

UGANDA / JUDGMENT

Ssetabi v Uganda (Criminal Appeal 6 of 2022) [2023] UGHC 388 (7 September 2023)

[2023] UGHC 388

COURT

High Court of Uganda

BEFORE

Katamba Nkwanga, J

CASE / FILE NUMBER

Criminal Appeal 6 of 2022

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CRIMINAL APPEAL NO.06 OF 2022

(ARISING FROM CRIMINAL CASE NO.255 OF 2021)

SSETABI JUSTUS:.....APPELLANT

VERSUS

UGANDA:.....RESPONDENT

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

Introduction

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This Appeal arises from the judgement of grade one Magistrate, His Worship Oburu Morris Ezra in the Chief Magistrates Court of Sembabule at Sembabuke delivered on the 23rd day of March 2022 vide SEMB-CO-255/2021.

The appellant (A2 at trial) together with Kiyaga Frank(A1) and Aliganyira Harunah (A3) were jointly charged with the offence of theft C/S 254 (1) and 265 of the Penal Code Act (as amended) in the Chief Magistrates Court of Sembabule at Sembabule. They pleaded not guilty to the charges. Prosecution led evidence of 3 witnesses while the Defence relied on testimony of 5 witnesses.

Upon evaluation of evidence, the Learned Trial Magistrate entered judgement where, he acquitted A1 and A3. He however found the Appellant (A2) guilty of the offence of theft, convicted the Appellant and sentenced the Appellant to 3 years imprisonment. The Learned Trial Magistrate also ordered the Appellant to pay Ugx. 9,000,000/= as compensation for the property stolen.

Background of the case.

At trial, it was the prosecution's case that the Accused persons jointly on the night of 5 th March 2021 at Dispensary Ward in Sembabule District stole Motor vehicle (Toyota Premio –silver in colour) Reg. No. UAS 598W valued at Ugx.9,000,000/= from a one, Kizito Richard.

Prosecution relied on the testimonies of PW1, Kizito Richard (the Complainant), PW2, Yasin Serluma and PW3, Batabuzi Noah while the Defence produced 5 witnesses that is; DW1, Kiyaga Frank (A1), DW2, Ssetabi Justus (the Appellant), DW3, Aliganyira Harunah (A3), DW4, Abasa Abdala, and DW5, Barushimana Alloyous.

Prosecutions case.

PW1 stated that on the night of 5/03/2021, he reached his home at around 10.00pm, parked his car and retired for the night however, when he woke up in the morning, the car was not there. He reported a case of theft to the police at Sembabule police station. He then stated that he went to Mubende where he discovered a motor vehicle that had the parts from his car and the car with the spare parts from his car was being fixed in a garage that belonged to A1. While at the garage, he intimated to A1 that he wanted to buy the said motor vehicle at Ugx7,000,000/= and A1 informed him that the car belongs to A2 whereupon they agreed with A2 on the phone. They agreed that A2 would come to the garage but A2 never came to the garage. PW1 then reported the matter to Mubende police where after, the vehicle with the stolen parts was impounded. PW1 stated that Police called A2 to come to the station but he did not yield to the summon. PW1 then stated that this prompted police to look for A2 and when they found him, he abandoned the car he was driving and disappeared on foot leaving the vehicle in custody of the chairman. The Chairman was arrested and told to produce A2. When A2 came to the station he stated that he bought the car from A3 who in turn failed to disclose where he bought the car. PW1 stated that the vehicle in the garage had parts belonging to his car to wit; the lights, door, bumper and the seal of the lights based on the markings. He stated that he bought the bumper from a one Yasin . PW1 further stated that he bought his motor vehicle at Ugx. 7,000,000/= in April 2021.

PW2, Yasin Serluma, on his part confirmed selling to PW1 some spare parts to wit, the front bumpers and a seal where the bumper closes. PW2 identified the parts which were admitted as evidence and marked PEQ1.

PW3, DC Batabuzi Noah on his part stated that he received a case file of stealing a motor vehicle. He stated that in March 2021, he received information from PW1 that PW1 had been in Mubende and had traced motor vehicle No. UAR734T that had spare parts from the stolen vehicle. PW3 then stated that they arrested three suspects in connection with the crime. He further stated that when he asked the suspects where they got the spare parts, A1 stated that he was a mechanic whose work was to only repair. A2 stated that he was buying the spare parts in Mubende, Masaka and Kampala. He neither had receipts nor did he take the Police to where he bought the spare parts. A3 is the one that sold motor vehicle UAR734T to A2 and A3 stated that he also bought the motor vehicle from somebody else however when tasked to bring the person from whom he bought the motor vehicle, he failed. PW3 stated that they picked the motor vehicle with parts of his stolen vehicle.

That was the Prosecution's case.

Defence's case.

DW1 (A1) stated that he was brought a car to repair and the car did not have a front bumper and head lights and that the car was brought to him on 9/01/2021.

DW2 (A2) on his part testified that he did not steal PW1's car. He further stated that he simply bought the vehicle from A3 at a cost of Ugx. 3,500,000/= and that he bought the car in January 2021.

DW3 (A3) on his part stated that the vehicle at police belonged to him and he bought the same from a one, Bbosa Ivan.

DW4, Abasa Abdala stated that he was one of the people who went to buy the motor vehicle in Busia on the 6/11/2020. The Motor vehicle was UAR 734T and it was bought from a one, Bbosa Ivan and that the motor vehicle was in good condition when it was bought.

DW5, Barushimana Alloyous stated that A2 informed him that police was looking A2. DW5 further stated that A2 asked him to accompany him to get A3 who had sold the motor vehicle to A2. A3 was later arrested and taken to Kasambya Police.

That was the Defence's case.

At the close of trial, the Learned Trial Magistrate in his judgement observed that the witnesses of the prosecution were able to identify parts of the stolen motor vehicle which were now part of another motor vehicle sold by A3 to A2. He further observed that it was not in dispute that A1 was just a mechanic with a garage. He also found that A2 admitted to buying the spare parts that prosecution witnesses identified. The Learned Trial Magistrate observed that A2 failed to give a proper account of where he purchased the spare parts which in his view could only mean that A2 is not innocent. He observed that the prosecution had failed to prove its case against A1 and A3 however, it had proved its case beyond reasonable doubt against A2.

Being dissatisfied with the decision of the Learned Trial Magistrate, the Appellant lodged an Appeal to this Court based on the following grounds as contained in the Appellant's amended memorandum of Appeal;

- 1. That the Learned Trial Magistrate erred in law and in fact when he convicted the Appellant of an offence of theft of a motor vehicle and ordered compensation of Ugx. 9,000,000/= (Nine million shillings) against the Appellant.
- 2. That the Learned Trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record hence arriving at a wrong decision.

The Appellant and the State were instructed to file written submissions but at the point of determination of this Appeal, only the Appellant had filed written submissions. I shall therefore dispense with submissions for the Respondent.

Submissions for the Appellant.

Counsel submitted on both grounds of Appeal jointly. It was submitted that it was erroneous for the trial Court to conclude that the Appellant be convicted for a period of 3 years imprisonment and pay a compensation of Ugx.9,000,000/= after serving his

sentence because at trial, the Complaint PW1, stated that he had purchased his motor vehicle at Ugx. 7,000,000/=. Counsel further submitted that the complainant stated that he only had an agreement for the stolen car but however, there was never evidence on record to support the fact that the complainant ever owned a car Registration No. UAS 598W. Counsel further submitted that there was also no proof of ownership. Counsel submitted that on the contrary, all evidence adduced at trial pointed to Motor vehicle registration No. UAR734T and not UAS 598W and therefore, Court convicted the Appellant on the assumption that the Complainant once owned motor vehicle Registration No. UAS 598W whose spare parts were found on Vehicle registration No. UAR734T.

Counsel submitted that the prosecution failed to prove beyond reasonable doubt that the Appellant stole motor vehicle registration No. UAS598W belonging to PW1.

Counsel relied on the authorities of Israel Epuku S/o Achutu v R (1934) EACA 166 to support his submissions.

Determination of Appeal.

This being a first appeal, this court 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*")

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (See: *Shantilal 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 courts 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*).

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*).

In resolution of the Appeal, I shall resolve the grounds separately starting with ground two and then ground 1.

Ground 2.

That the Learned Trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record hence arriving at a wrong decision.

For the offence of theft C/S 254 and 261 of the Penal Code, the Prosecution must prove beyond reasonable doubt that;

- (i) That at the material time, the complainant owned property that was capable of being stolen.
- (ii) That the Accused had no claim of right to that property
- (iii) That there was asportation of the property
- (iv) That the Accused had a fraudulent intent to permanently deprive the owner of that property.
- (v) That the Accused participated in commission of the theft.

(See: *Uganda versus Kakwerere James and Another, Court of Appeal Criminal Appeal No.170 of 2020*)

From the submissions, it is my observation that the Appellant intimates that the prosecution failed to prove beyond reasonable doubt that at the material time, the Complainant owned property that was capable of being stolen that is; motor vehicle No. UAS 598W and that the Convict stole the vehicle.

On perusal of the Trial Court's decision, it is my observation that the Learned Trial Magistrate largely based his findings on the evidence that A2 admitted to being in possession of the spare parts forming part of the complainant's car but he failed to adduce evidence to support whom or from where he purchased the spare parts.

On consideration of the evidence given at trial as whole, I have no doubt as to the existence of a motor vehicle UAS 598W and that the same was stolen. PW1 stated that he had a motor vehicle (premio) however the same was stolen. It is my view that existence of the car is supported by the fact that parts belonging to the car were recovered and identified. PW2 also testified that he sold to the PW1 spare parts for his vehicle to wit; bumper and seals of a premio. I also note that during trial, the defence never challenged the fact that the Complainant owned a car or that it was stolen. The case for the Defence was that the Accused persons did not steal the car and that the spare parts purportedly belonging to the Complainant's car were not stolen but rather bought. To put it simply, their defence rested on participation. I therefore find that there is no doubt that the Complainant owned a vehicle and that the vehicle was stolen. (See: *James Sawoabiri and Another versus Uganda, Criminal Appeal No.05 of 1990 for the proposition that an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue*.)

As to A2's participation in the theft, the prosecution may prove the same either through direct evidence or circumstantial evidence. (See: *Uganda versus Gidongo Martin, High Court Criminal Session No.424 of 2019*).

It is my observation that the Learned Trial Magistrate relied largely on circumstantial evidence and specifically, the doctrine of recent possession when he states that; "A2 admitted to having purchased the said spare parts that the Complainant and his witnesses were able to identify and describe during examination in chief as spares that belongs to the Complainant's stolen car, However, A2 failed to give true account of where he purchased the said spare parts i.e bumpers, lights and bonnet, neither did he adduce receipts of purchase, the dealer (the individual who sold him the*

spares, failure by the accused A2 to adduce evidence in proof/support where he purchased the fore mentioned spare parts how then did he get these spare parts if he did not steal the Complainant's car. Failure to adduce evidence in proof of purchase of the said spare parts makes him not innocent at all."

Circumstantial evidence is evidence that relies on an inference to connect to a conclusion of fact and it supports truth of an assertion indirectly for example, finger prints found at the crime scene if connected to the accused could place an accused at the crime scene. (See: *Uganda versus Ekinu Julius, High Court Criminal Session No.125 of 2018 (soroti)*)

While the doctrine of recent possession is such that where an accused is found in possession of recently stolen goods, the Court may presume that the accused is either the thief or he/she has received goods knowing them to be stolen unless he/she can account for the possession. (See: *Izongoza William versus Uganda, Supreme Court Criminal Appeal No.06 of 1998*)

In this case, it was the Learned Trial Magistrate's finding that since the Appellant admitted to being in possession of parts from a stolen vehicle, it was inferred that the Appellant was the one that stole the vehicle and the failure to adduce evidence, that is; failure to offer proof of purchase further compounded the inference that the Appellant committed the offence.

Since reliance was placed on the doctrine of recent possession, on top of the evidence pointing to nothing but the guilt of the accused, the accused must have failed to offer some credible explanation of how he came to possess the goods. The burden of proof is on the balance of probabilities. (See. *Izongoza William versus Uganda, Supreme Court Criminal Appeal No.06 of 1998*)

On reconsideration of all the evidence at trial, it is my observation that there is no doubt that the Appellant was found in possession of parts that belonged to the Complainant's stolen motor vehicle to wit; lights, door, bumper and the seal for the lights. DW1 in cross examination stated that when A2 brought his own car to garage to be fixed, it was missing some parts but later A2 brought the parts and as it would

turn out, the parts brought to A1 by A2 were parts from the Complainant's stolen vehicle.

In his defense, A2 testified that he bought the parts from Kampala in Bwaise. As the trial Court observed, it is also my observation that A2 did not name a person from whom he bought the parts. A2 also did not at least name a price or produced receipts pertaining to the alleged purchase of the spare parts. While PW3 tasked A2 to show him or take him to where A2 bought the parts, A2 failed. Considering the evidence above and the fact that he was found with not just one part but at least three or more parts of the Complainant's stolen vehicle, it was not enough for him to simply state that he bought the parts from Kampala. I note that A2 in his testimony was very specific as to the day he bought the bumper as 5th February however, I find it strange that he failed to be specific from whom or at what price he bought the parts or whether all the parts were bought from one source or multiple sources or the source all together. I cannot therefore fault

the trial Court for reaching a conclusion that in light of failure to satisfactorily account for the possession, the only inference that would be drawn is that the Appellant stole the vehicle.

I also note that in PW1's testimony, he stated that when the parts were discovered and the police summoned the Appellant, the Appellant left his other vehicle with the chairman and temporarily disappeared but later went to police upon arrest of the chairman. This evidence was not challenged and neither does the evidence support any explanation for the Appellant's actions. In my view, these are actions inconsistent with that of an innocent person.

In conclusion, it is my finding that the Learned Trial Magistrate properly evaluated the evidence and applied the appropriate law to reach his findings.

The first ground is answered in the negative.

Ground 1.

That the Learned Trial Magistrate erred in law and in fact when he convicted the Appellant of an offence of theft of a motor vehicle and ordered compensation of Ugx. 9,000,000/= (Nine million shillings) against the Appellant.

On top of sentencing A2 to imprisonment for 3 years, the Learned Trial Magistrate also ordered the A2 to compensate the Complainant, Ugx.9,000,000/= as the value of the car.

Under *Section 197(1)* of the *Magistrates Court Act*, upon conviction, the trial Court may order compensation for any loss occasioned as a result of the offence committed in the event of substantial loss. In *Uganda versus Ojandu, HC. Criminal Case No. 79 of 2016*, it was held that there must be evidence to support such compensation.

From the Complainant's testimony (PW1), he clearly stated that he bought the motor vehicle at Ugx. 7,000,000/= and not Ugx. 9,000,000/=. It is my humble opinion that it was erroneous on the part of the trial Court to order compensation of Ugx. 9,000,000/= as the value of the car. The circumstances therefore warrant an interference with the order on compensation.

In conclusion, this Appeal partly succeeds on the issue of compensation.

Orders.

- 1. The order for compensation in the amount of Ugx. 9,000,000/= is set aside.
- 2. The Appellant shall pay Ugx. 7,000,000/= as compensation for the motor vehicle.

I so order.

Dated and delivered at Masaka this 7th day of September, 2023.

Victoria Nakintu Nkwanga Katamba.

Judge.

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