THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HIGH COURT CRIMINAL APPEAL NO. 12/95

(ORIG. JINJA MJ. 288/95)

SHABAN MUGABI:::APPELLANT

VERSUS

UGANDA:::RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

This is an appeal against the decision of the learned Chief Magistrate sitting' at Jinja. The appellant Shaban Magabi is appealing against both the Conviction and sentence of the lower court. He was charged with the offence of theft c/s 252 of the Penal Code Act and he pleaded guilty. He was accordingly convicted and sentenced to 12 months imprisonment.

He gave 3 grounds for his appeal. The first ground is that the trial magistrate erred in law in failing to properly record the plea of the appellant, and failing to appreciate that the facts did not disclose the ingredients of the offence; the second ground is that the trial magistrate erred in law and fact in passing harsh and excessive sentence and the third ground is that the trial magistrate erred in law in the order he made in the order to return the money and sale of appellants property.

At the hearing of this appeal the learned counsel for the appellant Mr. Okwanga argued quite strongly that the plea of the appellant was not properly taken and that the facts as narrated by the prosecutor did not reveal that there was an offence of theft committed because the 1,500,000/= which the appellant is alleged to have stolen was actually given to him by the complainant's wife who was authorised by the complainant to pay the appellant 150,000/= but she instead wrote a cheque 1,500,000/= in his view this money was given away by consent, he there for argued that a plea of guilty for theft should not have been recorded. He relied on the cases of: Adan v Republic (1973) EA 445 and Yukubu Nabala v Uganda Criminal Appeal No. 3/94 decided by this court on 25-2-94 (unreported).

As for the issue of sentence it was his view that the sentence of 12 months was harsh since the accused had pleaded guilty and he was a first offender, he also argued that the order by the learned Chief Magistrate to have the appellant's property auctioned in addition to paying' the money was illegal.

On his part Mr. Okwanga who appeared for the respondent maintained that both the conviction and sentence were legal and should be sustained. He said this appeal should not be entertained as the accused pleaded guilty and by the provisions of section 216 of MCA an accused who pleads guilty cannot appeal against his own plea of guilty except as to the legality of sentence. He further argued that the sentence of 1 2 months imprisonment was quite legal considering the fact that the maximum sentence for theft is 5 years imprisonment. As for the order by the learned Chief Magistrate for restitution he contended that that order was quite proper in view of the provisions of section 213 of MCA.

I will deal with the first ground of appeal first. After considering the argument put up by the two learned counsel and on examining the record of the lower court I find nothing wrong with a plea in which the accused admitted having committed the offence. The appellant clearly stated that it was true that he stole the money from Peter Kintu; he used the money to buy a plot at Mbiko and some household property. This plea together with the fact that the accused continued to admit his guilt even after the facts had been narrated to him shows that the accused was quite aware of what he was saying and that plea did not in any way offend the provisions of section 122 of MCA or the rules as laid down in the case of: Adan v. Republic (1973) EA 445.

As regards to the contention by the learned counsel for the appellant to the effect that the facts did not reveal the offence of theft, this cannot be true because according to those facts and according to the plea of the accused it is clear that the accused/appellant having been lawfully given the money by the complainant's wife he eventually converted the money to his own use without the owner's consent. The moment ho decided to convert that money to his personal use he became a thief within the meaning of section 245(2) (e) and (3) of the Penal Code Act. The argument that the offence of theft was not revealed cannot be sustained.

The position being what it is the first ground of this appeal cannot succeed and this case must be distinguished from the case of Yukubu Nabala (supra) which was referred to this court as the facts in the two cases are entirely different.

Regarding the second ground of appeal I must say that I agree with the learned counsel for the appellant when he says that the sentence of 12 months was harsh and excessive in all the circumstances of this case: in the first place the accused had saved court a lot of expenses and time by pleading guilty, he was also a first offender. One other important fact which the trial court did not take into account was the circumstances under which the offence was committed. The commission of this commission of this offence was obviously facilitated by the stupidity of the complainant's wife and the accused should not be blamed so much for having taken advantage of that woman's stupidity. It was the woman who wrote the, wrong figures and the appellant should not be punished so much for that. I feel the sentence of 12 months in these circumstances was harsh and excessive.

I now turn to the third ground of this appeal. The gist of the order complained of in this ground of appeal reads as follows: - "Accused is to return the money and the property which was bought using the stolen money are to be auctioned to recover complainant's money". The interpretation of this order by the learned counsel for the appellant is that in addition to the appellant paying back the money his property is to be auctioned and in his view this was an illegal order. I agree with the learned counsel for the respondent when he says that under section 213 of MCA the court has powers to make an order for restitution of the property stolen. But the order of that nature should be clear. My understanding of the above order is that the appellant had to pay to the complainant the money which he had stolen and failure to do so the property he had bought using the stolen money should be sold in order to pay that money. The learned Chief Magistrate did not mean that the appellant had to pay the money in addition to the property being sold. I see nothing illegal in the Chief Magistrate's order although as a matter of practice this court has from time to time pointed out that a court of criminal jurisdiction should not be turned into a court of civil jurisdiction by making orders which tend to deprive the treasury of funds which would otherwise be collected as court fees.

The final outcome of this appeal is that the conviction is sustained but the sentence of 12 months imprisonment is set aside and in its place a sentence which will enable the convict to leave this court a free person is substituted. I feel the 7 months he had been in prison have taught him a lesson for his mischief. The order by the learned Chief Magistrate is partially

sustained to the extent that the appellant's a property which he bought with stolen money should only be sold if he does not refund the amount which he stole.

C. M. KATO
JUDGE
20-10-95