

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT GULU

[Coram: Egonda-Ntende, Bamugemereire & Mulyagonja, JJA]

CRIMINAL APPEAL NO. 175 OF 2018

(Arising from High Court of Uganda Criminal Appeal No. 017 of 2017 at Gulu)

BETWEEN

Benjamin Oteka=====Appellant

AND

Uganda=====Respondent

(Appeal from a Judgment of the High Court of Uganda (Mubiru, J.) delivered on the 6th day of December 2018)

JUDGMENT OF THE COURT

Introduction

- [1] This is a second appeal. The appellant was charged with 2 counts of threatening violence in the Chief Magistrates Court at Gulu. He was convicted and sentenced to 2 years and 6 months' imprisonment. He appealed to the High Court against conviction and sentence. The appeal was dismissed. He lodged a second appeal before this court.
- [2] He set forth 6 grounds of appeal in his initial memorandum of appeal and then 5 grounds of appeal in his supplementary memorandum of appeal, filed with leave of this court. The grounds in the initial memorandum of appeal are as follows:

'1. That the learned trial judge erred in law in re-evaluation and scrutiny of evidence and the circumstances of the case

on record as the first appellate court thereby wrongly confirming the conviction and sentence of the appellant.

2 That the learned trial judge erred in law when he held that he cannot interfere with the decision of the chief magistrate and prosecution had proved all the ingredients of the offence of threatening violence whereas not.

3. That the learned trial judge erred in law when he misdirected himself and totally disregarded the submissions of the Appellant with no arbitrary intent, thereby wrongly confirming the conviction.

4. That the learned trial judge erred in law when he neglected and disregarded the fact that there was domestic violence raised by the appellant thus reaching at an erroneous decision leading to a miscarriage of justice.

5. That the learned trial judge erred in law by generating fanciful theories that led court to arrive at erroneous decision occasioning miscarriage of justice.

6. That the learned trial judge erred in law by confirming the excessive and harsh custodial sentence regardless of the circumstances and despite the pleading raised by the Appellant, and wrongly dismissed the appellant's appeal against sentence and conviction.'

[3] The additional grounds in the supplementary memorandum of appeal are.

'Ground 1. That the learned trial judge failed to properly consider the evidence before him and thereby arrived at several wrong conclusions of the facts contrary to the truth of the matter as occasioning a miscarriage of justice.

Ground 2. That the learned trial judge was utterly biased against the appellant and made several rejections of credible evidence that would be in favour of the appellant this occasioning a miscarriage of justice.

Ground 3. The learned trial judge erred in law and fact when he concluded that the prosecution proved their case beyond reasonable doubt that the appellant threatened violence as charged this occasioning a miscarriage of justice.

Ground 4. The learned trial judge erred in law and fact when he ignored the crucial evidence that would show that the appellant never committed the offence convicted of.

Ground 5. That the learned trial judge erred in law and fact when he agreed with the decision of the lower court and upheld the conviction and custodial sentence against the appellant.'

- [4] The respondent opposed the appeal and supported the decision of the first appellate court.
- [5] Mr Jude Logik appeared for the appellant while Ms Immaculate Angutoko, Chief State Attorney, in the Office of the Director of Public Prosecutions appeared for the respondent. Both counsel filed written submission which they relied upon at the hearing of this appeal.

Factual Background to the Appeal

- [6] The first appellate court summarised the case before it in the following words.

'In the Court below, the appellant was charged with two counts of threatening violence C/s 81 (a) of The Penal Code Act. In the first count, it was alleged that on 8th September, 2013 at Acholi Inn, the appellant with intent to annoy and intimidate her, threatened to assault Caroline Ward. In the second count, it was alleged that on the same day and at the same place, with intent to annoy and intimidate her, the appellant threatened to assault Lisa Coggin.

The prosecution case was briefly that the two complainants had convened a Board meeting of "Favour of God Church" at the above mentioned venue. The appellant went to the table where they were seated and in a fit of rage, slammed the table, flipped it over, picked a laptop of Caroline Ward and raised it above her head threatening (*sic*) to hit her with it, all the while shouting threats and demanding for his property. The husband of Lisa Coggin, P.W.4 Keith Coggin intervened and restrained the appellant. The appellant continued to utter threats directed at Caroline Ward to spill her blood and kill her. The two, Caroline Ward and Lisa Coggin fled and locked themselves in a toilet. In his defence, the appellant stated that it is Caroline Ward who called him to that meeting. He never got anywhere close to the table. He politely asked Caroline Ward to give him his passport and when she refused, he walked away. He sought the intervention of the then L.C.5 Chairman to mediate.'

- [7] The foregoing is an accurate summary of the case of either party at the trial of first instance. The trial court believed the case for the prosecution and convicted the appellant of 2 counts of threatening violence. And it sentenced him to a term of 2 years and 6 months' imprisonment on each count to be served concurrently.
- [8] The appellant appealed against both conviction and sentence setting forth 5 grounds of appeal. The High Court (Mubiru, J.) heard the appeal and dismissed it. It confirmed the conviction and sentence of the Chief Magistrates' Court at Gulu.

Submissions of Counsel

- [9] Mr Jude Logik, learned counsel for the appellant, argued grounds 1, 2, 3 and 4 of the supplementary appeal together. He submitted that it was never established that the appellant threatened Carole Ward, his wife or Lisa Coggin, PW1. He contended that the appellant was a victim of a conspiracy

by PW5, his wife, and PW1, Lisa Cogin to destroy him, as they pursued their interest in property that was the subject of Divorce Cause No. 37 of 2017.

- [10] Mr Logik further contended that this complaint was raised only 2 years after the incident arose and that in between the incident and the prosecution of the appellant, there had been correspondence between Carol and the appellant with expressions of love. There was no conduct on the part of the appellant that would have induced fear in the complainants and he was therefore wrongly convicted of the said offences.
- [11] Regarding ground 5 counsel for the appellant submitted that the sentence imposed on the appellant was harsh and severe. Maximum sentence was 4 years' imprisonment and a caution would have sufficed.
- [12] Ms Angutoko, learned counsel for the respondent, submitted that section 45 (1) of the Criminal Procedure Code Act, permitted appeals only on points of law and not on facts or mixed points of law and fact. Neither was an appeal permitted on the severity of sentence. She submitted that ground 1 of the supplementary appeal offended section 45 (1) of the Criminal Procedure Act as well as rule 66 (2) of the Rules of this Court. It fails to particularise any errors of law made by the first appellate court.
- [13] Turning to ground 2 of the supplementary memorandum of appeal Ms. Angutoko submitted that this ground too offends section 45 (2) of the Criminal Procedure Code Act and Rule 66 (2) of the Rules of this court. The ground fails to point to any part of the record that shows bias on the part of the first appellate court.
- [14] Ms Angutoko argued grounds 3 and 4 together. She submitted that these 2 grounds offended rule 66 (2) of the Rules of this court as they do not disclose any point of law that is alleged to have been wrongly decided by the first appellate court. Regarding ground 5 of the supplementary memorandum of

appeal she argued that it offended section 45 (1) of the Criminal Procedure Code Act and it should be struck out.

Duty of A Second Appellate Court

[15] The Supreme Court in Bogere Moses v Uganda [1998] UGSC 22 discussed the duties of a first and second appellate court and stated in part,

‘.....normally it is the first appellate court which has a duty to re-evaluate the evidence of the trial Court. This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale we will assume the duty of the first appellate Court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in its consideration of the appeal as a first appellate Court, (it) misapplied or failed to apply the principles set out in such decisions as Pandya (supra) Ruwala (supra) Kairu (supra).

[16] A second appellate court will therefore only interfere with a decision of the first appellate court where that court failed to carry out its duty of re-evaluating the evidence and law in the court below and coming to its own independent decision. Where the first appellate court has carried out its duty of re-evaluating the evidence in the court below this court, as a second appellate court, will not re-evaluate the evidence afresh.

[17] Secondly, ordinarily a second appellate court will not interfere with the concurrent findings of fact of the trial court and first appellate court unless a miscarriage of justice has occurred. See Semuju Twaha v Uganda [2021] UGSC 65.

Some Preliminary Matters

[18] As noted above this is a second appeal. Section 45 (1) of the Criminal Procedure Act restricts such appeals to only points of law. It states,

‘(1) Either party to an appeal from a magistrate’s court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal **on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law.**’

[19] The said points of law must be set out in the memorandum of appeal in accordance with rule 66 of the Court of Appeal Rules. Rule 66 (2) is pertinent. I will set it out.

‘(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, **in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided,** and in a third appeal the matters of law of great public or general importance wrongly decided.’

[20] The appellant is required to set forth in his memorandum of appeal ‘**the points of law which are alleged to have been wrongly decided.**’ Ground 5 of the memorandum of appeal and grounds 1, 4 and 5 of the supplementary memorandum of appeal fail to comply with the foregoing rule.

[21] Ground 5 of the memorandum of appeal does not specify what the so-called ‘fanciful theories’ espoused by the first appellate court are and what points of law were wrongfully or in error made by the first appellate court which are objected to in that ground. It fails to comply with rule 66 (2) of the Court of Appeal Rules.

- [22] Ground 1 does not state the point of law that the lower court is alleged to have erroneously decided. It alleged that several wrong conclusions of fact were made by the first appellate court without specifying what those wrong conclusions of fact are. Ground 4 alleges that the first appellate court ignored crucial evidence that would show that the appellant never committed the offence without setting out what that evidence and or facts it gave rise to which were ignored by the first appellate court. Similarly Ground 5 contends that the first appellate court agreed with the findings of the trial court to convict the appellant without specifying the specific points of law which it is contended the first appellate court, in doing so, wrongly decided.
- [23] Ground 2 is made up of 2 parts which is wrong. The 2 parts should have formed 2 different grounds. The first part alleges bias on the part of the first appellate court. The second part of that ground alleges that the first appellate court rejected credible evidence in favour of the appellant without setting out the facts such evidence gave rise to, and which were rejected.
- [24] Grounds 1,4 and 5 are incurably defective for not complying with Rule 66 (2) of the Rules of this court and are accordingly struck out. So is the second part of ground 2 that alleges rejection of unspecified evidence.
- [25] Ground 6 of the memorandum of appeal is against severity of sentence as is a portion of ground 5 of the supplementary memorandum of appeal. Both grounds in relation to severity of sentence are barred by section 45 (1) of the Criminal Procedure Code Act. They are accordingly struck out.

Consideration of the surviving grounds of appeal

- [26] Grounds 1, 2, 3, and 4 of the memorandum of appeal and grounds 1 and 3 of the supplementary memorandum of appeal will be handled together as they all challenge the re-evaluation of evidence by the first appellate court.

- [27] We have examined both the record of trial court and the judgment of the first appellate court. The first appellate court after reminding itself of its duty as a first appellate court to re-evaluate the evidence in the court below; determined the elements of the offence and considered the evidence adduced in support of the charges against the appellant. It reached the conclusion that there was sufficient evidence to support the conviction of the appellant in the trial court. We find that the first appellate court was aware of its duties and carried the same out. It reached the same conclusion as the trial court.
- [28] Both the trial court and the first appellate court made concurrent findings of fact regarding the guilt of the appellant. We find no reason to fault the first appellate court. There is evidence on record to support its conclusions of fact and law.
- [29] We would reject grounds 1, 2, 3 and 4 of the memorandum of appeal and grounds 1 and 3 of the supplementary memorandum of appeal.

Ground 2 of the supplementary memorandum of appeal

- [30] It is contended that the first appellate court was biased against the appellant. No material was made available to us that would support this portion of this ground. It is without merit.

Decision

- [31] In agreement with learned counsel for the respondent, we are satisfied that this appeal had no merit. It is hereby dismissed.

Signed, dated, and delivered this 25th day of May 2023



Fredrick Egonda-Ntende

Justice of Appeal



Catherine Bamugemereire

Justice of Appeal



Irene Mulyagonja

Justice of Appeal