IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable

Criminal Appeal No. 0003 of 2018

In the matter between

OKELLO CHARLES **APPELLANT**

And

UGANDA **RESPONDENT**

Heard: 30 August, 2019
Delivered: 26 September, 2019

Criminal Law — Stealing a motor vehicle C/s 261 and 265 of *The Penal Code Act — Proof of offence — Whereas theft is an offence against possession and a person already in possession of property cannot commit theft of it, stealing can be committed by conversion — Stealing of a vehicle has a wider scope than the offence theft, in that stealing can also be committed by conversion.*

Evidence *— An evidential burden of proof when cast on the accused requires only a showing that there is sufficient evidence to raise an issue as to the non-existence of the fact as alleged by the prosecution - 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 — Where in a criminal trial the accused relies for his or her defence on any exception, exemption, proviso, excuse or qualification based on a matter within his or her peculiar knowledge, the evidential burden of proving the exception, exemption, proviso, excuse, is ordinarily cast on him or her — Generally provisions in statutes that reverse the evidential burden can be justified if the matter to be proved by the accused is peculiarly within the knowledge of the accused.*

***Criminal Procedure**: — Sentencing — on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence — While the court has discretion to order compensation under this provision for material loss caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit were instituted against him, he would pay substantial compensation - the power to order compensation under section 197 of The Magistrates Courts Act is subject to the basic rules of a fair hearing — An Appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, the trial Court failed to consider a material factor, or the sentence is harsh and manifestly excessive in the circumstances of the case*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant was jointly charged jointly with three others, with one count of Stealing a motor vehicle C/s 261 and 265 of *The Penal Code Act*. It was alleged that the appellant and the three others, during or around the month of August, 2016 at "Universal Garage" in Kampala, stole a bus Reg. No. UAJ 367 D valued at approximately shs. 122,000,000/= the property of Seraphine Ramtoo Olanya. The appellant was on 31st January, 2018 convicted of the offence after a full trial and was sentenced to seven (7) years' imprisonment. He was also ordered to pay shs. 46,000,000/= to the complainant within six months from the date of the judgment.

The respondent's evidence in the court below:

[2] The prosecution case was that the complainant, P.W.1 Seraphine Ramtoo Olanya, at all material time lived and worked in Liberia. During the month of November, 2014 he bought the bus in issue from a one Okello John at the price

of shs. 62,000,000/= He undertook major refurbishment of the bus at the cost of shs. 58,000,000/= following which its worth increased to shs. 122,000,000/= He then entrusted it to the appellant for its day to day management, plying the Kampala - Gulu route under the name and style of "Redeemer Bus."

[3] During the month of July, 2015 the appellant reported to the accused, by phone, that the bus broke down at Sasira and was towed to Migyera where it spent four months. Thereafter the appellant asked for and received shs. 1,200,000/= that enabled him hire towing services that enabled him to tow the bus from Migyera Petrol Station to "Universal Garage" in Kampala. An assessment was undertaken and the cost of the necessary repairs required to get the bus back onto the road was determined to be shs. 35,000,000/= at a minimum. The appellant asked the complainant to remit that sum to him to enable him undertake the necessary repairs. Instead, complainant replied he could not raise that sum and asked the appellant to have the bus parked and await the complainant's return. The bus remained parked at that garage for another four months.

[4] When the complainant returned to Kampala in September, 2015 he asked the appellant to take him where the bus was but the appellant told him he had sold it off. He could not provide any details of its sale, yet the complainant had not authorised him to sell it off. The appellant admitted liability and promised to compensate the complainant. By the time the complainant eventually returned in December, 2016 the appellant had deposited only shs. 5,000,000/= onto his account and realising the appellant was incapable of refunding the full value of the bus, the complainant reported the case to the police resulting in the arrest and prosecution of the appellant.

<u>The appellant's evidence in the court below</u>:

[5] In his defence the appellant stated that before he was entrusted with the management of the bus, he had known the complainant for long and had helped

the complainant purchase two house in Kampala and Nwoya. He was in charge of collection of rent which he would deposit of the complainant's bank account in Housing Finance Bank. In July, 2015 the bus developed a piston problem at Sasira and was towed to Migyera Petrol Station where it was parked for four months. Later using shs. 1,200,000/= remitted to him by the complainant, he had it towed to "Universal Garage" in Kampala where it was parked for the next eight months. The cost of replacing the engine was stated to be shs. 35,000,000/= Having failed to raise that sum, the complainant called him and instructed him to find buyers. Subsequently the appellant sold it off as scrap in August, 2016. Around December, 2016 he deposited shs. 5,000,000/= onto the complainant's Stanbic Bank account as the proceeds of that sale, after deduction of shs. 2,500,000/= parking fees at the garage and a similar amount he had used for the treatment of his mother. He was surprised to be arrested on 26th March, 2017.

Judgment of the court below:

[6] In his judgment, the trial Magistrate found that the appellant did not deny selling the bus. The bus was dismantled into scrap and therefore the complainant had been permanently deprived of his property. Dealing in that manner with property of this type belonging to another, one would require powers of attorney or some written authorisation. Having a logbook in his possession was not authority to sell but rather to manage its operations. Instead he used it to sell off the bus without authorisation. Although he claimed to have been authorised to sell, he did not disclose the reserve price set for him by the complainant. That the appellant deposited shs. 5,000,000/= later onto the complainant's account was not a validation of the appellant's prior unauthorised sale. The prosecution proved the case against him to the required standard and he was therefore found guilty, convicted and sentenced accordingly.

The grounds of appeal:

[7] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The learned trial Magistrate erred in law and fact when he convicted the appellant of the offence of Stealing a motor vehicle thereby arriving at a wrong decision.
2. The learned trial Magistrate erred in law and fact when he sentenced the appellant to seven years' imprisonment, which sentence was illegal, manifestly harsh, excessive and disproportionate in the circumstances of the case.
3. The learned trial Magistrate erred in law and fact when he ordered the appellant to pay the complainant compensation of shs. 46,000,000/= which was illegal, without any legal basis and he thereby arrived at a wrong decision.

Arguments of Counsel for the appellant:

[8] In his submissions, counsel for the appellant argued that the appellant was the complainant's agent, he managed the bus, helped him purchase two houses in Kampala and Nwoya and the collection of rent there from. He sold the bus off as scrap on instructions of the complainant and deposited the proceeds on the complainant's bank account. The sentence imposed is the maximum provided for under the law. The court did not consider mitigation by the appellant. During his trial, the appellant was denied bail and hence spent ten months on remand. That period was not taken into account at the time of sentencing. It should have been mathematically deducted. The bus was erroneously valued at shs. 70,000,000/= without evidence to that effect. The amount of shs. 46,000,000/= the appellant was ordered to pay is not backed by any evidence. The complainant's evidence was that he bought it at the price of shs. 62,000,000/= during the year, 2014. It

was on the road for two years yet the trial court did not take into account its depreciation. They prayed that the appeal be allowed.

Arguments of Counsel for the respondent:

[9] In response, counsel for the respondent, argued that all the essential ingredients of the offence were proved beyond reasonable doubt. The appellant admitted having been entrusted with the management of the bus yet its owner the complainant denied having permitted him to sell it off. The appellant did not present any powers of attorney from the complainant that authorised him to sell it off on his behalf. The complainant's attempt to have the matter resolved amicably by receiving part of the proceeds did not absolve the appellant of criminal liability fir stealing by conversion. The offence for which he was convicted carries a maximum punishment of seven years' imprisonment. He however conceded that the trial court erred in not taking into account the period of time the appellant had spent on remand and in determining the value of the bus without documentary proof. He prayed otherwise that the appeal should be dismissed.

Duties of a first appellate court:

[10] 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”). 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) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*).

[11] 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 court's 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*).

The first ground is struck out for being too general

[12] Under section 28 (4) of *The Criminal Procedure Code Act*, the grounds of appeal should include particulars of the matters of law or of fact in regard to which the court appealed from is alleged to have erred. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). The first ground of appeal does not specifically point out the errors observed in the course of the trial or the decision which the appellant believes occasioned a miscarriage of justice. It is accordingly struck out.

Ingredients of the Offence

[13] That notwithstanding, it is the duty of this court to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. For the appellant to be convicted of the offence of Stealing a motor vehicle C/s 261 and 265 of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

i. The motor vehicle in issue belonged to or was in possession of the complainant.
ii. The accused took or participated in taking the motor vehicle.
iii. The motor vehicle was intentionally taken wrongfully or without a claim of right.
iv. With the intention to permanently deprive the owner of the motor vehicle.

i. The motor vehicle in issue belonged to or was in possession of the complainant.

[14] As regards the availability of sufficient evidence to prove that bus Reg. No. UAJ 367 D was a motor vehicle that belonged to or was in possession of the complainant, it is common knowledge that a motor vehicle is a self-propelled vehicle that runs on land surface and not on rails. It is a mechanically propelled vehicle made, intended or adapted for use on roads. It was the testimony of both the complainant and the appellant that this bus actually existed. P.W.1 Seraphine Ramtoo Olanya testified that he bought it from a one Okello John at the price of shs. 62,000,000/= He undertook major refurbishment of the bus at the cost of shs. 58,000,000/= through remittances he sent to the appellant in instalments, following which its worth increased to shs. 122,000,000/= He tendered a photocopy of its logbook in court which showed it was registered in his name. He handed the original logbook to the appellant to enable him replace it with the new format and to secure a route chart. The appellant was involved in its purchase

where after the complainant entrusted it to him for its management. It was included in the fleet managed by "Redeemer Bus" whereupon it began plying the Kampala - Gulu route until it broke down some time in July, 2015.

[15] Possession within the meaning of this section refers to effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called *de facto* possession or detention as distinct from a legal right to possession. In the instant case, the complainant presented evidence to show that he was owner of the bus and that the appellant was entrusted with its physical possession on his behalf. Since it is the complainant who entrusted the bus to the appellant, the complainant had both knowledge of its existence in the hands of the appellant and as well had the ability to control it. This control was evinced by the fact that he instructed the appellant to two it after it broke down. Even if the complainant did not have physical possession of the bus at the time, he had the ability to gain possession of it, and this counted as constructive possession. For this type of offence, constructive possession is enough. The evidence before the trial court therefore proved beyond reasonable doubt that the complaint both owned and had constructive possession of the bus at the time of the alleged offence.

ii. <u>The accused took or participated in taking the motor vehicle.</u>

[16] As regards the availability of sufficient evidence to prove that the appellant took or participated in taking the motor vehicle, this is done by adducing direct or circumstantial evidence placing the accused at the scene of crime as perpetrator of the offence. It was the testimony of P.W.1 Seraphine Ramtoo Olanya that after purchasing and refurbishing the bus, he entrusted it to the appellant. In his defence, the appellant admitted having received it. He also admitted having sold it off as scrap at the price of shs. 10,000,000/= The evidence before the trial court therefore proved beyond reasonable doubt that the appellant took or participated in taking the motor vehicle.

iii. The motor vehicle was intentionally taken wrongfully or without a claim of right with the intention to permanently deprive the owner of it.

[17] As regards the availability of sufficient evidence to prove that the bus was intentionally taken wrongfully or without a claim of right with the intention to permanently deprive the owner, the taking under section 261 of *The Penal Code Act* means depriving someone with ownership or control of the property, of its possession or control. Property belongs to a person if at the time of the appropriation that person was in fact in possession or control of it (see *R v. Turner (No 2) [1971] 1 WLR 901* and R*. v. Bonner and others [1970] 1 WLR 838, [1970] 2 All ER 97, 54 Cr App Rep 257*). The prosecution had to prove what amounts in law to an asportation (that is carrying away) property under the control of the complainant, with intention to permanently deprive him of the property and without his consent or any claim of right.

[18] Under section 254 of *The Penal Code Act*, the *actus reus* of theft is “moving (in order) to take someone’s possession without his or her consent." Theft involves an unauthorised taking, keeping, or using of another's property. It is committed by a person who has no lawful justification in taking possession of the property in issue. However, under section 261 of *The Penal Code Act*, the *actus reus* of stealing may occur either by "taking" or "converting" the thing capable of being stolen. The fraudulent taking of property belonging to another is stealing and the just as the fraudulent conversion of property belonging to another to the use of the taker or to the use of any other person is also stealing. What is essential in either situation is that the taking or the conversion must be fraudulent.

[19] Whereas theft is an offence against possession and a person already in possession of property cannot commit theft of it, stealing can be committed by conversion. Conversion is committed by a person who deals with chattels not belonging to him or her in a manner inconsistent with the rights of the owner. In Garner B.A. (ed.), *Black’s Law Dictionary* (8th edn., 2004), at 1453, conversion is

defined in terms of tort and criminal law as: “the wrongful possession or disposition of another’s property as if it were one’s own; an act or series of acts of wilful interference, without lawful justification, with an item or property in a manner inconsistent with another’s right whereby that other person is deprived of the use and possession of the property." Therefore, the “act of taking” as an *actus reus* of the offence includes taking possession, refusing to give up possession upon demand, disposing of the goods to a third person, or destroying them, provided that it is also established that there is an intention on the part of the accused in so doing to deny the owner’s right or to assert a right vested in the owner.

[20] Stealing a motor vehicle involves a person who without having the consent of the owner or other lawful authority, takes the vehicle for his own or another's use or, knowing that the vehicle has been taken without such authority, drives it away. Stealing of a vehicle has a wider scope than the offence theft, in that stealing can also be committed by conversion. The offence is committed when the vehicle is taken by persons not having lawful access, or converted by one who had lawful access. It is also important to reiterate that it is not every taking without consent that amounts to stealing. A person is guilty of stealing a vehicle if he or she dishonestly appropriates it with the intention of permanently depriving the owner of it. The main difference between this offence and the act of joyriding, is that this offence requires that the accused had the intention to permanently deprive the owner of the motor vehicle (i.e. to not return it or give it back).

[21] It was the testimony of P.W.1 Seraphine Ramtoo Olanya that he entrusted the bus to the appellant but in August, 2016 the appellant failed to account for it. The bus has never been seen again. The appellant told him he had sold it off and promised to compensate him. P.W.2 D/ASP Gibaba James the arresting officer testified that he obtained information from Kisenyi Bus Park that the bus had been dismantled and sold as scrap. Exhibit P.2 showed the appellant sold the bus to the garage owner (A2 and A4 witnessed by A3) as scrap at the price of

shs. 10,000,000/= P.W.3 Otema Denis who was the conductor of the bus testified that when the bus developed a mechanical problem at Sasira, it was towed to Migyera Petrol Station where it spent about three months. He later assisted in having it towed to a garage in Kisenyi, Kampala where he handed it over to the appellant. When the complainant returned and asked for the bus, he told him it was at a garage in Kiesenyi. When they went to the garage they were told the appellant had sold the bus to the garage owner and it had been later sold as scrap. He never saw the bus again. The evidence before the trial court therefore proved beyond reasonable doubt that the appellant disposed of or participated in disposing of the bus in a manner that permanently deprived the complaint of his ownership and control of the bus, and this was done intentionally.

[22] The only contention was whether or not the appellant had the authority to dispose it off in that manner. It was the testimony of the complainant P.W.1 Seraphine Ramtoo Olanya that he never authorised the appellant to sell the bus. He testified further that his purported signature as seller on the agreement executed between the appellant, A2 and A4 as buyers and witnessed by A3, was a forgery. On the other hand, the appellant contended that he had been authorised by the complainant to sell off the bus.

The Burden of proof

[23] In criminal trials, both the evidential and persuasive burden of proving all elements of the offence lies on the prosecution. Viscount Sankey L.C. famously described the prosecution's duty to prove guilt beyond doubt as the "golden thread" running throughout English criminal law (see *Woolmington v. DPP [1935] A.C. 462*). However, over the centuries the common law, as a result of experience and the need to ensure that justice is done both to society and to accused persons, has also evolved an exception to the fundamental rule of criminal law that the prosecution must prove every element of the offence charged (see *Regina v. Edwards [1975] 1 QB 27*). Where in a criminal trial the

accused relies for his or her defence on any exception, exemption, proviso, excuse or qualification based on a matter within his or her peculiar knowledge, the evidential burden of proving the exception, exemption, proviso, excuse, is ordinarily cast on him or her where, taking the circumstances of the case into account, it would be proportional and fair to place the burden of proof on the accused (see *Regina v. Hunt (Richard) [1987] 1 AC 352, (1986) 84 Cr App R 163, [1986] 3 WLR 1115, [1987] 1 All ER 1*).

[24] An example at common law is that the burden of establishing insanity in a criminal trial is cast on the defence on the balance of probabilities (see *Daniel M'Naghten's Case [1843] 8 ER 718* and *R v. Sullivan [1984] 1 AC 156 at 171A*). But the shifting of the evidential burden does not discharge the legal burden of proof which at all times rests on the prosecution. The burden of disproving insanity, when it is properly raised in a criminal trial, is on the prosecution to the criminal standard, just as the prosecution have to disprove to the criminal standard accident or self-defence.

[25] There are also instances when provisions in penal statutes reverse the evidential burden by expressly requiring the accused to prove a defence or other matter. These provisions sometimes state that it is a defence to prove a particular matter (see for example under *The Penal Code Act*;- the offence of Promoting Sectarianism under section 41 (2) and the offence of Neglect of duty under section 114 (2) of the Act). Others provide that particular conduct constitutes an offence if committed without lawful justification or excuse, "the proof of which lies on the accused" (see for example under *The Penal Code Act*;- the offence of Cattle rustling under section 266 (1) (c); Unlawful Possession of housebreaking instruments, dangerous or offensive weapons under section 300 (1) (b) and (f); Possession of any stamp or part of a stamp which has been fraudulently cut under section 350 (g); Purchasing forged bank or currency notes under section 357, and so on). In either type of provision, the standard is almost always on the balance of probabilities.

[26] Generally, provisions of this kind that reverse the evidential burden can be justified if the matter to be proved by the accused is peculiarly within the knowledge of the accused. The justification is even stronger if it would be difficult or expensive for the prosecution to disprove the matter. Laws that require an accused person to prove certain facts within his or her peculiar knowledge are not inconsistent with the presumption of innocence and the burden of the prosecution to prove a case beyond reasonable doubt (see article 28 (4) (a) of *The Constitution of the Republic of Uganda, 1995* and *Nalongo Naziwa Josephine v. Uganda S. C. Criminal Appeal No. 35 of 2014*). Therefore, if a penal statute or judicial practice is to be construed as merely shifting the evidential burden no constitutional infringement occurs.

[27] An evidential burden of proof when cast on the accused requires only a showing that there is sufficient evidence to raise an issue as to the non-existence of the fact as alleged by the prosecution. In such situations, the accused need not testify to discharge that burden. The burden may be discharged by pointing to some piece of evidence tendered by other means and perhaps by the prosecution sufficient to raise a reasonable doubt as to his or her innocence. The accused may be acquitted even though he or she called no evidence because the statute or judicial practice does not discharge the prosecution from establishing the guilt of the accused beyond a reasonable doubt. It merely gives legal effect to an inference which it is reasonable to draw from facts established by the prosecution, apart from the statute. In such cases no constitutional invalidity could arise.

[28] This is further premised on the fact that in the natural order of things the one who asserts the affirmative of an issue has the burden of proving it. This principle is captured by the Latin expression; *matim ei qui affirmat non ei, qui negat incumbit probatio* (the proof lies upon him who affirms, not upon him who denies). The rule is adopted because the negative does not admit of the direct and simple proof of

which the affirmative is capable (see *Maria Ciabaitaru M'mairanyi and Others v. Blue Shield Insurance Company Limited, 2000 [2005]1 EA 280*).

[29] In the instant case, the defence raised by the appellant that he was authorised to sell the bus was a defence of permission or authority, which is some form of qualification, based on matters within his peculiar knowledge. It would therefore be reasonable for the appellant to bear the evidential burden, because it only inclines him to produce evidence of authorisation, which is a form of qualification. The application of this principle to the facts of this case is dependent upon the fact or the presumption that the appellant had peculiar knowledge enabling him to prove the position of what is otherwise a negative averment on the part of the prosecution. He therefore bore the evidential burden of adducing evidence establishing that positive assertion in his defence. The reverse evidential burden did not require the appellant to prove his innocence, it only required him to raise a matter of exculpation as a genuine issue. The prosecution would then carry the persuasive burden of negating the matter. The accused could not be convicted if the matter of exculpation he relied on raised a reasonable doubt regarding his guilt.

[30] The appellant therefore bore the evidential burden of raising a matter of exculpation as a genuine issue to the effect that he had prior authorisation from the complainant to dispose of the bus, whereupon the prosecution would then have the burden to disprove it to the criminal standard of beyond reasonable doubt. It was ultimately for the prosecution to prove that the appellant had no authority to sell the bus, but only after the appellant had either adduced evidence to show that he had such authority or by pointing to some piece of evidence tendered by other means, or by the prosecution, to show that he had the necessary authority to dispose of the bus. Apart from the assertion he made, the only evidence he adduced or pointed to was the fact that he had in his possession, the original logbook of the bus.

[31] The fact of possession for the purpose of selling the bus was disproved by the testimony of the complainant P.W.1 Seraphine Ramtoo Olanya who stated that the logbook was given to him only for purposes of enabling the appellant to manage the operations of the bus and to obtain a replacement of the logbook with the modern type. The complainant's denial of ever having authorised the appellant to sell the bus was corroborated further by the circumstantial evidence of the complainant's forged signature on the sale agreement. It was further corroborated by the fact that despite the appellant's prior knowledge the complainant's Housing Finance Bank account onto which he was periodically depositing rent collections from the complainant's houses, he did not deposit the proceeds of the sale of this bus onto that or any other bank account of the complainant until almost four months later.

[32] Even then, when he deposited the money onto a Stanbic Bank account that was provided by the complainant, it was after the intervention of the complainant. He did so only after the complainant challenged him to account for the bus. He further went ahead to make deductions from the proceeds of the sale, a quarter of which he applied to the treatment of his ailing mother, in respect of which he did not seek proper approval of the complainant. Overall the appellant behaved as if the proceeds of the sale were his own money until the intervention of the complainant. The conduct of the appellant is inconsistent with what would be expected of a person authorised to undertake such a sale. I therefore find that the evidence before the trial court proved beyond reasonable doubt that in disposing of the bus, the appellant intentionally did so wrongfully or without a claim of right, with the intention to permanently deprive P.W.1 Seraphine Ramtoo Olanya of that bus. I therefore find no merit in the appeal against conviction.

Limitations on appeals from sentence

[33] In the second ground the appeal is against sentence. It is settled law that an appellate court will not interfere with sentence imposed by a trial Court merely

because it would have imposed a different sentence. An appellate Court can only interfere with a sentence imposed by a trial Court where the sentence is either illegal, is founded upon a wrong principle of the law, the trial Court failed to consider a material factor, or the sentence is harsh and manifestly excessive in the circumstances of the case (see *James v. R. (1950) 18 E.A.C.A. 147*; *Ogalo s/o Owoura v. R. (1954) 24 E.A.C.A. 270*; *Kizito Senkula v. Uganda, S.C. Criminal Appeal No. 24 of 2001*; *Bashir Ssali v. Uganda, S.C. Criminal Appeal No. 40 of 2003*; *R v. Ball (1951) 35 Cr. App. R 164* and *Ninsiima Gilbert v. Uganda, C.A. Criminal Appeal No. 180 of 2010*).

[34] In his mitigation, the appellant stated that he had eight (8) children four (4) of whom are his biological children. Two of them were due to sit for UCE but dropped out of school when he was incarcerated. If imprisoned, he will not be able to find money to compensate the complainant. In the victim impact statement, the complainant prayed for a deterrent sentence. In justifying the imposition of the maximum penalty for the offence despite that mitigation the trial Magistrate stated that the appellant's conduct constituted a flagrant breach of trust, and that it was a daring act to steal a bus. He was of the view that the circumstances of the case required both personal and general deterrence, hence a retributive rather than a reformatory sentence.

[35] Retribution is based on the principle that people who commit crimes deserve punishment. Implicit in retribution is the condemnation or denunciation of both the offender and the offending behaviour. Deference looks into the preventive consequence of sentence. It is based on the belief that crime is rationalised and can be prevented if people are afraid of penalties. Knowledge that punishment will follow crime deters people from committing crime, thus reducing future violations of right and the unhappiness and insecurity they would cause (general deterrence). It aims at deterring other people who witness punishment and likeminded with the offender, from committing this kind of offence. It makes other people prudent by inducing the public to refrain from criminal conduct by using

the accused as an example of what will befall a person who violates the law. On the other hand, one of the goals of criminal sentencing seeks to prevent a particular offender from engaging in repeated criminality (specific deterrence). The actual imposition of punishment creates fear in the offender that if he or she repeats his or her act, he or she will be punished again. Imprisonment is ten used as a means to reduce the likelihood that an offender will be capable of committing future offences (incapacitation). It makes the offender incapable of offending for substantial period of time.

[36] That aside, rehabilitation seeks to bring about fundamental changes in offenders and their behaviour. Rehabilitation generally works through education and psychological treatment to reduce the likelihood of future criminality. This theory rests upon the belief that human behaviour is the product of antecedent causes, that these causes can be identified, and that on these basis therapeutic measures can be employed to effect changes in the behaviour of the person treated. This requires modification of attitudes and behavioural problem through education and skill training. The belief is that these might enable offenders to find occupation other than crime. In the case of incorrigible offenders, people in respect of whom the evidence adduced at the trial suggests that they are incurably bad, or by some vice of nature are beyond the reach of reformative influence, the application of purely reformative theory therefore, would lead to astonishing and inadmissible result.

[37] The vital purpose of punishment is to deter the offender from committing fresh crime and also to deter other with inclination to commit a crime of a similar nature. A court at sentencing is expected to focus on the primary importance of deterrence as an element in criminal justice, but without overlooking the reformative element. It is evident then that the determination of an appropriate sentence is a highly discretionary exercise guided by many factors and considerations. By setting a maximum penalty, the law provides a basis for the

grading of offences and creates room for the court to determine a sentence which is proportional to the harm caused.

[38] Sentencing is not a mechanical process. There may be a range within which the case fits, just like fingerprints no two cases are the same. Circumstances alter cases and it is the function of the trial court to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. The trial court uses its own moral judgement and at its discretion, guided by the law and the facts of the case, determines a sentence which will not only rehabilitate the offender but also act as a deterrence to the general public. Therefore, when the trial court has applied its mind to all relevant factors and exercised its discretion with caution, without personal emotions but with wisdom, justice, and competence, without any suggestion that it is acted arbitrarily, insolently, or in a discriminatory, prejudiced, intrusive and corrupt manner, so as to arrive at a just sentence for the offender, the victim, and the community, an appellate court will be slow to interfere with the sentence imposed by the court that not only has had the "feel" of the case, but has also seen the human impact of the offence play out through the testimonies of the various witnesses.

[39] While the appellate court may not require the trial court to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved, the appellate court will intervene;- if the sentence is illegal, where material factors were not taken into consideration by the sentencing court, where irrelevant factors were taken into account or the sentence is manifestly harsh or excessive. A sentence that is outrageously or shockingly harsh so as to constitute an affront to the overwhelming majority of conscientious people's sense of justice, will not be allowed to stand. is an injustice.

[40] The maximum penalty of any offence is usually reserved for circumstances where the conduct of the convict exhibited a depravity of mind as to be shocking

to the moral sense of the society, i.e. acts of baseness, vileness or a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Circumstances where the convict went about the commission of the offence with an utterly corrupt, perverted or immoral state of mind. Depravity of mind is a state of mind outrageously horrible or inhuman. It is characterised by an inherent deficiency of moral sense and integrity. It consists of evil, corrupt and perverted intent which, in relation to property offences, is devoid of regard for and indifferent to property rights. Offenses that involve depravity of mind such as fraud or breach of trust, may justify the imposition of the maximum sentence.

[41] I have perused the proceedings at sentencing, the submissions of both parties and the mitigation by the appellant. It is evident that when pronouncing the sentence, the trial Magistrate used his moral judgement and was guided by the law when he tailored the sentence to suit the individual circumstances and variety of facts presented during the trial. There was nothing to suggest that the appellant deserved a rehabilitative sentence. There is no material on basis of which it can be determined that his criminality was the product of antecedent causes, that these causes could be identified, and that on that basis therapeutic measures could be employed to effect changes in his behaviour. I am in agreement with the trial Magistrate that the appellant's conduct in this case was so wanton, so deficient in a moral sense of concern, so lacking and blameworthy that it constituted a depraved indifference to the property rights of others, as to justify the maximum sentence for purposes of deterring the appellant from committing fresh crime and also to deter others with inclination to commit crimes of a similar nature.

The Period spent on remand

[42] The only error I have found is that the trial magistrate did not take into account the period the appellant has spent on remand. When imposing a custodial

sentence on a person convicted of an offence, it is mandatory under Article 23 (8) of the *Constitution of the Republic of Uganda, 1995* to take into account the period spent on remand while sentencing a convict. This provision was applied in *Kizito Senkula v. Uganda S.C. Cr. Appeal No.24 of 2001*, and *Katende Ahamad v. Uganda, S.C. Criminal Appeal No.6 of 2004* where the Supreme Court held that in Article 23 (8) of *The Constitution***,** the words "to take into account" do not require a trial court to apply a mathematical formula by deducting the exact number of years spent by an accused person on remand, from the sentence to be meted out by the trial court. This decision was followed by the Court of Appeal in *Zziwa v. Uganda Cr. Appeal No. 217 of 2003*, and *Kaserebanyi v. Uganda Cr. Appeal No. 40 of 2006*, among other cases, where it was decided that to take into account does not mean a mathematical exercise. What is necessary is that the trial Court makes an order of sentence that is not ambiguous.

[43] However, Regulation 15 (2) of The *Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013*, is to the effect that the court should "deduct" the period spent on remand from the sentence considered appropriate, after all factors have been taken into account. This approach requires a mathematical deduction by way of set-off. From the earlier proposed term of twenty years' imprisonment, arrived at after consideration of the mitigating factors in favour of the convict, the appellant having been charged on 31st March, 2017 and kept in custody from then until his conviction and sentence on 31st January, 2018, he was entitled to a set off of ten months the period he had already spent on remand. I therefore make that deduction and reduce the sentence to a term of imprisonment of six (6) years and two (2) to be served starting from the date of conviction, 31st January, 2018.

Orders of compensation

[44] The last ground of appeal faults the trial court for having ordered the appellant to pay a sum of shs. 46,000,000/= to the complainant as compensation, within six

months from the date of the judgment. Section 197 of *The Magistrates Courts Act* empowers a trial court to make an order of compensation in addition to the sentence imposed, where it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit.

[45] This power to award compensation is intended to reassure victims of crime that they are not forgotten in the criminal justice system. Criminal justice increasingly looks hollow if justice is not done to the direct victim of the crime. In some cases, the victims lack the resources to institute civil proceedings after the criminal case has ended. The idea behind directing the convict to pay compensation to the complainant is to afford immediate relief so as to alleviate the complainant's grievance. It is a measure of responding appropriately to crime as well as reconciling the victim with the offence. For those reasons, the word "may" in section 197 of *The Magistrates Courts Act* should be interpreted to be obligatory whenever in any criminal trial, it is proved that the complainant suffered material loss in consequence of the offence committed for which substantial compensation is recoverable in a civil suit.

[46] There are obvious advantages of allowing one court to deal with the criminal and civil liability of material loss caused by the offence such as; avoiding unnecessary litigation, by allowing one court to deal with both criminal and civil liability and thus secure just treatment for both the accused and the victim of the offence and saving the victim of the offence time and costs of recovering compensation or damages in a subsequent civil suit. It provides the victim with a speedy and inexpensive manner of recovering reparation. It requires no more of the victim than a request for the order. It can be an effective means of rehabilitating the accused because this order quickly makes the accused directly responsible for

making restitution to the victim. The practical efficacy and immediacy of the order helps to preserve the confidence of society in the criminal justice system.

[47] By this provision, criminal prosecutions constitute a single proceeding, in which the criminal / civil line becomes blurred. For that reason, invoking this provision should be undertaken after careful consideration of whether or not there is no real danger of causing injustice in the criminal proceedings, since the discretion to award compensation must be exercised judiciously. A Prosecutor who desires the court to make such award needs to lead evidence relating to proof of the injury resulting out of the criminal act, and provide material to court during the prosecution case on basis of which the assessment of compensation will be made.

[48] While the court has discretion to order compensation under this provision for material loss caused by the offence, it must satisfy itself not only that the offender is civilly liable, but that if a civil suit were instituted against him, he would pay substantial compensation. This means in practice that the court has to decide whether the criminal punishment is enough, or whether there is a need for compensating the victim who has suffered loss, in addition to criminal punishment which may be imposed on the convict. The victim claiming compensation must, however, establish that he or she has suffered some personal loss, pecuniary or otherwise, as a result of the offence, for which payment of compensation is essential, such as would be recoverable in a civil suit. Whether a victim who has suffered loss as a result of the commission of an offence would recover compensation in a civil suit depends very much on the nature of loss caused by the offence. Sometimes criminal proceedings may be a sufficient remedy.

[49] From the procedural perspective, the power to order compensation under section 197 of *The Magistrates Courts Act* is subject to the basic rules of a fair hearing. In order to afford an accused ample and fair opportunity to meet the claim for

compensation, during the prosecution case, the court should hear prosecution evidence regarding this aspect as part of its case generally against the accused. That way the accused will have been given ample opportunity to reply or respond to evidence relevant thereto, and at the defence stage, to adduce such evidence as he or she may deem necessary, for rebutting the claim for compensation, or the assessment thereof. If this is done during and as part of the trial of the criminal liability of the accused, the court will at the same time have heard the evidence relating to proof of the injury resulting out of the criminal act and relevant to the assessment of compensation such that upon conviction of the accused, it will be in position at the same time to determine, assess and order compensation.

[50] In the instant case, the record of proceedings reveals that the complainant P.W.1 Seraphine Ramtoo Olanya narrated the loss sustained being a bus he bought in November, 2014 at the price of shs. 62,000,000/= He undertook major refurbishment of the bus at the cost of shs. 58,000,000/= following which its worth increased to shs. 122,000,000/= The appellant and his counsel had ample opportunity to cross-examine him. Since this evidence was introduced entirely during the prosecution case, the appellant was given ample opportunity to reply or respond it, and to adduce such evidence as he may have deemed necessary, in rebuttal thereof. He failed to do either.

[51] It is trite 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 (see *Habre International Co. Ltd v. Kasam and others [1999] 1 EA 115; Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008* and *James Sawoabiri and another v. Uganda, S.C. Criminal Appeal No. 5 of 1990*). On that account I find that the prosecution placed before the trial court sufficient material on basis of which the court came to its finding that the complainant had sustained material personal loss in consequence of the offence

committed for which substantial compensation was recoverable in a civil suit. On the facts of the present case, the order was appropriate in principle.

[52] What was left for the court to determine was the quantum. The power to award compensation in a criminal trial is a most peculiar power. The court's sentencing powers are limited by section 162 (1) (b) of *The Magistrates Courts Act* to sentences of imprisonment for periods not exceeding ten years or fines not exceeding one million shillings or both such imprisonment and fine. Section 180 thereof further restricts the power to impose fines by prescribing that where the amount of the fine which may be imposed is unlimited it shall nevertheless "not be excessive," and lays down a guiding sliding scale in respect of comparable terms of imprisonment in default of payment of fines imposed. In contrast, the power to award compensation is not expressly restricted in a similar manner. Just like the power to award general damages in civil proceedings, the power to award compensation appears to be at large.

[53] Whereas the power to impose fines is limited by law, section 197 of *The Magistrates Courts Act* does not impose any such limitation and thus, this power should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a magistrate. Discretion has to be exercised only along well-recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity. An order for compensation should only be made with restraint and with caution. The court should be mindful that under this provision, the accused is deprived of many of the protections which he would have in an ordinary civil action. For instance, the convict does not really have notice of the claim beforehand and cannot defend it properly. He has no right to discovery by which he could attempt to elicit proper proof of the damage occasioned by his offence.

[54] Although I do not read the section as requiring exact measurement such as is expected in proof of special damages in a civil suit, since the provision is clearly

not intended to be in substitution for the civil remedy, the court should be slow to make an assessment and award of substantial amounts as compensation without clear evidence of a definite amount by admission or other proof, otherwise it risks descending into purely civil consequences of the facts that constitute a crime. Section 197 of *The Magistrates Courts Act* is not to be used in *terrorem* as a substitute for or reinforcement for civil proceedings. It reflects a scheme of criminal law administration under which injuries inflicted or property, taken or destroyed or damaged in the commission of a crime, is brought into account following the disposition of culpability, and may be ordered by the criminal court to be returned to the victimised owner or that reparation be made by the offender, either in whole or in part under an order for compensation, where loss was occasioned.

[55] It is true that on account of its discretionary nature the sentencing process is traditionally permitted to proceed largely on the basis of information rather than on the basis of evidence. But the special nature of orders for compensation requires that they be made only on the basis of evidence by admission or otherwise. The section does not spell out any procedure for resolving a dispute as to quantum; its process is, *ex facie*, summary but I do not think that it precludes an inquiry by the trial magistrate to establish the appropriate amount of compensation, so long as this can be done expeditiously and without turning the sentencing proceedings into the equivalent of a civil trial. The trial magistrate ought to be mindful of the fact that had the complainant been forced to undertake a civil suit to recover the sum, he would have been forced to prove his loss in a stricter manner and the fact that prospect of obtaining in a summary way from the court in exercise of its criminal jurisdiction an order of compensation equivalent to a judgment in a civil suit is an open invitation to resort to the criminal process mainly for the purpose of obtaining the civil remedy, especially in cases of crime against property committed by persons against whom a civil condemnation is likely to be of some practical value.

[56] For that matter, an award of compensation must be reasonable. What is reasonable will depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the loss suffered the justness of claim by the complainant, the ability of accused to pay and other relevant circumstances and the court may allow a reasonable period for payment, if necessary by instalments. This requires an inquiry, albeit summary in nature, to determine the paying capacity of the offender, unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Another relevant consideration would be whether civil proceedings have been taken and, if so, whether they are being pursued and whether the criminal court will be involved in a long process of assessment of the loss.

[57] Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that the first and the most effective check against any arbitrary exercise of discretion is the well-recognised legal principle that orders can be made only after proper evaluation. Evaluation brings reasonableness not only to the exercise of power but to the ultimate conclusion. Evaluation in turn is best demonstrated by disclosure of the reasons behind the decision or conclusion. In that case, an appellate court will have the advantage of examining the reasons that prevailed with the court making the order. Conversely, absence of reasons in an appealable order deprives the appellate court of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own

[58] A compensation order should only be made when the amount can be readily ascertained, and only when the accused does not have an interest in seeing that civil proceedings are brought against him in order that he might have the benefit of discovery procedures and the production of documents. Obviously, though, neither the production of documents nor the examination for discovery will be of much, if any, significance if the amount owing to the victims is fixed and acknowledged. A victim of crime in a situation where the amount involved is

readily ascertained and acknowledged by the accused should not be forced to undertake the often slow, tedious and expensive civil proceedings against the very person who is responsible for the injury. In such situations, it would be unreasonable to deny the practical necessity for an immediate disposition as to reparation by the criminal court which is properly seized of the question as an incident of the adjudication over the criminal accusation.

[59] I have reviewed the prosecution case, the reasons the trial magistrate gave by for the award and the manner he went about the assessment. His determination of the value of the bus at shs. 70,000,000/= is consistent generally with the complainant's testimony and other facts of the case. The complainant was not under a duty to prove the value of the bust strictly. At sentencing, the court may proceed largely on the basis of information rather than on the basis of evidence. From that amount he deducted what the three co-accused of the appellant had paid already (shs. 24,000,000/=) hence the appellant was to pay the balance being shs. 46,000,000/= within a period of six months. I have not found any fault in principle nor in assessment and therefore this ground of appeal fails.

Order;

[60] In the final result, the appeal against conviction is unsuccessful and is dismissed. The appeal against sentence succeeds only in part with the result that the sentence of seven years imprisonment is set aside. Instead the appellant is to serve a term of imprisonment of six (6) years and two (2) to be served starting from the date of conviction, 31st January, 2018. Otherwise and subject to that order, the appeal stands dismissed.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant : M/s Odongo and Co. Advocates

For the respondent : Mr. Patrick Omia, Resident Senior State Attorney