

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA  
CRIMINAL APPEAL No. 006 OF 2017**

**ARISING FROM MAYUGE COURT CRIMINAL CASE NO.13 OF 2015)**

**MAGUMBA VICENT** ..... **ACCUSED**  
**VERSUS**  
**UGANDA** ..... **PROSECUTOR**

**BEFORE: JUSTICE MICHAEL ELUBU**

**JUDGMENT**

The appellant, MAGUMBA VICENT, was charged and tried on two counts: Threatening Violence C/S 81(a) and Malicious Damage C/S 335(i) all **of The Penal Code Act.**

The Trial Magistrate, H/W KINTU IMORAN, in his judgment delivered at Mayuge on the 20/4/17, convicted the appellant on both counts and sentenced him to 6 months on the first count and 12 months on the second count the sentences to run consecutively.

The background to this appeal is that **PW1, BAKAKI CHARLES** was in a garden at Namwogi Village in Mayuge District on the 20<sup>th</sup> of June 2015, when the appellant, who had a panga came and threatened to cut him. PW1 and several others were said to be planting sugar cane at the time. The Appellant uprooted and threw away the plants.

The police visited the scene and took pictures of the destroyed crops.

PW1 had hired the land on which the sugar cane was planted from one Alice Ataliba a relative of the appellant.

It was in these circumstances that the appellant was arrested and charged.

The appellant in his defence denied the charges. It is his case that he inherited the land from his father and has a will to prove it.

He admitted knowing Alice Ataliba, a sister of his own father, and was aware that she had hired the land out to PW 1. The appellant does not contest the occupation but claims ownership of the land. He indicated that PW1 got authority to use the land from **BASISE SIRAJI**.

The Trial Court believed the prosecution case and found as earlier stated.

The appellant being dissatisfied with the finding of the trial Magistrate filed 4 grounds of appeal namely:

1. That the learned Trial Magistrate erred in law and fact when he failed to properly and adequately evaluate the evidence on record thereby occasioning a miscarriage of justice.
2. That the learned trial Magistrate erred in law and fact when he failed to fully and properly evaluate the evidence of ownership as regards malicious damage to property thereby reaching a wrong decision of guilt of the appellant.

3. That the learned trial Magistrate erred in law when he convicted the appellant on the count I based on the uncorroborated evidence of the complainant thereby occasioning a miscarriage of justice.
4. That the learned trial Magistrate erred in law and in fact when he refused to receive and record evidence of witnesses of the appellant and threatened the defence witnesses by restraining and detaining them thereby occasioning a miscarriage of justice.

Mr. Mangeni Ivan Geoffrey represented the appellant. He argued grounds 1 and 3 jointly.

This court is mindful that as a first appellant court it must subject all the evidence adduced in the lower court to a fresh scrutiny arriving at its own finding but aware that it has not seen the witnesses testify and will be guided by the lower courts observations regarding demeanour.

Counsel in arguing grounds 1 and 3 first challenged the evidence supporting the first count of threatening violence.

**S.81 (a) The Penal Code Act** provides that,

*“Any person who with intent to intimidate or annoy any person, threatens to injure, assault, shoot or kill any person, or to burn, break or injure any Property commits an offence and is liable to imprisonment for a period not exceeding four years”.*

The elements of this offence are:

- i) An intention to annoy or intimidate.

- ii) By use of a threat to injure or kill or destroy property
- iii) The above were done by the accused

The burden is on the prosecution to prove these elements to a standard beyond reasonable doubt. It is also the duty of this court when it gives judgment to evaluate the evidence as a whole (see **Okethi Okale vs R (1965) EA 555**).

Bakaki Charles, the complainant PW1 stated that when he was in the garden with PW3, Musubika Monica, the appellant threatened both the LC I Chairman (one Godfrey) and himself (PW1) (see Pg 3 proceedings). From this evidence of the complainant the LCI Chairman was with PW1 in the garden.

The LCI Chairman Godfrey Ssali testified as PW2. He stated that he was at home on the 20/6/15. He was told about the events by PW1 when he made a report to him.

Musubika Monica was PW3 and was in the garden with PW 1. Her testimony was that it was her son Magumba who was chased by the appellant, who wanted to beat him. She does not mention a threat either to PW1 or PW2.

In his testimony, PW1 stated that police found the accused with uprooted plants. PW3 said the police came and found the accused uprooting the sugar cane.

PW4, No.56298 D/C Gummogoyo Henry was the police officer who visited the scene of crime. His evidence is that he did not see the appellant uproot the sugarcane.

When this evidence is considered as a whole, it is clear that there are material contradictions in the testimony. It is trite law that minor inconsistencies, unless they point to deliberate untruthfulness on the part of prosecution witnesses, should be ignored and that major ones which go to the root of the case, should be resolved in favour of the accused (See Alfred Tajar -V- Uganda Cr. Appeal No. 167 of 1969 EACA) (unreported).

I find that descriptions of events by each of these witnesses differ to such a degree that they cannot be ignored altogether and bring into question the conclusion whether indeed the appellant had a panga and threatened PW1. PW1 stated PW2 was at the scene whereas not, PW3 was at the scene and makes no mention of a threat to PW1. In these circumstances the evidence could not sufficiently sustain the 1<sup>st</sup> count owing to the grave, material and major inconsistencies in the prosecution evidence. The prosecution has a duty to prove the charges against the accused to a standard beyond reasonable doubt. To this end therefore the inconsistencies raise a serious doubt which is resolved in favour of the appellant.

Thus count I was not proved beyond a reasonable doubt.

## **Ground 2**

That the learned trial Magistrate erred in law and fact when he failed to fully and properly evaluate the evidence of ownership as regards malicious damage to property thereby reaching a wrong decision of guilt of the appellant.

I have listened to submissions on both sides regarding the 2<sup>nd</sup> count. The appellant was charged with malicious damage to property **c/s 335(i) of The Penal Code Act.**

In such a case the prosecution has to prove that:

- There was physical destruction / degradation of property
- which was done unlawfully and wilfully.
- That the appellant was responsible

This Court has no doubt that indeed sugar cane was uprooted by the appellant from a garden used by PW1. The evidence of PW1 and PW3 place him at the scene and show he uprooted the sugar cane.

What is in contention is whether the appellant acted unlawfully, deliberately and intentionally.

This court is mindful that the burden to prove the charges lay throughout on the prosecution.

In his defence, the appellant asserted that he had a will giving him the land and claimed its ownership.

At this point, when the claim was made, it was the duty of the lower court to investigate or establish the veracity of this claim. The prosecution should therefore have put all the evidence before the trial court to enable it investigate the claim of ownership.

PW1 stated his ownership or at least possession stemmed from one Ataliba Alice, a sister of the appellant's father. It was her who hired the land out to PW1 but she

was never called to establish this fact. The burden here lay with the prosecution to show that the appellants claim and action were unlawful and not for the appellant to prove his assertion of ownership, which as stated had clearly been brought into issue.

Malicious Damage to property is an offence relating to property (land) and Section 7 of **The Penal Code Act** 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.

A person was said to have a claim of right if he was honestly asserting what he believed to be a lawful claim even though that claim was unfounded in law or fact. To succeed, the claim must be made with the utmost good faith.

I have considered the facts in this case. I am persuaded that the appellant acted in a manner that was to him meant to establish what he claims to be his land (Pg 9). He appears to have been asserting his proprietary rights over this land. There has been no evidence to show that his actions were not bonafide.

In the circumstances I find that though there was damage to the sugar cane, the appellant was asserting an honest claim of right to the land on which the sugar cane was planted.

In a case of Malicious damage, honest belief, whether justifiable or not, that the property is the appellants own would negative the element of mens rea. (See **Sebalijja vs Ug HCB [1991] 15**. I am in total agreement with this holding.

In the circumstances, the second element of the offence of Malicious Damage was not proved beyond reasonable doubt.

The 2<sup>nd</sup> ground of appeal succeeds.

In the result, the 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal are rendered moot.

I accordingly allow this appeal. The conviction is quashed and sentence of the lower court set aside.

The appellant acquitted.



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**MICHAEL ELUBU**

**JUDGE**

**5.09.2017**