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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

(CRIMINAL DIVISION)

CRIMINAL APPEAL NO. 19 OF 2023

(ARISING FROM CHIEF MAGISTRATE’S COURT OF ENTEBBE CRIMINAL CASE

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NO. 468 OF 2022)

SEBAGULA ARON APPELLANT

Vs.

UGANDA RESPONDENT

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JUDGEMENT

BEFORE HON. JUSTICE GADENYA PAUL WOLIMBWA

1.0. Introduction

Sebagula Aron (the Appellant) was convicted by the Chief Magistrate of Entebbe of four counts and sentenced to serve a cumulative sentence of ten years and eleven months. Being dissatisfied with the decision of H/W Stella Amabillis delivered on 1st March 2023 at the Chief Magistrate’s Court of Entebbe, he appealed against conviction and sentence.

2.0. Background to the Appeal

On 7th August 2022, the Appellant was charged with two different counts, i.e. Criminal Trespass contrary to section 302 of the Penal Code Act and Malicious Damage to property contrary to section 335(1) of the Penal Code Act. In count 1, the prosecution case was that on 4th August 2022, at Bugiri-Bukasa cell in Wakiso District, the Appellant entered upon the land of Linda Luyiga Kavuma with intent to intimidate, insult, annoy, and maliciously destroy her property. In count 2, the prosecution case was that on 4th August 2022, at Bugiri-Bukasa cell in Wakiso District, the Appellant willfully and unlawfully destroyed 1 Musizi Tree; 2 Jackfruit Trees; 1

Avocado Tree; and 8 Mango Trees, all valued at about UGX—60,000,000 and belonging to Linda Luyiga Kavuma.

The Appellant denied the charges. The trial commenced shortly after that. On 19th October 2022, after the prosecution had led evidence of five witnesses, the charge sheet was amended under
35 Section 132 (1) of the Magistrates’ Court Act. Two additional counts were preferred against the Appellant, i.e. forgery contrary to sections 342, 345 (a) & 347 of the Penal Code Act and Uttering False Documentation contrary to section 351 of the Penal Code Act. The Appellant denied the charges. He was convicted on all four counts and subsequently sentenced.

In count 1, the Appellant was sentenced to 11 years’ imprisonment; in count 2, he was sentenced
40 to 4 years’ imprisonment; in count 3, he was sentenced to 3 years’ imprisonment; in count 4, he was sentenced to 3 years’ imprisonment. The trial court directed the sentences to run consecutively. Cumulatively, the Appellant was sentenced to serve a term of 10 years and 11 months’ imprisonment. The Appellant, dissatisfied with both conviction and sentence, filed this Appeal with prayers that the court quashes the conviction, set aside the sentence, and set him
45 free. Alternatively, it substitutes the sentence of 10 years and 11 months’ imprisonment with a fair and lenient sentence.

3.0. The Appeal Grounds

1. The Learned Trial Magistrate erred in law and fact in failing to properly weigh the evidence that was laid before the court, hence leading to a miscarriage of justice.
- 50 2. The Learned Trial Magistrate erred in law and fact in failing to consider the defense evidence which resulted in a miscarriage of justice.
3. The Learned Trial Magistrate erred in law and fact in sentencing the Appellant to 10 years and 11 months’ imprisonment, which is deemed harsh and excessive.

4.0. Resolution of the Appeal

55 4.0.1. The Law on Appeals

Section 34 (1) of the Criminal Procedure Code Act empowers an Appellate court to only interfere with the sentence passed by the trial court if it appears that the court acted on the wrong principle or overlooked some material facts or the sentence is illegal, or manifestly excessive as to amount to a miscarriage of justice. Additionally, Section 34 (2) (a) (b) (c) of the Criminal
60 Procedure Code Act empowers an Appellate Court to:

1. Reverse the finding and sentence, and acquit or discharge the appellant, or order him or her to be tried or retried by a court of competent jurisdiction;
2. Alter the finding and find the appellant guilty of another offence, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence by
65 imposing any sentence provided by law for the offence; or
3. With or without any reduction or increase and with or without altering the finding, alter the nature of the sentence.

4.0.2. Duty of the Appellate Court

This Court is cognizant that it is the first appellate court and must, therefore, evaluate all the
70 evidence on the court record, bearing in mind that it did not see the demeanour of the witnesses.

In Kifamunte Henry v Uganda (Criminal Appeal No. 10 of 1997) [1998] UGSC 20 (15 May 1998), the Supreme Court guided that:

75 *The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour, the appellate Court must be guided by the impressions made*
80 *on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanor, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on the credibility of witnesses which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire vs Uganda - Supreme Court*
85 *Criminal Appeal No. 23 of 1985 at page 5.*

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 331(I) of the Criminal Procedure Act.' It does not seem to us that except in the clearest of cases, we are required to reevaluate the evidence like is a first appellate Court save in Constitutional cases. On the second appeal, it is
90 *sufficient to decide whether the first appellate Court, on approaching its task, applied, or failed*

to apply such principles: See *P.R. Pandya vs. R. (1957) E.A. (supra) Kairu vs. Uganda (1978) F.I.C.B. 123.*

In line with the Supreme Court's decision above, the evidence from the Trial Court shall be re-evaluated, bearing in mind that the Appellate Court never had the chance to observe the
95 demeanour of the witnesses.

4.0.3. The Appeal Grounds

Grounds 1 & 2 of the Appeal touch on the evaluation of evidence. Therefore, they shall be merged into one ground of appeal for ease and economy of handling this appeal. Ground 3 shall
100 remain as framed. The reformulated grounds of appeal are, therefore, as follows:

1. Did the learned Trial Magistrate err in law and fact when she failed to evaluate the evidence on record, reaching a wrong decision that resulted in a miscarriage of justice?
Whether the Learned Trial Magistrate erred in law and fact in sentencing the Appellant to 10 years and 11 months' imprisonment which is deemed to be harsh and excessive.

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Ground 1 of Appeal: Did the learned trial magistrate err in law and fact when she failed to evaluate the evidence on record, reaching a wrong decision that resulted in a miscarriage of justice?

Counsel for the Appellant submitted that the Appellant's conviction for criminal trespass and
110 malicious damage was erroneous because of the following reasons: Firstly, the Appellant was not at the scene of the crime when the offences were committed. The Appellant was arrested 1 km away from the crime scene. Secondly, the prosecution failed to disprove the Appellant's alibi, and the Trial Chief Magistrate erred in law when she placed the burden of proving the alibi on the Appellant. Thirdly, the prosecution failed to prove the ingredient of intentional entry on the
115 crime scene, and the trial magistrate should have acquitted the appellant on that basis. Fourthly, the Trial Chief Magistrate did not pay attention to all the ingredients of the offences she was trying at the point. Fifthly, the Trial Chief magistrate erred in law to rely on the evidence of the caretaker, who was not called as a witness. He submitted that the evidence attributed to the caretaker was hearsay, which was inadmissible.

120 Counsel submitted that the Trial Chief Magistrate erred in law by combining counts 3 and 4 as forgery and uttering a false document as if it was one offence, yet these are two distinct offences. Additionally, the Appellant submitted to the Trial Chief Magistrate that she erred in law when she convicted the Appellant of the two offences without ascertaining whether the ingredients of the offences had been proved.

125 On the count of forgery, Counsel for the Appellant submitted that contradictions in the prosecution evidence were so grave and no ingredient could be proved by such evidence. He further argued that the investigating officer testified that the alleged document was given to him through the accused's brother, which fact automatically negates the second ingredient of the offence of forgery that the accused must have been in possession of the document. According to
130 Counsel for the Appellant, the evidence of the investigating officer in that respect was enough to acquit the appellant on the charges of forgery and uttering a false document.

In conclusion, counsel for the Appellant invited the court to set aside the convictions and free the Appellant.

Counsel for the Respondent opposed the appeal and supported the decision of the lower court on
135 the following grounds:

First, the trial Chief Magistrate correctly found that the ingredients of the case were proved beyond reasonable doubt. The Respondent submitted that the evidence of PW1, PW2, PW3, PW5 & and PW6 proved the ingredients of the offence of criminal trespass and malicious damage to property.

140 Secondly, the failure to call the caretaker was not fatal. She submitted that section 133 of the Evidence Act does not require a plurality of witnesses to prove a fact. Consequently, there was no need to have two or more witnesses testifying to the identity and participation of the accused in similar circumstances. What was important was the quality of the identification and that, in this case, the conditions for identification were favourable, so there was no possibility of
145 mistaken identity of the Appellant.

Thirdly, the prosecution witnesses correctly placed the Appellant at the crime scene. In particular, the witnesses said that the Appellant took them to the crime scene, showed them the

work he wanted them to do and that he was standing on the extreme part of the land on the day he was arrested.

150 Lastly, the prosecution evidence did not have contradictions. In summary, counsel for the Respondent asked the court to dismiss the Appeal.

To ensure this ground is sufficiently handled, the Court has structured the Appellant's arguments under this merged ground into six categories, which shall be dealt with chronologically. These are the Alibi Defense, Intentional Entry into land belonging to another, Hearsay Evidence, 155 willful and unlawful damage to property, Conviction for an offence whose ingredients were not discussed in the judgment, and Contradictions.

1. The Alibi Defense

Counsel for the Appellant submitted that when the alleged offence of Trespass and malicious 160 damage to property was committed, the appellant was not at the crime scene. He was only arrested 1 km away from the crime scene. Counsel for the Appellant further submitted that the Appellant's defence of Alibi was not shaken at all by the prosecution. In addition, he submitted that although the Trial Chief Magistrate recognised that the burden was on the prosecution to negative the alibi, in her analysis and evaluation of evidence, she assumed that the burden was on 165 the Appellant to prove his alibi and reach a wrong decision. The Respondents agreed that when an accused raises the defence of Alibi, the burden is on the prosecution to prove that the accused was at the crime scene and not at the different place he claims to have been. She submitted that in this case, the prosecution discharged this burden by placing the Appellant at the crime scene; hence, his alibi should be disregarded.

170 In **Sekitoleko v Uganda (1970) EA 42**, it was held that “*an accused person who raises a defence of Alibi does not have a burden of proving it.*”

Additionally, in **Bogere Moses and Another v Uganda, SCCA No. 1 of 1997**, the Supreme Court held that “*putting an accused person at the scene of crime means proof to the required standard that the accused was at the scene of the crime at the material time. To hold that such 175 proof has been achieved, the court must base itself upon the evaluation of evidence as a whole.*”

Where the prosecution adduces evidence that the accused was at the scene of the crime, and the defense not only denies it but also adduces evidence showing that the accused person was elsewhere at the material time, it is incumbent on the court to evaluate both versions judiciously and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se, the other version is unsustainable.”

As noted above, Prosecution does have the burden of disproving an Alibi raised by an accused person. This is done by adducing direct or circumstantial evidence and placing the accused at the crime scene as the perpetrator of the offence.

185 Upon evaluation of the evidence, the lower court found that the prosecution witnesses had put the accused person at the crime scene as the person who ordered and paid for cutting the trees and grading the land.

On pages 5 & 6 of the Trial Courts Judgment, it is stated that “*in the instant case, to disprove the defense of Alibi raised by the accused, the prosecution relied on the testimony of PW.1 Linda Luyiga Kavuma testified that at the time of arrest, she took photos of the accused in handcuffs at the scene of crime. The prosecution also relied on the testimony of PW2, the grader operator who told court that it is the accused that hired his services to grade the land and paid him a deposit of 1,000,000/= and that on 5/08/2022, the accused was at the crime scene from where they were both arrested.*

195 PW3 also testified that it was the accused that contacted him and his friend for a job to cut down 100 trees and on 05/08/2022, he took them to the land (Scene of Crime). PW5, a detective constable also testified that when he arrested the grader operator and the two men brought to cut trees, they led him to the accused who had given them the assignments to grade and cut down trees on the land. It was his testimony that the accused was monitoring everything nearby...

200 From the above evidence, there is no doubt that the prosecution witnesses put the accused at the scene of crime as the person who ordered and paid for the cutting of the trees and grading the land.”

Upon re-evaluation of the record as an appellant Court, it has been ascertained that the Appellant (Sebagulu Aron) hired PW2 (the grader manager) to grade the complainant's land measuring

205 approximately 4 acres at a fee of UGX. 2,000,000/=. He was given part payment of UGX.
1,000,000/= on 4/08/2022, taken to the land in question on the same day and ordered to start the
grading work the following day at 6:00 am. PW2's evidence shows that when the police arrived
at the scene and arrested him, the Appellant was standing at the extreme side of the land and
initially did not see the police officers. Upon PW2's arrest, he notified PW5 (No. 67536 D/C)
210 that he was hired by Sebagulu Aron (the Appellant) to do the bush clearing. He requested PW5
to allow him to lead him to the Appellant. When the Appellant saw the police, he fled. PW2,
however, chased and apprehended him. This evidence from PW2 puts the Appellant at the crime
scene on two occasions as the perpetrator of the offence. First, on 04.08.2022, when he took
PW2 onto the land where he was supposed to bush clear, and second when he was arrested at the
215 extreme end of the land on 05.08.2022.

The record also shows that the Appellant called PW3 to cut down trees for land meant to be
graded. PW3, alongside his friend Kyeyune, was directed to the land in question by the
Appellant. On arrival, the Appellant got out of a harrier and showed PW3 the trees meant to be
cut. In addition to PW2's evidence, PW3's evidence also places the Appellant at the crime scene
220 as the perpetrator of the offence.

PW5 testified that when he received a complaint from the complainant, he, in the company of
other police officers, proceeded to the crime scene, where they found a wheel loader operated by
Mukisa Ali and managed by Mukuba Denis (PW2). PW2 was arrested. Upon his arrest, PW2
notified PW5 that he was hired by Sebagulu Aron (the Appellant) to do bush clearing. He
225 requested PW5 to allow him to lead him to the Appellant, which he did. PW5 testified that he
arrested the Appellant next to the suit land. The fact that the Appellant was arrested next to the
suit land is circumstantial enough to corroborate the evidence of PW2 & 3, which directly placed
the Appellant on the land as the perpetrator of the offence.

Therefore, the direct and circumstantial evidence on record overwhelmingly discredits the
230 Appellant's Alibi. I agree with the trial court's finding that the prosecution witnesses put the
accused at the crime scene.

2. Intentional Entry into Land Belonging to Another

Counsel for the Appellant argued that the prosecution failed to prove the ingredient of intentional entry on the crime scene, and the trial magistrate would have acquitted the appellant on that
235 basis. He further argues that the trial magistrate seemed not to understand the real ingredient or the offence/ matter she was trying at the point.

In opposition, the Respondents argue that the evidence of PW1, PW2, PW3, PW5 and PW6 proved the ingredients of the offence of criminal trespass and malicious damage to property.

Documents on record show that the accused was charged with one count of criminal trespass
240 contrary to section 302 of the Penal Code Act. It provides that:

*“Any person who— (a) enters into or upon property in possession of another with intent to commit an offense or to intimidate, insult or annoy any person; or (b) having lawfully entered into or upon such property remains there with intent thereby to intimidate, insult or annoy any person or with intent to commit any offense, commits the misdemeanor termed criminal trespass
245 and is liable to imprisonment for one year.”*

The elements the prosecution has to prove before an accused is convicted of the offence of Criminal Trespass are:

1. Intentional entry onto property in the possession of another
2. The entry was unlawful or without authorisation.
- 250 3. The entry was for an unlawful purpose.
4. Participation of the accused.

On page 6 of the judgment, the trial court held that *“the first ingredient of the offence of criminal trespass requires proof of the accused’s intentional entry onto the property in possession of
255 another. To prove this, the prosecution relied on the testimony of PW1 Linda Luyiga Kavuma, who testified that she purchased the land in 2005, acquired a certificate of title in 2015, and has been using the land since then. The prosecution also relied on admitted documentary evidence exhibits P-1, a sale agreement, and p-2, a certificate of title. The accused did not challenge exhibits p-1 & p.2. during cross-examination or his testimony to the court. I therefore find that
260 this ingredient is proved beyond reasonable doubt.”*

In addition to PW1's testimony on record, the above extract shows that PW1 (the Complainant) was in possession of the suit land. The extract doesn't indicate whether the Appellant intentionally entered onto property belonging to another. In the above finding, the Trial Chief
265 Magistrate neglected to make a finding on the Appellant's intentional entry onto the suit land.

Since the trial court rightly found in favour of ingredients 2 and 3 (the entry was unlawful or without authorisation, and the entry was for an unlawful purpose), this court shall make a collective finding on elements one and four, which translates into the single question of whether the Appellant intentionally entered upon the Complainants land.

270 The evidence of PW2 (Mukubwa Denis) and PW3 (Bizimana John Bosco) show that the accused intentionally entered the land. PW2's testimony indicates that the Appellant entered the said land twice. Firstly, on 4/08/2022, to show him where to bush clear and secondly, on 05.08.2022, to monitor the ongoing works of the bush clearing. The evidence of PW3 also indicates that on 05.08. 2022, the Appellant intentionally entered the said land as he came to show him and his
275 colleague what trees to cut down.

Through PW2 & PW3, the prosecution proved the Criminal Trespass ingredient of Intentional Entry by the Appellant into the land belonging to another.

3. Hearsay Evidence with regard to proof of criminal trespass and malicious damage to property

280 Counsel for the Appellant argued that since the caretaker who called PW1 and informed her of the Appellant's presence on the land was not produced as a witness, the trial magistrate should not have relied on PW1's purely hearsay testimony.

In opposition, the Respondents argued that failing to call the caretaker was not fatal. They argued that there is an explicit statutory provision that does not require a plurality of witnesses to prove
285 any fact (see section 133 of the Evidence Act). The Respondents further argued that there was no need to have two or more witnesses testifying to the identity and participation of the accused in similar circumstances. What was important was the quality of the identification. They further argued that the identification circumstances were favourable, so there was no possibility of mistaken identity.

290 The Appellant's complaint is material, especially about the alleged malicious damage to property. In count II of the charge sheet, the Appellant allegedly destroyed various trees estimated at UGX60,000,000. Apart from the caretaker, who was not called as a witness, none of the prosecution witnesses were present on the 4th of August when the alleged destruction/ cutting down of the trees was done. PW1, the complainant, testified that he was told by the caretaker that
295 the Appellant cut the trees. The caretaker was not called to testify, meaning the complainant's evidence was hearsay.

Black's Law Dictionary (Fourth Edition, Bryan A Garner at page 352) defines hearsay evidence as:

*Traditionally, testimony that is given by a witness who relates not what he or she knows
300 personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence.*

Thus, hearsay evidence is evidence that a witness is merely reporting and not what he or herself saw or heard or came under the immediate observation of their bodily senses, but what they
305 learnt respecting the fact through the medium of a third person.

On page 2 of the record, PW1 (the complainant) testified that “*on 4th August 2022, I was called by my caretaker one Njumba who told me that he had returned and found the trees cut. He was not on site and he had returned to his home which is near the land. He was called to see the damage that had been done on the land. That trees had been cut. He told me that one Ssebagulu
310 and his team/agents are the ones who cut the trees.*”

Since the caretaker was not called, this part of PW1's evidence is considered Hearsay Evidence and, therefore, inadmissible. The trial court was obliged to exclude it from the evidence when arriving at the conviction of the Appellant. Considering that none of the prosecution witnesses saw the Appellant cutting or destroying the trees and that the only evidence linking him to the
315 destruction is inadmissible, the Trial Chief Magistrate should not have convicted the Appellant of the Malicious Damage to property contrary to section 335(1) of the Penal Code Act.

However, concerning the alleged entry of the Appellant on the complainant's land, the failure to call the caretaker is not fatal as the court relied on the direct evidence of PW2 and 3, whom the Appellant took to the complainant's land.

320 The import of these findings is that the prosecution established beyond reasonable doubt that the Appellant committed the offence of criminal trespass C/s 302 of the Penal Code Act when he unlawfully entered the complainant's land to annoy and or intimidate him. However, the Prosecution, on the other hand, failed to prove that the Appellant, on 4 August 2022, destroyed the complainant's trees valued at UGX 60,000,000. None of the prosecution witnesses saw the
325 accused destroy the trees. The Appellant was, therefore, wrongly convicted of malicious damage to property c/s 335(1) of the Penal Code Act.

4. Conviction for an offense whose ingredients were not discussed in the judgment.

The Appellant argued that by combining counts three and four as forgery and uttering a false document, it is as if the Trial Chief Magistrate was, at this point, framing her offence outside the
330 Penal Code Act against the Appellant. In addition, the Appellant argued that despite not discussing the ingredients of uttering a false document, she went ahead with convicting and sentencing the appellant on the same. The trial magistrate did not even relate or evaluate any prosecution evidence concerning the offence of uttering a false document. He further argues that such a conviction and sentence not backed by any evidence analysis in the judgment is illegal, so
335 it should be quashed, and the accused should be set free. In response, the Respondents argued that the Magistrate correctly found that the ingredients of the case were proved beyond reasonable doubt.

By way of introduction, the Appellant was lawfully charged with the two additional counts of forgery c/s 324,2,345(a) and 347 of the Penal Code Act and Uttering a False document c/s 351 of
340 the Penal Code Act following the amendment of the charge under section 132 of the Magistrates Courts Act. The Appellant took plea and denied the charges. He also gave evidence to disprove the prosecution's case. However, it is unfortunate that the Trial Chief Magistrate, out of error, combined the two offences into one when evaluating the evidence. Be that as it may, the combination of offences did not occasion a miscarriage of justice as the Chief Magistrate
345 addressed her mind to the fact that she was dealing with two offences both during the evaluation

of evidence and sentences. However, as a first Appellate court, I will re-evaluate the evidence to establish whether the trial chief magistrate rightly convicted the Appellant of the two offences.

But before I evaluate the evidence, my attention has been drawn to procedural lapses in handling witnesses who had testified before the amendment of the charge, including the counts of forgery and uttering a false document.

The prosecution tendered in an amended charge sheet to add the counts of forgery contrary to sections 342, 345(a) and 347 of the Penal Code Act and uttering a false document contrary to sections 351 and 347 of the Penal Code Act. The amendment was made after five prosecution witnesses had testified. The record shows that the Trial Chief Magistrate neither informed the appellant of his right to recall the witnesses nor recalled the witnesses after the amendment.

Section 132 of the Magistrates Courts Act, which is relevant to the procedure to be adopted on amendment of charges, provides as follows:

(1)Where, at any stage of a trial, it appears to a magistrate's court that—(a)the evidence discloses an offence other than the offence with which the accused is charged;(b)the charge is defective in a material particular; or(c)the accused desires to plead guilty to an offence other than the offence with which he or she is charged, then the court, if it is satisfied that no injustice to the accused will be caused thereby, may make such order for the alteration of the charge by way of its amendment or by the substitution or addition of a new charge as it thinks necessary to meet the circumstances of the case.(2)Where a charge is altered under subsection (1)—(a)the court shall thereupon call upon the accused person to plead to the altered charge;(b)the accused may demand that the witnesses for the prosecution or any of them be recalled and be further cross-examined by the accused or his or her advocate, whereupon the prosecution shall have the right to reexamine any such witnesses on matters arising out of such further cross-examination; and(c)the accused shall have the right to give or to call such further evidence on his or her behalf as he or she may wish.(3)Where an alteration of a charge is made under subsection (1), the court shall, if it is of the opinion that the accused has been prejudiced by the alteration, adjourn the trial for such period as may be reasonably necessary.(4)Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material, and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within any time limited by law

for the institution of the proceedings.(5)The court shall inform the accused of his or her right to demand the recall of witnesses under subsection (2), and that he or she may apply to the court for an adjournment under subsection (3).(6)In any case where a charge is altered under subsection (1), the court may make such order as to the payment by the prosecution of any costs incurred owing to the alteration of the charge as it shall think fit.

Section 132 of the Magistrates Courts Act grants the court power to allow the prosecution to amend charges at any time during the trial, provided the amendment does not cause injustice to the accused person. Amendment of charges is, therefore, not a mechanical process but one where a judicial mind must be applied to determine whether the amendment fits within the parameters of section 132(1) of the Magistrates Courts Act and, if so, whether the accused person will not be prejudiced.

In the matter before me, the Trial Chief Magistrate allowed the prosecution to amend the charges after it made a short application. In his application, The Learned State Attorney did not state why the prosecution was amending the charges. Unfortunately, the court did not ask the Learned State Attorney to justify the amendment. In an ideal situation, section 132 (1) of the Magistrates Courts Act requires the Prosecution to lay grounds for amendment of charges. The reasons are necessary to enable the Magistrate to determine whether the amendment will cause injustice to the accused person. That said, much as the court did not follow the ideal practice for amendment of charges, the record shows that the additional charges were necessary because the evidence on the record pointed to the possible commission of forgery of a sales agreement and uttering of the same for unlawful reasons, which would constitute offences under the Penal Code Act. These facts justified an application by the Prosecution to amend the charges.

The challenge in the lower court, however, remains about how the Trial Chief Magistrate handled the post-amendment trial of the case. According to the record, the Chief Magistrate, immediately after allowing the amendment, allowed the Prosecution to call the remaining witnesses contrary to section 132(2) and (5) of the Magistrates Courts Act. Section 132(2) provides as follows:

(2)Where a charge is altered under subsection (1)—(a)the court shall thereupon call upon the accused person to plead to the altered charge;(b)the accused may demand that the witnesses for the prosecution or any of them be recalled and be further cross-examined by

the accused or his or her advocate, whereupon the prosecution shall have the right to reexamine any such witnesses on matters arising out of such further cross-examination; and(c)the accused shall have the right to give or to call such further evidence on his or her behalf as he or she may wish.

410 Section 132(5) provides as follows:

“The court shall inform the accused of his or her right to demand the recall of witnesses under subsection (2), and that he or she may apply to the court for an adjournment under subsection (3).”

415 Section 132(2) & 132(5) of the Magistrates Courts Act obliged the Magistrate to inform the accused person of their right to recall witnesses after the amendment of charges. Justice Monica Mugenyi, as she then was in the case of **Elineo Mutyaba v Uganda (Criminal Appeal No. 45 of 2011) [2012] UGHC 35 (27 February 2012)** held that:

420 *“Section 132(1) of the MCA provides for the alteration of a charge by way of amendment or by addition of a new charge, provided that the court ‘is satisfied that no justice to the accused will be caused thereby.’ Where such alteration is made, section 132(2) places a duty upon the court to re-arraign the accused in respect of the altered charge, entitles an accused person to recall prosecution witnesses, and confers upon such accused person ‘the right to give or call such further evidence on his or her behalf as s/he may wish.’ Section*
425 *132(5) places a duty upon the court to inform such accused person of his/ her right to recall prosecution witnesses and/or additional defence witnesses, as well as the accused’s right to an adjournment.”*

In the present appeal, the record does not illustrate that the trial magistrate discharged the duty placed on him by section 132 (2) & (5) of the Penal Code Act. The appellant was not informed of
430 his right to recall any prosecution witness for cross-examination on the new charge, his right to call additional defence evidence (including his own), or, indeed, his right to an adjournment. Given that at that stage of the trial, the appellant had already testified, it would, in my view, only have been fair and just to advise him of his right to adduce further evidence in his defence as envisaged under section 132(2) and 132(5) of the Act and accord him the opportunity to do so.

435 Further, it would have underscored the fairness of the trial had the appellant been informed of his right to re-call prosecution witnesses as provided under section 132(2)(b).

Article 28(1) of the 1995 Constitution underscores accused persons' right to a fair trial. This entitlement is echoed in Ayume, F. J, 'Criminal Law and Procedure in Uganda', Law Africa Publishing, 2010 reprint at p.81 it was stated:

440 *"The proviso to this section is obviously to ensure that the accused is not embarrassed as a result of the amendment and that he has a fair trial."*

Justice Monica Mugenyi, as she then was, held that the provisions of section 132(2) of the Magistrates Courts Act are significant because they go to the roots of the right to a fair trial, which is protected in Article 28 of the Constitution. Failure to recall the witnesses renders the trial of the accused moot, and a conviction obtained in such circumstances is unsustainable. In 445 Jumane Mohamed vs. R 1986TLR231, Sammata J (as he then was) observed that after amendment of charges:

The accused person should be informed of his right to recall witnesses who had already testified before the substitution and the accused's reply should be reflected on the record.

450 In Ezekiel Hotay vs. R Cr. Appeal 6300 of 2016, the Court of Appeal observed that:

According to the preceding cited provisions, it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. Failure to do so rendered the evidence led by the prosecution witnesses to have no evidential value.

Similar observations were made in Ally Sudi Ulaya and Muhia Allen @Lyattu vs. Republic, Criminal Appeal 24 of 2022 reported in 2022 TZHC11983, a Tanzanian case dealing with a 455 similar provision.

In summary, the court must follow the procedure when dealing with the amendment of charges under section 132 of the Magistrates Courts Act.

- a. The prosecution must lay the factual and legal basis for the proposed amendment.
- 460 b. The Court must determine whether the proposed amendment is necessary and will thus not cause injustice to the accused person.

- c. Where the amendment is allowed, the court is legally responsible for informing the accused person of their right to recall witnesses who testified before the amendment.
- d. Failure to recall witnesses, unless the accused person elects not to recall them, renders pre-amendment evidence worthless against the new charges.

465

In the present case, the dictates of a fair trial would entail the appellant having the right to re-call prosecution witnesses for cross-examination on the newly preferred charge of malicious damage to property and defending himself on the same charge. Such right should have been duly explained to him as by law required. I, therefore, find that the trial magistrate's omission to discharge the duties placed upon him by the legal provisions cited above constituted a constitutional infringement upon the appellant's right to a fair trial and thus occasioned a miscarriage of justice.

470

I, therefore, overturn the appellant's conviction on the second count of malicious damage to property contrary to section 355(1) of the Penal Code Act. Given that I had upheld the appellant's conviction on the first count, ground 2 of this appeal partially succeeds and fails.

475

As observed above, the Trial Chief Magistrate erred in law when she failed to recall the five prosecution witnesses who had testified before the amendments were allowed. Consequently, the pre-amendment evidence of the five prosecution witnesses cannot be used against the Appellant in the additional charges of fraud contrary to sections 342,345(a), and 347 of the Penal Code Act and Uttering a False Document contrary to sections 351 and 347 of the Penal Code Act. For the avoidance of doubt, the court will only rely on the evidence of No. 67536 D/C Augustus Bernard (PW6), Mujurizi Jamiru David (PW7), and Detsat Ziraba Ruth (PW8) to determine whether the Appellant committed the additional offences of forgery and uttering a false document.

480

I will now consider the additional offences.

485 Count 3: Forgery Contrary to Sections 342, 345 & 347 of the Penal Code Act

For ease of reference, sections 342, 345 & 347 of the Penal Code Act are reproduced below.

Section 342 of the Penal Code Act provides that:

“Forgery is the making of a false document with intent to defraud or to deceive.”

Section 345 of the Penal Code Act provides that:

490 “Any person makes a false document who— (a) makes a document purporting to be what in fact
it is not; (b) alters a document without authority in such a manner that if the alteration had been
authorised it would have altered the effect of the document; (c) introduces into a document
without authority while it is being drawn up matter which if it had been authorised would have
altered the effect of the document; (d) signs a document — (i) in the name of any person without
495 his or her authority whether such name is or is not the same as that of the person signing; (ii) in
the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged
to be of the same name as the person signing; (iii) in the name represented as being the name of
a different person from that of the person signing it and intended to be mistaken for the name of
that person; (iv) in the name of a person personated by the person signing the document, if the
500 effect of the instrument depends upon the identity between the person signing the document and
the person whom he or she professes to be.”

Section 347 of the Penal Code Act provides that:

“Any person who forges any document commits an offence which, unless otherwise stated, is a
felony and is liable, unless owing to the circumstances of the forgery or the nature of the thing
505 forged some other punishment is provided, to imprisonment for three years.”

Forgery is a crime committed when a person creates or alters a legal instrument with
the intent to defraud. In **Uganda vs Obur Ronald and 3 Others Criminal, Appeal No. 007 of
2019(High Court at Gulu)**, Justice Mubiru held that:

510 *the offence of Forgery C/s 342 and 347 of the Penal Code Act, entails the making of a false
document, with intent to defraud or deceive and proof that the document was made by the
accused person. It involves making a document purporting to be what, in fact, it is not or making
a material alteration to a document. Forgery is the false making of an instrument purporting to
be that which it is not; it is not the making of an instrument which purports to be what it really is,
but which contains false statements —The false document must be clearly stated in the charge
515 sheet and identified at the trial.*

To prove this crime, the prosecution should have established the following ingredients:

1. The making of a false document;

2. With intent to defraud
3. The accused person made the document.

520 **Element 1: The making of a False Document**

It was PW5's (No. 67536 D/C Augustus Bernard Ojok) testimony that *"after the arrest of the accused, he informed him that he purchased the land on 12/Nov/2021 from Kaisyre, Musiitwa and Sekibala (PW3). That when he asked for evidence of purchase, he provided an agreement dated 12/11/2021, which agreement was brought by his brother. That the accused claimed that*
525 *the agreement was authored by M/s Mujurizi, Arinaitwe, Byamukama & Co. Advocates who also denied any knowledge of the agreement. That when they provided him with their headed paper, it looked different and the same was exhibited as P-12 & P-13.*

PW6 (Mujurizi Jamiru) testified that *"Police contacted him about an agreement written in Luganda using the firm letter head and that upon examining it, the features were different from*
530 *those of the law firm and the stamp thereon did not bear the name of the advocate executing the agreement and that the signature did not belong to any of the advocates at the firm. It was his testimony that as a matter of practice, they never make Luganda agreements but rather make English agreements and incorporate a translation."*

The prosecution, through PW5 & PW6's testimonies, as summarised above, proves to the
535 required standard that a document (a land sale Agreement dated 12th November 2021) was indeed forged. PW6, the Advocate who supposedly drafted the sale agreement, denied ever making such a document. With such evidence on record, only one thing comes to mind. The document in question was forged. This ingredient is considered proved to the required standard.

Element Two: The document was made with Intent to Defraud or Deceive

540 The Appellant did not challenge the ownership of the land in question as belonging to Linda Luyiga Kavuma. Through the testimonies of PW5 & PW6, it was established that a sale agreement dated 12th November 2021 purporting ownership of the land in question was forged. Whoever forged the document intended to rely upon it to deprive the legitimate owner of the land in question of their land by relying on the forged document to masquerade as the legitimate
545 owner and do as they please with it. This ingredient is thus considered proved to the required standard.

Element 3: The Document was made by the Accused

The evidence on this element still came from the testimony of PW5 & PW6.

PW5 (No. 67536 D/C Augustus Bernard Ojok) testified that “*after the arrest of the accused, he informed him that he purchased the land on 12/Nov/2021 from Kaisyre, Musiitwa and Sekibala (PW3). That when he asked for evidence of purchase, he provided an agreement dated 12/11/2021, which agreement was brought by his brother. That the accused claimed that the agreement was authored by M/s Mujurizi, Arinaitwe, Byamukama & Co. Advocates who also denied any knowledge of the agreement. That when they provided him with their headed paper, it looked different and the same was exhibited as P-12 & P-13.*”

PW6 (Mujurizi Jamiru) testified that “*Police contacted him about an agreement written in Luganda using the firm letter head and that upon examining it, the features were different from those of the law firm and the stamp thereon did not bear the name of the advocate executing the agreement and that the signature did not belong to any of the advocates at the firm. It was his testimony that as a matter of practice, they never make Luganda agreements but rather make English agreements and incorporate a translation.*”

On the face of it, the above testimonies show that the accused was responsible for forging the sale agreement dated 12th November 2021. The trial court relied upon this evidence from PW5 & PW6 in finding the Appellant guilty of the offence of forgery. The record, however, shows that the Appellant denied having forged the said agreement and having made a police statement at the time of the arrest. During the Examination in Chief, he testified that “*I did not make any statement at Police... I refused to record a statement since I had no lawyer...it is not true that I forged any documents...*” When cross-examined, the Appellant testified that “*...to look at the agreement from Mujurizi Alinaitwe and Byakama Advocates together with signature in police plain statement, the signatures are not the same. I always sign with my thumbprint, not my name.*”

The record shows no expert witness was called to prove that the Appellant forged the document. This is contrary to section 45 of the Evidence Act, which provides that “*When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of*

575 *any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact.”*

The record also shows that the person who delivered the forged document to the investigating officer was not called as a witness to establish how he came to be in possession of the document. Neither was his statement taken when delivering the agreement to the investigating officer.
580 These omissions cast doubt on whether the accused forged the said sale agreement. The calling of such witnesses by the prosecution, especially the expert witness, was necessary for establishing the whole picture of the case; in default, reasonable doubt as to the accused’s guilt arises. It is important to note that the burden does not shift to the accused person, and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his
585 defence. The accused does not have any obligation to prove his innocence. (*See Sekitoleko v. Uganda [1967] EA 531*). Accordingly, the prosecution failed to lead evidence to the required standard to prove this essential ingredient of the alleged offence.

Since the Trial Magistrate failed to evaluate the evidence on record properly and thus came to the wrong conclusion that the Appellant was guilty of the Offense of Forgery contrary to sections
590 342, 345 (a) & 347 of the Penal Code Act, the Conviction and Sentence is hereby quashed. The Appellant is therefore Acquitted for the Offense of Forgery contrary to sections 342, 345 (a) & 347 of the Penal Code Act.

Count 4: Uttering a False Document contrary to Section 351 of the Penal Code Act

For ease of reference, section 351 of the Penal Code Act provides that,

595 *“Any person who knowingly and fraudulently utters a false document commits an offence of the same kind and is liable to the same punishment as if he or she had forged the thing in question.”*

To prove the offence of uttering a false document, the prosecution must prove the following ingredients:

1. Uttering of a document;
- 600 2. Knowledge that the document is false or fraudulent; and,
3. The utterer has the intention to use it as genuine.
4. The accused person is responsible for uttering the document.

See **Kazibwe Elisha and Ssalongo William Kulumba, Criminal Appeal No. 013 of 2019 (High Court at Masaka).**

605 Section 2 of the Penal Code Act defines the word “Utter” to mean and include using or dealing with, attempting to use or deal with, and attempting to induce any person to use, deal with, or act upon the thing in question. Simply put, uttering a forged instrument is a legal term for intentionally creating a fake or altered document and circulating it to the public.

Having found initially that the prosecution failed to prove that the Appellant forged the sale
610 agreement dated 12th November 2022, the court finds that the charge of uttering a false document contrary to section 351 of the Penal Code Act fails accordingly. The Appellant’s conviction and sentence are hereby quashed.

Summary of Findings in Ground I of Appeal

Ground one partially fails and succeeds for the following reasons:

- 615 1. The direct and circumstantial evidence on record overwhelmingly discredits the Appellant’s Alibi. The prosecution adduced evidence, placing the Appellant at the crime scene.
2. The prosecution, through PW2 & PW3, clearly proved the Criminal Trespass ingredient of Intentional Entry by the Appellant into the land belonging to another.
- 620 3. PW1’s hearsay evidence of the Appellant's intentional and unlawful entry into her land for unlawful purposes was not the only evidence relied on by the trial Magistrate to convict the Appellant for the offence of criminal trespass. The trial court also relied on the direct evidence of PW2 and PW3. PW1’s hearsay evidence shall be excluded for inadmissibility, but by PW2 & PW3’s direct evidence, the trial court's findings against
625 the Appellant regarding the offence of criminal trespass shall not be invalidated.
4. The prosecution failed to prove one ingredient of the offence of Malicious Damage to Property (i.e. that the appellant destroyed the property/cut down the trees) to the required standard of beyond reasonable doubt.
5. The Trial Magistrate erred in law when she failed to recall the five prosecution witnesses
630 who had testified before the Charge Sheet was amended. Consequently, the pre-amendment evidence of the five prosecution witnesses cannot be used against the

Appellant in the additional charges of fraud contrary to sections 342,345(a) and 347 of the Penal Code Act and Uttering a False Document contrary to sections 351 and 347 of the Penal Code Act. In other words, their evidence is of no evidential value in this matter.

- 635 6. The prosecution did not prove to the required standard the offence of Forgery contrary to sections 342, 345 (a) & 347 of the Penal Code Act and Uttering a False Document contrary to section 351 of the Penal Code Act.
7. There were no contradictions in the prosecution witnesses' evidence regarding the forged sale agreement.

640 **Ground 2: Whether the Learned Trial Magistrate erred in law and fact in sentencing the Appellant to 10 years and 11 months imprisonment is deemed harsh and excessive.**

1. “Almost” Maximum Sentences and Maximum Sentences

It was the Appellants argument that even after recognizing that the appellant was a first-time offender in two counts, i.e. forgery and uttering a false document, the trial magistrate gave him
645 the maximum sentence of 3 years imprisonment prescribed by law for the said offences, while, in the other two counts, i.e. criminal trespass and malicious damage, the trial magistrate gave the appellant 11 months and 4years, respectively.

In opposition, the respondent argued that the sentence was neither illegal nor founded on the wrong principle of law, and there is no evidence of the court’s failure to consider a material fact.
650 The respondent also argued that the Trial Magistrate rightly exercised her discretionary power vested in her by ordering the sentences to run consecutively.

In **Kyalimpa Edward Vs Uganda Supreme Court Criminal Appeal No. 10 of 1995**, the Supreme Court, following the holding in **R vs Haviland (1983) 5 Cr. App. R(s) 109** stated, "*An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its
655 own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice.*"

660 It is a rule of practice that first offenders ordinarily do not receive the maximum sentence for the offence of which they have been convicted. (See the case of **Ainobushobozi Venancio V Uganda, CACA No. 242 of 2014**). On convicting the Appellant on Counts 3 & 4, the Trial Magistrate should not have given him, as a first-time offender, the maximum sentence prescribed for those offences. Doing so goes against the established principle of practice in **Ainobushobozi Venancio V Uganda supra**.
665 Since the Appellate Court acquitted the Appellant of the Offences in Counts 3&4, the error occasioned by the Trial Magistrate in that regard has been cured. There is no point for this court to reduce the sentences because the Appellant’s conviction on the said two counts has been quashed and set aside.

The Trial Magistrate, however, will not be faulted for using her discretion in light of the
670 mitigating and aggregating factors of the case to grant the appellant an “almost maximum sentence” on count 1. Despite the mitigating factor of being a first-time offender, the aggravating factors cited by the Trial Magistrate did not call for a lesser sentence. Therefore, the Appellate court does not consider the said “almost maximum sentence” of 11 months as illegal, manifestly harsh, or premised on a wrong principle of law. It will, therefore, not interfere with the discretion
675 of the trial magistrate by unjustifiably altering the sentence.

In light of Count 2, where the Appellant was also given an “almost maximum sentence” of 4 years imprisonment, this court finds no merit in discussing the legality of such a sentence since the Appellant has been acquitted of the Offence. Additionally, since the Appellant has been acquitted of 3 out of 4 counts, the court finds no merit in discussing the issue of whether the trial
680 court erred in directing the four sentences to run consecutive sentences, which cumulatively amounted to 10 years and 11 months imprisonment.

2. Time spent on remand is not considered.

Counsel for the Appellant argued that on page 10 of the judgment, the Trial Magistrate only mentioned the word ‘Time spent on remand’ but did not show how much time was considered
685 while sentencing the appellant. She did not even state that period in terms of months or days. In other words, the trial court did not consider the period spent on remand by the Appellant.

The respondent, in their reply, conceded to this argument. They acknowledged that the lower court record does not show that the period spent on remand was deducted. The Respondent

prayed for the period spent on remand to be deducted from the sentences imposed on the
690 Appellant.

It is a well-established legal principle that a sentence arrived at without considering the period spent on remand is illegal for failure to comply with a mandatory constitutional provision under Article 23(8). The respondent concedes that the Lower Court never deducted the period spent on remand by the Appellant. The record, too, speaks in favour of this recognised argument.

695 The Constitution under Article 23(8) requires the court to consider the period the person has spent on remand. Article 23(8) provides that “*Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.*”

700 Article 23(8) of the Constitution quoted above states that a sentence arrived at without considering the period spent on remand is illegal for failing to comply with a mandatory constitutional provision.

In **Rwabugande Moses v Uganda, SCCA No. 25 of 2014**, the Court held that “*we have found it
705 right to depart from the Court’s earlier decisions mentioned above in which it was held that consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula. It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or
710 subtracting that period from the final sentence...We must emphasize that a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence.”*

715 In the instant case, the Trial Magistrate stated, “*Considering the circumstances of this case and the period spent on remand, this court sentences the accused as follows...*” Such a broad sentence is ambiguous and raises doubt in a reader’s mind about whether the court accounted for the remand period in arriving at the final sentence. The record shows that the Appellant was

remanded on 10th August 2022 and granted bail on 12th September 2022. His bail was, however,
720 cancelled on 19th October 2022. The judgment was delivered on 1st March, 2023. This means the
Appellant spent approximately five months and twelve days on remand. This period of remand
shall be deducted from the sentence of eleven months' imprisonment imposed on the Appellant
for criminal trespass. The Appellant shall serve a net sentence of five months and eighteen days.

7.0. Decision

725 The Appeal succeeds in part, and the Court makes the following orders:

1. The Conviction of the Appellant on Count 1 is upheld.
2. The Conviction of the Appellant and sentence on Counts 2, 3 & 4 are quashed and set
aside.
3. The Appellant is sentenced to a net sentence of five months and eighteen days for
730 committing the offence of criminal trespass.



Gadenya Paul Wolimbwa

JUDGE.

23rd January 2024

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