THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 18/1994

ORIG. JINJA MJ. 245/94

NO.172 PC KALENGE STEVEN ::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

The appellant in this case no. 172 Stephen Kalenga, was charged before the Chief Magistrate court Jinja with the offence of store breaking and theft c/s 283(a) and 252 of the Penal Code Act. He was charged with 3 other people who did not appeal. He pleaded not guilty. He was tried, convicted and sentenced to 36 months imprisonment. He appealed against both the conviction and sentence. He gave 4 grounds of appeal which are as follows—

1. The trial magistrate erred when he convicted the appellant when the prosecution had failed to prove its case as required by law.

2. The trial magistrate erred when he relied on circumstantial evidence which did not conclusively establish that the appellant was guilty of the offence charged.

3. The trial magistrate erred in that he considered the evidence for the defence first and in isolation to that adduced by the prosecution.

4. The sentence of 36 months imprisonment was harsh and excessive.

The brief facts of this case, as may be gathered from the records of the lower court are that during the weekend of 18-3-1993 and 20-3-1993 the appellant and one Gerald Mubiru were on duty guarding the stores of Produce Marketing Board Silos at Masese in Jinja. During that same weekend a considerable number of empty gunny bags were stolen from one of the stores. Some of the bags were found in Iganga with a trader called Steven Kimbowa (PW2) who revealed that he had got the bags from one people who included Mubiru (Al). Later on

the appellant and Mubiru together with two other accused were arrested and charged with the present offence.

At the hearing of the appeal Mr. Mutyabule who appeared for the appellant argued that there was no evidence adduced by prosecution indicating that the appellant had participated in the Commission of the offence and that he trial magistrate was wrong to have shifted the burden of proof to the accused and that the evidence against the accused was circumstantial evidence which did not conclusively point to the guilt of the accused. He argued that the sentence of 36 months imprisonment was uncalled for as the appellant was a young man of 24 years and he was a first offender. On his part Mr. Okwanga who appeared for the respondent supported both the conviction and sentence and in his view there was evidence from PW1, PW4, PW5, PW9 and PW10 showing that the accused had participated in the commission of the offence.

I propose to deal with the first 3 grounds of appeal together as they are generally related; I will then proceed to deal with the 4th ground at the end.

This being the first appellate court it is entitled to evaluate and scrutinise the evidence as given in the lower court and come to its own conclusion bearing in mind that the court below had the advantage of seeing the witness in the witness box an advantage which the appellate court does not have: Williamson Diamonds LTD v Brown (1970) EA 1 and Pandya v R (1957) EA 336. In the instant case the charge against the appellant was that of store breaking although there might have been evidence that the offence was committed but there was no evidence to support the allegation that the present appellant participated in the commission of that offence. According to the evidence available there is no doubt that over the weekend when the alleged breaking took place the appellant and Al were supposed to be on guard duty at the stores but it does not; mean that that the appellant would be held criminally liable for whatever took place it those stores during the weekend. It is our law that a mere presence at the place where the offence is committed is not enough to hold somebody liable for commission of that offence: R v Komen Arap Chelap & others (1938) 5 EACA 150 and R v Ramji Hiriji & others (1946) 13 EACA 127.

In his evidence PW1 Denis Kabagambe told the court that their people were supposed to guard the place only during the nights but during the day's one would be relieved and be replaced by a security officer it is possible that the alleged offence was committed when this appellant had been relieved and was not present. This fact is supported by the evidence of

PW1 who said that when he talked to Shiraji, he (Shiraji) told him that he got the bags from Mubiru and that on that evening he had only seen Mubiru. The evidence of Kimbowa (PW2) also shows that when the bags where delivered To Iganga it was only Mubiru who was there and who helped with the unloading of the bags. Kimbowa emphatically said that he did not see the appellant in Iganga. In his evidence PW6 Muwanga Saleh said that it is Mubiru alone who went and asked him to provide him with transport to carry the bags but he did not see the appellant. None of the 10 witnesses called by the prosecution said that he had seen the appellant participating in the commission of this offence. I do not know from where the learned counsel for the respondent got the idea that PW1, PW4, PW5, PW9 and PW10 had given evidence incriminating the appellant.

Judging from the evidence of the above witnesses (PW1, PW2 and PW6) I am inclined to agree with Mr. Mutyabule's submission that no witness testified as having seen the appellant participating in the commission of this offence. It is our law that an accused person should be convicted on the weakness of his defence or on mere suspicion: Israil Epuka s/o Achietu v R (1934) 1 EACA 166 AT PAGE 168. I also agree with Mr. Mutyabule's contention that the holding of the Chief Magistrate that the appellant must have known the circumstances under which the bags left the stores and found their way to Iganga was not supported by evidence on record. On the contrary the evidence of PW2 Kimbowa and that of PW6 Muwanga clearly shows that the appellant had no knowledge of what was happening. In all these circumstances I find that the circumstantial evidence upon which the court relied in convicting the accused was dangerously weak and could not safely support a conviction. The law on circumstantial evidence was clearly stated in the case of: Teper v R (1952) AC 480 at page 489, George William Senkatuka v R (1946) 13 EACA 89 and Simon Musoke v R (1958) EA 715. That such evidence could only be relied upon by court if it (evidence) conclusively pointed to nothing but accused's guilt and there were no co-existing facts tending to weaken or destroy the inference of such guilt.

It must also be pointed out here, as indeed it was pointed out by Mr. Mutyabule in his forceful submission, that the duty is placed upon the prosecution to prove the case against the accused beyond reasonable doubt: Okethi Okale v Republic (1965) EA 555 at page 559. In the present case it must be said with much certainty that prosecution did not discharge that burden of proof.

I now turn to the issue of the sentence. It is the case for the appellant that the sentence of 36 months was too harsh. On this point I agree with the contention of the learned counsel for the respondent Mr. Okwanga that a sentence of 3 years or 36 months cannot be regarded as being harsh and excessive, considering the nature of the crime and circumstances under which it was committed and in view of the fact that the maximum sentence for this kind of offence is 7 years imprisonment. I find nothing excessive in this sentence imposed by the lower court especially when the value of the property involved was within the range of 4,000,000/=.

The position being what it is I find that the appellant was not proved beyond reasonable doubt to have committed any offence, his appeal is accordingly allowed, the conviction is quashed and the sentence set aside. The appellant is to be set free forthwith unless he is being held in prison for some other lawful purposes.

C.M. KATO
JUDGE
22-1-1996