

UGANDA / JUDGMENT

Kizito & Another v Uganda (Criminal Appeal 136 of 2022) [2024] UGHCCRD 79 (18 December 2024)

[2024] UGHCCRD 79

COURT

HC: Criminal Division (Uganda)

BEFORE

Muwata, J

CASE / FILE NUMBER

Criminal Appeal 136 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 136 OF 2022 ARISING FROM CITY HALL COURT CASE
NO.1473 OF 2018

1. KIZITO JULIET

2. SSETYAMBULE ROBERT--. -----. APPEALLANT

VERSUS

UGANDA--. -----.-RESPONDENT BEFORE HON: JUSTICE ISAAC MUWATA
JUDGEMENT

The appellants being dissatisfied with the decision of Her Worship Nabirye Fatuma appealed to the High Court against sentence and conviction. They filed different memorandums appeal with some grounds similar while some are distinct. The I't appellant premised this appeal on the following grounds;

- 1. That the trial magistrate erred in law and in fact when she failed to properly evaluate the evidence laid out by the appellants thereby reaching a wrong decision
- 2. That the learned trial magistrate erred in law and in fact by totally failing to consider the evidence of the complaints own audit report thereby reaching a wrong decision
- 3. That the learned trial magistrate erred in law and in fact when she wrongly held that theft had occurred yet it hadn't in direct contravention of the complainants audit report.

- 4. That the learned trial magistrate erred in law and in fact by proceeding with the hearing without ascertaining whether the accused were actually properly fied as possible culprits.

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- 5. That the learned trial magistrate erred in law and fact when she created /imagined her own evidence of a safe yet the audit report clearly showed that there was no safe in the premises /organisation in question thus creating her own witness and cross examination.
- 6. That the leamed trial magistrate erred in law and fact when she shifted the burden ofproof from the prosecution to the accused/appellant thus occasioning a miscarriage ofjustice
- 7, That the learned trial magistrate erred in law and in fact when she presided over a matter that she clearly had no jurisdiction over thus presiding over a nullity in law.
- 8. That the learned trial magistrate erred in law and in fact when she relied heavily on hearsay evidence and circumstantial evidence thus arriving at a wrong decision
- 9. That the leamed trial magistrate erred in law and in fact when she ignored the alternative suspect theory set out in the audit report and assumed that the accused were the only possible perpetrators of the alleged crimes
- 45 10. That the learned trial magistrate erred in law and in fact when she allowed evidence from a contaminated crime scene thus occasioning a gross miscarriage ofjustice.
- ^I1. That the learned trial magistrate erred in law and fact when she proceeded on a defective charge sheet thus occasioning a gross miscarriage of justice as the correct charge would have been embezzlement triable before the anti-corruption court and not the trial court
- 12. That the learned trial magistrate erred in law and fact when she unjustly assumed that personal behaviour ofthe accused amounted to a criminal offence thus occasioning a miscarriage ofjustice
- ¹3. That the learned trial magistrate erred in law and fact by denying the appellants right to legal counsel of his own when he directed them to change their own legal counsel.
- 14. That the learned trial magistrate erred in fact and law when she ⁶⁰ sentenced the appellant to a harsh term of5 years.

The 2nd appellant raised the following grounds;

- 1. That the learned trial magistrate erred in law and in fact when she found that the prosecution had proved all the ingredients for the alleged offences whereas not.

- 65 2. That the learned trial magistrate erred in law and in fact by failing to subject the evidence on record to a thorough appraisal and evaluation thereby coming to a wrong decision that the prosecution had proved its case beyond reasonable doubt
- 3. That the learned trial magistrate erred in law and fact when she created/imagined her own evidence thus coming to a wrong conclusion in law and fact,
- 4. That the learned trial magistrate erred in law and fact when she shifted the burden of proof from the prosecution to the accused/appellant thus occasioning a miscarriage of justice.
- 5. That the learned trial magistrate erred in law and fact when she ignored the alternative suspect theory set out in the forensic audit report and assumed that the accused were the only possible 75 perpetrators of the all nme.

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- 6. That the learned trial magistrate erred in law and fact when she allowed evidence from a contaminated crime scene thus occasioning a gross miscarriage of justice.

The appellants prayed that the appeal be allowed, both sentence and conviction be set aside. They also filed their written submissions which ^I have carefully considered.

85 Duty of the I't appellate court.

The first appellate court must rehear the case by reconsidering all the evidence that was presented to the trial court. This includes re-evaluating the evidence for both the defense and the prosecution. The first appellate court must make its own conclusions on the issues and determine if the trial court properly applied the law and assessed the facts.

The first appellate court can only interfere with the trial court's findings if the lower court made an error or misdirected itself on a matter of fact or law that caused a miscarriage of justice. The first appellate court does not rehear the witnesses. However, if the question is about the witnesses' demeanor or manner, the first appellate court should be guided by the trial judge's

impression. See: *Henry Kifumunte v Uganda* (1999) 2 EA 127.

Almost all grounds raised in both memoranda of appeal relate to the question of evaluation of evidence by the trial court, except for grounds 7, 11, 13, and 14 of the 1st appellant's memorandum of appeal, which I shall address later. I shall re-evaluate the evidence as presented in the lower court:

The appellants were charged with the offense of theft contrary to sections 254(1) and 261 of the Penal Code Act. The prosecution alleged that between 2015 and 2018, at Ntinda i

worth UGX 50,000,000/;, the property of Ntinda Youth Development Organization. The prosecution presented four witnesses.

Standard of Proof

The standard of proof in criminal cases is proof beyond a reasonable doubt and not on a balance of probabilities. This was the holding by Lord Denning in *Miller v Minister of Pensions* U94712 ALL ER 372 - ³⁷³as follows: "That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt..."

PW1's Testimony: Rossette Muhoozi

Her evidence was to the effect that both appellants were former staff of Ntinda Development SACCO. The 1st appellant was a cashier, while the 2nd appellant worked as a treasurer.

She testified that on the 28th of March 2018, the board members of the SACCO called for an emergency meeting where the chairperson informed them that some money was missing and investigations revealed that Kizito

120 Juliet (Al) had taken the money.

> Her evidence was that Al had large amounts of money in FINCA Bank Ntinda Branch, about UGX 14,000,000/=, despite earning a salary of UGX 300,000/;. She also testified that Al was building a house in Magere and that her children were studying in a school with fees of UGX 800,000/;.

125 Upon arrest, Al was found with UGX 3,000,000/; and UGX 650,000/; in different areas of her house. Further searches revealed a bank slip with a figure of UGX 3,000,000/;, which was exhibited in court.

During another search at Al's premises on the 2nd of April 2018, bank deposit slips and a land purchase agreement dated the 22nd of December ²⁰¹⁶were recovered, indicating that Al had paid UGX 7,000,000/;, leaving a balance of UGX 4,000,000/;. Another agreement indicated that Al had paid the balance of UGX 2,000,000/;. The search certificate for the recovered items was also tendered in court by the prosecution. In cross examination, the witness stated that the total amount recovered from A I in cash was UGX 6,865,000/=.

PW2: No. 56112 DIC Igwe Madina

Her testimony was that they searched Al's house and recovered money in different denominations. They also recovered documents, including a withdrawal slip wherein Al had withdrawn UGX 2,000,000/; on the 27th of March 2018 from FINCA Bank, hidden in her private parts.

She also testified that they recovered another deposit slip from FINCA Bank dated the 18th of December 2018, indicating that Al had deposited UGX 2,800,000/-. Additionally, they recovered a receipt book for the SACCO and photocopies of land agreements. She testified that she received money from the complainant, which was said to have been recovered from Al, totaling UG) {2,471,000/:- and UGX 650,000/:-, tendered in court through three exhibit slips.

In cross-examination, she testified that at the police station where Al was reporting on bond, her bag was searched, and UGX 3,611,800 was recovered from her bag and exhibited in court. Her evidence also indicated that one of Al's recovered bank statements showed a withdrawal of UGX 8,700,000/:-, tendered in court as PE22.

PW3: Katerega Aloysius

He testified that he was instructed by the vetting committee of the SACCO to conduct an internal audit of the SACCO's books of accounts. He came up with a balance sheet showing about UGX 54,000,000/:- missing. Although he was not qualified to do it, the internal audit revealed that some money had gone missing. He stated, however, that he did not know who stole the money.

160 PW4: Kato Paul

His evidence was to the effect that A2 investigated the theft of UGX 50,000,000/:-. He testified that some of the money was recovered from Al and that he was sure Al took the money, although he did not see her steal it. The report on who was culpable was made by A2 and presented to the SACCO.

PW5: Boniface Lekgenya Ogwang

He testified that he is an auditor with 10 years of practice. He conducted an audit on the SACCO. His evidence indicated that by the time they conducted the audit, Al was no longer working there, but A2 still was. His evidence showed that a digital system called Excel Spreadsheet had some ledgers deleted, which would have helped in the absence of cash books.

His findings were that the assets were less than the liabilities by about UGX 55 million. He testified that the report was not conclusive because of the absence of the cashbook and the deletion of some information from the general ledger. The audit report, which detailed the weaknesses in the organization and made recommendations, was tendered in by the witness.

In cross-examination, he confirmed that he did not know who deleted the ledgers and that the loss could not have been more than UGX 55 million. He also stated that it was inaccurate to say that A2 deleted the ledgers, as Al was living in the building, had the keys, and had the combination for the safe

Section 254 of the Penal Code Act provides that:

"(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing. 185

Section 261 of the Penal Code provides that:

"Any person who steals anything capable of being stolen commits the felony called theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is

provided, to imprisonment not exceeding ten years." 190

Theft is committed when the prosecution proves the following elements of the offence beyond reasonable doubt: That the property taken is capable of being stolen; that the property taken belongs to another person; that the property was taken without a claim of right and with the intention of permanently depriving the owner of it and that the accused person is responsible for taking the property. See the cases of *Sula Kasiira vs Uganda S. C. Crim. Appeal No. 20 of 1993* and *Uganda v Opio (Criminal Case 112 of 2014)* I20171 UGHCCRD 36 (10 February 2017). 195

From the evidence presented by the prosecution, it is evident that the theft magistrate relied on the audit report submitted 200 occurred. The learned tri

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by PW5 to confirm that indeed money was missing from the SACCO's books of accounts. This evidence was corroborated by the testimonies of PW1, PW3, PW4, and PW5. In her judgment on page 3, the learned trial magistrate stated, "regardless of the fact that different people mentioned different sums of the amount that was missing, it is clear from the evidence that money was missing." The money belonged to the SACCO, as indicated in the evidence. Therefore, it is clear that theft occurred since the money was missing and could not be accounted for by those responsible for handling it.

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It is also apparent that the money was taken without a claim of right and with the intention of permanently depriving the SACCO of the funds. The learned trial magistrate relied on the evidence of PW1 and PW5, which proved that money belonging to the SACCO had been illegally siphoned from the organization. The intention to permanently deprive the SACCO

can be inferred from the fact that the money was not returned and was taken illegally without the consent of the organization and its board members.

The evidence of PW5 indicated that the digital system, Excel Spreadsheet, had ledgers deleted, which demonstrates an illegal intent to permanently distort or cover the tracks of whoever stole the money. I cannot fault the learned trial magistrate for finding that the prosecution had proved this element beyond a reasonable doubt. 220

The last element pertains to the participation of the accused persons. In convicting the accused, the learned trial magistrate relied on circumstantial evidence in the absence of any direct evidence of theft.

It is well-established law that where the prosecution's case depends solely on circumstantial evidence, the Court must, before deciding on a conviction,

find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt. See: Byaruhanga Fodori v. Uganda, S. C. Crim. Appeal No. 18 of 2002; [2005] I U. L. S. R. 12 at p. 14. The Court must be certain that there are no other co-existing circumstances which weaken or destroy the inference of guilt. See: S. Musoke v. R. [1958] E. A. 715.

Furthermore, before drawing an inference of the accused's guilt from circumstantial evidence, it is crucial to ensure that no other co-existing circumstances weaken or completely destroy that inference. 235

The circumstantial evidence relied on by the learned trial magistrate included the fact that A1 was found with large amounts of money in FINCA Bank, as evidenced by the bank statements submitted in court. Additionally,

- she relied on the fact that when the police and A2 searched A1, they found her with large sums of money. For someone earning a monthly salary of UGX 300,000, it is not plausible for her to possess such large sums of money. A2 also informed PW1 that A1 was building a house in Magere and sending her children to a kindergarten with fees of UGX 800,000. 240
- The learned trial magistrate also applied the principle of recent possession, which is an application of the ordinary rule relating to circumstantial evidence. A1 offered no explanation for the large amounts of money she was found with. Furthermore, PW5 testified that A1 had the keys to the offices and the combinations to the safe. Although PW5's audit report could not confirm who stole the money, it confirmed that money was missing, and the circumstantial evidence of A1 possessing large sums of money without explanation was sufficient to prove her participation in the theft.

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Regarding A2, I find that the circumstantial evidence was not sufficient to establish his guilt. Evidence indicated that he was the one who raised the alarm about the missing money, reported the matter to the police, and was cooperative during the investigations. He also helped produce the audit report indicating the SACCO was losing money. Such conduct is not consistent with the guilt of an accused person.

260 26s The fact that he searched Al's place and recovered some money without the police cannot be the basis for a conviction. It was presumptuous for the learned trial magistrate to base her conviction on this fact. There was no evidence presented by the prosecution to show that he was covering his own involvement. On the contrary, the evidence that he initiated the investigation leading to the discovery of the loss absolves him of guilt in the absence of any other circumstantial evidence to suggest otherwise

In conclusion, I do not find fault with the decision of the learned trial magistrate to convict the 1st appellant, as there was sufficient evidence to prove her participation in the commission of the theft. However, regarding the 2nd appellant, I find that the circumstantial evidence was not sufficient to prove his involvement in the commission of the theft.

275 The 1st appellant further raised a ground of appeal with regard to jurisdiction of the trial court to hear the trial. The courts have consistently held that Jurisdiction is a creature of statute; it cannot be assumed. It is the power granted to courts to hear and determine cases. Any order issued by a court without jurisdiction is null and void to that extent. The 1st appellant contended that the learned trial magistrate erred in law and in fact by presiding over a matter that she clearly had no jurisdiction over, thus presiding over a nullity in law.

Section 161 of the Magistrates Courts Act provides for the criminal jurisdiction of magistrates. It states that, subject to this section, ^a magistrate's court presided over by:

- (b) a magistrate grade I may try any offence other than an offence in respect of which the maximum penalty is death or imprisonment for life.
- 285 The maximum sentence for the offence of theft is imprisonment not exceeding 10 years. Clearly, the trial court had jurisdiction to try the offence of theft.

The 1st appellant also argued that the learned trial magistrate proceeded on a defective charge sheet thus occasioning a gross miscarriage of justice as the correct charge would have been embezzlement triable before the anticorruption court and not the trial court.

Section 85 of the magistrates courts act provides that a charge sheet must contain sufficient facts to inform the accused of the nature of the offence. If the charge sheet lacks these details, it can be considered defective. Secondly, section 88 of the Magistrates Courts Act requires that the charge sheet must be clear and specific. Any ambiguity or lack of clarity can render the charge sheet defective.

I have reviewed the amended charge sheet, and it is clear that it contained sufficient details for the 1st appellant to understand the nature of the charges against her. There is no indication that the details were insufficient. In fact, the 1st appellant took a plea based on this charge sheet. Nonetheless, even if the charge sheet were defective-which it is not-the 1st appellant has not demonstrated that this defect resulted in a miscarriage of justice.

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Secondly as to if she ought to have been tried in the anti-corruption court, Theft is not tried in the Anti-Corruption Court because the Anti-Corruption Court in Uganda is specifically established to handle cases related to corruption offenses. The Anti-Corruption Act, 2009, defines corruption offenses and outlines the jurisdiction of the Anti-Corruption Court, which includes offenses such as bribery, abuse of office, and causing financial loss to the government.

Theft, on the other hand, is a general criminal offense that falls under the jurisdiction of the regular criminal courts. The Anti-Corruption Court focuses on corruption-related crimes committed by public officers or involving public resources, whereas theft can be committed by anyone and does not necessarily involve public resources or public officers.

The 1st appellant also raised the issue of alternative suspect theory alternative suspect theory. This theory involves presenting evidence that another individual, rather than the accused, committed the crime.

320 For this theory to apply, the accused must present evidence that some else committed the crime instead of them. The evidence can be direct, circumstantial, or both. The evidence must have an air of reality for the court to consider it. The court must ensure that the evidence presented connects the alternative suspect to the crime, showing they had the opportunity, motive, or means to commit the crime.

325 The evidence should have significant probative value, meaning it must be strong enough to raise a reasonable doubt about the defendant's guilt. This defense can therefore only be raised where there is sufficient evidence to connect a third party to an offence.

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In the instant case, I find that the 1st appellant failed to present strong, relevant evidence to suggest that some person other than her committed the offence. She was found with money and the circumstantial evidence clearly pointed to her. She merely mentioned names of other persons but did not adduce any evidence pointing to their guilt. There was sufficient evidence linking her to the commission of the theft. Accordingly I find that the said theory is not applicable since no evidence was presented by her.

The 1st appellant argued that the sentence of one year was harsh. Sentencing is at the discretion of the judicial officer handling the matter. This discretion can only be interfered with if it is shown that the sentence was based on a wrong principle, the court overlooked some material fact, or if the sentence was manifestly harsh and occasioned a miscarriage of justice.

The maximum sentence for the offence of theft is 10 years. The 1st appellant was sentenced to a fine of UGX 1,500,000/ \$=\$ or one year in default, and also ordered to refund UGX 30,000,000/ \$=\$. The learned trial magistrate reasoned that most of the money was found in possession of A1 during the searches and investigations. Given the evidence presented at the trial, the sentence is not harsh and I find no reason to depart from the trial court. Therefore, this ground fails.

Consequently, the appeal filed by the 2nd appellant succeeds; his conviction, sentence, and order of compensation are set aside. He should also be refunded any monies paid as a fine. As for the 1st appellant, her

appeal is dismissed. The orders of the trial court against her are maintained.

I so find 18/12/2024 Judge

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