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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-CN-0068-2009

BERNARD SERUGO .....APPELLANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. JUSTICE RUGADYA ATWOKI

JUDGMENT

The appellant herein was charged with and convicted of the offence of malicious damage to property c/s 335(1) of the Penal Code Act, and sentenced to a fine of shs 500,000/- or in default imprisonment for 19 months. He was dissatisfied with that decision and appealed to this court against both the conviction and sentence.

The facts as found by the trial court in brief were that there was a dispute between the appellant and the complainant, one Sendawula Kironde Kigozi over land. Sometime between 2006 and March 2009 the appellant cut down crops on that disputed land, which included bananas, avocado trees, coffee trees. He claimed them to be on his land while the complainant said these were his plants and on his land, hence the charge.

Four witnesses testified for the prosecution while the accused and two others testified for the defence. The learned Grade I magistrate sitting at Nakaseke believed the prosecution witnesses and found the accused guilty and sentenced him as stated above.

Six grounds were set out in the memorandum of appeal as follows.

1.The trial magistrate erred in law and fact when he did not properly evaluate the evidence before him and misdirected himself by not considering the ingredients of the offence willing fully and lawfully. The defence will submit that the accused was lawfully on the kibanja.

2. The trial magistrate erred in law in not visiting the locus in quo to ascertain malicious damage if any.

3. The trial magistrate erred in law by admitting the confession at the police and basing a judgment on it.

4. The trial magistrate erred in fact by not properly assessing the evidence of the prosecution which concerned that the accused had rights in the kibanja.

5. The trial magistrate erred in law by admitting evidence full of grave inconsistencies by the police witnesses.

6. The trial magistrate erred in law and fact by conducting a civil matter as a criminal case and therefore ruled on a balance of probabilities.

Ms Doreen Basaza appeared for the appellant. The DPP was not represented though they were served with hearing notice. The grounds of appeal were repetitious and court advised counsel to argue the first and last grounds of appeal as this would effectively dispose of all the grounds of appeal. She did so but in the process touched all the other grounds of appeal.

The duty of a 1st appellate court is to give the evidence a fresh and exhaustive scrutiny and arrive at its own conclusions of fact, but keeping in mind the handicap of not having had the opportunity of seeing the witnesses as they testified and determining their demeanour. See *Bogere Moses & Kamba Vs. Uganda* SC. Cr. App. No. 1 of 1997, (unreported), citing with approval *Pandya Vs. R.* [1957] EA. 336.

The evidence of the complainant PW1 Sendawula Kironde Kigozi was that he was the owner of the land on which the destroyed crops were growing, having inherited the same from his father. He planted on that crops like bananas, coffee, avocados, yams and jack fruits. During the war, they all run away and upon return, he found one Lugalabo the father of the appellant in occupation of the same. He warned Lugalabo of this and he heeded the warning. Those who had bought from Lugalabo were compensated and all including Lugalabo left. However later, the appellant came and laid claim on the land and he cut down the crops growing thereon. He was repeatedly warned to desist from doing this, and if he felt that his rights were being violated, to take lawful action of suing in courts of law.

The complainant told court that the appellant did not heed the advice but rather proceeded to cut down the crops. Photographs of destroyed crops were tendered in evidence.

PW2 George William Katende was the one at the scene. He testified that the crops were planted by PW1 who was the owner of the land. The plants were cut down by the appellant and this was after he was warned to stop doing so. This evidence was corroborated by that of PW3 Semuyaba Godfrey. He told court that the appellant was warned several times to stop cutting the crops of PW1 in vain.

The Investigating Officer PW4 was D/C Ogwokcan Bruno. He told court that he visited the scene when the complaint of malicious damage was reported to the police. He recovered a panga and knife which were allegedly used to cut down the crops. These were exhibited in court. He observed the crops which were cut down. That was the prosecution evidence.

The appellant was DW3. He told court that he was the owner of the land on which the crops grew. He insisted that he inherited the land from his father who in turn got it from PW1's father.

DW1 Ntonio Kyagala told court that the father of the appellant used to live on the land, and that upon his death, the appellant continued to live on the land and cultivate the same. When PW1 returned, he ordered the appellant to stop cultivating the land but the appellant never heeded this. DW2 Ngobeka told court that the land belonged to the grandfather and was surprised that PW1 the professor was charging people living thereon.

The complaint of the appellant was that the trial magistrate did not set out the ingredients of the offence properly. Malicious damage to property is constituted when there is wilful and unlawful damage to property. The destruction or damage must have been done wilfully. It also must have been unlawfully done. The accused must be the person who damaged or destroyed the property.

The evidence on record was that PW3 Semuyaba Godfrey the shamba boy the complainant PW1 witnessed the destruction and cutting down the crops by the appellant. His testimony was corroborated by PW2. The police officer PW4 visited the scene and observed the destroyed crops. The defence witnesses did not dispute that the crops were indeed destroyed, or that the appellant was the person who did so. All that the defence consisted of was that the appellant was lawfully on the land. The evidence was clear that the appellant wilfully destroyed the crops.

It was argued that there was no unlawfulness. Even if the appellant was lawfully on the land, once it was proved that the crops belonged to the complainant PW1, their cutting them down without his consent and without a lawful order constituted an unlawful act. The ingredients of the offence were fully and properly proved by the prosecution evidence. The appellant intended and wilfully cut the crops down. This was unlawful as he did not have the consent of the owner or a court or other lawful order to do so. The evidence was clear that the appellant was the person who did the cutting.

Despite the fact that the trial magistrate wrongly included the aspect of recklessness in the ingredients of the offence, he nonetheless came to the right conclusion.

The appellant complained that the trial magistrate did not visit the locus in quo to ascertain the damaged property. In criminal jurisprudence, it is not the court which goes out to look for or ascertain the evidence of either side. The burden is on the prosecution to adduce evidence before court which proves the charge beyond reasonable doubt. Where the evidence falls short of this standard, the court will invariably acquit the accused person because where prosecution evidence leaves doubt whether or not the accused committed the offence charged, such doubt must be resolved in favour of the accused. In the present case, there was evidence that crops were destroyed. This came from PW3, the shamba boy, PW4 the Investigating Officer and even appellants own witness DW2.

There was a complaint that the trial magistrate admitted a statement recorded at the police station and used it to found a conviction. The record showed that there was a statement made by the accused while in the hands the police. In court he said it was extracted from him under torture. From the judgment, the trial magistrate mentioned it and how the defence counsel vehemently refused to have a trial within a trial conducted. The trial court however did not mention it in its assessment of the evidence. There was nothing to show that it was ever considered by the court when passing judgment.

The other complaint was in the last ground of appeal. It was drafted rather awkwardly. This was a criminal matter and it was reported to the police as such. It came to court and the suspect was duly charged. He denied the charge of malicious damage to property. Evidence was adduced by the prosecution. The accused testified and called witnesses to testify on his behalf.

I did not see where and how the trial court conducted a civil matter as a criminal case. At the end the trial magistrate analysed the evidence on both sides and believed the prosecution evidence and made his decision, not on a balance of probabilities, but as he rightly cited the leading case *Woolmington v. DPP* [1935] AC 365, and others, on the standard of beyond reasonable doubt.

Indeed the appellant was advised to seek remedy from civil court instead of rushing to cut down the crops of the complainant. He retorted that he could only leave if he was compensated. That could have been arrived at through a civil suit. The complaint was therefore without any basis. All the grounds of appeal are accordingly dismissed.

The appellant's counsel did not submit on the sentence. The trial court imposed a sentence of a fine of shs 500,000/- or in default imprisonment for 19 months. Section 180(d) of the Magistrates Courts Act provides a scale for terms of imprisonment in default of fines. Where the fine exceeds shs 100,000/- the maximum period of imprisonment is 12 months. In view of that provision, the sentence of the trial court is altered accordingly. The default term of imprisonment shall be 12 months.

In the end I was satisfied that the learned trial magistrate analysed the evidence on both sides properly and came to the correct decision. I did not find that there were any inconsistencies which affected the decision of the trial court. The appeal is accordingly dismissed.

Rugadya Atwoki

Judge

26th April 2011.