THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

HCT-00-CR-CN-0030 OF 2012

NABAJJA GETRUDE KISULE & 2 ORS……APPELLANTS

VERSUS

UGANDA……PROSECUTION

BEFORE: THE HON. JUSTICE LAMECK N. MUKASA

Mr. Mungoma Justine of Counsel for the 1st and 2nd Appellant

Mr. Muganga John Patrick of Counsel for the 3rd Appellant

Ms. Kataike Florence, State Attorney for State.

Court clerk:

Mr. Kutosi Charles

JUDGMENT:

This is an appeal against the judgment of the Magistrate Grade One at Makindye Chief Magistrate's Court whereby the 1st, 2nd, and 3rd Appellants were found guilty and convicted on the offence of receiving stolen property contrary to section 314(a) of the Penal Code Act. The 3rd Appellant was also found guilty and convicted of the offence of theft, contrary to section 254 and 261 of the Penal Code Act.

The grounds of the Appeal for the 1st and 2nd Appellants were:-

1. The learned Grade One Magistrate erred in law and fact when she failed to appropriately evaluate the circumstantial evidence in regard

to the participation of the 1st and 2nd Appellants and came to a wrong conclusion.

2. The learned Grade One Magistrate erred in law when she failed to appropriately apply the legal test of circumstantial evidence or facts of the case upon which conviction was based.
3. The learned Grade One Magistrate erred in law when she convicted the Appellants based on the weaknesses of the Appellants defence rather than on the strength of the Respondent's case.
4. The Learned Grade One Magistrate erred in law and fact when she made an order for compensation in the sum of 65,000,000/= (Sixty five million shillings only) when the property was recovered and returned to the complainant.
5. The conviction and sentence handed down on the Appellants is too harsh in the circumstances.
6. The learned trial magistrate erred in law when she kept shifting the burden of proof on the accused.

The grounds of Appeal for the 3rd appellant were:-

1. The learned Trail Magistrate erred in law and fact when she failed to evaluate evidence on record of the 3rd Appellant that he did not steal the items but bought.
2. The trial magistrate erred in law and fact when she convicted and sentenced the 3rd Appellant for both counts of theft and being on possession of stolen property.
3. The Learned Grade One Magistrate erred in law and fact when she made an order for compensation of the complainant in the sum of Ug. Shs. 65,000,000/= (sixty five million shillings.
4. The conviction and sentence given to the Appellants is too harsh given the circumstances.

In his submissions Mr. Muganga for the 3rd Appellant conceded that on the circumstantial evidence adduced by both the prosecution and in defence by the 1st and 2nd Appellants the Learned Trail Magistrate reached a correct decision to convict the 3rd Appellant on the charge of theft. Therefore the 3rd Appellant thereby abandoned ground one.

Ms. Kataike, for the State, in her submission agreed that the learned trial magistrate had erroneously convicted the 3rd Appellant on count 2 of receiving stolen property having found him guilty of theft of the property. I agree that an accused can not be found guilty of receipt of property which same property he has been found guilty of stealing. Therefore ground 2 of the 3rd Appellant's appeal succeeds.

Ground 3 and 4 of the 3rd Appellants appeal are the same as ground 4 and 5 of the 1st and 2nd Appellants appeal so will be considered together in my judgment.

I will consider grounds 1 and 2 of the 1st and 2nd Appellants appeal together, then grounds 3 and 6 together and then lastly grounds 4 and 5 whereby I will also be considering grounds 3 and 4 of the 3rd Appellants appeal together.

The duty of 1st Appellant Court was summarized in Baguma Fred vs Uganda SCC in Appeal No. 7 of 2004 where it was stated:

> *" First it is trite law that the duty of a first appellant Court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witness, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such revaluation that*

it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court. (See: Pandya vs R(1957)EA 336, Riwala vs R(1957)EA 570, Bogere Moses vs Uganda, Crim Appl No. 1/97(SC) and Okethi Okale vs Republic (1965) EA 555"

Grounds 1& 2 – The two grounds can be reframed into one ground that the learned trial magistrate erred in law and fact when she failed to appropriately and properly evaluate and apply the circumstantial evidence with regard to the participation of the 1st and 2nd Appellant in the commission of the offence.

In Katende Semakula vs Uganda SCC Appeal No. 11 of 1944 it was held that circumstantial evidence must be narrowly examined, because evidence of this kind may be fabricated to cast suspicion on another. That it is therefore necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other existing circumstances which would weaken or destroy the inference. In Bogere Charles vs Uganda SCC Crim Appeal No. 10 of 1998 it was held:

> "---- *in a case depending exclusively upon circumstantial evidence, she(court) must find, before deciding upon convictions that inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt."*

Taylor on Evidence 11th Ed. Page 74 provides:

> *"The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt"*

See: also Teper vs R(1952) AC 480, Simon Musoke vs R(1985) EA 715.

The complainant, Engineer Mulunya Chris, testified that the Accused persons were his neighbors for over ten years. In August 2011 he found his house vandalized and several items stolen. On a search of Nabanja's home 17 doors and 3 door frames were dug from Nabanja's kitchen. Also door hinges and electrical materials were found under Nabanja's bed. Nabanja and Kisule asked the witness for forgiveness. PW2 Francis Musula, the area Chairman LCI also testified that police dug up in the kitchen where doors had been buried. That electrical wires and lamp holders were found in Nabanja's bedroom, PW3 Golooba Stanley David, an Investigator with ASKA Security Services in his evidence stated:

> *"……...There is a kitchen, inside it had fresh soil showing like something ha d been buried there. We asked A1 , A2 and A3 what was buried in the kitchen, none of them could answer. The police and well wishers dug it up-------- we started seeing doors piled. The doors were removed around 17, 3 door frames. The electrical were found in A1's bedroom. A1 told us the things were brought in by a son who was not around……"*

The above evidence was also corroborated by PW4 No. 37545 D/C Oromchan Patrick, PW5 No. 40486, D/C Ogwal Richard and PW6 No. 3985 PC Wabwire Job, the police Officers who participated in the search of Nabanja's home.

In her testimony, Nabanja Gertrude testified that when policemen came to search her home she told them that she had seen three doors brought by Kiridde Denis. That when she asked him where he had got the doors Kiridde told her that a rich man had removed the doors and sold them to him. That the doors were found in the kitchen, where her goats sleep. In

cross-examination she stated that she did not see the hole being dug and did not know that doors had been hidden there until when she saw 17 doors being dug out. She admitted that wires were found under her bed but that she did not put them there, the house is a family house. She occupied it with about 30 people, some of them children and others adults. She also stated that Kiridde brought buyers but they did not buy.

Hudson Kisule was in his Senior Six vacation aged 18 years. He testified that he had not seen the items until when they were recovered by the police. He stated that the doors and door frames were buried in the goats' house and the soil was fresh. He however stated that it was Kiridde who had brought the doors and that when he asked him, Kiridde told him that he had bought the doors from the engineer where he was working. That Kiridde would always bring things from his work place and keep them in the goat house.

Kiridde Denis testified that there was a hole in the kitchen which had remained after they uprooted a tree. That he put the doors in the hole and covered them with iron sheets. He explained that he had buried the doors so that they do not steal them because the kitchen had no locks.

On the above evidence the learned trail Magistrate stated in her judgment;

> *" When PW3 Golooba asked A1 and A2 what was buried in the kitchen/goats' house they kept quiet. This is an indication that A1, A2 all knew that Kiridde had hidden the doors because they were stolen. All these items were found in A1 and A2's house…….. the electrical wires found under A1's bed…… A1 told Court she saw them under her bed but she did not know who put them there.*

From the above, A1 and A2 knew the items Kiridde brought in their home could have been stolen. When A4 buried them or hid them……., A1 and A2 never informed police"

She on above finding convicted the Appellants of receiving and retaining property knowing or having reasons to believe the same to have been feloniously stolen.

Mr. Mungoma, for the 1st and 2nd Appellants argued that there was no evidence to prove that they participated in the concealment of the doors or that they knew that the doors had been buried there. Further that there was no evidence to prove that they knew that the items had been stolen. He submitted that the mere fact that stolen items were found in the Appellant's premises was not sufficient evidence of receiving. He argued that the two appellants did not have control and did not invite the 3rd Appellant to bring the items home since he was a son in the home and had free access thereto.

On the other hand Ms. Kataike for the State argued that the 1st Appellant was the mother of the 2nd and 3rd Appellant. The stolen property was recovered from her kitchen where she stays with her sons. That a kitchen is a place where a person commonly cooks food, she would have become suspicious of what was buried in the fresh soil in her kitchen. With regard to the 2nd Appellant, counsel argued that being a family member and residing in the same home constructively knew what was buried in the kitchen.

In Mbazira Siraje & Anor vs Uganda SCCA No. 7 of 2004 it was stated:

" The doctrine of recent possession of stolen goods is an application of the ordinary rule relating to circumstantial evidence. The fact that a person is in possession of goods soon after they are stolen raises a

presumption of fact that that person was the thief or that that person received the goods knowing them to have been stolen, unless there is a credible explanation of innocent possession. It follows that the doctrine is applicable only where the inculpaltory facts, namely the possession of the stolen goods, is incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances that weaken or destroy the inference of guilt.

The starting point for the application of the doctrine of recent possession, therefore, in proof of two basic facts beyond reasonable doubt; namely; that the goods in question were found in possession of the accused and that they had been recently stolen."

The evidence shows that the 1st Appellant had at least seen the 3rd Appellant bring in three of the doors. She does not state where these three doors were kept. It is an undisputed fact that the doors and a door frame were dug out of a hole within the kitchen and the soil was fresh. The hole could not have been left by an uprooted tree. This was a kitchen in use and where goats were kept. A kitchen is a facility which is in daily use in a home and the goats must have been daily taken out and brought into the kitchen. A hole which accommodated 17 doors and a door frame could not have been small. Therefore must have been easily noticeable by the users of the kitchen. Any user of the kitchen must have been undoubtedly aware of the situation of the kitchen. The first Appellant was the mother and/or grandparent of the respective residents of the home. She was the female head of the home and thus the prime user of the kitchen. Genuinely obtained property is not hidden in a hole and covered with soil. The circumstances point to the guilt of the 1st Appellant. Further electrical wires were found under the bed of the 1st Appellant. She only denied having put them there but was aware of their

presence. This case is distinguishable from Katende Semakula vs Uganda SCC Crim App 11 of 1994 quoted by Mr. Mungoma for the 1st and 2nd Appellants. In that case the property recently robbed was found in Semakula's father's house but the father had denied that his son Semakula had been to the house the night in issue, he had not seen Semakula bring the property and could not explain how he knew that Semakula had brought in the property. The court found that anybody else including Semakula's father could have hidden the property. The evidence on record shows that the 1st Appellant had received the property and retained the same in her home knowing that it was stolen property.

With regard to the 2nd Appellant he was a member of the family and resident there as any other member of the family. There is no evidence to show that he occupied the same bedroom with his mother to know whatever was kept there. There is no evidence that he was a regular user of the kitchen to be assumed to know the state of the kitchen. All he admitted is that the 3rd Appellant used to bring home things and keep them in the kitchen. There is no evidence to show that the 2nd Appellant knew that the 3rd Appellant had concealed the doors in a hole dug in the kitchen. The evidence on record did not prove the guilt of the 2nd Appellant beyond reasonable doubt.

In the result the 1st Appellant's appeal on grounds 1 and 2 fail, while that of the 2nd Appellant succeeds.

Ground 3 and 6 are on burden of proof. The burden of proof rests upon the prosecution to prove the guilt of the Accused person beyond reasonable doubt by proving each and every ingredient of the offence charged. This burden of proof cast on prosecution in all criminal offences remains with the prosecution throughout the trial and never shifts to the Accused. This has

been the position of the law since the case of Woolington vs DPP(1935) AC 462 and the same is the basis of the provisions in Article 28(3) of the Constitution.

Against this standard principle, the learned trial magistrate erred when she based a conviction on the 1st and 2nd Appellants keeping quiet when asked as to who had buried the doors in the kitchen and for having failed to report to the police. It is trite that an accused is convicted on the strength of the prosecutions case and not on the defence weakness. Accordingly grounds 3 and 6 are upheld.

Grounds 4 and 5 (also grounds 3 and 4 of the 3rd Appellants' grounds of Appeal). The Appellants were jointly ordered to compensate the complainant with shs 65,000,000/= being shs. 60,000,000/= the value of the items and shs 5,000,000/= cost of labour for fixing them and time lost. Section 197 of the Magistrate Court Act grants a trial Magistrate Court the discretion, in addition to any lawful punishment, to order the convicted person to pay a victim of the offence compensation as the Court deems fair and reasonable, the record shows that in the course of the proceedings. The learned trial magistrate ordered and the recovered properties were returned to the complainant. In Adam Owonda vs Uganda SCC Crim Appeal No. 323 of 1993 it was held that an order for compensation cannot be justified in the circumstances where all the stolen properties were received by police and returned to the complainant. Their Lordships referred to Kiiza & Nkonge vs Uganda Crim Appl No. 24 of 1993 where they had pointed out that the complainant can only be compensated for what he or she has lost in the robbery. On the basis of the above authorities this order for compensation is set aside.

The Appellant were each sentenced to five years imprisonment on Count 2 of receiving stolen property. It was submitted on behalf of the Appellants that the sentences handed down on the Appellants are too harsh in the circumstances.

I have already held that the conviction of the 2nd Appellant, Kisule Hudson, cannot stand. The 2nd Appellants' conviction and sentence are set aside and he is accordingly acquitted.

The conviction of the 1st Appellant, Nabanja Gertrude Kisule is upheld. The maximum sentence for the offence under section 314 is imprisonment for fourteen (14) years. She was sentenced to five (5) years imprisonment. In her evidence the 1st Appellant stated that she is 40 years but went on to say that she did not know the year she was born and was just guessing her age. Apparently the learned trial magistrate appreciated the fact that the 1st Appellant was of advanced age when she stated in her reasons for sentence:-

" A1 is elderly, custodial sentence only will not be considered"

The order for compensation was apparently in the alternative though not clearly so recorded. Parents should not shield the wrongs of their children and where in so doing they commit an offence, they should be punished if found guilty.

However considering the apparent advanced age of the 1st Appellant and the fact that she was found a first offender her sentence is reduced from 5 years to six (6) months imprisonment from the date of conviction.

The 3rd Appellant, Kiridde Denis was convicted on the first Count of theft and sentenced to two years imprisonment. The maximum sentence of theft under section 261 of the Penal Code Act is imprisonment for 10 years. In

the circumstance of this case I find the sentence of imprisonment to two years not harsh. Accordingly the conviction and sentence of the 3rd Appellant on Count of theft is upheld.

However his conviction and sentence on the second count is set aside.

LAMECK N. MUKASA
JUDGE
28/11/2012

28/11/2012
Mr. Wabusa Eddy holding brief for Mr. Mungoma and Mr. Muganga for the Appellants
Mr. Kataike Florence for the Respondents
All Appellants present
Mr. Kutosi Charles, Court clerk

Court: Judgment delivered.

LAMECK N. MUKASA
JUDGE
28/11/2012