

UGANDA / JUDGMENT

Uganda v Byaruhanga (Criminal Appeal 12 of 2022) [2023]

UGHCCRD 66 (10 February 2023)

[2023] UGHCCRD 66

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

Criminal Appeal 12 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL No 12 OF 2022

(Arising from Nabweru Chief Magistrates Court Criminal Case No. 698 of 2017)

UGANDA

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APPELLANT

v S

BYARUHANGA SAMUEL

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RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The state filed this appeal against the judgment, orders and sentence of HW Sanyu Mukasa, Magistrate Grade I Nabweru Magistrates Court, who acquitted the respondent, **Byaruhanga Samuel**, on two Counts of: 1. Malicious Damage to Property c/ss 335 (1) of the Penal Code Act (PCA) and Domestic Violence s/s 4 (1) and (2) of the **Domestic Violence Act**.

The background to this matter is that the prosecution produced evidence to show that the complainant, one Teddy Nyirakamana is the estranged wife of the accused, Samuel Byruhanga. They have been separated for several years but had two children, Gumisiriza Joseph and Josephine Kisembo. The Respondent has a second wife

$\mathbf{1}$

called Amany Betty. It is alleged that on the 14th of August 2017 at Nansana West 1B Zone in Wakiso district, the Respondent went to where the complainant lived, and armed with a pick axe destroyed the veranda of a house she was constructing. He also broke the glass in the windows and the front door.

That the Respondent then viciously abused the complainant calling her a prostitute and blamed her for infecting him with gonorrhoea. There were several people, including the complainant's grandchildren and neighbours present at the time. The police were called and when they went to the scene to carry out inquiries the Respondent again turned on the complainant and stated abusing her. The police scenes of crime officer took pictures of the damage and these were exhibited. The Respondent was then charged with the offences listed above.

In his defence, Samuel Byruhanga, the Respondent (accused) denied these charges. He stated that the complainant illegally constructed a building, comprised of 3 rental units and shops, on his plot. That the way she placed the building blocked the access to two other plots which also belong to the accused. He stated that the building materials used during the construction were stolen from him. That on several occasions he told the complainant to stop the construction. However, every time he went to the village, the complainant and her son Joseph, would resume the construction. The respondent stated that the complainant did not seek his permission either to start or carry on with the construction. Eventually he filed a civil claim where the plot and building were adjudged to belong to him. A copy of the judgement was exhibited. The respondent asserted that he cannot be blamed for destroying his own property.

The learned trial magistrate found that the Respondent owned the plot and enjoyed an honest claim of right over the property and could not therefore be found guilty of malicious damage to his own property. Secondly, that the acts of abuse by the respondent were not repetitive or sustained as required by the Domestic Violence Act. Consequently, the respondent was acquitted on both counts.

2

The appellant being dissatisfied with the conviction and sentence of the trial court filed this appeal with the following grounds:

- 1. The learned trial magistrate erred in law and fact when she struck off the evidence of the PW 1 for not having been cross examined.
- 2. The learned trial magistrate erred in law and fact when he she failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion of acquitting the Respondent.

Submissions

The parties were granted leave to file written submissions but only the appellant complied.

This Court reminds itself that as a first appellate court, it has a duty to subject the evidence to a fresh scrutiny and come to its own conclusions, bearing in mind that it has not seen the witnesses testify (Kifamunte Henry V Uganda SCCA NO. 10 of 1997 unreported).

It is also the duty of the court to evaluate the evidence as a whole carefully balancing each material piece of evidence against the rest of the material adduced.

It is trite that the onus is on the prosecution to prove all the elements of the offence the appellant was charged with to a standard beyond reasonable doubt.

Grounds

1. The learned trial magistrate erred in law and fact when she struck off the evidence of the PW 1 for not having been cross examined.

The complainant in this matter, Teddy Nyirakamana, was never cross examined. It was the finding of the trial magistrate that it was a derogation of the Respondent's constitutional right to a fair trial to deny him the right to cross examine the

complainant. That it is an important element of the that right for an accused person to face his accusers and to examine and probe their evidence as part of building his defence. Because that was not done here, the evidence of Nyirakamana was struck off the record.

The appellant's complaint is that the Respondent was represented at trial. After the complainant (PW 1) had testified, the matter was adjourned for cross examination on the 24th of August 2018. Thereafter however, the hearing was adjourned several times until the 26th of February 2019 when the prosecution called its second witness. It is the submission of the appellant that failure to cross examine should not be visited on the State because neither the Court nor the Respondent brought up the issue of cross examination after the other witnesses had testified. That the finding on fair trial would only apply if the Respondent had been out rightly denied the right to cross examine. But that was not the case here. It is argued that failure to cross examine simply meant the defence agreed with the evidence of the prosecution. The appellant cited *Brown v Dunn* (1894) 6 R.67, HL where it was held that it is a well-established principle that, in general a party must challenge in cross examination the evidence of any witness of the opposing party if he/she wishes to argue that evidence given on a particular issue should not be accepted. Failure to cross examine a witness on a particular important point may lead the court to infer that the cross examining party accepts the witness evidence, and it will be difficult to suggest that the evidence should be rejected.

This court finds that the appellant's argument is valid. The Respondent was represented at the beginning of the trial. He later conducted his defence personally. It was however the duty of the Court to remind him that he had a right to challenge the complainant's testimony. There is nothing on record to show that the Respondent intended to waive his right to cross examine PW 1. For that reason, it was the duty of either Counsel in conduct of the defence to cross examine, or the Court to remind the Respondent that he had a right to cross examine PW 1.

For that reason, it was improper for the Court to strike out the evidence of PW 1.

Accordingly, the first ground of appeal succeeds.

Ground 2

The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion of acquitting the Respondent.

The complaint by the appellant is that the evidence on record established all the elements of the offence of Malicious Damage to property c/s 335 of the Penal Code Act. The sections provides as follows,

Any person who willful and unlawfully destroys or damages any property commits an offence and is liable, if no other punishment is provided, to imprisonment for five years.

It can be seen from the above that the elements of this offence are:

- The wilful or unlawful destruction of property $\mathbf{i}$.
- Belonging to another ii.
- iii. By the accused person

There is overwhelming evidence that the building was damaged by the accused. Photographs were exhibited showing the broken glass in the windows. It is a requirement in the ingredients of this offence that the accused person destroyed property that he knew belonged to another.

This court however has to consider the defence set up by the appellant. He stated that the building was his and built on a plot of land that belonged to him. He also said that the building materials were stolen from him.

In a decision of The Chief Magistrate's Court of Nabweru, *Byaruhanga Samuel* Milton vs Gumisiriza Joseph CS 138 of 2018 Nabweru Chief Magistrate's Court it was held that the house in dispute belongs jointly to the complainant and the

respondent. It added that the plot in question is the property of the respondent. I note that this court was not furnished with any evidence to show that that Judgment was ever appealed, quashed or set aside.

This court therefore has to determine whether the respondent enjoyed an honest claim of right as envisaged in Section 7 of the Penal Code Act which stipulates,

A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

The appellant in this matter raised the defence of an honest claim of right under Section 7 of the Penal Code Act.

If a person is honestly asserting what he believes to be a lawful claim, he has a claim of right even though the right asserted is unfounded in law and fact ... It is however a complete defence for the accused to show that he had a *bonafide* belief that he was asserting a claim to property that belonged to him (Criminal Law by William Musyoka *Law Africa* pg 132 -133).

See also Byekwaso Sebalijja vs Ug 1991 (HCB) 15

An honest claim of right is a complete defence applicable to cases involving property. In the instant case the respondent was acting under the belief that he owned the property in question and had in fact been confirmed by a court of law to own the property he damaged. In addition, the dispute had a history. The complainant had constructed the house despite the respondent's continued directives to halt the construction. He asserts farther that the materials used in the construction were stolen from him.

In these circumstances, like he said in his defence the property was his and he cannot be charged with destroying his own property.

I find that indeed the respondent had an honest claim to the ownership of the damaged property. He therefore enjoyed the complete defence of a claim of right and cannot be guilty of Malicious Damage to property.

The second count was Domestic Violence s/c/s 4 (1) and (2) of the **Domestic Violence** Act which stipulate as follows:

- 1) A person in a domestic relationship shall not engage in domestic violence. 2) A person in a domestic relationship who engages in domestic violence commits an offence and is liable on conviction to a fine not exceeding forty eight currency points or imprisonment not exceeding two years or to both.

The elements of the offence are that:

- a) That the victim was in a domestic relationship with the accused
- b) That the victim suffered repeated incidents of physical, mental or emotional
- c) That the abuse was caused by the accused

The evidence in the instant case was that the complainant had not lived with the Respondent for more than 17 years. However, she lived right next door to the respondent and his second wife. The definition for domestic relationship under section 3 \$(1)\$ of the Act includes one where the victim has previously been married to perpetrator. The first element of the offence was therefore established.

The facts show that on the 14th of August 2017, the respondent viciously abused the complainant. That there were several people present, including a police officer, who all testified as eyewitnesses to the event.

In Section 2 of The Act,

"emotional, verbal and psychological abuse" means a pattern of degrading or humiliating conduct towards a victim, including but not limited to—

- (a) repeated insults, ridicule or name-calling;
- (b) repeated threats to cause emotional pain;
- (c) the repeated exhibition of possessiveness or jealousy which is such as to constitute a serious invasion of the victim's privacy, liberty, integrity or security;

\$(d)\$ -

As can be seen here, to qualify as an offence under the Domestic Violence Act, the abusive conduct must be shown to follow a repeated pattern of insult, name-calling or threats. In other words, there should be proof of recurring abusive behaviour. Otherwise the acts are ordinary offences punishable under other laws like Penal Code.

Consequently, while it was shown that the parties had a domestic relationship, there was no evidence, at all, that Teddy had experienced a pattern of abusive behaviour from the Respondent. This incident appears to have been a heated one off episode that happened on the 14th of August 2017. For that reason, I find that the facts cannot sustain a charge of Domestic Violence c/s 4 (1) and (2) of the Domestic Violence Act.

In the result and for the reasons given, this appeal is dismissed.

For the avoidance of doubt:

- 1) The order of acquittal on malicious damage to property is confirmed.
- 2) The order of acquittal on Domestic violence is confirmed.

Michael Elubu Judge 10.2.2023

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Prepared on 13 October 2026 · Esheria