

UGANDA / JUDGMENT

Sekandi v Uganda (Criminal Appeal 40 of 2023) [2023] UGHCCRD 115 (23 September 2023)

[2023] UGHCCRD 115

COURT

HC: Criminal Division (Uganda)

CASE / FILE NUMBER

Criminal Appeal 40 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 40 OF 2023 (HCT-00-CR-CN-0040-2023)

(ARISING FROM MAKINDYE CHIEF MAGISTRATES COURT CRIMINAL CASE NO. 575/ 2021)

SSEKANDI JOHN ::::::::::: APPELLANT

VS

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

JUDGMENT

BY JUSTICE GADENYA PAUL WOLIMBWA

This is an appeal from the judgment and sentence of HW Patience Lorna Tukundane, Magistrate Grade I, sitting at the Chief Magistrates Court, Makindye delivered on May 29th 2023.

Background to the Appeal

Sekandi John, hereinafter called the Appellant, was charged with criminal trespass contrary to section 302 of the Penal Code Act. The prosecution's case was as follows: The Appellant and others still at large on September 28th, 2020, at Ziranumbu Cell, Ssabagabo Municipality in Wakiso district, entered upon the land of Ruhanga Ariyo, hereinafter called the complainant, with the intention of annoying and intimidating him. They destroyed property and graded the land from the facts gathered from the evidence. On 17th September 2019, the Appellant sold the subject land measuring 100 by 100 ft to the complainant for consideration of thirty million

shillings. The complainant paid eighteen million shillings in two instalments, leaving a balance of twelve million to be paid after the Appellant transferred the land(kibanja) or, more specifically, assisted in getting the kibanja registered in his name. The complainant immediately took possession of the land. He planted bananas and mangoes on it. He also built a site house and fenced off the ground. However, the Appellant later claimed he had been paid little money.

On 28 September 2020, without any warning to the Complainant, the Appellant, with a group of unknown people, entered upon the land, destroyed property, and graded it on the pretext that he had retaken possession for failure to pay the balance of the purchase price. In his defence, the Appellant testified that while it was true that he had sold the complainant the kibanja for sixty million shillings, the complainant only paid one million shillings and disappeared for four months. This was when he paid him five million shillings, then three million shillings and another six million shillings, making a total of fifteen million. The complainant again went silent. After failing to locate the complainant, he called him using the wife's phone. The complainant came with LDUs and the Police and tried to force him to sign an agreement to receive the balance of forty-five million shillings, which he refused.

The trial Magistrate found the Appellant guilty of criminal trespass because, on 2 January 2017, the Appellant handed over vacant possession of the land to the Complainant after execution of the agreement of sale of the Kibanja. There was uncontroverted evidence from the complainant and PW2 and PW3 that the complainant was in possession of the land at the time of the trespass. PW1, PW2 and PW4 all confirmed that the Complainant was in possession of the land. The Trial Magistrate also found that the Appellant had graded the complainant's land intending to annoy or intimidate him.

The Trial Magistrate sentenced the Appellant to seventeen months imprisonment, the time he had spent on remand. The Trial Magistrate, in sentencing the Appellant, stated as follows:

Considering both counsel's submissions and that the convict looks to be in bad health, he is hereby sentenced to time spent on remand. He is, therefore, discharged unless being held on other lawful charges.

It is worth noting that the Appellant had been on remand for seventeen months and was essentially sentenced to 17 months and six days imprisonment for an offence with a maximum sentence of 12 months.

The Appellant, being aggrieved with the conviction and sentence of the Trial Magistrate, filed the present appeal.

Grounds of Appeal

The grounds of Appeal are:

1. That the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence of possession, unlawful entry and intention to annoy or intimidate, thereby reaching a wrong decision of guilt of the Appellant.

2. That the learned Trial Magistrate erred in law and fact when she unlawfully convicted the Appellant of criminal trespass.
3. That the Learned trial Magistrate erred in law and fact when she sentenced the Appellant on the time spent on remand.

Representation

The Appellant was represented by Ms. Fred Kalule & Co Advocates, while Ms. Jane Francis Apolot, Senior State Attorney, represented the Respondent.

Submissions of the Appellant

Although the Appellant listed several grounds of Appeal, he chose to argue them together. Therefore, for ease of considering the appeal, I will consider the grounds of appeal together. The gist of the Appellant's submissions is that the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence and wrongfully convicted him of criminal trespass in the absence of uncontroverted evidence to show that the complainant was in possession of the land at the time of the alleged trespass. In particular, the Appellant submitted as follows:

Failure to prove that the Complainant was in possession of the land.

Counsel for the Appellant submitted that the prosecution failed to prove the ingredients of the offence of criminal trespass; he submitted that the prosecution did not prove that the complainant was in possession of the land, that the Appellant entered upon the land and that the Appellant entered the land to either annoy or intimidate the complainant. He submitted that the prosecution's evidence fell short of proving that the complainant was in possession. He referred me to the case of **Uganda vs. Kinyera and 3 Others Criminal Session case 374 of 2018 [2018] UGHCCRD 297**, where the court observed that possession within the meaning of this section refers to effective, physical, or manual control, or occupation evidenced by some outward act, something called defacto possession or detention as distinct from a legal right to possession. He submitted that the prosecution's evidence fell short of establishing that the complainant was in possession of the land. He made cited the following examples-

Firstly, the Trial Magistrate disregarded the evidence of PW4, who testified in cross-examination that the complainant had never been in possession of the land. Secondly, although the complainant testified that he had put up a fence and planted a banana plantation on the land, PW2 testified that there was no structure on the land. Thirdly, although the complainant testified that he had a structure on the land, PW2, in cross-examination, denied that there was no structure on the ground.

Fourthly, although PW4, the investigating officer, testified that she went to the scene of the crime with SOCO (Scenes of Crime Officers) and that the complainant showed him the land, half of which had been graded yet PW4 in cross-examination testified that she did not find trees on the land. He submitted that the evidence of PW4 contradicted the complainant's evidence, who had

testified that he had mango trees and bananas destroyed by the Appellant. Counsel for the Appellant also questioned why the photographs marked exhibit PEX5 did not show evidence of destroyed mango trees. He also wondered why no mango trees existed on the ungraded land.

Fifthly, whereas the complainant testified that he had built a guard house on the land, PW4 never mentioned finding a guard house on the ground. Sixthly, whereas PW4 testified that bananas had been cut or destroyed, she failed to identify them using the sketch map marked Exhibit PExh4. He submitted that PW4 should have indicated the bananas on the sketch. He concluded that the bananas were not shown on exhibit PExh4 because they were not on the land.

Lastly, although the complainant testified that he erected a chain-linked fence in 2017, PW4 testified that there was no fence on the land except for finding poles and holes meant to erect a fence on the ground. And that, in any case, the complainant denied that the fencing materials were his. And that even if it was assumed that the complainant had a fence, why wasn't the chain-linked fence exhibited? He also queried why there was nothing on the ungraded land.

In conclusion, counsel submitted that the prosecution case on possession of the land by the complainant was not true and that the court should have believed the credible evidence of the appellant, who testified that the complainant had never been in possession of the land, including having any developments on it.

Failure to prove that the Appellant entered on the land.

The gist of the Appellant's case is that the prosecution failed to prove that he entered the complainant's land. He submitted that although the complainant testified that on 28 September 2020, he rushed to the scene after his caretaker told him that the Appellant with some people were grading the land, PW4, however, testified that it was the new buyer of the land who was grading the land on the appellant's instructions. The Appellant insisted that he never graded the land. Secondly, counsel submitted that since the prosecution failed to prove that the complainant was in possession of the land, it was pointless to say that the Appellant had entered the land, which the complainant has never been in possession.

Failure to prove an intention to intimidate, annoy, or commit a crime or an offence.

Counsel submitted that since the complainant did not have possession of the land, it is impossible that the appellant either annoyed or intimidated him. He submitted that the complainant never gave evidence that he either feared or was under the impression that the Appellant would harm him.

The Respondent's Submissions

The Learned Senior State Attorney submitted that the prosecution proved beyond reasonable doubt that the appellant committed the offence of criminal trespass. She submitted that criminal Trespass is committed when-

1. There is an actual entry by the accused person.

2. The entry must be unlawful.
3. The entry must be with intent to annoy or intimidate the person entitled to possession.

She submitted that the prosecution called four witnesses to prove the case. The complainant testified that he owned the land upon which the Appellant had trespassed. He testified that on the fateful day, he was informed by the caretaker of the land that people were grading the land. He rushed to the land and found a grading crew levelling the land. The crew told him the Appellant had instructed them to grade the land. PW1 tendered two sales agreements marked PEX1 and 2 to prove that he bought the land. PW2 testified that he was present when PW1 bought the land. He was the author of exhibit PEX1. PW2 also testified that PW1 planted crops and fenced off the ground.

PW3, the handwriting expert, testified that the appellant's two agreements for PW1 bore the appellant's signature. His report was marked as Exhibit PEX3. PW4, the investigating officer, went to the crime scene, where she saw that half of the land had been graded. The complainant said the concrete poles on the land were not his. PW4 talked to the Appellant, who told her he was re-selling the land because PW1 had not paid the entire purchase price. PW4. tendered in a sketch map of the scene marked Exhibit PEX4 She submitted that from the above evidence, the prosecution proved all the ingredients of the offence of criminal trespass against the Appellant.

Concerning the contradictions in the prosecution case, the Senior State Attorney submitted that the inconsistencies in the prosecution case were not material and, therefore, did not amount to deliberate falsehoods. She referred to the case of Uganda vs. Adrien James Peter HCCS No. 10 of 2010, where Justice L Gidudu observed that:

On the credibility and inconsistency of witnesses, the Courts have stated in a number of cases that a witness may be untruthful in certain aspects of his evidence but truthful in the main substance of his evidence. Further, that a witness who has been untruthful in some parts and truthful in other parts could be believed in those parts where he has been truthful. But whereas it is true to say that minor discrepancies might be explained away by immediate delay before the accused person was brought to trial, grave inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.

She submitted that if there were inconsistencies in the prosecution case, they were minor and did not go to the root of the credibility of the witnesses and ought, therefore, to be ignored.

Concerning ground III, the Appellant did not address this ground of appeal. Nonetheless, the Senior State Attorney felt obliged to submit on the ground. She conceded that the sentence imposed by the trial Magistrate was illegal because it exceeded the prescribed maximum sentence. She advised the court to set aside the sentence and substitute it with a legal sentence.

Rejoinder by the Appellant

Counsel for the Appellant submitted that the entire evidence of the prosecution was full of contradictions and inconsistencies, which the Trial Magistrate should have inquired into during the evaluation of the evidence.

He submitted that if indeed it was true that the complainant had planted mangoes and bananas on the land and erected a guard house, these should have been captured in the sketch plan, or the stumps would have been seen. There should have also been evidence of a destroyed chain-linked fence and destroyed crops. He also submitted that there should have been developments on the ungraded land, as the complainant and PW2 alleged.

Consideration of the Appeal

The Duty of the First Appellate Court

According to Kifamunte Henry v Uganda (Criminal Appeal No. 10 of 1997) [1998] UGSC 20 (15 May 1998)

*The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See *Pandya vs. R.* (1957) E. A. 336 and

Okeno vs. Republic (1972) E. A. 32 Charles B. Bitwire vs Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.*

*Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 331(I) of the Criminal Procedure Act.' It does not seem to us that except in clearest of cases, we are required to reevaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal, it is sufficient to decide whether the first appellate Court, on approaching its task, applied, or failed to apply such principles: See *P. R. Pandya vs. R.* (1957) E. A. (supra) *Kairu vs. Uganda* (1978) FI. C. B. 123.*

In obedience to the Supreme Court's decision above, I will re-evaluate the evidence of the Trial Court, bearing in mind that I never had the chance to observe the demeanour of the witnesses.

Consideration of the Appeal

The gist of the present appeal is that the prosecution failed to prove the elements of the offense of criminal trespass beyond a reasonable doubt. My duty, therefore, is to interrogate the evidence to establish whether the prosecution proved the case of criminal trespass against the Appellant.

The prosecution bears the burden of proving its case beyond reasonable doubt that the Appellant, as in this case, committed criminal trespass. In **Uganda vs. Kinyera Walter, Okot Bosco, Oyoo Franco and Ocaya Jackson (High Court Criminal Session Case No. 0374 of 2018)**, Justice Mubiru held that criminal trespass is committed when there is:

1. Intentional entry onto property in the possession of another
2. The entry was unlawful or without authorization.
3. The entry was for an unlawful purpose.
4. The accused entered the land.

Justice Mubiru defined possession in the following words:

Possession is intended to be possession at the time of entry, and it does not imply that the person in possession must be present at the actual time of entry.... It is worthy of note that the party lawfully entitled to possession has a right to private defence of the property, embedded in the defence of bonafide claim of right under section 7 of the Penal Code Act;

Possession within this section refers to effective physical or manual control or occupation, evidenced by some outward act, sometimes called defacto possession or detention, as distinct from a legal right to possession.

The offense of criminal trespass is meant primarily to protect the lawful possession of property that gives meaning to the right to property protected under Article 26(1) of the Constitution. However, for possession to be protected, the prosecution must establish that the complainant is in actual as opposed to constructive possession. The complainant must have taken possession of the land, and they need not be physically present when committing the offence. Interference with the complainant's intention to exclude.

Was the Complainant in possession of the land?

The prosecution called the following evidence to prove that the complainant was in possession of the land. The complainant testified that he bought the land in 2019 for thirty million shillings. He paid eighteen million shillings in two instalments, leaving a balance of twelve million to be paid after the Appellant transferred the land(kibanja) or, more specifically, assisted in getting the kibanja registered in his name. The prosecution tendered two sales agreements marked exhibit PEX1 and PEX2 to evidence the purchase. The prosecution also called the evidence of PW3, a handwriting expert, who confirmed that the Appellant signed both agreements. According to Clause 3 of the Sales Agreement dated 17th September 2019(Exhibit PE2), the vendor gave the purchaser the right to take possession of the land upon execution of the agreement. This clause is

material in this case because it is the one that gave the complainant the right to enter into the disputed land despite having not paid the full purchase price.

As I understood him, the Appellant maintained that the complainant had never taken possession of the land while not disputing the purchase. In particular, they pointed to a lack of physical evidence, such as not having crops, a site house, and a chain-linked fence to protect the property from asserting that the complainant was not in possession of the land. The Appellant submitted that despite the complainant testifying that he had mangoes and bananas on purchasing the land, there was no single banana or mango tree on the disputed land. The Appellant referred to the evidence of PW4, the investigating officer who visited the land but did not see any developments. He also submitted that the crime scene photographs did not show any developments on the land.

I examined the photographs taken of the disputed land. The pictures show that a substantial part of the land was excavated, and a considerable amount of soil was moved, covering a significant portion. The photographs also show that a piece of the disputed land is bare with minimal green cover- mainly grass. While the pictures do not show developments on the land, such as mango trees, bananas, and an old chain-linked fence, they show a site house made of silverfish iron sheets. The photographs also show new or fresh fencing poles made of concrete that were attributed to the Appellant.

Prima facie, I agree with the Appellant that although the prosecution's case was that the Appellant destroyed the complainant's mangoes and bananas on the disputed land, the crime scene photographs do not show any signs that the land had these crops. Be that as it may, the court takes cognisance of the fact that a grader deployed by the Appellant made a massive movement of soil, destroyed and moved the earth from one part of the land and covered a substantial portion of the land in question. Is it possible that the crops referred to by the complainant are covered under the soil? The complainant testified that the soil covered the crops. I do not doubt him because he was a truthful and consistent witness. Besides, the crops are said to have been planted just a year ago when the land was being graded. The crops must have been young and easy to destroy or cover-up, as seen from the vast soil sitting on the part of the disputed land.

The Appellant attacked the inconsistencies between what the prosecution case said in court and what was pertaining to the disputed land. The Appellant argued that these contradictions pointed to deliberate falsehoods. As Justice Lawrence Gidudu observed in *Uganda vs. Adrien James Peter* HCCS No. 10 of 2010, not all contradictions should be interpreted as falsehood. For ease of reference, Justice Gidudu said:

On the credibility and inconsistency of witnesses, the Courts have stated in a number of cases that a witness may be untruthful in certain aspects of his evidence but truthful in the main substance of his evidence. Further, that a witness who has been untruthful in some parts and truthful in other parts could be believed in those parts where he has been truthful. But whereas it is true to say that minor discrepancies might be explained away by immediate delay before the accused person was brought to trial, grave inconsistencies, unless satisfactorily explained would

usually but not necessarily result in the evidence of a witness being rejected.

**Uganda Versus Rutaro*(1976) *HCB*162; *Uganda Versus George W. Yiga (1979) HCB*217; *and Uganda Versus Abdalla Nasur*(1982) *HCB*1 followed.*

Therefore, for contradictions to constitute falsehoods, they must be material, deliberate, manufactured, intentional and made to mislead the court. Contradictions made out of honest mistakes or lapses of memory do not amount to falsehoods as long as the witnesses' evidence is consistent in material form. In the instant case, the complainant gave uncontroverted evidence that he planted bananas and mangoes on the land. He also said that he had a chain-linked fence on the land. However, none of these was exhibited because they were missing from the disputed land that had already been interfered with through massive soil movement. As I observed, there is a very strong possibility, which is accurate, that the grader destroyed these crops and covered them under the soil it moved on the disputed land. My belief is strengthened by evidence of a site house on the disputed land, which reinforces the fact that the complainant was in possession of the land.

Yes, there are contradictions, but these are minor and do not take away the fact that after purchasing the land, the complainant took possession of it and was in possession when it was graded. I must hasten that possession does not mean being physically present on the land when the trespass occurs. Possession means that the complainant should have some control over the land against which he or she can assert his or her rights against unlawful visitors on the land. In an instant, as evidence has shown, the complainant, besides having a site house on the land and crops that the grader destroyed, had a caretaker who immediately alerted him of intruders on the land. This act resulted in a criminal case. It should also be pointed out that the Appellant gave the complainant possession of the land on execution of the sales agreement marked exhibit PEX2.

The trial magistrate was, therefore, right when she found that the complainant was in possession of the land.

Was there an entry on the land?

The evidence of the complainant, PW2, and PW4, together with the photographs taken by the soco, show that there was entry upon the land. The disputed land was graded, and there are fencing poles, indicating that whoever entered the land intended to establish adverse possession of the land against the complainant's right. The Appellant, in his police statement, marked exhibit PEX5, admitted to having sent the grader to grade the land, meaning that he entered upon the land. He also admitted to having signed the two sales agreements. PW3, a handwriting expert, verified his signatures. Therefore, the claims by the Appellant that the complainant failed to live up to his contractual obligations are false. On the other hand, I find the conduct of the appellant fraudulent. During the trial, he admitted that he was selling the land to Namara, knowing he had sold the same land to the complainant and was bound by the Sales Agreements. The Appellant, for brevity, is not a man who can be trusted to keep his word.

Did the Appellant intend to annoy the Complainant?

The entry of the Appellant on the disputed land was to assert an adverse claim against the complainant's lawful rights in the land. Laying an adverse claim when you know that another person owns the land is equivalent to entering the land intending to annoy or intimidate the person in possession.

Is it the Appellant who entered into possession?

By his admission, the Appellant entered upon the disputed land to assert his claim of right. The Appellant did not have any claim of right over the land, having sold it to the complainant.

In conclusion, the Trial Magistrate was correct when she convicted the Appellant of Criminal Trespass contrary to section 302 of the Penal Code Act.

Ground III of the Appeal

The Appellant abandoned his ground on sentencing, but the learned Senior State Attorney addressed it because she felt duty-bound to address the court on an illegal sentence of 17 months imposed on the Appellant. While it is not the practice for the court to address abandoned grounds of appeal, I will address this matter to sound a warning to Magistrates Grade Is, who hold inmates on longer periods of remands beyond statutory sentences. In this case, the appellant was held in custody for 17 months and sentenced to the same period of imprisonment by the Trial Magistrate. Yet the offense of criminal trespass carries a sentence of twelve months. A Magistrate does not have jurisdiction to sentence a convict to a sentence longer than what is provided for in the law. Therefore, the sentence imposed by the Trial Magistrate on the Appellant is illegal and substituted by a caution.

Before I leave this matter, let me emphasise that remanding a suspect for a period longer than the sentence of the offence they are charged with is a travesty of justice and violates Article 23(8) of the Constitution. For ease of reference, Article 23(8) of the Constitution provides that :

Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

As the law does not recognise negative sentences, courts should either endeavour to try cases expeditiously or grant bail to accused persons so that they do not serve illegal (negative) sentences, as happened in this case. The courts are equally reminded to take cognisance of Article 20(2) of the Constitution, which provides that:

The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of the Government and by all persons.

The above provision directs judicial officers in discharging their duties to ensure that the Bill of Rights is respected and enforced without compromising any of the protected rights in the Constitution. Therefore, judicial officers advised not remand suspects mechanically without bearing in mind the implication of Article 23(8) of the Constitution, like what unfortunately happened in this case.

DECISION

All the grounds of appeal are dismissed except ground VII, which is allowed. The sentence of the Trial Magistrate is set aside and substituted with a caution.

It is so ordered.

Gadenya Paul Wolimbwa

JUDGE

23rd September 2023

I request the Deputy Registrar to deliver this judgment on 27th September 2023.

Gadenya Paul Wolimbwa

JUDGE

23rd September 2023

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