

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL APPEAL NO. 10 OF 2008

(Arising from City Hall Criminal Case No. 352 of 2007)

MUHWEZI JACKSON.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

Before: Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

This judgment is in respect of an appeal that the above-named appellant preferred against a decision of a Magistrate Grade 1 of City Hall, Kampala (as she then was – Her Worship Ms. Esta Nambayo -) dated 8th February 2008. Under that decision the learned trial Magistrate convicted the appellant of the offence of malicious damage to property contrary to section 335 (1) of the Penal Code Act (Cap.120). She, then sentenced him to pay a fine of shillings 1,000,000/= or in default thereof to suffer imprisonment for 3 years.

The above decision and sentence aggrieved the appellant; and hence the appeal herein, which seeks to overturn that decision and replace it with an acquittal and Order setting aside the sentence.

Be that as it may, before this Honourable Court goes into the merits of the appeal it is wise to acquaint oneself with the evidence that the learned trial Magistrate had before her as she made the above decision. Court will begin with the State’s evidence that is briefly as follows:

Harriet Nakiberu (PW2 – the complainant) had been living since childhood on a customary holding in Ntinda near Kampala. Such customary holding is popularly known as “*a kibanja*” in the central part of Uganda. The said kibanja had a house (with ten rooms, boys’ quarters and other structures) built on it. That house was made of bricks. Nakiberu became a beneficiary of the kibanja in question as the remaining child of the late Jackson Kiberu who died in 1994. Initially, a one Wasswa was the registered proprietor of the Mailo interest on which the above kibanja was found. Subsequently, Wasswa sold his Mailo interest to the appellant. At that point, in time, unease developed on the land; and Nakiberu started receiving notices purporting to evict her from the kibanja in question. She quickly notified the Administrator-General about that new development. In turn, the Administrator-General warned the appellant against evicting Nakiberu

from her kibanja without compensating her. However, the Administrator-General's warning fell on deaf ears, for Nakiberu continued to receive threats of eviction. Finally, on 18th February 2007 a grader mauled down all Nakiberu's buildings that were standing on the above kibanja; and completely destroyed them. Nakiberu reported the matter to the police. The police arrested the appellant and took him to the lower court where he was tried for the offence that is the subject of this judgment.

In his defence the appellant denied having committed the above offence. He explained that on the material day he was in Kabale; and that he did not play any part (direct or indirect) in destroying the complainant's buildings.

After considering the above evidence the learned trial Magistrate made a finding that the State had proved, beyond reasonable doubt, that the appellant committed the offence in question. She, therefore, convicted the appellant of the above offence; and sentenced him accordingly. The above decision and sentence aggrieved the appellant; and hence the appeal herein.

At the time of hearing the appeal, Mr. Mutabingwa represented the appellant and Mr. Byansi represented the respondent. Both counsel agreed, then, that the appellant was the registered proprietor of the land in question. They further agreed that the complainant's buildings which were standing on the above piece of land were destroyed. Finally, both counsel also agreed that the appeal herein raised three main issues, which Court duly recorded.

However, on second thought Court now believes that the appeal herein can only be satisfactorily disposed of if two more issues were added to the above list. Therefore, in all, Court will below discuss five issues; and they are as follows:

(a) whether the record of the lower court reflects that Nakiberu had a genuine interest in the land in question;

(b) whether the record of the lower court shows that the destruction of the property on the kibanja in question was unlawfully and willfully brought about;

(c) whether the record of the lower court reveals that the appellant was implicated in the destruction of the above property;

(d) whether section 7 of the Penal Code Act (Cap. 120) protects the appellant; and

(e) the available remedies.

This Court will, below, address the above issues in turn.

With regard to the first issue (**i.e. whether the record of the lower court reflects that Nakiberu had a genuine interest in the land in question**) the testimonies of the following witnesses provide the answer: i.e. Harriet Nakiberu (PW2) and Nasuru Nankya (PW7). Nakiberu testified that she was born at the kibanja in question, which kibanja had been her home for over 43 years. She, then, pointed out that she finally became the beneficiary of the interest in that kibanja when her father (the late Jackson Kiberu) and her two brothers died. Nankya (a State Attorney, working in the Administrator-General's office) confirmed the correctness of Nakiberu's testimony. She pointed out that her office was aware of Nakiberu's beneficial interest in the said kibanja, which is found on the land in question.

Indeed, the record of the lower court clearly shows that the appellant did not challenge the above areas of evidence in cross-examining Nakiberu and Nankya. Besides, the appellant's defence did not dispute Nakiberu's interest in the above kibanja.

All in all, therefore, this Court is satisfied that the record of the lower court reflects that the complainant had a genuine interest in the land in question.

With regard to the second issue (**i.e. whether the record of the lower court shows that the destruction of the property on the kibanja in question was unlawfully and willfully brought about**) it is first of all very important to understand the meaning of some key words in this area. The key words in this area are the words "**unlawfully**" and "**wilfully**".

The word "**unlawfully**" is an adverb; and it is derived from the word "**unlawful**", which is an adjective. **WORDS AND PHRASES legally defined (Third edition (R-Z) at page 359**, agrees that the more accurate use of the word "**unlawful**" conveys this meaning: i.e. "**contrary to law**".

Therefore, when a person has done something “**unlawfully**” it means that he or she has done that thing in a manner that is contrary to the law.

At page 435, the above book also defines the word “**wilfully**” to mean an act “**done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it**”.

According to Peter Mubogwe (PW1), Harriet Nakiberu (PW2) and Katongole Makumbi (PW8) the person who demolished the buildings in question had no court order authorizing him to do so. In addition, that person did not demolish those buildings accidentally. He came with a grader in broad day-light and deliberately knocked down the said buildings.

Again the respondent did not challenge the above areas of the above witnesses’ testimony during cross-examination nor did he contradict those areas in his defence.

All in all, therefore, this Court is satisfied that the record of the lower court shows that the destruction of the property on the kibanja in question was unlawfully and willfully brought about.

With regard to the third issue (**i.e. whether the record of the lower court reveals that the appellant was implicated in the destruction of the above property**) Court has this to say: As already pointed out the appellant is the registered proprietor of the Mailo interest on which the kibanja in question is found. However, Nakiberu testified that as soon as Wasswa (the original registered proprietor of the above Mailo interest) sold his interest in the land to the appellant, she received threats of eviction from the kibanja in question. She, then, reported the matter to the Administrator-General, but she subsequently lost the said kibanja; and all her buildings on it were destroyed. Nankya, the Administrator-General’s representative confirmed the truthfulness of Nakiberu’s testimony. Nankya further pointed out that her office responded to the above threats by warning the appellant against evicting Nakiberu without compensating her.

In cross-examining the above witnesses, the appellant did not challenge them in respect of the above areas. In addition, even in his defence the appellant did not deny that he was the moving force behind the threats that preceded Nakiberu's eviction from the kibanja in question.

In all, therefore, the above evidence sets up a collection of strong circumstantial evidence implicating the appellant in the eviction of Nakiberu from her kibanja and the destruction of the buildings thereon. In any case, when one considers all the important events preceding the said eviction (including Wasswa's demise in 2006 - i.e. Wasswa the former owner of the Mailo interest in question) this burning question inevitably comes to mind: Who else had an interest in evicting Nakiberu from the said kibanja? The answer to that question is very simple; and it this: No one else, except the registered proprietor of the Mailo interest on which that kibanja was standing i.e. the appellant.

Consequently, although there is no direct evidence implicating the appellant in the eviction of Nakiberu from her kibanja and destruction of all her buildings thereon, the circumstantial evidence available irresistibly points to him as the moving force behind that mayhem. **((See Simon Musoke v R [1958] E.A. 715 and Teper v R. (2) [1952] A.C. 480 at page 489).)** In short, the appellant cannot escape criminal liability in respect of the offence under consideration.

In conclusion this Court has no choice, but to make a finding that the record of the lower court reveals that the appellant was implicated in the destruction of the above property.

With regard to the fourth issue **(i.e. whether section 7 of the Penal Code Act (Cap. 120) protects the appellant)** Court has this to say: For the sake of clarity, it is wise to take a good look at the above law before going into a discussion touching it. For that reason Court will, below, reproduce that law verbatim:

"7. Claim of right.

A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.”

Mr. Mutabingwa was of the opinion that because the appellant was the registered proprietor of the Mailo interest on which the kibanja in question was found, section 7 of the Penal Code (Cap. 120) effectively insulated him from culpability in respect of the offence under consideration. Mr. Byansi thought otherwise. In his view, the evidence on the record of the lower court showed that the appellant intended to defraud Nakiberu by evicting her without compensating her.

With respect, this Court does not agree with Mr. Mutabingwa’s interpretation of the above law. In Court’s opinion, the above law does not apply where the property in question is the subject of multiple interests. In the instant case, we have seen that much as the appellant had a registered interest in the land in question, Nakiberu too had a legitimate interest on that land as a kibanja holder. Therefore, the appellant ought to have respected Nakiberu’s said interest.

Secondly, Mr. Byansi was absolutely right in saying that the evidence on the record of the lower court reveals fraud on the appellant’s part in that he threw Nakiberu out of her kibanja without compensating her. The Administrator-General’s file, which is part of the lower court’s record as (Exhibit P2) is clear. It shows that the Administrator-General’s office warned the appellant against evicting Nakiberu from her kibanja without compensating her. However, the appellant did not heed that warning! He went ahead to evict Nakiberu without compensating her. This was not only dishonest, but it was also a serious breach of the law. **(See Article 26 of the Constitution.)** Consequently, what better evidence of fraud would one need than that? Yet, according to section 7 of the Penal Code Act (Cap. 120) the presence of fraud would deny a person protection despite a claim of right he or she might have in a given property.

All in all, therefore, section 7 of the Penal Code Act (Cap. 120) does not protect the appellant in the circumstances of this case. To hold otherwise, would be to encourage high-handedness and lawlessness in cases of this nature.

With regard to the fifth issue (**i.e. the available remedies**) Court has this to say: Since Court has resolved all the five issues listed above against the appellant, it means that the appeal herein has failed. Therefore, that appeal is hereby dismissed. The conviction of the appellant and the sentences the lower court passed against him shall remain standing.

However it should be remembered that the appellant's high-handedness and lawlessness caused Nakiberu, a totally innocent person, to suffer material loss in that all her buildings were completely destroyed. For that reason, it is only fair that the appellant pays Nakiberu some reasonable compensation in respect of that loss.

Taking into account all, therefore, this Court hereby orders as follows: The appellant shall also pay Nakiberu a sum of shillings 50,000,000/= as compensation in respect of all her buildings, which the appellant destroyed on 18th February 2007.

The above amount of money is generally based on two things: (a) the estimated value of the buildings destroyed; and (b) the estimated cost of land in Ntinda, which is a popular residential area that is very near the city. However, this Court must emphasize that the above figure is only a rough estimate that is supposed to place something into the hands of Nakiberu for the time being. Indeed, the true amount in terms of money representing the actual loss Nakiberu suffered could be very much higher than the above sum of money; and Nakiberu is free to seek other remedies to realize that figure.

The power to make the above Order is derived from section 197(1) of the Magistrate's Courts Act (Cap. 16) and section 34(2)(b) of the Criminal Procedure Code (Cap. 116).

E. S. Lugayizi (J)

2/12/2008

Read before: At 10.16 a.m.

Appellant

The complainant

Ms. Nakigudde for the DPP

Mr. Mutabingwa for the appellant

Ms. Aceng c/clerk

E. S. Lugayizi (J)

2/12/2008

R/A explained

E. S. Lugayizi (J)

2/12/2008