IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0012 of 2017

In the matter between

UGANDA **APPELLANT**

And

1. OJWIYA SANTO
2. OJOK CHARLES
3. OPIO JOHN
4. OPIO SUNDAY
5. RUBANGAKENE FRED **RESPONDENTS**

Heard: 23 June, 2020.
Delivered: 14 August, 2020.

Criminal Law *— Criminal Trespass C/s 302 of The Penal Code Act. — The offence of criminal trespass is complete upon the unlawful entry with the requisite intent such that the offence of malicious damage to property was not merely incidental to that of criminal trespass. — There must be a corresponding actual, unlawful entry by the person accused. In regards to intent, it is not necessary that the accused actually commits an offence or actually intimidates, annoys or insults the person in possession of the property, mere intention to do so will amount to criminal trespass. — Intention, which is a state of mind, can never be proven as a fact; it can only be inferred from other facts which are proved.*

Criminal Procedure*— Joinder of charges— section 86 (1) of The Magistrates Courts Act— Any offences, whether felonies or misdemeanours, may be charged together in the same charge if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character. — Issues of joinder ordinarily arise where both inchoate and substantive offences are allegedly committed*

in the same transaction. Joinder of offenses is justified primarily for reasons of administrative efficiency. The law favours joinder and the avoidance of multiple trials, hence a person may be charged with several offences using a single set of facts. — It is not appropriate to though include additional (rather than alternative) counts in a charge where, as a matter of substance, the counts are alternatives or are based on the same facts. It is not appropriate to though include additional (rather than alternative) counts in a charge where, as a matter of substance, the counts are alternatives or are based on the same facts — Exercising the discretion to strike out charges on a charge-sheet requires a magistrate to strike a balance between the interests of the accused in avoiding unnecessary prejudice and the public interest in the efficient allocation of judicial resources, consistency of decisions, convenience of witnesses and finality of litigation.— Prima facie case— sections 127 and 128 (1) of The Magistrates Courts Act — A trial court is required to determine whether or not the evidence adduced has established a prima facie case against the accused. It is only if a prima facie case has been made out against the accused that he should be put to his or her defence — A prima facie case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents were jointly charged with two counts; - in the first Count, with the offence of Criminal Trespass C/s 302 of *The Penal Code Act*. It was alleged that the respondents and others still at large, on 2nd July, 2015 at Wum village, Lapainant East Parish in Gulu District, unlawfully entered upon land in possession of Kitara David Ladit with intent to intimidate, insult or annoy the said Kitara David Ladit. In the second Count, they ewer charged with the offence of Malicious Damage to Property C/s 335 (1) of *The Penal Code Act*. It was alleged that the respondents and others still at large, on 2nd July, 2015 at Wum village, Lapainant East Parish in Gulu District, wilfully and unlawfully damaged 260 stems of pine tree saplings and beans, the property of Kitara David Ladit.

[2] While delivering his ruling on a *prima facie* case, the Chief Magistrate struck the first count off the charge sheet, stating that there had been a misjoinder since upon damaging the complainant's property on the land they had trespassed on, the offence of criminal trespass ceased to matter. He found that the prosecution had failed to establish a *prima facie* case in the second count against all the respondents. The respondents were therefore acquitted.

[3] The prosecution case was that there was a land dispute between the complainant and the 1st respondent over the approximately five acres of land. On the fateful day the respondent had entered onto the land and cut down 260 pine tree saplings and destroyed a garden of beans that had been intercropped with the trees. At the close of the prosecution case, the trial Magistrate ruled that the prosecution had wrongly joined the two counts. The respondents were accordingly acquitted of the offence of Malicious Damage to Property C/s 335 (1) of *The Penal Code Act*.

[4] Counsel for the appellant filed a notice of appeal but did not file a memorandum of appeal nor submissions in support of the appeal, despite having been notified and given a month's period to do so. Consequently, neither did the respondents file submissions. However, considering that under section 28 (1) of *The Criminal Procedure Code Act*, a criminal appeal is commenced by a notice in writing signed by the appellant or an advocate on his or her behalf, it was incumbent upon this court to consider the merits of the appeal, despite the lapses of the appellant.

Duties of the first appellate court.

[5] 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”).

[6] 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*). 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*).

[7] In his ruling on co-case-to-answer, the learned Chief Magistrate stated;

> The offence of criminal trespass should not be charged where a person who allegedly enters upon land in possession of another does an act which itself constitutes an offence. Meaning that since the accused are alleged to have damaged the growing plants of the complainant (which is charged as malicious damage to property) on land which is in the possession of the complainant, then they should not have been charged with criminal trespass. It is clear that the offence of criminal trespass charges the intent of the intruder, and if the intruder has done what he had intended then this intent ceases to matter. It is the actual thing which he does which is now charged. My only authority for this view is the practice where suspects for the offence of burglary and theft, for example, are not charged for the offence of criminal trespass, yet they enter upon the land of the victim with the criminal intent, or even to annoy. Thus I strike out the count of criminal trespass as preferred against the accused in Count I of the charge. I only wish that this decision could go to a court of record, preferably the

> Supreme Court, so that police officers preferring charges get to appreciate the fact that it is not the number of counts in a charge that matter but rather credibility of the proofs in respect of the allegations."

Joinder of offenses.

[8] In our criminal trial practice there is a tendency against what is known as the splitting up of charges, where the criminal transaction is considered to be one and the same offence. It is difficult though, if not impossible, in view of the decided cases, to lay down a hard-and-fast rule, which will apply with justness in every instance that has already been adjudicated upon, or which may in future arise for decision. The tendency is to consider each case on its facts. The initial decision of whether to join multiple charges in a charge-sheet or indictment is that of the prosecution. Joinder of offenses is justified primarily for reasons of administrative efficiency. The law favours joinder and the avoidance of multiple trials, hence a person may be charged with several offences using a single set of facts.

[9] Exercising the discretion to strike out charges on a charge-sheet requires a magistrate to strike a balance between the interests of the accused in avoiding unnecessary prejudice and the public interest in the efficient allocation of judicial resources, consistency of decisions, convenience of witnesses and finality of litigation. Consequently, questions of joinder and severance of offences must be determined at the start of proceedings. It is the reason why under section 139 (2) of *The Trial on Indictments Act*, in determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It is odd therefore that in the instant case, joinder was considered and decided at the close of the prosecution case.

[10] According to section 86 (1) of *The Magistrates Courts Act*, any offences, whether felonies or misdemeanours, may be charged together in the same charge if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character. Multiple offenses may be preferred in one charge, whether felonies or misdemeanours or both, if they are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. For this proviso to apply, there must be a common factual origin, connection or nexus between the offences, the offences must be linked, or in a series, rather than separate and discrete, and it must be convenient in all the circumstances to try the offences together, rather than separately (see *Ludlow v. Metropolitan Police Commissioner [1971] AC 29* and *R v. Kray [1970] 1 QB 125*). Sometimes failure to try related charges together would constitute harassment or unduly consume the time or resources of the parties. The trial court should encourage joinder of charges for trial unless it determines that joinder is not in the best interests of justice.

[11] It is not appropriate though to include additional (rather than alternative) counts in a charge where, as a matter of substance, the counts are alternatives or are based on the same facts. Sometimes the prosecution will lay alternative charges because it is not known which elements of the respective offences will be challenged (see section 88 (f) of *The Magistrates Courts Act* and *Ross Hillman Ltd v. Bond [1974] 2 All ER 287*). Charges are preferred in the alternative, where the prosecution is unsure of how the facts will actually turn out at trial, yet an accused who is acquitted cannot normally be subjected to a further prosecution in the future using the same facts. In such cases, the accused is not convicted of both charges, but of one or the other.

[12] The rule against double jeopardy essentially states that a person who is acquitted of charges arising out of a specific set of facts should not be prosecuted again for the same alleged facts (see article 28 (9) of *The*

Constitution of the Republic of Uganda, 1995 and section 89 of *The Magistrates Courts Act*). The prosecution will often charge a person with a main or principal charge (which is usually the most serious charge) followed by alternative or backup charges (which are usually less serious). In its judgment, the court will first consider evidence in relation to the principal charge. If it finds the accused guilty in relation to that charge, it will dismiss the alternative charge. It is only if it finds the accused not guilty in relation to the principal charge that it will consider the evidence in the light of the alternative charge.

[13] Issues of joinder ordinarily arise where both inchoate and substantive offences are allegedly committed in the same transaction. Inchoate offences are a type of crime completed by taking a punishable step towards the commission of another crime. The basic inchoate offenses are attempt, solicitation, and conspiracy. Except for conspiracy, inchoate offenses merge into the target crime. This means that if the accused is prosecuted for the target crime, attempt and solicitation cannot be charged as well. However, both conspiracy to commit a crime and the crime itself may be charged.

[14] Joinder may also be considered in cases where the prosecution thinks that to restrict the offences charged might not give rise to the appropriate sentence in total, having regard to the totality of the criminal conduct. When two or more separate offences are committed with different conduct although that conduct may very well arise out of one act as the criminal episode unfolds, they may be joined in one charge. There is no universal test or criterion though which can be applied to every case to determine whether an accused can be charged and convicted of multiple offenses arising from the same act or transaction or whether or not the actions of the accused amount in substance to one offence. The basic approach is that of common sense and fairness. The existing tests are not equally applicable in every case.

[15] One approach considers; (a) whether the acts alleged in the charges were committed with a single intent in the course of a single criminal transaction; and (b) whether the evidence necessary to establish one of the offences involves proof of the other. Using the first of these tests, the accused's conduct may be considered as one continuous act and therefore one count will be preferred or if the evidence necessary to establish one crime involves proving another crime. On the other hand, if in the circumstances the evidence necessary to prove one count would not prove the other, then both counts will be charged.

[16] Another approach focuses on the conduct, the *animus* or desire to harm, and the import of the accused. Under this approach, the focus is on the offender's conduct that constitutes the commission of the offense, not upon the temporally related course of conduct or same acts or transaction or the act being considered as one continuous act. The test is applied disjunctively: the existence of any one prong suffices for joinder. An affirmative answer to any of the three will permit separate counts. If the acts committed in the same transaction constitute offenses of dissimilar import or result in offenses committed with separate *animus*, then they may be charged together, but in separate counts. Import generally means "effect." Offenses have dissimilar import when they involve separate victims or the harm from the crimes is separate and identifiable. Two or more offenses of dissimilar import exist if the harm that results from each offense is separate and identifiable. The test is fact-specific and requires the Court to evaluate the conduct of the accused to determine if the offences are actually dissimilar or if they should be merged into one charge.

[17] A person may engage in an extended course of conduct with a specific offence as his or her only objective. The second of those tests is used in the determination of whether or not the conduct was committed with a single continuous objective or purpose or *animus* separate from other distinct purposes or objectives. Where an individual's immediate motive involves the commission of one offence, but in the course of committing that crime he or she must, *a priori*,

commit another, then he or she may well possess but a single *animus*, and in that event may be charged with only one offence. Animus can be uncovered through an objective inquiry into constructed intent.

[18] That notwithstanding, it is possible for a person to trespass onto another's property with intent only to intimidate, insult or annoy but not to commit any other offence or to have entered the premises with another criminal purpose and abandoned it before actually completing the criminal act. In the former scenario, the accused does not have in contemplation any other offence to be consummated, none to be pursued further than the point of intimidating, insulting or annoying the victim. However, in the latter scenario where the conduct is merely incidental to a separate underlying crime, there exists no separate *animus* sufficient to sustain separate counts. Where the offender has but one *animus*, to commit the ultimate offence, the underlying offence may not be charged. Nevertheless, despite initial absence of a separate *animus*, where the conduct subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate *animus* as to each offense by reason of the escalation, sufficient to support separate counts. There must be a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.

[19] This explains why on the authorities, a conspiracy does not merge with the substantive offence, which is the object of the conspiracy, when that offence has been committed. A person may be convicted both of the conspiracy and of the substantive offence. Unlike attempt and solicitation, conspiracy does not merge with the substantive offense; a conspirator may be punished for both. A conspiracy may be charged, notwithstanding that the offence which is its object has been committed (see *R. v. Saik [2007] 1 A.C. 18*). It is generally undesirable though for an accused to be charged with both conspiracy to commit an offence and the substantive offence where the criminality of the accused can be

adequately represented in a single charge (see *R. v. Dawson [1960] 1 W.L.R. 163* and *R. v. West [1948] 1 K.B. 709*).

[20] Where the conduct of the accused in the same transaction constitutes two or more offenses of dissimilar import, or where his or her conduct results in two or more offenses of the same or similar kind committed separately or with a separate *animus* as to each, the charge may contain counts for all such offenses, and the accused may be convicted of all of them. A separate *animus* could be proved by showing that the ultimate offence subjected the victim to a substantial increase in the risk of harm or loss separate from that involved in the underlying crime, where the substantive counts do not represent the overall criminality of the accused's actions. Criminals may commit several crimes to accomplish a single illegal purpose. In such cases, mere proximity in time and location within which several offenses may be committed does not necessarily make one offense intertwine with the others.

[21] Court is cognisant of the fundamental difficulty of determining the motivations of criminal conduct from a variety of perspectives, some obvious, some suspected, and others unpredictable. However, a showing of desire to harm is sufficient to prove *animus*. In criminal trespass, the *animus* is directed at the person of the complainant while in malicious damage the *animus* is directed at the property of the complainant. The harm that results from each offence is separate and identifiable.

[22] In the instant case, although arguably the respondents were alleged to have committed both offences in one continuous act, with no break in the chain of events, their alleged conduct was necessarily different in the commission of both offences. The continuous conduct morphed during the transaction. The respondents' alleged actions are best described as one transaction in which the conduct shifted to constitute the commission of a second crime following the commission of the first.

[23] The offence of criminal trespass is complete upon the unlawful entry with the requisite intent such that the offence of malicious damage to property was not merely incidental to that of criminal trespass. On basis of the facts as alleged by the prosecution, the criminal trespass would have been committed upon entering the land with the necessary *animus* and the malicious damage that followed would be separate conduct that constituted the commission of a second, distinct offence. Even though the two crimes were temporally related, they have different elements, and therefore, the conduct required to prove each crime is distinct. The elements of the two crimes do not correspond to such a degree that the commission of one crime will result in the commission of the other. Although both crimes occurred contemporaneously and were effectuated to achieve the same criminal object, each was a distinct offence. It was a misdirection to strike out the first count.

[24] At the close of the prosecution case, sections 127 and 128 (1) of *The Magistrates Courts Act*, require the trial court to determine whether or not the evidence adduced has established a *prima facie* case against the accused. It is only if a *prima facie* case has been made out against the accused that he should be put to his or her defence (see section 128 (1) of *The Magistrates Courts Act*). Where at the close of the prosecution case a *prima facie* case has not been made out, the accused would be entitled to an acquittal (See *Wabiro alias Musa v. R [1960] E.A. 184 and Kadiri Kyanju and Others v. Uganda [1974] HCB 215*).

[25] A *prima facie* case is established when the evidence adduced is such that a reasonable tribunal, properly directing its mind on the law and evidence, would convict the accused person if no evidence or explanation was set up by the defence (See *Rananlal T. Bhatt v R. [1957] EA 332*). The evidence adduced at this stage, should be sufficient to require the accused to offer an explanation, lest he runs the risk of being convicted. It is the reason why in that case it was decided by the Eastern Africa Court of Appeal that a *prima facie* case could not be established by a mere scintilla of evidence or by any amount of worthless,

discredited prosecution evidence. The prosecution though at this stage is not required to have proved the case beyond reasonable doubt since such a determination can only be made after hearing both the prosecution and the defence.

Proof of a *prima facie case.*

[26] There are mainly two considerations justifying a finding that there is no *prima facie* case made out as stated in the Practice Note of Lord Parker which was published and reported in *[1962] ALL E.R 448* and also applied in *Uganda v. Alfred Ateu [1974] HCB 179*, as follows:-

a) When there has been no evidence to prove an essential ingredient in the alleged offence, or
b) When the evidence adduced by prosecution has been so discredited as a result of cross examination, or is manifestly unreliable that no reasonable court could safely convict on it.

Ingredients of the offence of Criminal Trespass

[27] For a prima facie case to be made out with regard to the offence of Criminal Trespass C/s 302 (a) of The Penal Code Act, the prosecution had to lead credible evidence on each of the following essential ingredients;

1. Intentional entry onto property in possession of another.
2. The entry was made without authorisation.
3. The entry was for an unlawful purpose.
4. The appellant entered onto the premises in those circumstances.

1st issue; whether there was sufficient evidence regarding intentional entry onto property in the possession of another.

2nd issue; whether there was sufficient evidence showing that the entry was made without authorisation.

[28] The first two elements of the offence of criminal trespass preferred in the first count will be considered together, and these require proof of a deliberate unauthorised or otherwise illegal entry onto premises or other direct interference with possession of such premises, by way of intruding into the airspace, throwing or placing objects on the premises, while such premises are in actual possession of another.

[29] The possession is clearly intended to be possession at the time of entry and it does not imply that the person in possession must be present at the actual time of the entry. 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.

[30] There must be a corresponding actual entry by the person accused. Constructive entry by a servant, for instance, acting on the orders of his master is not an entry, within the meaning of the section. The section covers both movable and immovable property, for instance there can be a criminal trespass to a motor car as well as to land and proof of the use of force is not necessary. One enters another's premises if he or she physically crosses a boundary onto that person's premises. He or she may enter on the surface of the land, but she also may enter above or below the surface, because ownership of land extends below the earth and above the earth for some distance that's reasonably useable in connection with the surface. The entry may be intentional or negligent. A person commits an intentional trespass as long as he or she intentionally takes the action that interferes with the complainant's right to exclude. An entry resulting from intentional action is a trespass even if the trespasser didn't mean to trespass or didn't realize that his or her action would be a trespass, unless perhaps a court feels that the trespasser's mistake was excusable.

[31] The entry onto the property must be unlawful. The section does not protect a trespasser in possession as against a party lawfully entitled to possession. It is worthy of note that the party lawfully entitled to possession has a right to private defence of his property embedded in the defence of bona fide claim of right under section 7 of The Penal Code Act.

[32] The evidence before court regarding the two elements at the close of the prosecution case included that of P.W.1 Kitara David Ladit who testified that he owned land on which he had planted pine tree saplings intercropped with beans. He inherited the land from his father and had been living thereon since the 1970s. P.W.2 Kolo Walter testified that the complainant is his neighbour and he had a garden of beans pine tree saplings intercropped with beans on his land. The two witnesses stated that on 2nd July, 2015 each of them saw the respondents on that land. This evidence was neither so discredited as a result of cross examination, nor was it manifestly unreliable that no reasonable court could safely convict on it. It constituted credible evidence regarding the two elements that called for an answer from the respondents.

3rd issue; <u>whether the entry was for an unlawful purpose (an intention to commit an offence, or, to intimidate, insult or annoy the person in possession of the property).</u>

[33] The intent referred to in the section is “to commit an offence,” or to “to intimidate” (meaning to overawe, to put in fear by a show of force or threats or violence), or “to insult” (meaning to assail with scornful abuse or offensive disrespect) or to annoy (meaning to molest), (*see Kigorogolo v. Rueshereka [1969] EA 426*). It is not necessary that the accused actually commits an offence or actually intimidates, annoys or insults the person in possession of the property, mere intention to do so will amount to criminal trespass.

[34] A person will be guilty of the offence if he or she knows or ought to know that his or her course of conduct will cause the other so to fear or get annoyed. The intent to annoy and intimidate must be not with respect to any and every person connected with the property but with respect to any person in actual possession of such property. A person in constructive possession is not contemplated by the section. The word "annoy" as used in the section should be taken to mean annoyance which would reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual.

[35] A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to intent to insult or annoy within section. In order to establish criminal trespass, the prosecution must prove a specific intention to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover of the real intent or, at any rate, constituted no more than a subsidiary intent.

[36] Intent implies having something in mind as a plan, purpose or design, committing an act with a specific goal in mind, i.e. what one has clearly formulated in mind to do or bring about or alternatively, a decision to bring about, insofar as it lies within the accused's power, the commission of the offence, no matter whether the accused desired that consequence of his or her act or not. For this offence, the concept of intent involves acting knowingly and purposely. This intention can be inferred from the circumstances but it must be actual and not a probable one. It may be inferred from conduct which was calculated in an objective sense to cause alarm and distress, which will depend on the context of the conduct in each case. For this offence, a person is considered to have acted with intent if the definitions of purpose and knowledge are satisfied.

[37] There has to be evidence of such intention, or facts from which such an intention might be reasonably inferred, e.g. if it is shown that the person in possession of the property expressly prohibited the accused from coming to the property, an

intent to annoy may be legitimately inferred (see *Elineo Mutyaba v. Uganda H.C. Criminal Appeal No. 45 of 201*1, where the complainant asked the appellant to leave the premises but he opted to remain there).

[38] In general terms, where a person is aware of probable and possible consequences of his or her planned action, the decision to continue with such a plan means that all the foreseen consequences are to some extent intentional. The court will combine both subjective and objective elements but being an element of specific intent, court will tend to use a more subjective than objective test, hence this specific intent must also be demonstrated on a subjective basis. The more certain the consequences would be to a reasonable person and the accused, the more justifiable it is to impute sufficient desire to convert what would otherwise only have been recklessness into intent. But if the degree of probability is lower, the person will be considered to have acted with mere knowledge or recklessness.

[39] Alternatively, a person will be held to intend a consequence (obliquely) when that consequence is a virtually certain consequence of their action, and they knew it to be a virtually certain consequence (see *R v. Woollin [1999] AC 82* where use of the phrase "substantial risk" in place of "virtual certainty" was held to have blurred the line between intention and recklessness). The court is therefore entitled to infer the necessary intention, where it feels sure that the prohibited consequence was a virtual certainty (barring some unforeseen intervention) as a result of the accused's actions and that the accused appreciated that such was the case. An accused person will be taken to intend to accomplish all outcomes necessary to the overall plan, including all additional consequences that flow naturally from the original plan, when it is his or her conscious object to engage in conduct of that nature or to cause such a result. Merely knowing that a result is likely does not prove intention, but once it is shown that the accused was aware of the nature of the act and was practically certain of the consequences, the court

may then infer that he or she intended to cause that particular result when committing the act.

[40] Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved (see *Sinnasamy Selvanayagam v. R [1951] AC 83 at 87*). If there are no admissions, to be found guilty of this offence, The circumstantial evidence must be of such a quality that the only rational inference open to the Court to find in the light of the evidence must be that the accused intended to intimidate or annoy a person by threatening to do some unlawful act. Being a mental element, the intention may be deduced from utterances, or certain acts designed to intimidate, insult or annoy any person in possession of such property. Before the court may rely on circumstantial evidence to conclude that the accused had the required intent, yet must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the accused had the required intent.

[41] If the court can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the accused did have the required intent and another reasonable conclusion supports a finding that the accused did not, the court must conclude that the required intent has not been proved by the circumstantial evidence. However, when considering circumstantial evidence, the court must accept only reasonable conclusions and reject any that are unreasonable.

[42] It was the testimony of P.W.1 Kitara David Ladit that at the time the respondent entered onto that land, they armed with pangas, axes and spears and upon seeing him they became violent towards him, forcing him to flee. These were facts from which the requisite intention might be reasonably inferred. This evidence was neither so discredited as a result of cross examination, nor was it manifestly unreliable that no reasonable court could safely convict on it. It

constituted credible evidence regarding this element that called for an answer from the respondents.

4th issue; whether the respondents entered onto the premises in those circumstances.

[43] There had to be direct or circumstantial evidence placing each of the respondents at the scene of crime as a participant in its commission. P.W.1 Kitara David Ladit testified that it was around 8.00 am when he was altered by his brother that the accused were destroying his garden. He went to the garden where he found the respondents uprooting the pine tree saplings and slashing his beans. P.W.2 Kolo Walter testified that he went to the scene together with the complainant and found that A1 Ojwiya Santo was directing the rest. A3 Opiyo John was slashing using a panga. A2 Ojok Charles had an axe on his shoulder and was standing in the garden. A5 Rubangakene Fred was uprooting the pine trees. This evidence was neither so discredited as a result of cross examination, nor was it manifestly unreliable that no reasonable court could safely convict on it. It constituted credible evidence regarding this element that called for an answer from the respondents.

[44] For a prima facie case to be made out with regard to the offence of Malicious Damage to Property C/s 335 (1) of The Penal Code Act, the prosecution had to lead credible evidence on each of the following essential ingredients;

1. Property belonging to another or the accused and another person.
2. Damage to or destruction of that property.
3. The act that caused the damage or destruction was wilful.
4. The act that caused the damage or destruction was unlawful.
5. The accused did or participated damaging or destroying the property.

4th issue; whether property belonging to another or the accused and another person was allegedly involved.

[45] The general rule in the law of malicious damage is that a person may do what he or she likes with his or her own property, provided that he or she does not injure the rights of others (see *Breeme's Case (1780) 2 East P.C.1026*), or it is not done dishonestly with an ulterior intent such as to commit a fraud. Property belongs not only to the owner but also to persons having other, lesser interests. The complainant should have custody, control or a proprietary right or interest in the property. A person may be convicted of damaging a tangible object if some other person has an interest, of a possessory or proprietary nature, in it.

[46] It was the testimony of P.W.1 Kitara David Ladit that he owned land by inheritance from his late father and had been living thereon since the 1970s. At the time of the incident, he had planted over 600 pine tree saplings on that land. This evidence was neither so discredited as a result of cross examination, nor was it manifestly unreliable that no reasonable court could safely convict on it. It constituted credible evidence regarding this element that called for an answer from the respondents.

5th issue; <u>whether that property was damaged or destroyed.</u>

[47] To "damage" means the permanent or temporary reduction of functionality, utility or value of some tangible property. The damage or change to the property need not be permanent hence if the functionally is deranged or interference with function occurs this will satisfy the notion of “destroy or damage.” The concept of damage for the purposes of the crime includes tampering with property in such a way as to require some cost or effort to restore it to its original form. The damage may include marking, defacing, removing or altering the property.

[48] P.W.1 Kitara David Ladit testified that about forty, two-year-old pine tree saplings were uprooted, and approximately three acres of the beans intercropped therein slashed. This was corroborated by his neighbour, P.W.2 Kolo Walter. This evidence was neither so discredited as a result of cross examination, nor was it

manifestly unreliable that no reasonable court could safely convict on it. It constituted credible evidence regarding this element that called for an answer from the respondents.

6th issue; whether the act that caused the damage or destruction was wilful.

[49] The damage to or destruction of the property must have been done maliciously, with intent or recklessly. When an act is said to have been done wilfully it means that it was done deliberately and intentionally, not by accident or inadvertence. Malice under this section in not considered in the old vague sense of wickedness in general but as requiring either; (i) an actual intention to do the particular kind of harm that was done; or (ii) recklessness as to whether such harm should occur or not (i.e. the accused must have foreseen that the particular kind of harm might be done and yet had gone ahead on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the property destroyed or damaged, or its owner (see *R v. Cunningham [1957] 2 QB 396*).

[50] The ordinary meaning of "wilful" is deliberate" or "intentional." Therefore the state of mind contemplated by the word "wilfully" is that the accused had an intention to do the particular kind of harm that was done, or alternatively that he or she must have foreseen that that harm may occur, yet nevertheless continued recklessly to do the act. If a person intended to cause injury to a person, but instead caused injury to property, the necessary intention would not have been established unless it is proved that the person acted recklessly, not caring whether the property was damaged or not (see *R. v. Senior [1899] 1 Q.B. 283 and R. v. Pembliton [1874-80] All E.R. Rep. 1163*). Intention in this context is knowledge and recklessness (in the sense of foresight and disregard of consequences or awareness and disregard of the likelihood of the existence of circumstances).

[51] P.W.1 Kitara David Ladit testified that it was around 8.00 am he found the respondents uprooting the pine tree saplings and slashing his beans. P.W.2 Kolo Walter testified that found that A1 Ojwiya Santo was directing the rest. A3 Opiyo John was slashing using a panga. A2 Ojok Charles had an axe on his shoulder and was standing in the garden. A5 Rubangakene Fred was uprooting the pine trees. This evidence was neither so discredited as a result of cross examination, nor was it manifestly unreliable that no reasonable court could safely convict on it. It constituted credible evidence regarding this element that called for an answer from the respondents.

7th issue; whether the act that caused the damage or destruction was unlawful.

[52] The damage to the property should not only be wilful but it should also be unlawful. With regard to the requirement of unlawfulness, “Unlawfully” means not justified authorised or excused by law. An act which causes injury to the property of another and which is done without the owner’s consent is unlawful unless authorised or justified or excused by law. Thus if an accused person had a lawful excuse for his wilful act, his act would not be unlawful. To be unlawful, it must not fall within the ambit of a justification ground (such as, for example, private defence, necessity, superior orders or consent), or be something that the accused is entitled to do in terms of the law of property or the provisions of a statute. It follows that if for instance an accused acted in reasonable self-defence or in reasonable exercise of a supposed right, it could not be said he acted "unlawfully" (see *R. v. Clemens [1898] 1 Q.B. 556*).

[53] An honest belief in a right to do damage to the property of another in protection of one's own interests, is a defence. Not only must the claim of right be honest but also the means employed for its protection must be reasonable in relation to the supposed rights. An honest (though erroneous) belief by the accused; (a) that he had a right which he or she was entitled to protect; and (b) the means of protection used were proper in the circumstances, is a defence. An act which is

in fact unreasonable in all the circumstances, for the purposes of criminal law, is evidence that the accused's beliefs were not honestly held.

[54] On its face, the testimony of both P.W.1 Kitara David Ladit and his neighbour P.W.2 Kolo Walter which was neither so discredited as a result of cross examination, nor was it manifestly unreliable that no reasonable court could safely convict on it. It constituted credible evidence regarding this element that called for an answer from the respondents. As to whether any of the respondents had a plausible justification or excuse for the conduct giving rise to this accusation, this could only be determined by hearing them in their defence.

8th issue; whether the respondents or any of them damaged or participated in damaging or destroying the property.

[55] There had to be direct or circumstantial evidence placing each of the respondents at the scene of crime as a participant in its commission. P.W.1 Kitara David Ladit testified that it was around 8.00 am when he was altered by his brother that the accused were destroying his garden. He went to the garden where he found the respondents uprooting the pine tree saplings and slashing his beans. P.W.2 Kolo Walter testified that he went to the scene together with the complainant and found that A1 Ojwiya Santo was directing the rest. A3 Opiyo John was slashing using a panga. A2 Ojok Charles had an axe on his shoulder and was standing in the garden. A5 Rubangakene Fred was uprooting the pine trees. This evidence was neither so discredited as a result of cross examination, nor was it manifestly unreliable that no reasonable court could safely convict on it. It constituted credible evidence regarding this element that called for an answer from each of the respondents.

[56] According to section 20 of *The Penal Code Act*, when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a

nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence (see *Uganda v. Sebaganda and s/o Miruho [1977] HCB 8*; *R v. Salmon [1880] 6 Q.B 79* and *Nanyonjo Harriet and another v. Uganda, S.C. Criminal Appeal No.24 of 2002*. In order to make the doctrine of common intention applicable, it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence. An unlawful common intention does not imply a pre-arranged plan. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to disassociate himself from the assault (see *No.441 P.C. Ismail Kisegerwa and No.8674 P.C. Bukombe v. Uganda [1979] 81* and *Bumbakali Lutwama and four others v. Uganda, S.C. Cr. Appeal No. 38 of 1989*).

[57] In conclusion therefore, had the trial magistrate properly directed himself he would have found that a *prima facie* case had been made out against each of the respondents.

Order:

[58] In the final result, the appeal is accordingly allowed. The ruling of the trial court is set side. Consequently, a retrial is order before another Magistrate of competent jurisdiction.

Delivered electronically this 14th day of August, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondents: