant used Maka General Agencies to carry out the damage of the complainant's property was not supported by any evidence on record. The letter which was written by Maka General Agencies to the

complainant was dated 23rd August 2004. It was giving the occupants of the buildings notice to vacate and were given seven days within which to do so. They were warned that if they did not vacate they will be evicted without any further warning. No eviction or damage to the property of the complainant took place after seven days as the letter had threatened. The events leading to the prosecution of the appellant occurred on 18th January 2007- a period of almost four years after the letter was written. The first letter was written on 11th May 2004. No evidence was led by the prosecution that the letter in question was written by the appellant or that it was written on his behalf. What these two letters raise is strong suspicion against the appellant but they are not enough to form a basis for his conviction.

In the circumstances we are not satisfied that the appellate judge re-evaluated the evidence as it was his legal duty to do. He handled the appeal as if it was a civil dispute. The evidence did not place the appellant at the scene of crime and it was not proved that he procured another person to commit the offence.

Section 7 of the Penal Code Act which protects acts and omissions done in the exercise of an honest claim of right and which are done without intention to defraud. There is no dispute that the appellant is the registered owner of the land and the building which was damage was on the land. What is on the land belongs to the land. The learned trial magistrate did not consider the provisions of this section and the parties did not address court on its provisions. It was raised for the first time on appeal. In dealing with the provision of the section, the learned judge said:

With respect, this court does not agree with Mr Mutabingwa's interpretation of the above law. In court's opinion, the above law does not apply where property in question is the subject of multiple interests. In the instant case, we have seen that much as the appellant had a registered interest in the land in question, Nakiberu too had a legitimate interest on that land as a kibanja holder. Therefore, the appellant ought to have respected Nakiberu's said interest

Secondly Mr Byansi was absolutely right in saying that the evidence on record of the lower court reveals fraud on the appellant's part in that he threw Nakiberu out of her kibanja without compensating her. The Administrator General's file, which is part of the lower court's record as (exhibit P2) is clear.

It shows that the Administrator General's office warned the appellant against evicting her. However, the appellant did not heed that warning! He went ahead to evict Nakiberu

without compensating her…….according to section 7 of the Penal Code Act (Cap120) the presence of fraud would deny a person protection despite a claim of right he or she might have in a given property."

The learned appellate judge found that section 7 did not protect the appellant in the circumstances of the case.

In the instant appeal, the appellant denied having damaged the property of the complainant and he was not seen doing so. The case of Byekwaso (supra) which Mr Mutabingwa cited is distinguishable from the instant appeal on the facts. Byekwaso was a customary tenant on the complainant's land who was the registered proprietor. His defence was that the complainant planted trees on the land he (the appellant) honestly regarded as his before seeking his consent. He thus uprooted the trees. The appellant before us has not raised the defence of honest belief that the land is his since he is the registered proprietor. The defence under section 7 would not have been available to him.

On appraisal of the evidence which was adduced by the prosecution, the submissions made by both counsel and the authorities which were cited, the appellant's conviction cannot be allowed to stand. We allow the appeal quash the conviction and set aside the fine imposed by the trial court. We order for the immediate refund of the money he paid.

As for the order of compensation, the learned appellate judge relied on section 197(1) of the Magistrate Courts Act and section 34(2) (b) of the Criminal Code Act. The two sections read:

Section 197(1)

"(1) when any accused person is convicted by a magistrate's court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is in the opinion of the court, recoverable by that person by a civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable."

This section gives a trial magistrate and not an appellate judge to award compensation to any person who appears to have suffered material or personal injury as a result of the offence which has been committed**.** This order of compensation is over and above any lawful punishment which the court might impose.

Section 34(2) of the Criminal Procedure Code reads:

"Subject to subsection (1), the appellate court on any appeal may-

(a) Reverse the finding and sentence, acquit or discharge the appellant, or order him or her to be tried or retried by a court of competent jurisdiction;

(b) Alter the finding and find the appellant guilty of another offence, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence by imposing any sentence provided by law for the offence; or

(c)……."

This section gives power to the appellate court to alter the finding of the trial court and reduce or increase the sentence. It does not give the appellate court power to order compensation which had not been ordered by the trial court.

In the appeal now before us, the trial magistrate did not order the appellant to pay any compensation to the complainant. No evidence was led as to the damage allegedly caused by the acts that were complained of and the parties did not address court on the matter.

We accept the submissions of counsel for the appellant that the appellant was never given an opportunity to be heard and there was no basis on which the order was made. The order would be set aside.

Dated at Kampala this 15th day of December 2009.

A.E.N.Mpagi-Bahigeine

Justice of Appeal

S.G.Engwau

Justice of Appeal

C.K.Byamugisha

Justice of Appeal

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