THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

HCT – 02 – CO – CN – 0007 – 2007

CRIMINAL APPEAL NO. 0013 – 2006

(Arising from Apac Original Criminal Case no. 120 – 2006)

1. **OKAE TERENSIO**
2. **OPIO FRANCO**
3. **OTIM SARAFINO**
4. **AKAKI FRANCIS::APPELLANTS**

VERSUS

UGANDA::RESPONDENT

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

The appellant appealed to this court against the decision of Magistrate Grade I, Apac, dated 12.10.2006, whereby the four appellants were found guilty and convicted on eight (8) counts of malicious damage to property c/s 335 (1) of the Penal Code Act and were sentenced to a fine of Ug. Shs. 400,000/= or in default to 2 ½ years imprisonment. In addition each appellant was ordered to compensate the complainants with Ug. Shs 600,000/= compensation to be paid within two (2) months.

There are five grounds of appeal, summarized as follows:-

1. That the trial court had no jurisdiction to try the case.
2. That the trial court ought to have made a finding that the prosecution witnesses had a standing grudge against the appellants and therefore the possibility of telling lies against the appellants could not be ruled out.
3. That the sentences imposed were omnibus and thus illegal.
4. That the trial magistrate failed to make a correct decision on the question of the defence of alibi, the defence set out by the appellants.

5. That there are fundamental errors patent on the face of the record.

At trial the prosecution case was that the appellants had destroyed houses of the complainants on the 16th and 17th March, 2006, at Ayegero village, Atana Parish, Apac Sub-county, Apac District. The destruction was by burning the complainants houses. The reason for doing so was because the complainants were suspected by the appellants to be practicing witchcraft and therefore should be banished from the area.

The appellants denied the charges and each one put up an alibi he was never at the scene of crime, at the material time.

The complaint in the first ground of appeal is that the evidence of prosecution witnesses discloses that what was done was arson c/s 327 of the Penal Code, even though the appellants were charged of and convicted of the offence of malicious damage to property c/s 335 of the Penal Code Act.

Since section 161 (1) (b) of the Magistrates Courts Act, Cap. 16, provides that a Magistrate Grade 1, may try any of offence other than an offence in respect of which the maximum penalty is death or imprisonment for life, and since the punishment for arson under section 327 of the Penal Code, is imprisonment for life, therefore the trial court had no jurisdiction to try the case.

While it is true that the evidence of the prosecution witnesses was to the effect that houses were destroyed by being put on fire, there is also evidence that there were other acts, other than use of fire, that were disclosed. PW4, Akello Judith, for example, stated that she saw one Onapa hold the hoe and axe and started knocking the wall. She also maintained that she saw second appellant destroying the house.

PW2 Okae Alfred testified seeing third appellant hitting his house, and other appellants destroying the wall of his house.

PW3 Akullu Agnes saw appellants, throw stones and bricks, in addition to burning the houses.

To the extent therefore that they were other acts, other than burning, and also since the burning of houses was taken by court as evidence of causing malicious damage to property, the argument that the trial court was not seized of jurisdiction to try the offence cannot be sustained. The first ground of appeal fails.

As to the second ground of appeal the complaint is that the trial magistrate did not make a specific finding that the prosecution witnesses had a standing grudge against the

appellants and therefore the possibility of telling lies against the appellants could not be ruled out.

An evaluation of the evidence adduced, at trial, shows that none of the prosecution witnesses testified that there was a grudge between them and any of the appellants. PW2 and PW4 specifically stated there was no such grudge. PW1 and PW3 were silent about the matter. PW5, the police investigating officer found no existence of such a grudge. None of the appellants put the issue of the existence of a grudge to any of the prosecution witnesses. DW3, the third appellant, stated there was no such grudge.

While it is true that DW4, the fourth appellant, testified that there was a land dispute and that the houses burnt were in that land, he did not state, and it was not established, whether it was that land dispute that led to the circumstances that resulted into the criminal prosecution of the appellants. There was no evidence before court that the existence of the land dispute made the prosecution witnesses to tell lies against the appellants, or the appellants against the prosecution.

This court, on fresh re-evaluation of the whole evidence, finds that, the overwhelming evidence adduced before the trial court was to the effect that the prosecution witnesses, who constituted complainants in the case, except PW5, the investigating officer, as well as the evidence of defence witness DW9, the LCIII Chairman, established that the facts that led to the prosecution of the appellants were because the complainants and their family people and relatives were being evicted by destruction of their houses and properties because they were taken to be practicing witchcraft.

Therefore on the basis of the evidence before the trial court, there is no justification for faulting the trial magistrate for not having made a finding that the prosecution witnesses had a standing grudge against the appellants and therefore the possibility of telling lies against the appellants could not be ruled out. The second ground of appeal also fails.

The third ground of appeal is that the sentences imposed on the appellants were omnibus and therefore illegal.

The state, rightly in the view of this court, conceded to this ground.

The trial magistrate sentenced the appellants to a fine of shs 400,000/= or in default to serve a sentence of 2½ years imprisonment. The trial court also ordered the accused to

compensate the complainants shs 600,000/= compensation, and the compensation to be paid within two (2) months.

Each of the appellants was the subject of a charge of seven (7) counts of malicious damage to property c/s 335 (1) of the Penal Code Act. This is born out by the amended charge sheet on the court record dated 24.03.2006 signed by the officer preferring the charge and the magistrate. The court record, page 1 of proceedings shows an amended charge sheet was admitted by court and a plea taken on the same.

The conviction of each of the appellants was therefore in respect of each of the seven counts of the charge sheet of malicious damage to property c/s 351(1) of the Penal Code Act.

A single sentence concerning all convictions for the different seven (7) counts was therefore omnibus and is illegal as it offends section 175(1) of the Magistrates Courts Act. The trial magistrate ought to have imposed in respect of each appellant a separate sentence on each count: see **MOHAMED WARSAMA V REPUBLIC (1956) 23 EACA 576;**

and

MWAKA PESILE V REPUBLIC (1965) EA 407

It also follows that the default sentence of 2 ½ years in default of paying the fine of Ug. Shs 400,000/= for all the appellants is erroneous in law being contrary to the provisions of section 180(d) of the Magistrate' Courts Act, cap. 16.

The order to pay compensation is also bad in law by reason of being vague and omnibus in its own way. There were six (6) complainants according to the stated charge sheet. The order: **"Each accused to compensate the complainant shs 600,000/= compensation to be done within two month",** is not clear whether the complainants are to share the shs 600,000/= or whether each complainant is to be paid by the appellants shs 600,000/=. The order is of course, also unclear as to how much of the compensation each appellant is to pay.

The third ground of the appeal succeeds.

The fourth ground of appeal is that the trial magistrate failed to make a correct decision on the question of the defence of alibi, the defence each of the appellants put up.

On pages 15 and 16 of the judgment, the trial magistrate set out the law as to the defence of an alibi put up by an accused. He cited the case of **UGANDA VS DUSMAN SABUNI (1981) HCB.**

The trial magistrate evaluated the whole evidence adduced before him and came to the conclusion that each of the appellants had been placed at the scene of the crime.

This court, has re-evaluated the evidence of prosecution witnesses and that of defence, and has found that prosecution witnesses PW1, PW3 and PW4 as well as the appellants were close blood relatives, more or less of same family and therefore knew each other well. The destruction of the houses and other properties was by fire, among other things used, and there was also moonlight which all made property identification possible. PW2, PW3 and PW4 were emphatic of having identified the appellants at the scene of crime. On the other hand, none of the appellants, though close relatives of PW1, PW2, PW3 and PW4 admitted that the complaints' houses and other household properties had been burnt. The appellants, more or less in unison, stated in their respective testimonies of knowing nothing about the incident. Their respective witnesses DW7 for second appellant, DW8 for third appellant, DW9 and DW10 for the fourth appellant, did not claim to have been with each of the appellants at the crucial time on the days the houses and properties of the complainants were destroyed. Yet there was no doubt, a fact confirmed by DW9, the LCI Chairman of the area, that the complaints' houses and properties had been burnt because, according to this witness;

"The whole village is tired of them. They are told to vacate but they refused. Their houses were burnt."

This witness did not explain, his assertion, as to why the complainants should have burnt their houses and destroyed their other properties so as to frame the appellants, who are very close blood relatives and members of almost the same family.

This court, on re-evaluating the evidence, agrees with the trial magistrate, that the appellants were put at the scene of the crime by the prosecution evidence, and the alibi of each of the appellants was disproved. The fourth ground of appeal is disallowed.

The fifth ground is that there are fundamental errors patent on the face of the record.

It is submitted for the appellants that at the end of the prosecution case, the provisions of section 128 of the Magistrates Court Act were not complied with in that the record of the lower court does not show that, before the defence was opened, whether the charges were read back and explained to the appellants and whether the three options of presenting their

defence was explained to them: whether to give sworn evidence, or to make an unsworn statement or elect to keep quiet.

As a consequence, it is submitted for appellants, by court conducting this part of the trial as it did, tantamounted to compelling the appellants to fill the gaps in the prosecution case during their being cross examined and thereby shifting the burden of proof to the defence. Yet the burden of proof lay on the prosecution throughout the trial.

Though the record of the trial court is silent as to whether or not the options set out in section 128 of the Magistrates Courts Act were explained to each of the appellants, the submission of counsel for appellants that all the appellants were sworn and cross examined, thus appellants being compelled to fill the gaps in the prosecution case is not valid. This is because the record of trial court is very clear that first appellant gave evidence not on oath and was not cross examined. So too did the second appellant. The third and fourth appellants testified on oath but were not cross examined.

While the language of section 128 of the Magistrate's Court Act is in mandatory terms, given what the record of proceedings shows, as stated above, the appellants substantially exercised the options set out in the section. At any rate none of them was cross examined by prosecution so as to extract more evidence than what they testified to in their respective defences.

In the considered view of this court no miscarriage of justice has been shown to have been caused to any of the appellants. A miscarriage of justice occurs where by reason of a mistake, omission or irregularity in the trial the appellant loses a chance of acquittal which is fairly open to that appellant: see **UGANDA V BORESPEYO MPAYA (1975) HCB 245 :** See **also Archbold, 38 Edition, Para 925**. This court, being alive to the error and irregularity the trial magistrate has been criticized of, by counsel for appellants, as regards non compliance with section 128 of the Magistrates Court Act, having properly directed itself on the evidence that was before the trial magistrate, comes to the conclusion that no injustice was done to any of the appellants. The fifth ground of appeal also fails.

It is now necessary to revert to the issue of the sentence imposed upon the appellants, in view of the fact that ground number three (3) of the appeal has been successful.

Section 39(1) and (2) (c) of the Criminal Procedure Code Act, Cap. 116 empowers this court as an appellate court, to set aside a sentence by reason of its illegality and substitute the

same with a lawful one. In exercise of those powers this court sets aside the omnibus sentence imposed upon the appellants of **"a fine of shs 400,000/= or in default service 2½ years in prison",** and an order of **"Each accused to compensate the complainants shs. 600,000/= to be done within 2 months."**

Instead this court substitutes a sentence of each appellant paying a fine of shs 200,000/= (Two hundred thousand shillings only) or in default each appellant to serve a sentence of 1½ years imprisonment. In addition to the fine of shs 200,000/= each appellant is to pay shs 50,000/= (fifty thousand) to each of the persons whose properties was maliciously damaged these persons being named in each of the counts in the charge sheet dated 24.03.2006, (the typed one) namely:

Name	**Count**
Omara	1
Okae Andrew	2
Aweri Bosco	3
Akullu Agnes	4
Okae Alfred	5
Adongo Bito	6
Ogwal Tom	7

The payment of the compensation is to be effected by each appellant to each of the above named within a period of two (2) months from the date of this judgment; and if payment is not effected as herein directed, then the defaulting appellant is to serve an additional sentence of one year's imprisonment.

Subject to the substitution of sentence as above, the appeal stands dismissed.

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Remmy K.Kasule

Judge

31st October, 2008