



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Criminal Appeal No. 0003 of 2017

In the matter between

UGANDA

APPELLANT

And

1. ACAYE MICHAEL BRIAN

2. ORESTER ELIA

3. ADOKORACH EMMA

4. OJWANG DANIEL

5. ONEK PETER

RESPONDENTS

Heard: 23 June, 2020.

Delivered: 14 August, 2020.

Criminal Law — *Malicious Damage to Property C/s 335 (1) of The Penal Code Act.— 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.— 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 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 prosecution should prove beyond reasonable doubt that the accused did or participated in destroying the property; belonging to another, damaged or destructed the property and that the act that caused the damage or destruction was willful and was unlawful— To "damage" means the permanent or temporary reduction of functionality, utility or value of some tangible property and the damage need not be permanent. When an act is said to have been done wilfully it means that it was done deliberately and intentionally, not by accident or inadvertence. — With regard to the requirement of unlawfulness, it must*

be proved that the act was unlawful, thus if an accused person had a lawful excuse for his wilful act, his act would not be unlawful.

Criminal Procedure— 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.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The respondents were charged jointly with two counts; in the first Count they were 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 17th June, 2012 at Lacor Trading Centre in Gulu District, wilfully and unlawfully damaged Ife Hotel, the property of Oyella Judith. In the second, they were charged with the offence of Theft C/s 254 (1) and 261 of *The Penal Code Act*. It was alleged that the respondents and others still at large, on 17th June, 2012 at Lacor Trading Centre in Gulu District, stole cash shs. 5,000,000/= the property of Oyella Judith. They were tried and all were acquitted on both counts.

The appellant's evidence in the court below:

[2] The prosecution case briefly was that the complainant, P.W.1 Oyella Judith, had for about eight years operated a food kiosk at rented premises located at Lacor Trading Centre. On the morning of 17th June, 2012 at day break, her two female employees were found lying unconscious in the food kiosk. She was suspected by her local community for poisoning and bewitching her two female employees. A village meeting was convened at which it was resolved that she should be banished from the village. The five accused participated in throwing her property out of the kiosk and in demolishing it.

Respondents' evidence in the court below.

- [3] In their respective defence, each of the respondents denied the charges. Testifying as D.W.1 the 1st respondent Acaye Michael stated that he was sleeping at home at around 7.00 am when he was called to the scene where he found two girls in the kiosk one of whom was convulsing. He took her to Lacor Hospital by boda boda. He convened a village meeting at which it was resolved that the complainant be banished on suspicion of witchcraft. She and her property were handed over to Lacor Police Station. He did not participate in destruction of the kiosk.
- [4] Testifying as D.W.2 the 2nd respondent Orester Elia stated that he arrived at the scene after the two ladies had been taken to hospital and the police had closed the kiosk. A meeting was convened at around 2.00 pm and the complainant was banished from the village on suspicion of witchcraft. Loaded her property onto a car and drove her to the police station to secure her safety. It is the land lord who destroyed the kiosk later.
- [5] Testifying as D.W.3 the 3rd respondent Adokorach Emma wife of the 1st respondent, stated that at around 5.00 am she responded to a call and found two girls lying unconscious in the complainant's kiosk. An ambulance was called to the scene which took one of them to hospital. A meeting was convened at 3.00 pm which banished the complainant from the village. The kiosk was destroyed much later, four to five months later, but she did not participate in its destruction. Testifying as D.W.4 the 5th respondent Onek Peter Chairman of Lacor business community, stated that he attended a meeting at 3.00 pm at which it was resolved to banish the complainant from the village on suspicions of witchcraft. She packed her property, the L.C hired a lorry and she was taken to the police station.

- [6] Testifying as D.W.5 the 4th respondent Ojwang Daniel Latoro stated that the complainant was a tenant at their home. A meeting was convened accusing the complaint of witchcraft. She accepted to vacate. She requested for assistance and a vehicle was hired which delivered her property to the police post. An inventory was made and she signed for all her property.
- [7] D.W.6 Okema James Okullu, a meeting was convened at his home accusing the complaint of witchcraft. She accepted to vacate. She requested for assistance and a vehicle was hired which delivered her property to the police post. An inventory was made and she signed for all her property. D.W.7 Laker Alice, a meeting was convened accusing the complaint of witchcraft. She was banished from the village. A vehicle was hired which delivered her property to the police post. An inventory was made and she signed for all her property.

Judgment of the court below:

- [8] In his judgment delivered on 11th January, 2017 the trial Magistrate found that the complainant Oyella Judith was banished from the village on suspicion of engaging in witchcraft. She was evicted from her rented premises. The respondents were all present at the scene and participated in removing her property from the kiosk and loading in onto a truck. She later turned round and accused them of having stolen shs. 5,000,000/= from her. There was no evidence to show that she had recently withdrawn some of that money from the bank, as she claimed. None of the two counts was proved hence all respondents were acquitted of both counts.
- [9] 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.

- [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”).
- [11] 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*).

Ingredients of the offence of malicious damage to property.

[12] For the respondents to be convicted of the offence of Malicious Damage to Property C/s 335 (1) of *The Penal Code Act*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

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.

1st issue; whether the property in issue belongs to another or the accused and another person.

[13] 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.

[14] It was the testimony of the complainant, P.W.1 Oyella Judith, that she operated a mud and wattle food kiosk at Obiya West in Bar Dege Division. P.W.4 Lakot Jennifer, a police officer who went to the scene the following day 17th June, 2012 after receiving a report from P.W.1, stated that from her investigations she found that the complainant was a tenant of a kiosk that belonged to the family of the 1st respondent Acaye Michael. Testifying as D.W.1 the 1st respondent Acaye Michael stated that the kiosk was built on his land by his sister, Amony Charity. He only had a tender to collect market dues. The 3rd respondent Adokorach Emma testified as D.W.3 and stated that the kiosk belonged to her aunt Amony Charity and the complainant was a tenant. On account of that evidence, I find

that the prosecution proved beyond reasonable doubt that the complainant was in rightful and effective possession of the food kiosk at the time of the offence. The food kiosk in issue belonged to the family of the 1st respondent and the complainant was their tenant.

2nd issue; whether that food kiosk was damaged or destroyed.

[15] 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 functionality 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.

[16] It was the testimony of the complainant P.W.1 Oyella Judith, P.W.2 Atim Catherine and P.W.3 Aber Lilly that they saw the kiosk being demolished on 17th June, 2012 after the eviction of the complainant. However, according to the 3rd respondent Adokorach Emma, wife of the 1st respondent, the kiosk was destroyed much later, four to five months after eviction of the complainant and replaced by a container. P.W.4 Lakot Jennifer, a police officer, arrived at the scene on 17th June, 2012 testified that she found that the door had been removed. Exhibits D. Ex.1 and 2 show the items lying outside but the kiosk was still intact.

[17] Removal of the door, if proved, would amount to interference with the function or integrity of the food kiosk and would therefore satisfy the notion of "destroy or damage." However, the defence version was not disproved. In light of exhibits D. Ex.1 and 2, which contradict the oral testimony of the prosecution witnesses, the nature of and extent of the damage was not proved to the required standard.

3rd issue; whether the act that caused the damage or destruction was wilful.

- [18] 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 is 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*).
- [19] 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).
- [20] It was the testimony of the complainant P.W.1 Oyella Judith that on 17th June, 2012 at 7.30 am she found people gathered at her kiosk. The 1st respondent Acaye Michael was inside. He used a hammer to destroy part of the wall. The 2nd respondent Orestor Elia was outside. The 3rd respondent Adokorach Emma was carrying food from the fire. She did not participate in the demolition but was

ferrying items from the kiosk. The 4th respondent Ojwang Daniel crushed the cooking stones with a hammer. The 5th respondent Onek Peter picked her bag containing shs. 5,000,000/= He did not participate in the demolition but was ferrying items from the kiosk. If believed, 1st respondent Acaye Michael's act of using a hammer to destroy part of the wall would constitute a deliberate act that resulted in damage or destruction of the kiosk. However, when resolving the first issue the court came to the conclusion that the nature and extent of damage to the kiosk was not proved to the required standard.

4th issue; whether the act that caused the damage or destruction was unlawful.

[21] The damage to the property should not only be wilful but it should also be unlawful. With regard to the requirement of unlawfulness, it must be proved that the act was unlawful. Thus if an accused person had a lawful excuse for his wilful act, his act would not be unlawful. It must be unlawful, in that it does not fall within the ambit of a justification (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.

[22] 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*). 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.

[23] The reason advanced by the respondents in their defence was that of eviction of an undesirable tenant. The eviction of tenants who are in breach of tenancy agreements is regulated by *The Rent Restriction Act*, Cap 231 which, under section 6 thereof, provides that court may grant an order of ejectionment where;- any rent lawfully due from the tenant has not been paid; any other obligation of the tenancy has been broken or not performed; the tenant, or any person residing with him or her or using the premises, has been guilty of conduct which is a nuisance or “annoyance” to adjoining occupiers; the tenant has assigned his or her interest in the premises or sublet the whole or part of the property without the consent of the landlord. In the instant case, the respondents violated almost all the above in a manner that would have justified issuance of an order of eviction.

[24] It was their defence that she was evicted due to suspected witchcraft. Under section 6 of *The Rent Restriction Act*, the word "annoyance" indicates such conduct of a person which would harm, injure or irritate other persons or to make them angry, which includes an act that interferes with the peaceful and reasonable enjoyment of the premises by the adjoining or neighbouring occupiers. For the action of the tenant to qualify as one causing annoyance or nuisance, it must be proved that it is either: - (i) of a gross character, or (ii) of an unusual character, or (iii) frequent and persistent, or (iv) it is of such a nature that one cannot ordinarily expect in a household, or (v) it is of such a nature that it would not be possible for the neighbours to lead a normal life which one can hope to live in a neighbourhood of that character. A single and isolated act of the tenant would in some situations amount to nuisance or annoyance within the meaning of section 6 of *The Rent Restriction Act*.

[25] According to section 4 (1) of *The Witchcraft act*, any person in whose possession or control is found an article which by common repute or belief is used for the purposes of witchcraft or any article used in practising witchcraft, other than bona fide for scientific purposes or as a curio, commits an offence. Suspected

engagement in witchcraft would probably justify termination of the tenancy agreement. However, banishment on account of suspected engagement in witchcraft is unconstitutional (see *Attorney General v. Salvatory Abuki S. C. Constitutional Appeal No. 1 of 1998*).

[26] On the other hand, an owner of a property has the right to evict a trespasser who has refused to vacate the property (see *Harvey v. Brudges 14M & W437*) and that where such eviction is effected, the owner may also remove the property and goods of the person evicted to leave the premises empty. When tenants defy the landlord's terms and conditions of tenancy agreed between the parties and the landlord prefers to repossess or effect a lawful act which the tenants continue to disregard, they become trespassers on the property concerned (see *Tumushabe and another v. Anglo African Ltd and another, S. C. Civil Appeal No. 7 of 1999*).

[27] It was the testimony of the 2nd respondent Orester Elia that it was the landlord who destroyed the kiosk. He ordered the removal of the complainant's property from the kiosk. The accusation was that she was putting faeces and herbs in food. According to the 3rd respondent Adokorach Emma, at the meeting the complainant's bag was checked and three sticks tied together were found. It was resolved that the complainant should vacate the premises. Dry faeces, tied up hair and herbs were also recovered from the complainant's house. The items were taken to the police. On account of this evidence, I find that there were grounds upon which it was reasonably believed that the complainant, as a tenant, was guilty of conduct which is a nuisance or annoyance to adjoining occupiers.

[28] The ground may have justified termination of the tenancy and eviction by court order. However, eviction without such an order was unlawful. Evidence by the 3rd respondent Adokorach Emma that the demolition occurred several months after the eviction and that of the 2nd respondent Orester Elia to the effect that it is the landlord who destroyed the kiosk was never disproved though. The implication is

that the prosecution failed to prove beyond reasonable doubt that if any damage was caused to the kiosk, which was not proved either, that it was unlawful.

5th issue; whether any or all of the respondents participated damaging or destroying the property.

[29] It was the testimony of the complainant P.W.1 Oyella Judith that on 17th June, 2012 at 7.30 am she found people gathered at her kiosk. P.W.2 Atim Catherine testified that she arrived at the scene at around 7.00 am before the arrival of P.W.1 whose arrival time was around 8.00 am. She observed from a distance, about ten meters away. From her perspective; it is the 2nd respondent Orester Elia who mobilised the community accusing P.W.1 of being a witch. Although he did not touch anything, he was the one giving the orders. The 2nd respondent Acaye Michael used a hammer to destroy part of the wall. The 3rd respondent Adokorach Emma did not participate in the demolition but was ferrying items from the kiosk. The 4th respondent Ojwang Daniel crushed the cooking stones with a hammer. The 5th respondent Onek Peter did not participate in the demolition but was ferrying items from the kiosk.

[30] P.W.3 Aber Lilly testified that she stood about 50 meters away. It was around 3.00 pm when the kiosk was demolished. It is the 2nd respondent Orester Elia who mobilised the community accusing P.W.1 of being a witch. It is him who ordered the people to destroy the kiosk. Two girls lay unconscious inside the kiosk. The 1st respondent Acaye Michael used a hammer to destroy part of the building. The 5th respondent Onek Peter picked cooking utensils from inside the house. The 3rd respondent Adokorach Emma was throwing items like furniture out of the house. Lastly, P.W.4 Lakot Jennifer, a police officer, stated that it is the 4th respondent Ojwang Daniel who said that they did not want the complainant to operate from that place anymore. The evidence placing each of the respondents at the scene of crime was given by eyewitness who knew the respondents very well before the incident. Although there are variations regarding the time at which

the vents occurred during which each of the respondents was identified at the scene of crime, each of the identifying witnesses was close enough such that the possibility of mistaken identification is ruled out. Had the prosecution proved beyond reasonable doubt that damage was caused to the kiosk, which was not proved, this evidence would have implicated each of the respondents by virtue of section 19 of *The Penal Code Act*. However, failure to prove one of the essential ingredients of the offence inevitably results in acquittal. I therefore find that the trial court therefore came to the right conclusion regarding this offence.

[31] As regards the second count, for the respondents 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.

5th issue; whether the property in issue belongs to another or the accused and another person.

[32] 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.

[33] It was the testimony of the complainant P.W.1 Oyella Judith that shs. 5,000,000/= was stolen from her bag. P.W.4 Lakot Jennifer, a police officer, testified that in a statement she recorded from the complainant the following day, 18th June, 2012 the complainant alleged a total of shs. 1,160,000/= had been stolen from her. The complainant attempted to explain the contradiction away by claiming to have

borrowed some money from a bank the previous week but again the figures were not matching. She contradicted herself regarding the bag in which she kept the money, at one time saying she had left it behind in the kiosk and at another saying she came with it from home when she learnt about the fate of her employees. In two statements she made on two consecutive dates, she was inconsistent by a wide margin regarding the amount of cash she had in the bag at the material time.

[34] 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).

[35] The complainant was the only witness regarding the amount and the circumstances in which it was stolen. Contradictions in those aspects were material to the decision as to whether or not any amount of cash was stolen from her. These were grave inconsistencies and contradictions which were not satisfactorily explained and therefore the trial court correctly rejected her evidence. It rightly found the respondents not guilty on the second count and correctly acquitted them.

Order:

[36] In the final result, there is no merit in the appeal. It is accordingly dismissed.

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

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the appellant :

For the respondents: