

THE REPUBLIC OF UGANDA
IN THE CHIEF MAGISTRATES COURT OF PALLISA AT PALLISA
CRIMINAL CASE NO **PAL-00-CR-C0-174-2023**
UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTION
VS
TIBITA ZAPUROZA:::::::::::::::::::::::::::::::::::: ACCUSED

Before: His Worship Kyembe Karim ESQ

Learned Magistrate G.I

JUDGMENT

Introduction

By charge sheet dated 7th /June /2023 and sanctioned the same day, the accused was charged with one count of theft contrary to formerly Section 254(1) and 261 of the penal code Act cap 120, now **Section 237 and 244 Penal code Act, cap 128**, Laws of Uganda, 2023 revised edition.

Factual background

It was the prosecution allegation that the accused, in the month of September, 2022 at Ngalwe Central village, Olok sub-county in Pallisa

District stole the land purchase agreement, the property of a one, Aisu John Peter.

When the charges were read to the accused, she denied the charges and a plea of NOT GUILTY accordingly entered.

It has been settled in a plethora of cases that, by denying the charges, the accused placed in issue all and every essential ingredient of the offence with which he is being charged.

It is also settled that the prosecution bears the burden to prove the ingredients beyond reasonable doubts as laid out in the case of **Miller VS Minister Of Pensions (1947)2 ALLER ER AT 372.**

This burden does not shift to the accused and the accused is only convicted on the strength of the prosecution evidence and not the weakness of the Accused's defence as laid out in **Sekitoleko VS Uganda (1967) EA at 531.**

I have reminded myself of the above principles and I am also aware and I have cautioned myself that the accused has no obligation to prove his innocence.

Evidence adduced:

In attempt to prove the charges, prosecution first called the complainant, the said **Aisu John Peter** whose testimony was taken down as **Pw1.**

Prosecution also called Pw2- Zubairi Putiri told court that the accused is a wife to his uncle, the complainant, Aisu John Peter and it is he

(complainant who told him that the accused had stolen the agreement of which, He (Pw2) had earlier witnessed.

No. 62529 D/C Bwire Bernard was the investigating officer and he testified as prosecution witness no. 3 and his testimony taken down as **Pw3**.

He told court that, originally, he came to know the complainant because he (Pw1) first reported a criminal trespass complaint on the 26th February, 2023 against his brother, a one Osako. That upon the said complaint, they requested the said complainant (Pw1) to bring proof of ownership, upon which he stated that it is his brother, a one, Oine Nelson who keeps it for safe custody. That on the 1st March, 2023, Pw1 in follow up to his earlier complaint, now informed police that the said Oine Nelson had lost the purchase agreement and that's how this case arose.

That the police then tasked Pw1 to bring witnesses to the said land transaction and he brought the defence secretary who had authored the agreement, upon which, a statement was extracted from them. That he discovered that the said sale agreement was between a one, Ogosu Umaru selling land to the complainant, Aisu John (Pw1) at a consideration of 5 heads of cattle and Pw1 had paid the full consideration.

That the said Oine Nelson was then summoned, upon which, he explained that the accused (*wife to the complainant*) had gone to the said Oine Nelson's home in November, 2022, and requested for the said

agreement, lying that it is the husband (*complainant*) who had sent for the same and it had been given to her (*accused*).

That the said Oine Nelson was then released on police bond to help with tracking the accused , who was now on the run, having separated from her husband (Pw1). That upon arrest, the accused admitted to police that she had picked the agreement but the one between herself and the said Umaru Ogosu was a mortgage transaction and upon police asking her to produce the said mortgage agreement, she told police that she had returned it to the said Umaru Ogosu and upon picking the said agreement, she approached the said Osako (*whom reports of trespass had originally been lodged against*) also brother to the said Umaru Ogosu demanding that she be given back her cows and UGX. 400,000/=.

That the said Osako gave her back the 2 cows together with UGX. 250,000/=, leaving a balance of UGX. 150,000/= and it was agreed that the agreement be given to a one, Ikulo Ali, a brother to the said Osako. That when Ogosu reported at police, he also maintained that the transaction between himself and the accused was that of a mortgage sort of arrangement and later, the said Ogosu made additional statement distancing himself from the alleged mortgage agreement and asserting that for him, he only entered a sale agreement between himself and the complainant/Pw1.

In **University Of Ceylon VS Fernando (1960), WLR 233** Court observed that:

“.. the opportunity to cross examine the adversary witness is a fundamental one but where that opportunity is extended and the

party does not take it up, does not amount to denial of that opportunity...”

In this case, the accused duly exploited the opportunity.

The prosecution thereupon rested its case.

On the 5th February, 2025 after considering all evidence on the record, this court ruled that a prima facie case had been established which required the accused to be placed to his defence.

In **WIBIRO ALIAS MUSA VS REPUBLIC (1960) EA 184** it was held:

“This court is not even obliged at this time to find whether the evidence is worthy of too much credit or if believed, is weighty enough, beyond reasonable doubts. That conclusion can only be made after the defence case is heard”.

All the three modes of defence were explained to the accused. That is;

1. Give evidence on Oath, whereby she will be subjected to cross examination by the prosecution.
2. Give evidence not on Oath whereby the accused will not be subject to cross examination.
3. Elect to keep silent.

The Accused called 3 witnesses including herself and she opted to testify under oath and her testimony was taken down as **Dw1- Tibita Zapuloza.**

She testified that, a one Umar Ogozo came to her and told her that he had land and wanted to mortgage it out in exchange for 2 cows and UGX 400,000/=. That she gave him the said items and he made for her an agreement around the year, 2016 and she gave the said agreement to her in-law, the said Oine Nelson. That a time came and the said Umar Ogozo wanted to take back his said land and was ready to return the said items, upon which Dw1 went to the said Oine Nelson to collect the said agreement and she indeed confirmed it to be the one. That she later came to learn that Pw1 had assaulted their daughter when she asked for a pen and the said daughter had gone to report at police, which prompted Dw1 to follow her but upon reaching police, she was made to make a statement and subsequently detained on allegations that she had stolen her husband's sale agreement. That the agreement written for her when the land was handed back to her was impounded at police and another agreement was made for her when her items were being returned. That at police, she was made to sign a statement and the same was admitted as **PEX2**. The agreement upon which Dw1 received back the said items was admitted as **DEX3**.

Dw2- Umar Ogozo told court that in 2016, he had problems and thus, decided to mortgage his land to the accused in exchange for 2 cows. That one of the cows was a calf, upon which he demanded another calf and later, another UGX. 400,000/=. That they executed an agreement in presence of witnesses including the complainant(Pw1) and he handed over the agreement to the accused. That sometime later, the accused called him stating that she wanted the items back and the agreement was one of mortgage not a sale.

Dw3- Oine Nelson told court that in 2016, the said Ogo Umar mortgaged his land to the accused and made for her an agreement which the accused brought to Dw2 to keep. That after some time, she came back and picked it and it was a mortgage agreement and he has never heard any information to the effect that Umar Ogo sold the land to Aisu John (Pw1), and that he has never sold any land to Pw1. In response thereof, prosecution exhibited **PEX2-** a statement made at police by the said Umar Ogo and the police statement of Dw3 –Oine Nelson admitted as **PEX3**.

She thereupon rested her defence.

THE LAW AND ANALYSIS OF THE EVIDENCE

The offence of theft is created under formerly, **Section 254(1) and 261** of the Penal Code Act, Cap 120, and now **Sections 237 and 244** Cap 128 Laws of Uganda, 2023 revised edition.

According to **Section 2 of the Evidence Act Cap 8,**

“evidence” denotes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved and includes testimonies by accused persons, admissions, judicial notice, presumptions of law and ocular observation by the court in its judicial capacity.

Section 237 Penal Code Act Cap 128 Laws of Uganda, 2023 revised edition provides:

*A person who fraudulently and without claim of right takes **anything capable of being stolen, or fraudulently converts to***

***the use** of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.*

As regards taking of money, **Section 237(2)(e) of the Penal Code Act** states that a person who takes such money with an intent to use it at the will of the person who takes or converts it, although he/she may intend after words to repay the amount to the owner still commits the offence of theft.

To prove the charge the prosecution has to prove beyond reasonable doubts the following ingredients.

- i. The accused fraudulently took something,
- ii. Anything capable of being stolen.
- iii. the property of someone else
- iv. Without claim of right.
- v. An intention to permanently deprive the owner of the thing.
- vi. Accused's participation

Evaluation of Ingredient i, ii, iii & iv

The legal position in Uganda, as stated by the Supreme Court in **Sula Kasiira vs Uganda S.C. Crim. Appeal No. 20 of 1993**, regarding what the crime of theft is, stands as follows:-

“There must be what amounts in law to an asportation (that is carrying away) of the goods of the complainant without his consent... The removal, however short the distance maybe, from one position to another upon the owner's premises is sufficient asportation...”

Property will be regarded as belonging to any other person having possession or control of it. It is the reason why a person may be liable for theft of their own property if it is deemed to be in the possession or control of another.

*For example in **R v. Turner (No 2) [1971] 1 WLR 901**, the accused took his car into a service station for repairs. When he went to pick it up he saw that the car was left outside with the key in. He took the car without paying for the repairs. He was found guilty of theft of his own car since the car was regarded as belonging to the service station at the time as they were in possession and control of it.*

The prosecution must also prove an intention to permanently deprive the owner of the thing allegedly stolen. This is sometimes called *mensrea*. In **R VS CUNNINGHAM (1957)2 QB 396**, court stated that:

“ mensrea is the actual intention to do a particular kind of harm or recklessness as to whether such harm will occur or not.”

In the instant case, Pw2 testified that:

“...that the said Nelson was then summoned, upon which, he explained that the accused (wife to the complainant/Pw1) had gone to the said Oine Nelson’s home in November, 2022, and requested for the said agreement, lying that it is the husband (complainant/Pw1) who had sent for the same and it had been given to her (accused)...”

In corroboration thereof, prosecution exhibited PEX3 –Oine Nelson’s (Dw3’s) statement made at police

In her defence to the aforesaid evidence, the accused, testifying as Dw1 told court that:

“...a one Umar Ogozo came to me and told me that he had land and wanted to mortgage it out in exchange for 2 cows and UGX 400,000/=. That I gave him the said items and he made for me an agreement around the year, 2016 and I gave the said agreement to my in-law, the said Oine Nelson. That a time came and the said Umar Ogozo wanted to take back his said land and was ready to return the said items, upon which I went to the said Oine Nelson to collect the said agreement and I indeed confirmed it to be the one....”

From the testimony above, it seems to me that indeed the land, the subject of the allegedly stolen agreement originally belonged to a one, Umar Ogozo.

While the prosecution evidence is to the effect that the said Umar Ogozo sold the land to Pw1 who then kept the sale agreement with Dw3-Oine Nelson wherefrom the accused later picked/stole the same under false pretenses alleging that the husband (Pw1) had consented, the accused evidence in defence is to the effect that the said Umar Ogozo has never sold the said land to Pw1 and the accused's connection to the said land was when the said Umar Ogozo mortgaged it to her in exchange for 2 cows and UGX. 400,000/=

Like I set out in the introduction, an accused is not under compulsion to testify. However, if she elects to testify, everything she tells court is evidence and can be relied upon as provided in **Section 2 of the Evidence Act Cap 8.**

All defence witnesses testified to the effect that the agreement kept with Oine Nelson was a mortgage agreement not a sale agreement as alleged by prosecution through Pw1 and Pw2.

This court has however read prosecution exhibit **PEX 3-** the police statement of the said **Oine Nelson**.

I reproduce hereunder the relevant excerpt:

“...after the complainant who is my clan brother and my closest friend after having bought land from my brother, Ogoso and the land sales agreement signed by witnesses had been handed over to him. On the way back home, Aisu requested me to take custody of his sales agreement since it was insecure with his family, especially, the wife, so I accepted....”

“...that year upto 2022 in September when Aisu’s wife (ex-wife), one called Tibita came to my home at around 10:00 hours....requested for the sales agreement claiming that the said Aisu wanted to keep it himself and I did not mind contacting Aisu to confirm...”

From evidence above as a whole, this court is satisfied as to the veracity of the prosecution evidence that there existed an agreement kept in the custody of Oine Nelson **Dw3**. And that the accused later picked the said agreement from the said Oine Nelson –**Dw3**.

As regards what type of agreement that was, the prosecution alleges it was the sale agreement in favour of Pw1 while the accused’s evidence in defence is to the effect that it was a mortgage agreement executed between herself (Dw1) and Dw2 and subsequently kept in the custody of Dw3.

This court is convinced by the prosecution exhibit **PEX 3**, the excerpts of which are here above already reproduced.

In **UGANDA VS WANYAMA STEVEN CRIMINAL SESSION CASE NO 0405/2015** Hon. Justice Steven Mubiru held:

“...for the prosecution to secure a conviction there must be credible and direct circumstantial evidence placing the accused at the scene of crime as an active participant in the commission of the offence...”

Court further held that:

“ in a case depending exclusively on circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

*“The circumstances must be such as to produce moral certainty to the exclusion of any reasonable doubt. It is necessary before drawing the inferences of the accused’s responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference as held in **SHUBADIN MERALI & ANOR VS UGANDA (1963) EA 647.**”*

This court hereby rejects evidence given by Dw3 purporting a mortgage agreement between Dw1 and Dw2. It appeared to court to have been cooked. While at police, he (Dw3) admitted to receiving a sale agreement from Pw1 and subsequently handing the same over to the accused as per **PEX3**. However, while testifying in court, he changed the whole story

altogether and lied that he had received a mortgage agreement from the accused.

Article 28 of The Constitution of the republic of Uganda, 1995 presumes all accused persons innocent until proven guilty or if they have pleaded guilty.

The prosecution bears the onus to adduce evidence before this court can take away this constitutional presumption of innocence.

The evidence before me fully establishes that there a sale agreement, the property of the complainant (Pw1) in the custody of **Dw3 –Oine Nelson** and that the same was asported fraudulently from the custody of **Dw3** by the accused under false pretenses to the effect that Pw1 had consented thereof.

As the said agreement has never been recovered and as per the testimony of all the witnesses that the land the subject of the said agreement has been transacted in (*whether by mortgage or sale*) and given the accused's vehement conduct, this court is also satisfied that the intention to permanently deprive the owner of the same was fully established.

It is my finding that the said ingredients have been proven to the satisfaction of court beyond reasonable doubts.

I find that the prosecution successfully proved ingredients i,ii,iii & iv ingredient beyond reasonable doubts.

Ingredient v: participation of the accused

Exerpts from **PEX3** are to the effect that:

“...that year upto 2022 in September when Aisu’s wife (ex-wife), one called Tibita came to my home at around 10:00 hours....requested for the sales agreement claiming that the said Aisu wanted to keep it himself and I did not mind contacting Aisu to confirm...”

From my evaluation of ingredient i,ii,iii & iv, I have already found and rejected the accused’s plea that the agreement allegedly picked from Dw3 by Dw1 was not a mortgage agreement as alleged, but Pw1’s sale agreement kept in custody thereof as per PEX3. The accused was thereby effectively placed at the crime scene as the active and sole participant. Dw1s participation in handing over the said agreement appears to have been innocent without menrea, since he was tricked by Dw1.

I have looked at all the exculpatory facts adduced by the accused and they are extremely incompatible with her innocence. I find so, because I did not find them truthful or capable of explanation upon any other reasonable hypothesis other than that of guilt of the accused as the sole participant.

For those reasons, I also find that prosecution proved this ingredient beyond reasonable doubts.

Having found that the prosecution satisfied court on all the ingredients of the offence charged, I find the Accused GUILTY and CONVICT her of the offence of theft contrary to **Section 237 and 244 Penal Code Act** Cap 128 Laws of Uganda, 2023 revised edition.

In conclusion, I make the following orders.

1. I hereby I find the Accused GUILTY and CONVICT her of the offence of theft contrary to **Section 237 and 244 Penal Code Act** Cap 128 Laws of Uganda, 2023 revised edition.
2. I order restitution of the complainant into possession of the subject land whose agreement was stolen by the Accused.
3. The accused is hereby remanded until hearing on *allocutus* and subsequent sentencing.

I so order.

Dated at PALLISA this15th....day ofJULY.....2025



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HIS WORSHIP KYEMBE KARIM

MAGISTRATE GRADE 1

