



**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

Reportable  
Criminal Appeal No. 0015 of 2018

In the matter between

**UGANDA**

**APPELLANT**

And

**OMONA FRANK**

**RESPONDENT**

**Heard: 23 June, 2020.**

**Delivered: 14 August, 2020.**

**Criminal Law** — *Stealing a motor vehicle C/s 254 and 265 of The Penal Code Act — The prosecution should prove beyond reasonable doubt that; The motor vehicle in issue belonged to or was in possession of the complainant, that the motor vehicle was intentionally taken wrongfully or without claim of right, with the intension to permanently deprive the owner of the motor vehicle and that the accused took or participated in taking the motor vehicle — The offence is committed when the vehicle is taken by a person not having lawful access. Stealing of a vehicle has a wider scope than the offence of theft, in that stealing can also be committed by conversion. — The main difference between this offence and joyriding which occurs when the offender intends and has the means to return the vehicle to the rightful owner, unconditionally and promptly is that this offence requires that the accused had the intention to permanently deprive the owner of the motor vehicle. — Theft C/s 254 (1) and 261 of The Penal Code Act — The complainant should have custody, control or a proprietary right or interest in the property — There should be proof that; the accused took or participated in taking property belonging to another, that it was intentionally taken wrongfully or without claim of right, with the intention to permanently deprive owner of it.*

**Evidence**— *It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a*

witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored.

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## JUDGMENT

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**STEPHEN MUBIRU, J.**

Introduction:

- [1] The respondent was charged with two counts; in Count 1 he was charged with the offence of Stealing a motor vehicle C/s 254 and 265 of *The Penal Code Act*. It was alleged that the respondent, on 14<sup>th</sup> April, 2016 at Comboni Vocational Institute in Gulu District, stole an Ace 125 cc motorcycle Reg. No. UEB 969 H valued at shs. 4,000,000/= the property of Daniel Comboni Vocational Institute. In the second count, he was charged with the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*. It was alleged that the respondent, on 14<sup>th</sup> April, 2016 at Comboni Vocational Institute in Gulu District, stole nine (9) laptop computers all valued at shs. 22,500,000/= the property of Daniel Comboni Vocational Institute. He was tried and acquitted on both counts.
- [2] The respondent was primarily employed as a teacher by Daniel Comboni Vocational Institute and subsequently additional responsibilities were assigned to him as the Gateway (main centre) Centre Manager of its youth project. As part of his duties he was allocated the motorcycle in issue and one laptop computer. He never returned these items at the end of his contract. The respondent denied the offences. He stated in his defence that his contract with Daniel Comboni Vocational Institute expired in May, 2013. During September, 2013 M/s Voluntary Service Overseas initiated a project to which he was recommended to be the Gateway (main centre) Centre Manager. He was to oversee the vocational training aspects. This did not include management of the project assets. The official closure of the project was in December, 2015 but a few members of staff, him inclusive, were retained until January, 2016 to close the project.

[3] On 29<sup>th</sup> February, 2016 he was notified by Konrad Tremmel and P.W.1 Ochen Richard, the Director and Principal respectively of Daniel Comboni Vocational Institute, notifying him that his contract had come to an end and therefore he should vacate the staff quarters. He was officially handed a termination later on 14<sup>th</sup> April, 2016 and he vacated the premises. P.W.1 Ochen Richard, the Principal of Daniel Comboni Vocational Institute, received seven (7) of the laptops while P.W.3 Lia Everlyne, an Accounts Assistant with Daniel Comboni Vocational Institute received five (5) of the laptops. When M/s Voluntary Service Overseas provided the twelve (12) laptops, P.W.5 Opiyo Mark, the Information Technology Instructor of Daniel Comboni Vocational Institute took charge as he was responsible for their engraving and distribution. Whoever received a laptop from him, himself inclusive, would sign for it. When on 1<sup>st</sup> March, 2016 an email was set to him (exhibit P. Ex.1) instructing him to collect the assets including the laptops, he responded by email dated 9<sup>th</sup> April, 2016 (exhibit D. Ex.2 (ii) explaining the whereabouts of the laptops.

[4] At the end of his contract, Mr Konrad Tremmel the Director and P.W.2 Olwoch Bernard, the Personnel Coordinator of Daniel Comboni Vocational Institute, donated to him the motorcycle and the laptop he had been using. He could not have taken nine laptop computers off the securely guarded premises of Daniel Comboni Vocational Institute without detection. The Guidance Councillors all came up with a similar story of how they did not find him in office thereby handing over their laptops to P.W.5 Opiyo Mark. The similarity in their testimonies is too close to be true. The loss allegedly occurred during early 2016, yet he was arrested in December of that year.

Judgment of the court below:

[5] In his judgment delivered on 7<sup>th</sup> June, 2018 the trial Magistrate found that in his defence, the respondent did not deny having taken the motorcycle. The only question was whether or not he took it fraudulently with an intention to

permanently deprive its owner, of it. The evidence shows that it was donated to him in appreciation of his services to Daniel Comboni Vocational Institute. It was the evidence of P.W.2 Olwoch Bernard that they had given the motorcycle to the respondent as a gift, but it was later revoked when they discovered they had no authority to do so. The respondent failed to return the motorcycle nevertheless. It was therefore taken with the consent of the owner. The delay or refusal to return the motorcycle did not constitute him a thief. The remedy was for the owner suing him for conversion. The same reasoning applies to the laptop computers. One laptop was recovered from the respondent upon his arrest and he explained in his defence that it had been donated to him. This raised a doubt which ought to be resolved in favour of the respondent. The fact of donation may be inferred from the period of time that had elapsed since the respondent had left the employment of Daniel Comboni Vocational Institute, the staff quarters and hand over of the keys thereto, and the time it was recovered from his possession. There was no demand for the return of the laptop. Even if there had been such a demand a failure to comply, the remedy would be in the tort of conversion.

- [6] There was no evidence to show that the respondent had collected the rest of the eight laptops from the training vocational institutes. There was no written record to back up the testimony of Opio Mark to the effect that he handed over the laptop returned by Bobi Community Polytechnic to the respondent. Neither the records of return of the laptops nor the telephone calls allegedly made by the various Guidance Councillors to Mark Opio and the respondent were adduced in evidence. The accusations were based on a personal vendetta between the respondent and the Director of Daniel Comboni Vocational Institute. The respondent should never have been charged at all.

The grounds of appeal:

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

1. The learned trial Magistrate erred in law in holding that the motorcycle registration number UEB 969 E and one laptop were given as gifts to the respondent.
2. The learned trial Magistrate erred in law and fact in the interpretation and application of the law of theft.
3. The learned trial Magistrate erred in law and when he admitted in evidence and relied on a statement recorded at police by a person not called as a witness by the prosecution, as evidence in favour of the respondent.

Arguments of Counsel for the appellant:

[8] In support of those grounds, the learned Senior Resident State Attorney, submitted that the respondent in his defence claimed that the motorcycle had been sold to him by P.W.2 Olwoch Bernard and a one Onen. In the same breath he claimed that it was given to him as a gift in appreciation of his services. He was aware that the gift had been rescinded. He disappeared from work in February, 2016 only to be arrested in December, 2016 and that was not a mere delay by evidence of a fraudulent motive. Had he not been arrested, he had no intention of returning the motorcycle. Conversion is an element of the offence of theft. There was no evidence at all to show that the laptop was ever given to him as a gift. Before he left the job, he had been instructed to collect all the computers for the verification exercise and indeed he collected the. He never accounted for any of the computers. It was erroneous for the trial court to have admitted in evidence a statement made by the Director of Daniel Comboni Vocational Institute, Konrad Tremmel, to the police, yet he was not called as a witness. It was a misdirection for the court to have imputed bad faith and vendetta in the prosecution of the respondent, based on the contents of that statement. They prayed that the appeal be allowed.

### Arguments of Counsel for the respondent:

[9] In response, counsel for the respondent submitted that the prosecution failed to prove all the ingredients of the offence to the required standard. It was the testimony of P.W.2 Olwoch Bernard, the Personnel Coordinator of Daniel Comboni Vocational Institute that at one time as a good gesture they agreed to give the motorcycle to the respondent. He testified further that the respondent's contract was terminated around the month of March, 2016. He therefore took the motorcycle with him in good faith. By the time M/s Voluntary Service Overseas sent its email demanding for the return of the motorcycle, the respondent had already vacated office. His delay in rerunning the motorcycle cannot be construed as theft. There is no evidence to show that the complainants ever demanded the motorcycle from him. He could not have fraudulently deprived Daniel Comboni Vocational Institute of the motorcycle when it is they that had given it to him. Although he was accused of having stolen the laptop computers, no documentary evidence was adduced to prove his receipt of any of the computers. Evidence that the witnesses called him by phone and that he confirmed to them that he had received the computers, is a fabrication. The trial Magistrate correctly admitted the police statement of the Director of Daniel Comboni Vocational Institute, Konrad Tremmel, although he was not called as witness, since it was relevant to a fact in issue; the circumstances in which the respondent was given the motorcycle as a gift in appreciation of his services at the end of his contract.

### 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 grounds of appeal will be considered concurrently.

[12] For the respondent to be convicted of the offence of Stealing a motor vehicle C/s 261 and 265 (a) of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. The motor vehicle in issue belonged to or was in possession of the complainant.
2. The motor vehicle was intentionally taken wrongfully or without a claim of right.
3. With the intention to permanently deprive the owner of the motor vehicle.
4. The accused took or participated in taking the motor vehicle.

**1<sup>st</sup> issue; whether the motorcycle belonged to or was in possession of the complainant.**

[13] 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. Section 2 (1) (oo) of *The Traffic and Road Safety Act, Cap 361*, defines “motor vehicle” as any self-propelled vehicle intended or adapted for use on the roads. 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.

[14] It was the testimony of P.W.1 Ochen Richard, the Principal of Daniel Comboni Vocational Institute that on 26<sup>th</sup> September, 2013 the institute received the motorcycle as part of a grant from M/s Voluntary Service Overseas. It was handed to the respondent in his capacity as the Gateway Centre Project Manager. P.W.2 Olwoch Bernard, the Personnel Coordinator of Daniel Comboni Vocational Institute, testified that M/s Voluntary Service Overseas gave the institute a Honda motorcycle registration number UEB 969 H. It was handed over to the respondent to facilitate his coordination of the youth project. In his defence, the respondent never disputed any of this evidence and neither was it discredited by cross-examination. I therefore find that the trial court correctly found that the motorcycle was owned by M/s Voluntary Service Overseas but was bailed to Daniel Comboni Vocational Institute, in whose possession it was before it was given to the respondent for use in his employment.

**2<sup>nd</sup> issue;** whether the motorcycle was intentionally and wrongfully taken or without a claim of right.

[15] The prosecution had to prove what amounts in law to an asportation (that is carrying away) the motorcycle from possession of the complainant, with intention to permanently deprive the complainant of that motorcycle, without the complainant’s consent or any claim of right. The offence is committed when the vehicle is taken by a person not having lawful access. Section 254 (1) of *The Penal Code Act*, defines theft as “fraudulently and without claim of right [taking]

anything capable of being stolen." 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.

[16] However, unlike the offence under common law which can only be committed by a person who initially did not have possession of the item, under section 254 (1) and (2) of *The Penal Code Act*, the *actus reus* of stealing may occur either by "taking" or "converting" the thing capable of being stolen. These provisions are explicit that stealing can also be committed by conversion. The fraudulent taking of property belonging to another is stealing 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. Whereas at common law theft is an offence against possession and a person already in possession of property cannot commit theft of it, under section 254 (1) and (2) of *The Penal Code Act*, stealing can be committed by conversion. This is one of the areas that give the offence of stealing under a wider scope than the offence theft. 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.

[17] In Garner B.A. (ed.), *Black's Law Dictionary* (8<sup>th</sup> 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.

[18] Stealing of 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. For conversion to amount to stealing, it must be done with one of the fraudulent intents under section 254 (2) of *The Penal Code Act*.

[19] It was the testimony of P.W.1 Ochen Richard, the Principal of Daniel Comboni Vocational Institute, that towards the end of the project in 2016, M/s Voluntary Service Overseas undertook an exercise that involved taking an inventory of the assets it had bailed to Daniel Comboni Vocational Institute. That exercise required the respondent to return the motorcycle. The respondent was not co-operative when contacted and he eventually vacated the Institute's premises, not leaving behind a forwarding address. All contact was lost with him thereafter. P.W.2 Olwoch Bernard, the Personnel Coordinator of Daniel Comboni Vocational Institute, testified that at one time they had as a gesture of goodwill and appreciation decided (as per his statement to the police as well - exhibit D. Ex.3) to give the motorcycle to the respondent, but M/s Voluntary Service Overseas told them they had no authority over the assets. He then called the respondent around the month of March to return the motorcycle. The respondent promised to return it but he never did so, claiming he had sold it off, only for it to be recovered from him by the police at Hoima.

[20] In his email dated 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii)), the respondent stated;

I only have one motorbike and one laptop to account for.... I will think of handing over the two assets with me on condition that Daniel Comboni Vocational Institute pays me outstanding wages

for which I communicated to you and for which Bernard promised will be done this week.

On account of this evidence, I find that initially the respondent had the defence of mistake of fact available to him. Under section 9 (1) of *The Penal Code Act*, a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he or she believed to exist. Therefore no offence was committed when, at the time of taking, the accused genuinely believed that the owner has consented.

[21] All this had changed by 1<sup>st</sup> March, 2016 when an email was sent to the respondent (exhibit P. Ex.1) by M/s Voluntary Service Overseas, directing the respondent to collect all assets for verification. Although in his defence the respondent claimed not to have seen this email until 9<sup>th</sup> April, 2016 he certainly had done so by 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii) when in that email he tacitly acknowledged the demand to return the motorcycle, which he undertook to do conditionally. By that email, the respondent was in effect asserting a lien as justification for his refusal to return the motorcycle on demand, or within a reasonable time thereafter.

[22] A lien is a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation. English common law recognises a lien as a right to refuse the return of goods to the owner or another person asserting ownership or title over them until the debt owed has been satisfied (see *Hammonds v. Barclay (1801)*, 2 East 227, 102 E.R). A lien can arise in one of the following ways: by equity; by the operation of law (a legal or common law lien such as those engaged in business in which they are required by law to receive the goods; see *Robins & Co. v. Gray*, [1895] 2 Q.B. 501; or where there was an enhancement in value of the goods as a result of the work); it can be bargained for, or extended, as a matter of contract (a contractual lien),

or may be created by statute (a statutory lien). A particular lien gives the lienholder the right to retain goods to secure payment of charges for services provided in relation to those goods. A general lien gives the lienholder the right to retain the goods to secure charges other than those relating to the goods retained (such as for previous charges in respect of goods that have been returned to the debtor).

[23] In the instant case, *The Employment Act, 2006* makes no provision for such a lien as the respondent sought to assert. A possessory lien was therefore not part of the respondent's employment contract as a matter of statute. The respondent could as well not purport to assert a lien based on common law since all of the common law liens which arise by operation of law are particular liens. General liens do not arise out of operation of law, but must be founded upon an express agreement or implied from a usage of trade (see *Trottier v. Red River Transportation Co., (1875-83) Man. R. 255, at 261-2 (Q.B.)*). His employment contract dated 1<sup>st</sup> September, 2013 (exhibit D. Ex.1) had no specific provision creating such a lien, yet there is no usage of trade establishing such a lien. Outside the recognised realm of liens, one may not take or retain property of another to offset a debt due.

[24] For a number of reasons, his claim of asserting a lien over the motorcycle is not maintainable at common law as well. Firstly, the respondent had no pending payments due to him for services provided in relation to the motorcycle that he sought to retain until payment of his claim, nor had he expended money, labour or skill at the request of the owner and thereby enhanced the value of the motorcycle. Secondly, there is neither evidence explaining the circumstances in which such a claim arose nor the amount involved. Although there are many types and classes of liens, there can be no lien unless there is a debt. In the absence of evidence to establish the amount of this claimed debt, either predicated upon contract or *quantum meruit*, there is established no underlying basis for the lien. Thirdly, a lien will not automatically exist if the chattel belongs

to a third party who is not the indebted party. In this case the motorcycle belonged to M/s Voluntary Service Overseas and not his former employer, Daniel Comboni Vocational Institute. Fourthly, he was not engaged in business in which he was required by law to receive the chattel as bailee.

[25] Where a person has been given permission by the owner of a motor vehicle to take and use it for a particular purpose, but on completion of that purpose fails to return it and thereafter uses it without any reasonable belief that the owner would consent to the use, he is to be regarded as having taken the vehicle without the owner's consent or other lawful authority (see *R. v Phipps (1970) 54 Cr App R 300*). I therefore find that the trial court misdirected itself when it failed to find that the prosecution had proved beyond reasonable doubt that the motorcycle was intentionally and wrongfully taken or without a claim of right.

**3<sup>rd</sup> issue;** whether the motorcycle was taken with the intention to permanently deprive the owner of that motorcycle.

[26] A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. The main difference between this offence and 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). Joyriding occurs when the offender intends and has the means to return the vehicle to the rightful owner, unconditionally and promptly. A careful examination of decided cases reflects that the purpose in adopting the "intent to permanently deprive" requirement was to distinguish between substantial and reprehensible deprivations of an owner's property on the one hand and, on the other, mere *de minimis* takings in which the owner's property rights are compromised little, if at all.

[27] An accused may be regarded as having the intent permanently to deprive even though he or she did not intend the victim to lose the chattel itself, if he or she

intended to treat the item as their own to dispose of regardless of the victim's rights. An accused will be deemed to have an intention to permanently deprive the owner of the property if the taking was for a period, or in circumstances, which made it equivalent to an outright taking or disposal. For example under section 254 (2) (c) of *The Penal Code Act*, intent to permanently deprive may be inferred from imposing a condition as to its return which the owner may be unable to perform. Intent to ransom the property back to the owner is intent to permanently deprive (see *R v. Lloyd [1985] 1 QB 829*). With regard to stealing a motor vehicle, intention on the part of the accused in denying the owner's right or to assert a right which is inconsistent with the owner's right is enough.

[28] It was the testimony of P.W.1 Ochen Richard, that the respondent was arrested from Hoima. That is when the motorcycle was recovered from him. In his defence, the respondent admitted having been arrested in December, 2016. This evidence shows that for six months or thereabouts, from around 4<sup>th</sup> June, 2016 when he acknowledged notice of the demand, until his arrest in December, 2016, he treated the motorcycle as his own, by undertaking to restore it to the owner only on payment of "ransom" money. The intent to return the motorcycle upon the occurrence of an uncertain future event, such as the one he imposed under these circumstances, is tantamount to an intent to permanently deprive the owner of his motorcycle because the intent to return the motorcycle was too tenuous and illusory to have any legal effect. Intent to keep the motorcycle indefinitely as ransom was an intent to deprive permanently. That the motorcycle was recovered only after his arrest does not compel the conclusion that the accused intended only to temporarily deprive the owner of it. I therefore find that the trial court misdirected itself when it failed to find that the prosecution had proved beyond reasonable doubt that the motorcycle was taken with the intention to permanently deprive the owner of that motorcycle.

**4<sup>th</sup> issue;** whether the respondent took or participated in taking that motorcycle.

[29] This required direct or circumstantial evidence implicating the respondent as perpetrator of the offence. In his defence, the respondent admitted having had the motorcycle in his possession. This is corroborated by his email dated 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii), where the respondent stated “I only have the motorbike ..... to account for.... I will think of handing over the two assets with me on condition that Daniel Comboni Vocational Institute pays me outstanding wage for which I communicated to you and for which Bernard promised will be done this week.” I therefore find that this element too was proved beyond reasonable doubt.

[30] For the respondent to be convicted of the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

1. Property belonging to another.
2. Intentionally taken wrongfully or without a claim of right.
3. With the intention to permanently deprive the owner.
4. The accused took or participated in the taking

**5<sup>th</sup> issue;** whether the laptop computers belonged to another.

[31] 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. 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.

[32] It was the testimony of P.W.1 Ochen Richard, that on 26<sup>th</sup> September, 2013 the institute received seven (7) laptop computers as part of a grant from M/s

Voluntary Service Overseas (exhibit P. Ex.1). They were handed to the respondent in his capacity as the Gateway Centre Project Manager. The respondent retained one and distributed the rest to Guardian Councillors at Gateway Centre, and the Vocational Training Institutes located at Atiak, Keyo, Gulu Community and Bobi Polytechnic. P.W.2 Olwoch Bernard testified that M/s Voluntary Service Overseas gave the institute twelve (12) laptop computers. They were handed over to the respondent, who distributed them among the vocational training institutes at Atiak, Keyo, Gulu Community and Bobi Polytechnic. P.W.3 Lia Everlyne, an Accounts Assistant with Daniel Comboni Vocational Institute testified that during the year 2014 she received five (5) laptops and one desk top computer from M/s Voluntary Service Overseas, on behalf of the respondent (exhibit P. Ex.2). She later handed the items to the respondent but he did not sign for them. They were later distributed to various Vocational training Institutes. Despite the inconsistency in the number of computers received, I find that they belonged to M/s Voluntary Service Overseas but bailed to Daniel Comboni Vocational Institute for the duration of its youth project.

**6<sup>th</sup> issue;** whether the laptop computers were intentionally and wrongfully taken or without a claim of right.

[33] The prosecution had to prove what amounts in law to an asportation (that is carrying away) property in possession of the complainant, with intention to permanently deprive him or her of the property and without her consent or any claim of right. Section 254 (1) of *The Penal Code Act*, defines theft as "fraudulently and without claim of right taking anything capable of being stolen." It 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. One important distinctive aspect of the offence of theft at common law is that the crucial time of lack of consent is the time of the taking.

- [34] When a person who is a servant employed by any association or religious or other organisation, steals any chattel being the property of that association or religious or other organisation, to which he or she has access by virtue of his or her office, that person commits the offence of Embezzlement instead (see section 268 of *The Penal Code Act*). Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from theft in that the original taking was lawful, or with the consent of the owner, while in theft the felonious intent must have existed at the time of the taking.
- [35] To prove the offence of embezzlement under section 268 of *The Penal Code Act*, the prosecution must establish the following specific elements in addition to the general elements: (i) there was a trust or fiduciary relationship between the accused and the private organization or State or local government agency; (ii) the property came into the possession or care of the accused by virtue of his/her employment; (iii) the accused's dealings with the property constituted a fraudulent conversion or appropriation of it to his/her own use; and (iv) the accused acted with the intent to deprive the owner of the use of this property. It should be noted, however, that the intent required to violate the law is not an intent to deprive another of his/her property permanently. Therefore, even if an individual intends to return the property, his/her actions are still illegal. In short, restoration of the property illegally taken is no defence to embezzlement.
- [36] It was the testimony of P.W.1 Ochen Richard that the Principals of Atiak Vocational Institute, Keyo Vocational Institute and Gulu Community told him that the respondent had picked the laptops without signing any acknowledgement for them. P.W.2 Olwoch Bernard testified that when the project was about to end, the respondent was instructed to collect all the laptops, including the one he had in his custody, and return them to Daniel Comboni Vocational Institute for verification by M/s Voluntary Service Overseas. The project was due to end in March, 2016. The accused suddenly absconded from work without making a

proper handover. P.W.3 Lia Everlyne, an Accounts Assistant with Daniel Comboni Vocational Institute testified that during the year 2014 she received five (5) laptops and one desk top computer from M/s Voluntary Service Overseas, on behalf of the respondent. She later handed the items to the respondent but he did not sign for them. She has never seen the six computers again.

[37] P.W.4 Olanya Stephen, the former Sub-grant Officer of Daniel Comboni Vocational Institute testified that at one time he saw four (4) laptop computers in the office of the respondent, after they had been returned by the institutes. M/s Voluntary Service Overseas had written a letter indicating that the project had ended, instructing the respondent to collect all the equipment. It is on basis of that letter that he too handed over a laptop to the respondent during early 2016, but he never signed for it. The respondent was the custodian of the laptops. He has never seen them again. P.W.5 Opiyo Mark, the Information Technology Instructor of Daniel Comboni Vocational Institute testified that he had participated in the distribution of five of the laptops. At one time during May, 2015 the respondent had collected the laptops to be taken for repair. The witness collected three of them on his behalf and handed them over to the respondent. P.W.6 Nyeko Bosco, a former Guidance Councillor at Daniel Comboni Vocational Institute, attached to Bobi Community Polytechnic, testified that the respondent was his immediate supervisor. During the year 2013 the respondent had delivered to him a laptop computer which he used for two years. In June, 2015 he received a call from the respondent instructing him to return the computer to him. He handed over the computer to P.W.5 Opiyo Mark and signed a delivery form. He called the respondent the following day to confirm he had received the computer and he replied in the affirmative.

[38] P.W.7 Nyeko Christopher, a former employee of Daniel Comboni Vocational Institute, attached to Atiak Technical Institute, testified that the respondent was his immediate supervisor. When the project ended in June, 2015 he handed over the laptop computer he had been using, to P.W.5 Opiyo Mark who had to check

its condition, upon instructions of the respondent. He signed a delivery form and later called the respondent to confirm he had received the computer. Two weeks later the respondent wrote him a letter of recommendation to enable him secure another job. P.W.9 Acellam Phillips, a Guidance Councillor with Daniel Comboni Vocational Institute, attached to Gulu Community Vocational Institute, testified that the respondent was his immediate supervisor. At the end of his contract in March, 2016 he received a call from the respondent instructing him to return the computer to him. He handed over the computer to P.W.5 Opiyo Mark and signed a delivery form. He called the respondent the following day to confirm he had received the computer and he replied in the affirmative. After one month he was re-instated and requested for the return of the computer he had been using, but the respondent told him he would have to work without one.

[39] The respondent in his email dated 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii), stated;

I only have .... one laptop to account for.... The rest of the laptops are with people who were using them and I do not have the mandate to ask them for it (sic) now since I am no longer an employee of Daniel Comboni Vocational Institute and not the Centre Manager anymore. I tried retrieving the laptops from some of the people (for example Mr. Olanya Stephen who lives next to your fence) and my efforts were frustrated by the Principal who told me to hand over the laptop back to him.....I will think of handing over the two assets with me on condition that Daniel Comboni Vocational Institute pays me outstanding wage for which I communicated to you and for which Bernard promised will be done this week.

[40] In his other email dated 3<sup>rd</sup> September, 2016 (exhibit D. Ex.2 (i), the respondent stated;

I don't have the laptops in question because when M/s Voluntary Service Overseas did general repair of all the laptops, they were sent back to the respective Vocational Training Institutes. Only one remained with our post-training support officer who still has it up to now. The rest of the laptops are with the individuals who

were using them. One laptop from Keyo was spoilt and taken for repair in Kampala but [was] never brought back.”

- [41] In exhibit D. Ex.4 dated 14<sup>th</sup> July, 2016 by Konrad Tremmel addressed to M/s Voluntary Service Overseas, he reported; laptops retained at Gateway Centre (7); laptops taken for repair to VSO office and never returned – by the respondent (1), by Sunday Nighty (1), Keyo Community (1), Gulu Community (1); laptops alleged to have been picked by the respondent – Bobi Community (1), Keyo Community (1); laptop in the respondent’s possession (1); laptops still with the institutes – Gulu Community (1), Bobi Community (1), Atiak Technical’s was looted during a strike that took place on 21<sup>st</sup> March, 2016 (1) another still in their possession (1).
- [42] Analysis of the available documentary evidence reveals that according to the assets verification report of 14<sup>th</sup> July, 2016 four (4) laptops were taken to M/s Voluntary Service Overseas but were never returned; two (2) laptops were allegedly picked by the respondent [from Bobi Community and Keyo Community]; one (1) laptop was in possession of the respondent; three (3) laptops were still with the institutes and one (1) had been looted or destroyed making a total of eleven (11) laptops. Of these, three are attributed to the respondent.
- [43] However, P.W.4 Olanya Stephen, the former Sub-grant Officer of Daniel Comboni Vocational Institute testified that he handed over a laptop to the respondent during early 2016, but he never signed for it. P.W.6 Nyeko Bosco, a former Guidance Councillor at Daniel Comboni Vocational Institute, attached to Bobi Community Polytechnic, testified that in June, 2015 he received a call from the respondent instructing him to return the computer to him. He handed over the computer to P.W.5 Opiyo Mark. P.W.7 Nyeko Christopher, a former employee of Daniel Comboni Vocational Institute, attached to Atiak Technical Institute, testified that when the project ended in June, 2015 he handed over the laptop computer he had been using, to P.W.5 Opiyo Mark upon instructions of the respondent. P.W.9 Acellam Phillips, a Guidance Councillor attached to Gulu

Community Vocational Institute, testified that in March, 2016 he received a call from the respondent instructing him to return the computer to him. He handed over the computer to P.W.5 Opiyo Mark and signed a delivery form.

[44] Hence by the oral testimony, five (5) computers are attributed to the respondent, the one he had in his possession and then the rest from; the Gateway Centre during early 2016, Bobi Community Polytechnic in June, 2015; Atiak Technical Institute in June, 2015 and from Gulu Community Vocational Institute in March, 2016. All the witnesses claim to have handed over the computer to P.W.5 Opiyo Mark upon instructions of the respondent, and to have signed a delivery forms. P.W.8 No. 56357 D/C Kanamwangi testified that on 6<sup>th</sup> December, 2016 the respondent was arrested from Hoima District from where he was escorted to Gulu CPS. On interrogation, he admitted having one laptop in his possession.

[45] There is an inconsistency between the documentary and oral evidence regarding the number of laptop computers entrusted to the respondent's possession. While the documentary evidence attributes three (3) computers to the respondent's possession by 14<sup>th</sup> July, 2016, the oral testimony attributes to him five (5) computers between June, 2015 and March, 2016. On his arrest and by his admission, the respondent had only one laptop computer in his possession. The discrepancy between the number of laptop computers entrusted to the respondent was never explained.

[46] It is settled law that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored (see *Alfred Tajar v. Uganda*, EACA Cr. Appeal No.167 of 1969, *Uganda v. F. Ssembatya and another* [1974] HCB 278, *Sarapio Tinkamalirwe v. Uganda*, S.C. Criminal Appeal No. 27 of 1989, *Twinomugisha Alex and two others v. Uganda*, S. C. Criminal Appeal No. 35 of 2002 and *Uganda v. Abdallah Nassur* [1982] HCB). In the instant case, it was alleged in the charge sheet that the

respondent stole nine (9) laptop computers all valued at shs. 22,500,000/= The contradictions in the number of computers is material to the decision as to whether or not he stole all the nine laptop computers he is accused of having stolen. These were grave inconsistencies and contradictions which were not explained at all and therefore the trial court correctly rejected all that evidence.

[47] The evidence before court was so contradictory that it could only be relied on for establishing the fact that the respondent had only one computer in his possession. By his own admission and by the testimony of P.W.8 No. 56357 D/C Kanamwangi, the respondent had only one laptop computer in his possession.

[48] It was the respondent's defence that this laptop had been given to him as a gift at the end of his contract in appreciation of his services. The prosecution witnesses acknowledged having given him only the motorcycle and not the laptop. Giving the respondent the benefit of the doubt, I find that initially he had the defence of mistake of fact available to him. Under section 9 (1) of *The Penal Code Act*, a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he or she believed to exist. Therefore no offence was committed when, at the time of taking, the accused genuinely believed that the owner has consented.

[49] All this had by changed by 1<sup>st</sup> March, 2016 when an email was set to the respondent (exhibit P. Ex.1) by M/s Voluntary Service Overseas, directing the respondent to collect all assets for verification. Although in his defence the respondent claimed not to have seen this email until 9<sup>th</sup> April, 2016 he certainly had done so by 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii)) when in that email he tacitly acknowledged the demand to return the motorcycle, which he undertook to do conditionally. By that email, the respondent was in effect asserting a lien as

justification for his refusal to return the motorcycle on demand, or within a reasonable time thereafter.

[50] In his email dated 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii), the respondent stated “I only have one motorbike and one laptop to account for.... I will think of handing over the two assets with me on condition that Daniel Comboni Vocational Institute pays me outstanding wage for which I communicated to you and for which Bernard promised will be done this week.” While analysing the first count it has been demonstrated how this assertion of a lien was misconceived and cannot afford the respondent a defence. For the same reasons I find that the trial court misdirected itself when it failed to find that the prosecution had proved beyond reasonable doubt that the respondent had intentionally and wrongfully taken or without a claim of right, one laptop computer belonging to the complainant.

**7<sup>th</sup> issue;** whether the laptop computer was taken with the intention to permanently deprive the owner of that laptop computer.

[51] It was the testimony of P.W.1 Ochen Richard that it was after the respondent was arrested from Hoima that one laptop was recovered from him. P.W.2 Olwoch Bernard testified that only one laptop, the one the respondent had retained in his possession, was recovered. The rest were not. The respondent failed to account for nine laptops in all. P.W.8 No. 56357 D/C Kanamwangi testified that on 6<sup>th</sup> December, 2016 the respondent was arrested from Hoima District from where he was escorted to Gulu CPS. On interrogation, he admitted having one laptop and motorcycle in his possession. Both items were recovered from him. The respondent claimed that the two items had been given to him but later he was asked to return them because they were required by the sponsor. He claimed to have sold them off after notification that he should return them.

[52] In his email dated 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii), the respondent stated “.....I will think of handing over the two assets with me on condition that Daniel Comboni Vocational Institute pays me outstanding wage for which I communicated to you and for which Bernard promised will be done this week.” While analysing the first count it has been demonstrated how this assertion of a lien was misconceived and cannot afford the respondent a defence. For the same reasons I find that the trial court misdirected itself when it failed to find that the prosecution had proved beyond reasonable doubt that the laptop computer was taken with the intention to permanently deprive the owner of that laptop computer.

**7<sup>th</sup> issue:** whether the respondent was implicated in taking that laptop computer.

[53] This required direct or circumstantial evidence implicating the respondent as perpetrator of the offence. In his defence, the respondent admitted having had the motorcycle in his possession. This is corroborated by his email dated 4<sup>th</sup> June, 2016 (exhibit D. Ex.2 (ii), where the respondent admitted having the laptop in his possession, stating further “.... I will think of handing over the two assets with me on condition that Daniel Comboni Vocational Institute pays me outstanding wage for which I communicated to you and for which Bernard promised will be done this week.” I therefore find that this element too was proved beyond reasonable doubt.

Order:

[54] For all the foregoing reasons, the trial court misdirects itself and came to the wrong conclusion. For that reason the judgment of the court below is set aside. Instead judgment is entered finding the respondent guilty of the offence of Stealing a motor vehicle C/s 254 and 265 of *The Penal Code Act* in respect of Count 1. He is accordingly convicted of that offence. The respondent is further found guilty of the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act* in respect of Count 2. He is convicted of that offence as well.

[55] Since the judgment has been delivered electronically, consequently a warrant of arrest returnable on 10<sup>th</sup> September, 2020 at 2.30 pm is issued for purposes of producing the respondent before court for sentencing.

Delivered electronically this 14<sup>th</sup> day of August, 2020 .....Stephen Mubiru.....  
Stephen Mubiru  
Resident Judge, Gulu

Appearances

For the appellant : Mr. Patrick Omia (Senior Resident State Attorney)

For the respondent : M/s Conrad Oroya Advocates.