THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.013 OF 2021

(Arising from Criminal Case No.584/2020)

RUKUNGIRI CRB 1717/2020

UGANDA==========APPELLANT

VERSUS

ASHABA BOAZ==========RESPONDENT

BEFORE: HON. JUSTICE MOSES KAZIBWE KAWUMI

JUDGMENT

This Appeal arises from the judgment of His Worship Ntalo Nasul Hussein delivered on 9th November 2021. The Respondent who was the accused in the case was acquitted which prompted the State to lodge the Appeal.

Background.

The Respondent was charged with Theft contrary to sections 254(1) and 261 of the Penal Code Act. The Particulars of the offence were that in May 2019 at Omukayaga trading center in Rukungiri District, he stole 24,000 kilograms of maize valued at Shs.28,800,000/= the property of Musinguzi Boaz.

It was the evidence of Musinguzi (PW1) that he gave the Respondent Shs.12,000,000/= to buy maize for trading purposes. A kilo of maize was at the time selling at Shs.500. PW1 stated that the Respondent bought and showed him maize in a store at Omukayaga and they agreed that it would be sold when the market price had increased.

In May 2019 when the price had increased to Shs.1,200/=, PW1 went to the store but did not find the maize. The Respondent disappeared until his arrest in September 2020. It was the evidence of PW1 that he did not execute an agreement with the Respondent but there are people who witnessed the exchange of the 12,000,000/=.

Ainembabazi (PW2)told court that the Respondent went to their home in January/February 2019 on invitation by PW1 with whom he worked in the grains business. PW1 got Shs.12,000,000/= from PW2 and gave it to the Respondent for purposes of buying popcorn. In May 2019 when PW1 went for the maize, the Respondent had disappeared. He was arrested in September 2020.PW2 was not cross examined on her evidence.

Arinda(PW3) testified that he is a brother to the Respondent and PW1 is their Uncle .It was his testimony that in January/February 2019 PW1told him to take the Respondent to his home and while there, PW1 gave the Respondent Shs.12,000,000/= for purposes of buying maize. PW3 rode the Respondent up to the store at Omukayaga with the money.

In May 2019 PW1 requested PW3 to go and look for the Respondent because he had found no maize in the store. The Respondent could not be traced and he learnt of his arrest after sometime.

SPC Muhangi (PW4) arrested the Respondent in September 2020 on a complaint that had been lodged by PW1.

D/AIP Arimpa (PW5) interrogated the Respondent as the Investigating Officer. It was his evidence that the Respondent admitted that he received Shs.14,000,000/= from PW1 for buying maize. That the Respondent gave the money to a one Caleb and Gerald but they disappeared with it.

The trial Magistrate ruled that a prima facie case had been established and required the Respondent to be put to his defense. The Respondent denied knowing or being related to PW1 and told court that he was coerced into signing Police statements that were not read back to him.

Two Police statements in which the Respondent acknowledged that he knew PW1 and that they had been together in business were tendered in evidence by the Prosecution. The Respondent however denied having dealt with PW1 in his defense in court.

In the judgment, the magistrate observed that the Prosecution had to prove what was fraudulently taken from the complainant with an intention that he is permanently deprived of it in order to secure a conviction .The court noted that while the Charge was about taking maize valued at Shs.28,800,000/=, the Prosecution witnesses talked about the Respondent receiving Shs.12,000,000/=.

The magistrate further noted that no evidence pointed to the existence of the maize in the store and in the quantities mentioned in the Charge sheet. The court observed that PW1 or any witness did not state that the Respondent received maize and noted that the evidence created the impression that Shs.12,000,000/= should have informed the basis of the charge that should have been preferred against the accused.

The court dismissed the evidence of the Police Statements admitted in evidence on the basis that they do not support the charge against the Respondent, did not show that they were read back to the Respondent and the recording officers were not called to prove them. It was further observed that they were not Charge and Caution statements to be admitted post a trial within a trial if they were repudiated or retracted.

The Respondent was acquitted. The State filed a Memorandum of Appeal on two grounds:-

1. That the trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby arrived at a wrong decision.
2. The trial Magistrate erred in law and fact when he acquitted the respondent when there was overwhelming evidence on court record connecting the Respondent to the charge.

Prayers were made for the Court to set aside the judgment of the lower court, convict and sentence the Respondent on the evidence on record.

Representation.

Ms. Nabagala Grace Ntege (CSA) appeared for the Appellant while Mr.Bakanyebonera Felix appeared for the Respondent.

Counsel filed submissions which have been taken into account in reaching the decision of the court. I will consider the two grounds of Appeal jointly since they both relate to evaluation of evidence.

Duty of the Court.

This being the 1st Appellate court, its mandate is evaluate the evidence, consider the materials that were before the trial court and make its own conclusions bearing in mind that it did not listen to or observe the witnesses.

Submissions.

The gist of the submissions by the Appellant is that there was ample evidence on record to show that the Respondent received shs.12,000,000/=,bought the maize which he showed to PW1 at the time when the price had shot to Shs,1,200/= but did not pass it on to him hence the charge was proved.PW1 further testified that he did not authorize the Respondent to take the maize out of the store which proved both the aspects of asportation and the intention to deprive him of the maize.

Counsel for the Respondent on the other hand argues that the trial court rightly found that the charge was defective and that the Respondent should have been charged with **"something else to do with Shs.12,000,000/=".**

It was contended that only PW1 claims to have seen the maize, but did not prove that he rented the store. It was further submitted that no investigations were made to establish whether money changed hands and maize was bought by the Respondent on behalf of PW1.

Counsel submitted that in the absence of proof that the Respondent used the Shs.12,000,000/= to buy maize which he did not pass on to the Respondent, the first ingredient of the offense was not proved.It was further argued that the quantity of the maize allegedly seen by the Respondent was not established and that it was the only consignment in the store for PW1 to claim that it was what was bought for him.

Consideration.

For a charge of Theft contrary to sections 254(1) and 261 to be proved, the Prosecution must to the standard of proof beyond reasonable doubt prove the following elements;-

1. The fraudulent intent to deprive the owner of the property in issue without a right of claim by the accused.
2. As portation of the property.
3. Participation of the accused.

What I find evident from the record is that the Respondent received from PW1 Ugx.12,000,000/=. This is apparent in the evidence of PW1 and PW3 together with the undisputed evidence of PW2 who was never cross examined by the Respondent. The purpose for the payment was also not in doubt given the evidence of PW2 who had kept the money and that of PW3 who rode the Respondent to PW1's home and to the Store at Omukayaga trading center after he received the money.

I am alive to section 133 of the Evidence Act to the effect that no particular number of witnesses is required to prove a fact. It was only PW1 who claims to have seen the maize bought with the money he passed on to the Respondent. PW1 did not state when he saw the maize, did not establish the quantity and only guessed that it could fill two lorries. Even attaching a price to what he saw was speculative.

For the charge of theft of maize to be proved, the Prosecution had to establish that the maize was indeed bought, in the quantities agreed, and passed on to PW1 by the Respondent so that it became his property. The Prosecution still had to prove what the price was at the time PW1 sought to get the maize from the store. All this was not done.

I thus do not fault the trial Magistrate for his holding to the effect that the evidence adduced by the Prosecution did not prove the charge to the required standard. What indeed the evidence proved was the receipt of Ugx.12,000,000/= by the Respondent for purposes of buying maize which he failed to deliver to PW1 the owner of the money.

I also do not fault the trial Magistrate for rejecting the Plain statements in which the Respondent is stated to have admitted receiving the money. These were not Charge and Caution statements and should not have been admitted in evidence in the first place.

FestoAndroaAsenua V Uganda.SC Criminal Appeal No.1/1998.

The Prosecution should have either preferred a charge of Obtaining Money by False Pretensecontrary to section 305 of the Penal Code Act or Theft of the 12,000,000/- contrary to sections 254(1) and 261 of the Act but not theft of maize.

The issue for the court to resolve is whether the trial court correctly acquitted the Respondent in view of the glaring evidence of the receipt of the Ugx.12,000,000/= from PW1?

Under section 132(1)(a) of the Magistrates Courts Act, **where at any stage of the trial,** it appears to a magistrate's court that the evidence discloses an offence other than the offence with which the accused is charged, the magistrate **if satisfied that no injustice will be occasioned to the accused** may make an order for the **alteration of the charge by way of amendment or by substitution or addition of a new charge as it thinks necessary to meet the circumstances of the case.**

The accused is then called upon to plead to the altered charge and allowed, if he so wishes, to have the prosecution witnesses re-called for cross examination.

The trial magistrate knew what charge the evidence led by the Prosecution proved. The trial magistrate found a prima facie case established and required the accused to be put to his defense. The charge was subsequently found to be defective and the Respondent was acquitted. I find the acquittal to have been incorrectly arrived at.

How could a prima facie case have been established on a defective charge not supported by the evidence led by the Prosecution? Why then was the Respondent required to defend himself against a defective charge? The import of section 132(1)(a) is to give the trial court the latitude to correct any mistakes/infractions by the Prosecution provided no miscarriage of justice is occasioned to the accused.

If every defect in a charge sheet terminated into an acquittal, a lot of injustice would be occasioned to complainants for lapses by the Prosecution in the preparation of charge sheets and Justice would not be served at the expense of technicalities.

The dismissal of the case and acquittal of the Respondent in view of the evidence on record led to a miscarriage of justice which this court has to remedy. The Appeal succeeds and the judgment of the lower court is hereby set aside.

Section 35 of the Criminal Procedure Code Act (cap.116) mandates the Appellate court to enter such decision or judgment as authorized by the law and to make such necessary orders.

The evidence on record sufficiently proves a charge of Obtaining Money by False Pretense contrary to section 305 of the Penal Code Act. I find the Respondent guilty of that offense and accordingly convict him.

The Respondent is hereby sentenced to 2 years imprisonment to be computed from 11th August 2022. The Respondent shall also compensate PW1 MUSINGUZI BOAZ with Shs.8,000,000/=.

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Moses Kazibwe Kawumi **Judge**

11th August 2022