

UGANDA / JUDGMENT

Kizito v Uganda (Criminal Appeal No. 22 of 2021) [2022] UGHCCRD 66 (16 August 2022)

[2022] UGHCCRD 66

COURT

HC: Criminal Division (Uganda)

BEFORE

Asiimwe, J

CASE / FILE NUMBER

Criminal Appeal No. 22 of 2021

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****CRIMINAL APPEAL 022. OF 2021****ARISING FROM MAKINDYE CRIMINAL CASE NO.747 OF 2020****KIZITO ANDREW alias MBWABWA & ANOR APPELLANTS****VERSUS****UGANDA RESPONDENTS BEFORE: HON. JUSTICE TADEO ASIIMWE****JUDGEMENT**

This appeal arises out of a decision of His Worship Okumu Jude Muwone magistrate grade one dated 31/03/2021.

Background

The background of this appeal as can be ascertained from the record of the lower court is the appellants were charged with three counts but convicted on two counts of stealing motor vehicle and obtaining money by false pretence and sentenced to a cation on both counts. In addition to the above, the Magistrate issued other orders.

Being dissatisfied with the decision of the learned trial magistrate's decision, the appellants filed this appeal on the following grounds;

- 1. The learned Trial Magistrate erred in both law and fact when he held that a motor vehicle low bed trailer Registration no. UBB 592M belongs to Attorney kizito and not intertech industrial machinery Uganda ltd.
- 2. The learned Trial Magistrate erred in both law by shifting the burden of proof to the appellants when he held that the appellant failed to prove that they bought motor vehicle low bed trailer Registration no. UBB 592M using the company money. \

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- 3. The learned Trial Magistrate erred in both law and fact when he held that the appellants' made false representation to Jodis Koyelenge by telling him that motor vehicle low bed trailer Registration no. UBB 592M belongs to InterTech industrial machinery Uganda ltd whereas not.
- 4. The learned Trial Magistrate erred in both law and fact when he held that the sale of motor vehicle low bed trailer Registration no. UBB 592M by the appellants on behalf of the company in which they are shareholders and directors to Jodis Koyelenge without filing company resolutions and minutes authorizing them to sale constituted intentions to defraud.
- 5. The learned Trial Magistrate erred in both law and fact when he failed to evaluate the evidence on record there by arriving at a wrong decision in convicting the appellants' for the offences of stealing when he held that the sale of motor vehicle low bed trailer Registration no. UBB 592M and obtaining money by false presence.

At the hearing of this appeal, the appellants were represented by Counsel Innocent Wanambuko while the respondent by Mariam Njuki an Attorney from ODPP. Both counsel-filled submissions, which I shall, consider in this appeal. Counsel for the appellant submitted at length arguing that the elements of theft and obtaining money by false pretence were never proved by prosecution as it failed to prove the complainant's ownership of the motor vehicle in issue. He further submitted that it was wrong to shift the burden of proof to the appellants' contrary to the law. In response, the learned attorney submitted that prosecution led sufficient evidence of to prove all the ingredients of the offences.

DUTY OF THE FIRST APPELLATE COURT

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This being a first appellate court, it is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see

Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997 and Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it".

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic* [1957] EA. 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilai M. Ruwala v. R.* [1957] EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post* [1958] E. A 424).

DETERMINATION

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In their written submissions both counsel argued grounds 1,3,4 & 5 together and ground 2 alone. I have however noted that all the 5 grounds fault the magistrate for failure to evaluate the evidence in regard to ownership of motor vehicle low bed trailer Registration no. UBB 592M. As such, this court will resolve all the 5 grounds together.

From the evidence on record, the appellants were charged and convicted on two counts of stealing motor vehicle and obtaining money by false pretence and sentenced to a cation on both counts. The basis of their conviction was that the complainant transferred the said motor vehicle in to the names of the appellants' company for purposes of easy clearance of taxes and that the appellants' instead without his knowledge sold of the said motor vehicle. The appellants' in their defence claimed ownership of the said motor vehicle as it was voluntarily registered in their company name by the complainant whom they allegedly sent money and he shipped the motor vehicle to the appellants'.

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A close Scrutiny of the lower court record, I have no doubt that the facts before the lower court constitute a dispute which give rise to the need to determine civil rights of the parties.

Interestingly in this matter, the trial magistrate seemed to be aware of the civil nature of the matter as he went ahead to discuss issues of company law as regards company resolutions authorizing the buying and the selling of the motor vehicle. He went ahead to do the unheard of in criminal cases to shift the burden of proof in criminal cases to the appellants'.

In the case of **Joseph Agenda Vs Uganda HCT-00-CR-CM 003 of 2011** court brought out the distinction between civil and criminal proceedings where it was held that "there is a clear distinction between civil and criminal actions. The civil proceedings determine the civil litigants' civil claims or liabilities and the standard of proof is on the balance of probabilities. There is a public interest in the criminal proceedings and the required standard of proof is beyond reasonable doubt. The civil proceedings are individualistic in nature while the criminal proceedings are public in nature."

In this case as already stated above, the subject matter is a motor vehicle where each party is claiming ownership. These are not rights that can be determined in criminal courts in my view.

In **Okello Oris Atana & Another vs. Uganda Cr. App 0035/2013**. Court stated as follows.

", *Claim of ownership is a civil right that ought to be allowed to be proved in a Civil Court and should never be criminalized as this would amount to persecution.*

Further Section 7 of the penal code Act is to the effect that; -

A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done was done by the person with respect to the property was done in exercise of an honest claim of right.

I entirely agree with the above position and wish to add that there is need to be careful in taking a decision to prosecute any person who claims ownership

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property. Under normal circumstances the issue of ownership should first be resolved in civil courts.

Both the appellants on behalf of the company and the complainant in the criminal case claim the said Motor vehicle. There is also a civil case no 918 of 2020 (Anthony Kizito vs intertech industrial Machinery (u) LTD and Another) between the same parties. This therefore means that unless the issue of ownership is settled the criminal liability remains in question.

In **Sublime Baker Vs Uganda Criminal Appeal NO. 21 OF 2018**, Justice Flavia Senoga Anglin held that;

"There is no universal principle that proceedings in a criminal case must necessarily be stayed when a similar or identical matter is pending before a civil court. However, in the present case, the criminal proceedings arise out of complaints for offences allegedly committed during the pendency of the civil suit, involving the same facts and allegations. The issue of ownership of the disputed land is pending decision before the Land Division and also the Court of Appeal. The dispute involved in the criminal proceedings is purely of a civil nature and if allowed to continue while the civil matters are pending, it will create complications instead of facilitating the matter. ' '

Similarly, in the present case, there is a pending civil case in the commercial Division between the parties over ownership of the same M/V which the appellants were convicted for having stolen.

From the above evidence, there is no doubt in my mind that the sale of the M/V by the appellant led to complaint and conviction of the appellants by the trial Magistrate. It is the same M/V that the complainant is claiming in the **civil suit no 918 of 2020 (Anthony Kizito vs intertech industrial Machinery (u) LTD and Another)** in the commercial court.

I find that the determination of ownership rights of the suit property (M/V) can best be resolved through a civil case. If the appellants are found to own an interest in the said MV, then their sale would be valid, and therefore criminal proceedings against them would be unfortunate and an abuse. The reverse could also support the prosecution's case. *J/jT^a*

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In conclusion, this appeal has merit and the same is hereby allowed. The conviction of the appellant in criminal case no 747 OF 2020 by the trial Magistrate is set aside and substituted with acquittal. All the subsequent orders are also vacated.

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JUDGE

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16/08/2022.

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