

UGANDA / JUDGMENT

Zimula and Another v Uganda (Criminal Appeal 150 of 2018) [2021] UGHCCRD 90 (31 May 2021) [2021] UGHCCRD 90

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

Criminal Appeal 150 of 2018

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

CRIMINAL APPEAL No 150 OF 2018

(Arising from Nabweru Chief Magistrates Court Case No 359 of 2013)

1. ZIMULA JOHN 2. NAKIMBUGWE MATILDA ::::::::::::::: APPELLANTS

vs

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

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellants, ZIMULA JOHN and NAKIMBUGWE MATILDA, filed this appeal against the judgment, orders and sentence of HW PAUL MATYAMA, Magistrate Grade I Nabweru Court, who convicted them on a charge of Malicious Damage to Property c/s 315 of the Penal Code Act (PCA) and sentenced them to 6 months imprisonment.

The background to this appeal is that on the 14th of May 2013 the appellants were produced before the Magistrates Court at Nabweru on charges of 1. Malicious Damage c/s 335 of the PCA and 2. Conspiracy to Effect an Unlawful Purpose c/s 392 (f) of the PCA.

The background to this appeal is that one Jafari Mugerwa, who was the complainant, has a house in Nabweru South Wakiso District. That the 2nd Appellant **Nakimbugwe Matilda** lived directly opposite the Jafari Mugerwa. It is alleged that on the 9th of April 2013 Jafari Mugerwa left for work but was called by his daughter at about 11.00 am. She told him that there were people breaking the retention wall of his wall supporting his wall fence. He rushed home and found A1 and A2 breaking the wall. Jafari reported the matter to police and the two were arrested and charged as stated above.

The accused persons denied the charges. A1 set up an alibi stating that on that morning he had gone to a place called Mende and only returned at 8.00 pm. That he was not at the scene of crime.

The 2nd appellant denied participating in the crime and said that the wall was demolished by the Nansana Town Council officials.

The learned trial magistrate convicted the appellants on the charge of causing malicious damage and acquitted them on the second count of Conspiracy to effect an unlawful purpose.

The appellants being dissatisfied with the finding and orders filed this appeal with 7 grounds namely,

- 1. The learned trial Magistrate erred in law and in fact when after observing that the prosecution had not proved the case beyond reasonable doubt went ahead to convict the Appellants of the offence of malicious damage c/s 335 (1) PCA
- 2. The learned trial magistrate erred in law and in fact when he convicted the Appellants of malicious damage to property c/s 315 PCA yet the prosecution did not prove all the elements of the offence of malicious damage against the Appellants.
- 3. The learned trial magistrate erred in law and in fact when he held that the Appellants were the people who demolished the complainant's perimeter wall fence.
- 4. The learned trial magistrate erred in law and in fact when he formed an unbalanced view on the evidence on record and failed to properly evaluate and consider the evidence on record and wrongly ignored evidence given by the defence witnesses in particular D. W.3, D. W.4 and D. W.5 that it was the area local authority of Nansana Municipality which took the Responsibility for demolishing the complainant's perimeter wall fence and absolved the Appellants thereby casting a doubt on the prosecution case.
- 5. The learned trial Magistrate erred in law and in fact when he failed to give due consideration to the case for the defence and did not address himself to the Appellants' claim that the complainant's perimeter wall was constructed on an access road thereby blocking the feeder road to the homes of residents and that a complaint was made to the local authorities by the area residents.
- 6. The learned trial Magistrate erred in law and in fact when he failed to find that there was no criminal intent when the complainant's perimeter wall fence was demolished.

- 7. That the sentence imposed against the Appellants by the learned Magistrate was excessive in the circumstances.

WHEREFORE the Appellants pray to this Honourable Court;

- (a) To allow the Appeal.
- (b) To quash the conviction set aside or vary the sentence.
- (c) To grant such order / directives as the Court may deem.

The above grounds of appeal are repetitive and augmentative. They boil down to the challenge that the learned trial magistrate erred in law and fact when he convicted the appellants of the offence.

Submissions

The parties were directed to file written submissions and both parties filed. This Court issued guidelines on the number of pages and attachment of authorities. The appellant did not comply with the guidelines. Although the submissions are on record in view of failure to comply with this Courts order, the submissions have not been used by this Court.

Determination

This is a first appellate Court and as such the law is clear on what its duties are. The Supreme Court held in **Baguma Fred vs Ug SCCA No 7/2004** that,

It is trite law that the duty of a first appellate court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusion on that evidence. Secondly, in so doing it must consider the evidence on any issue in its totality and not any piece in isolation. It is only through such re-evaluation that it can reach its own conclusion, as distinct from merely endorsing the conclusion of the trial court.

In carrying out these duties the court shall remain mindful that the burden of proof rests, throughout, on the prosecution who must prove a criminal case to a standard beyond reasonable doubt.

The argument is that the evidence cannot sustain a charge of Malicious Damage c/s 335 (1) of the PCA.

The Section stipulates as follows,

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

The elements of this offence are

- 1. The existence of property

- 2. The wilful or intentional or unlawful destruction or damage of that property
- 3. By the accused.

1. The existence of property

In this sense it is the right of ownership in a material object, or that object itself (see Black's Law Dictionary).

In this instant case, the complainant, Jafari Mugerwa, lived next to the 2nd appellant in Nabweru South Wakiso district. Their two homes were separated by a narrow road. The complainant built a wall fence around his property. On the outside of the wall fence he also built a stonework retention wall about 50 cm high, to reinforce and protect it.

Both appellants admitted that the complainant had a house in the area and that it had a wall fence.

In the result therefore Jafari Mugerwa was the owner of the wall that surrounded his property and as such the first element, that there was property is established.

2. The wilful or intentional or unlawful destruction or damage of that property

On the 9th of April 2013 on Nakafeero Shifa, PW 2, the complainant's daughter was in the house tending to her late mother, who was then ailing. At about 11.00 am she had people on the outside knocking down the wall fence so she came out. Her evidence at page 11 of the record is that she saw the appellants with several people. The 2nd appellant picked demolished stones from the fence and threw them into her compound. At that point, Nakafeero phoned her father who was away at work. He came right away. At page 5 of the record he states that he found that the wall had already been demolished but the two appellants were at the scene. The second appellant said to him that she was the one who did it. Nakafeero had stated in her evidence at page 12 that the 2nd appellant was saying that the wall had blocked her car and it could not pass. DW 4 a neighbour called Melvin Mangeni also testified that the wall blocked the road and car could pass.

The 2nd appellant in her evidence said that Jafari built his wall into the access road and cars could not pass. She then went to Nabweru South and reported to the LC Chairman who referred her to the town council. That the Town Council directed the Jafari to break down the wall but he only demolished the top and left the bottom intact. That the Nansana Town Council people are the ones who broke the wall. DW 3, Butai Ahmada was a Councillor and a resident of the area. He attended a Nansana Town Council meeting where it was resolved that the wall be demolished because it was blocking the road to a place called Naluma as a connection from Nansana to Hoima Road. That the District Planner directed that the wall be demolished. DW 3 testified that the wall was demolished in his presence by the Town Council enforcement personnel. This witness was shown a photograph of men (D2) demolishing the wall and stated that they were in maroon attire and employees of Nansana Town Council.

On the day that the wall was demolished DW 4 took a picture of the ongoing demolition which were exhibited as D 2. This picture shows a house with a perimeter wall. Two men are holding pick axes. One of them dressed in a maroon overall is digging up stone work built next to a wall fence. The Maroon overall has a writing on the back which DW 3 identified as reading Nansana Town Council. DW 4 also stated the men were from Nansana Town Council.

DW 5, Lwanga Charles was the Superintendent of Works in Nansana Town Council. He acknowledged seeing a complaint, D 3, from Nabweru South about encroachment on an access road. He visited the scene with the Town Clerk, Physical Planner and Enforcement team. He identified the men in D2 as the enforcement team and that they did the demolition. That the man in the maroon overall is part of the road gang.

For the second element of this offence placed the onus on the prosecution to show beyond a reasonable doubt that the damage was done intentionally, wilfully and unlawfully. The evidence here is that DW 2 was aggrieved by the complainant blocking the road and reported to Nansana Town Council which authorised demolition of the wall. The actual demolition was done by the road gang.

It was therefore not true that the demolition was unlawful. It followed after a process of assessment and by the local authority.

It is the finding of that the second element was not established.

3. By the accused

The evidence shows that the demolition was carried out by the Nansana Town Council Road gang and not the appellants.

At page 2 of his judgement, the learned trial magistrate found that the prosecution had failed to prove all the ingredients of the offence. In an astounding turn he then found the appellant guilty.

It is clear from the above however that evidence fell short of proof beyond reasonable doubt.

In the result, the appeal against conviction is allowed. The sentences against the appellants are set aside.

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Michael Elubu

Judge

31.5.2021

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