THE REPUBLIC OF UGANDA

IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT, AT KOLOLO

CRIMINAL APPEAL NO.028 OF 2019

(Arising out of Anti-Corruption Division Criminal Case No 00 355 of 2018)

BUSALE OBEN ALIAS TUMWESIGYE **APPELLANT**

VERSUS

UGANDA :: **RESPONDENT**

BEFORE THE HON. JANE OKUO KAJUGA J

JUDGEMENT

This is an appeal from the decision of the Chief Magistrate sitting at the Anti-Corruption Division delivered on 22nd November 2019 in which the Appellant was convicted on the charge of Personating a public officer c/s 17 (b) of the Anti-Corruption Act (Constituting Count 1) and Obtaining money by false pretense from Atulinda Gad c/s 305 of the Penal Code Act (constituting Count 3 on the charge sheet)

The case for the prosecution was that the Appellant in the months of January and March 2018 at Mbarara Weighbridge, falsely presented himself as a person employed by the Public Service as a Uganda National Roads Authority (UNRA) weighbridge operator and received money from drivers in order to allow them bypass the weighbridge without having their trucks weighed. Two of these drivers were Sesimba Daraus and Atulinde Gad from whom he allegedly obtained money worth Ushs 50,000 and 30,000 respectively. This is the foundation for the charges of obtaining money by false pretenses. The prosecution contended that he obtained the money from the drivers with intent to defraud them.

The Appellant was tried and convicted on the 22nd November 2019 and sentenced to 12 months' imprisonment on count 1 and 12 months' imprisonment on Count 2, sentences were to run concurrently. He was acquitted on the remaining count.

The facts of this case as drawn from the evidence before the trial Court are hereby summarized as follows:

That one Jackson Byarugaba, working as a weighbridge operator at Mbarara Station received several reports from truck drivers to the effect that a man who drives a white Ipsum UAQ 001V was posing as a member of staff of UNRA at the weighbridge and allowing the drivers to bypass the weighbridge, contrary to the law. He did this in exchange for a fee. The man was described as being short and dark. Some of the drivers who had complained were Sesimba Daraus and Atulinde Gad.

On 23rd March 2018, a white Tata truck was impounded and returned to the weighbridge. The driver, Senkasi Shafiq protested that he had spoken to a staff member called Oben and been allowed to bypass the weighbridge. An operation was carried out by the patrol team, leading to impounding of the Ipsum, then the arrest and subsequent prosecution of the accused.

Prosecution led evidence of five witnesses:

1. PW1, Jackson Byarugaba, the weigh bridge operator at Mbarara and complainant in the case
2. PW2, No. 33546 Katushabe Sula, a police officer attached to Mbarara Police station and part of the police patrol that arrested the accused
3. PW3, Nogwa Lauben, also a police officer attached to Mbarara Police station and part of the patrol with PW2
4. PW4, No. 29166 D/Cpl. Tukei Ismail, attached to investigations and compliance at UNRA
5. PW5, Aturinda Gad, a truck driver who met the accused who introduced himself as an employee of UNRA and allowed him to go if he could pay 30,000/= He later identifies the accused as the person he spoke of.

The appeal is based on four grounds, summarized here below:

1. That the trial magistrate erred in law and fact when she failed to properly evaluate the evidence as a whole thus occasioning a miscarriage of justice
2. That she erred in fact and law when she held that the appellant had been properly identified as an impersonator thus occasioning a miscarriage of justice
3. That she relied on hearsay evidence thus arriving at a wrong conclusion
4. That she passed an illegal, harsh and excessive sentence thus occasioning a miscarriage of justice.

Both the Respondent and the appellant filed written submissions.

Counsel for the appellant contends that the prosecution did not adduce evidence to prove the charges to the requisite standard. He argued **grounds 1, 2 and 3** together and his position can be summarized as follows:

1. **Identification**: That PW 5 did not properly identify the accused as it was at night and conditions did not favor proper identification. He did not know the accused before. No identification parade was held.
2. **Circumstantial evidence**: Court did not subject this evidence to close scrutiny. PW1-PW4 never saw the accused commit the offences but acted on information from the drivers. PW 5's evidence was not corroborated. Circumstantial evidence was too weak to sustain a conviction.
3. **Hearsay evidence**: The evidence of PW 1, 2 3 and 4 was hearsay and therefore unreliable.
4. **Consideration of prosecution case in isolation of the defence evidence**. That the evidence of the accused denying his involvement was not considered i.e. that he did not know PW5, that one Moses had been driving the car and he was a fat man a bit light chocolate colour in complexion, that he did not know where the weighbridge was and had never passed there.

As regards **Ground 4 (four),** Counsel for the appellant contended that the sentence was illegal because the Magistrate did not take into account the period spent by the accused on remand in arriving at the custodial sentence. This contravened Article 23 (8) of the Constitution.

Also, that the sentence was harsh and excessive because the court did not impose the option of a fine. Further that the Magistrate branded the accused as "no ordinary suspect" because of the unproven allegation that he had during the course of trial been arrested over similar offenses"

The appellant prayed that this appellate Court finds merit, allows the appeal, quashes the conviction and sets aside the sentence against the appellant.

Counsel for the Respondent on the other hand argued that the Chief Magistrate properly evaluated the evidence. The arguments are summarized as follows:

1. **That identification was proper**: Failure to carry out an identification parade was not fatal as there was other evidence of identification. The accused was properly identified by PW5 who interacted with him during the negotiations, the apt description of the appellant and his car and the fact that he was found in the same car by PW2 and PW3 and finally linked to it by PW4.
2. **Corroboration**: That there was sufficient corroboration of the evidence of PW5, i.e. the complaints lodged with PW1 by drivers and description of the man and the car, the connection of the accused to the Ipsum as he had been seen in it before he offered the money, PW 1 himself had seen the vehicle in issue at the weighbridge before, that PW 2 had secured from the white truck driver, the description of the ipsum and the accused, the evidence that accused took off when told that he was wanted for impersonation,.
3. **Circumstancial evidence**: That there was direct evidence of PW 1 to PW 5 and not all evidence was circumstancial. The evidence was incompatible with the innocence of the appellant
4. **Hearsay evidence**: That the trial court did not rely on hearsay evidence.
5. **Sentence**: The sentence was not illegal as the remand after conviction did not constitute the period referred to in Article 23 (8) of the Constitution. Neither was it harsh and excessive.

She prayed for dismissal of the appeal

RESOLUTION OF ISSUES

This is a first appeal and as such, this court is enjoined to carefully and exhaustively re-evaluate the evidence as a whole and make its own decisions on the facts **(See cases of Kifamunte Henry Vs. Uganda SCCA No, 10 of 1997 and Bogere Moses and Anor vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997**)

In **Kifamunte's case**, the Supreme Court of Uganda stated as follows:

"We agree that on 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 the 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 judgement appealed from but carefully weighing it and considering it"

Being mindful of the above, and the fact that I did not have the opportunity to see the witnesses testify, I proceed to review the evidence that was adduced before the trial court and make up my own mind on whether the offense of personation and obtaining money by false pretenses were proved by the facts to the requisite standard and whether the judgement of the lower court is proper.

I have considered the record of proceedings and the judgement of the lower court, examined the exhibits tendered in this case and the submissions filed before this court.

Grounds 1, 2 and 3

An appellate court must establish whether the trial court considered the totality of the evidence to determine whether essential elements of a crime have been proved beyond reasonable doubt. **(SCCA No 15/2014: Mumbere Julius Versus Uganda)**

It is the finding of this Court that there were several factors linking the appellant to the crimes charged. These were evaluated by the trial Magistrate in her judgement as including,

1. The evidence of PW 1 regarding the complaints he had received from drivers that a man driving an Ipsum Vehicle Reg. No UAQ 001 V was allowing drivers to bypass the weighbridge after paying him some money. Specifically, on 23.3.2018, when he interrogated the driver of a white TATA truck, he said he had been cleared by UNRA staff called "OBEN"
   The man was described as a short, dark, slightly big sized man

   PW 1 had himself seen the said Ipsum around the way bridge.

2. That when PW2 and 3 tracked the Ipsum on the instructions of PW1, they got a man who gave them a permit as identification in the names of Tumwesigye Moses. He ran away when they told him he was wanted for impersonation. They later saw the very man at police claiming the ipsum which they had impounded and were able to confirm his real names as Busale Oben (using the National ID).

3. Evidence of PW 2, PW 3 and PW 5 confirmed that the accused fitted the description of the man in the reports.

4. That PW 5 who spoke with the accused directly during the negotiations was able to identify him as the one who identified himself as a UNRA staff, allowed him bypass the weighbridge for a negotiated a fee of Ushs. 30,000/=

This court is of the view that there was overwhelming evidence of identification, and other direct and circumstancial evidence that linked the accused to the crimes for which he was convicted and that the trial Magistrate cannot be faulted in arriving at the conclusion of guilt. The evidence considered as a whole, can only lead to this conclusion.

It is clear that the conduct of the accused upon learning that he was wanted was not that of an innocent person. He ran away. Why would he do that upon learning what the crime was? Why would he have to run if indeed he was Tumwesigye Moses as per the identification he gave PW 2 and 3 and had never been at the weighbridge at all as he alleged? He hid his right identity in order to escape the

law but found no way out when his car was impounded. He was arrested when he came to claim it and when he was identified as the OBEN that had been reported about. This is one of the factors that the Magistrate rightly relied on to arrive at a conviction.

The use of the name Tumwesigye by the accused is first raised by PW 2 and PW3. This is further corroborated by PW 5 who testified that the man who introduced himself as UNRA staff had said he was called Tumwesigye. This is the same man that he later identified by photo. It was Oben! It's clear that he was using the fake identity to avoid being caught!

The appellant's argument that an identification parade was necessary and that failure to conduct the same meant that the aspect was not proved is not supported by law. In **Baluku Samuel and another Versus Uganda** (SC Criminal Appeal 21/2014), the Supreme Court disregarded evidence from a faulty identification parade but went ahead to find that the accused had been properly identified at the scene of crime. The court considered that there had been adequate time for proper identification at the scene, and the crime had taken place in broad daylight.

The identification evidence was properly evaluated by the magistrate. At page 6 of her judgement she finds that:

"He was positively identified by PW 2, 3 and 5 as the person who was driving UAQ 001V, and who was holding out as a UNRA official and who PW 5 positively identified as the person who took 30,000 shillings from him to pass the weighbridge without being disturbed"

Whereas she did not evaluate the factors favoring correct identification and the basis on which she arrives at the conclusion of positive identification, this did not occasion a miscarriage of justice. Under cross examination, PW 5 stated that they negotiated the amount he was to pay and they were together from 9-9.30 pm. This was sufficient time for him to be able to recognize the appellant. It would be ridiculous to conclude that PW 5 spoke to a man he could not see, and proceeded to negotiate with him and then give him money without seeing the person at all! Further, before he gave him the money he was at the Ipsum at the bridge. I agree with the Respondent that there was sufficient identification at the scene of crime.

The Respondent argues that there was sufficient evidence of corroboration and I agree with this position. The various bits of evidence all corroborate each other. The evidence of PW 5 finds sufficient corroboration from that of PW 1, PW 2, Pw 3 and PW4. This evidence has already been set out and I will therefore not dwell on this aspect.

Whereas it is true that there was no witness to the negotiation or the payment of Ushs 30,000/=, there is no law that prohibits a court from convicting on the strength of the evidence of a single witness. The trial Magistrate clearly believed this aspect of the evidence to be true since the rest of the evidence was fully corroborated. Again, she cannot be faulted in this regard. This court can not interfere with her findings relating to the credibility of the witness as she had the opportunity to see the witness and this court did not.

The appellant argues that the trial magistrate relied on circumstancial evidence which was not sufficient to prove the participation of the accused. The inferences that he alleges to have weakened the conclusion of guilt was the poor conditions of identification and need for an identification parade. Having addressed this issue of identification in detail and found that it was proper, this ground cannot stand. Also as argued by the respondent, this was not a case depending exclusively on circumstancial evidence.

Lastly regarding hearsay evidence, the test to be applied is if the trial court relied on purely hearsay evidence to reach its conclusion. If not, then the aspects of hearsay are severable **(Ramadhan Situma and 2 others versus Uganda** (UGSC 9/2000) and it cannot be concluded that there was a miscarriage of justice.

Pw 1's evidence of reports received from drivers in his role as weighbridge operator do not constitute hearsay. He relays to court the facts as were brought to his attention by various drivers. This is information he himself heard.

PW 5, one of the drivers he referred to as having reported to him testified in court. His evidence was relied upon by the court. It did not constitute hearsay. Neither did the evidence of PW 2 and 3 in material particulars.

PW 4's evidence contained a lot of hearsay, but is severable. The vital evidence court gets from him is that of interviewing the accused and establishing that he was called Oben Busale. He retrieved the national identity card which was

tendered in court as an exhibit. This evidence was properly relied upon and corroborated.

Evaluation of defense evidence: I am satisfied that the learned trial magistrate considered the defence case as against the prosecution evidence and disbelieved the defence case. At page 3 of the judgement she considers the accused's defence that he did not know where the weighbridge was and denied having any uniform or identity card with which to identify himself as a UNRA officer. In holding against this argument the trial magistrate observed that it was immaterial if he did not have a uniform or an identity card for UNRA. The prosecution evidence of PW 5 was considered and believed as against that of the accused.

At page 5 of the judgement she states that the accused denied the allegations against him because he had never met Darius or Gad in his life. She disregarded the evidence because she was satisfied by the prosecution evidence of identification. I am unable to find that the Court considered the prosecution evidence in disregard of the defense case.

Grounds 1, 2 and 3 of the appeal fail.

GROUND 4

Illegality of sentence

I agree with the appellant that the sentence passed by the lower court was illegal for not taking into consideration time spent on remand as required by Article 23 (8) of the Constitution of Uganda which reads as follows:

"where a person is convicted and sentenced to a term of imprisonment for an offense, any period he or she spends in lawful custody in respect of the offense before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

The record of proceedings shows that after reading judgement and convicting the appellant on 22nd October 2019 the court remanded the convict till 25th of November 2019. This period should have been taken into consideration. It wasn't. This constituted an illegality in law.

The use of the term "shall" in Article 23 (8) is mandatory. (**Rwabugande Moses versus Uganda** (Supreme Court Criminal Appeal No 25/2014), **Naturinda Samson versus Uganda** (Supreme Court Criminal Appeal No 25/2015)

The Respondent argues that the time does not matter because he was remanded after the completion of the trial.

I disagree with this position as trial is completed after sentence. The three days on remand should have been considered. Nowhere in the judgement is there proof that this was done.

This renders the sentence an illegality.

Harshness and excessiveness of sentence:

The highest penalty for count 1 is not more than 3 years in prison or a fine of not more than 72 currency points. The penalty for obtaining money by false pretenses is imprisonment for five years.

The trial magistrate had the power to impose a fine on count one but this was not mandatory. Failure to impose the option of a fine on count 1 does not constitute harshness or excessiveness. The imposition of 12 months' sentence on both counts, running concurrently was not harsh and excessive in the circumstances.

I however accept that the sentence was an illegality for not considering time spent on remand. The High Court has unlimited original jurisdiction in all matters under the Judicature Act and can set aside and impose an appropriate sentence on appeal.

I accordingly set aside the sentence for illegality.

I proceed to substitute the sentence. The trial Magistrate's intention was to impose imprisonment of 12 months on each count. I will not interfere with that.

The sentence of 12 months on each count is upheld, minus the period spent on remand of three days. He will serve 362 days from the conviction date.

I so order

Jane Okuo

Judge of the High Court