

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 246 OF 2014**

**1. ALAWI SEKANDI**

**2. SARAH SSOZI ::: APPELLANTS**

**VERSUS**

**UGANDA ::: RESPONDENT**

*(Appeal from the judgment of Hon. Justice Joseph Murangira in Criminal Appeal No. 29 of 2014; also arising from the Judgment of Her Worship Esta Nambayo in Criminal Cause No. 173 of 2012)*

**CORAM: HON. JUSTICE GEOFFREY KIRYABWIRE, JA**

**HON. JUSTICE CHEBORION BARISHAKI, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF COURT**

This is a second appeal from the judgment of the High Court which upheld the conviction of the Chief Magistrate's Court which convicted the appellants of the offence of obtaining money by false presence contrary to section 305 of the Penal Code Act.

The appellants filed this appeal against conviction and sentence on the ground that "*the learned trial Judge erred in law by failing to re-appraise evidence before the trial court and thereby wrongly upheld conviction imposed upon each appellant.*"

**Background**

The 1<sup>st</sup> and 2<sup>nd</sup> appellants are mother and son. The facts of the case as accepted by the Chief Magistrates' Court are that the complainant paid for a plot of land at church zone- Kabowa. The land was being sold to him by Alawi Sekandi, the 1<sup>st</sup> appellant and also a son to the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant together with Kevin Kazibwe and

Serunkuuma Steven signed as witnesses to the sale. The first payment of 3,000,000/= was made to the 1<sup>st</sup> appellant and a sale agreement was executed. The second installment was of 10,000,000/= and was also paid to the 1<sup>st</sup> appellant in the presence of the 2<sup>nd</sup> appellant. The third installment was paid to the 2<sup>nd</sup> appellant in absence of the 1<sup>st</sup> appellant. The complainant made three payments in total. The total cost of the said land was 25,000,000/=.

### **Representation**

At the hearing of the appeal, Mr. Magambo Victor appeared for the appellants while Ms. Joanita Tumwikirize appeared for the respondent.

### **Submissions of the appellant**

Counsel submitted that the trial court did not pronounce itself on law and procedure with regard to hearing the evidence of PW1. At the trial, PW1 was called, examined and cross examined by the appellants. Counsel Muhwezi then appeared for the appellant and sought to recall PW1 for cross examination but the trial Magistrate denied the request. Counsel relied on **Serwano Mawanda Vs Regina Criminal Appeal No. 141 of 1961** on the notion that there should be evidence of intent to defraud and submitted that the appellate Judge failed to make a finding that the prosecution failed to prove that false pretense operated in the mind of PW1. In addition, the appellate Judge failed to make a finding that the trial court received the testimony of PW1 the second time illegally after three months of his first testimony. That section 136 and 137 of the Evidence Act provides for the procedure of examination in chief, cross examination and re-examination and the trial court had discharged its duty in respect of PW1 on 15/6/2012. The other evidence he gave on 2/10/2012 should not have been considered by the trial court.

Counsel submitted that there was no corroborating evidence connecting the appellants to the offence of obtaining money by false pretense. He relied on the decision in **R vs Baskerville (1916) 2 KB 358** that corroborative evidence must be independent testimony

which connects the accused with the crime. He argues that it was a mistrial and miscarriage of justice for PW1 to testify afresh after his record of evidence had been taken by court four months earlier. That the trial court became *functus officio* by its ruling delivered on 3/2/2012. He relied on **R Vs Jackson (1953)1 ALL ER 872** on the notion that failure to give evidence is not corroboration.

Further, that the learned appellate Judge did not point out sufficient evidence to show that each appellant associated with the other for unlawful purpose of common intention of intent to defraud.

### 10 **Submissions of the respondent**

In reply, counsel for the respondent submitted that the learned judge properly re-evaluated the evidence and came to a proper conclusion in dismissing the appeal because it had no merit. As regards intention to defraud, counsel submitted that the complainant, on requesting to have the chairman present, was told that the chairman had died which was not true. The chairman testified as PW4 and stated in his testimony that he had seen the agreement made with the appellants on which the 15,000,000/= was paid and had also witnessed the other sale on the same land to different people. That this kind of conduct can only be inferred to having intention to defraud the complainant.

Counsel submitted that the prosecution proved all the ingredients of the offence of obtaining money by false pretence and were rightly convicted by the trial and appellate court.

### 25 **Court's consideration of the appeal**

As a preliminary matter, we note that this is a second appeal. The role of this court as a second appellate court is laid down under **Rule 32(2) of the Judicature (Court of Appeal Rules) Directions** which provides that;

30 ***“On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn***

***by the trial court, but shall not have discretion to hear additional evidence.”***

This Court is therefore obliged to appraise the inferences of fact drawn by the trial court.

5 We also recall the provisions of **Section 45 of the Criminal Procedure Code Act**, which is the applicable law concerning appeals from the High Court in the exercise of its appellate jurisdiction. It provides;

***Second appeals***

10 ***“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.”***

15 The effect of this provision is to bar appeals on matters of fact or matters of mixed fact and law. The Supreme Court has distinguished clearly the duties cast on a first appellate and on a second appellate court in the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997** thus;

20 ***“We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. 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***  
25 ***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***  
30 ***appellate Court must be guided by the impressions made on the Judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which***

5 **may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See *Pandya v. R* [1957] EA 336, *Okeno v. Republic* [1972] EA 32 and *Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985* at page 5.**

10 Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 33(i) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles: See *P.R. Pandya v. R* (supra), *Kairu v. Uganda 1978 HCB 123*....”

15 Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied, (i.e. to re-examine and re-evaluate the evidence, and come to its own conclusion), were properly applied and if it did not, for it to proceed and apply the said principles.

20 The appellant’s argument is that the appellate Judge failed to make a finding that the trial court received the testimony of PW1 the second time illegally after three months of his first testimony. The proceedings of the Chief Magistrates Court on page 48 to 49 of the record shows that the appellants appeared before the chief magistrate and the charges were read to them and they pleaded not guilty. At that point, the appellants were unrepresented and after  
25 PW1 testified, the appellants cross examined him themselves and the matter was adjourned to 3/2/2012. On that date, counsel for the appellants/accused was present and requested to cross examine PW1 but the trial Magistrate denied and stated that;

30 **“Accused never told court he had counsel if he had done so, court would have reserved the cross-examination. He finished his cross-examination. It is poor practice to re-open cases when accused deems it necessary to engage counsel. Application denied.”**

The trial magistrate was transferred and could not finish the case. The new magistrate did not start afresh but continued with the proceedings. On page 52 of the record, the state prosecutor informed court that there was an amended charge sheet and the accused persons pleaded to the amended charge sheet after the charges were read to them. Counsel for the accused/appellants applied to court to have PW1 recalled. The matter was adjourned and on 2/10/2012, PW1 was recalled after both parties agreed that he be recalled to enable counsel for the appellants to cross examine him (PW1). After his testimony, counsel for the appellants cross examined him.

Section 100 of the Magistrates Courts Act provides that;

***“100. Power to summon material witnesses or examine person present.***

***Any magistrate’s court may, at any stage of any trial or other proceeding under this Act, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and reexamine any person already examined, and the court shall summon and examine or recall and re-examine any such person if that person’s evidence appears to it essential to the just decision of the case; but the prosecutor or the advocate for the prosecution or the defendant or his or her advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time, if any, as it thinks necessary to enable that cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness.”***  
**(Emphasis ours)**

From the above section, it is quite clear that the trial Magistrate acted within section 100 of the Magistrates Courts Act to recall PW1 to testify again. In addition, PW1 was recalled by consent of both parties and the appellants did not object to PW1 testifying again. The learned

appellate Judge carefully re-evaluated the evidence on record. The appeal Judge held that;

5 ***“As I have stated hereinabove in this judgment that I have re-evaluated the prosecution evidence on record, certainly I am satisfied that the trial Chief Magistrate properly evaluated the evidence on the record of appeal and came to the right decision, therefore, I do not see any reasons on which to fault the trial Chief Magistrate on grounds 1 and 10 2 of appeal. In the result, I find that the submissions of counsel for the appellants on the said grounds of appeal fell short to discredit the prosecution overwhelming evidence against the appellants.”***

15 We reiterate our earlier position that this court, being a second appellate court, need not re-evaluate the evidence except in cases were the 1<sup>st</sup> appellate court did not exercise its duty. (See S. 33(i) of the Criminal Procedure Act.)

20 We have carefully scrutinized the judgment of the appellate court and the evidence on record. We see no error on the part of the learned appellate Judge. We find that the learned appellate Judge rightly found that there was intention to defraud on the part of the appellants. They had no intention of selling the said land to PW1 as seen from the evidence of all the prosecution witnesses and as such, we find no reason to interfere with the finding of the trial court and the High court on appeal. This appeal has no merit and is accordingly 25 dismissed.

Dated this 9<sup>th</sup> day of July 2019

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**Hon. Justice Geoffrey Kiryabwire, JA**

Hon. Justice Cheborion Barishaki, JA

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Hon. Justice Stephen Musota, JA.

9/7/19.

Appellants advised  
Mr. Mwangi of the appellants.  
Mr. Mwangi of the appellants.  
Served: clear.

Copy: Judgment delivered in the presence of  
the above. ~~\_\_\_\_\_~~ 9/7/19