THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO 29 OF 2018

(ARISING FROM CRIMINAL CASE NO. 758 OF 2017 KCC COURT)

SUNDAY ALEX ---------- APPELLANT

VERSUS

UGANDA --------- ---------- RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

Brief Facts:

The Appellant was charged before the Magistrate Grade I City Hall, with the offence of obtaining money by false pretences contrary to Section 305 if the Penal Code Act.

The case of the prosecution was that on the 15th day of February, 2016, at Dundu Trading Center, Kisaasi Central Zone, Kyanja Parish, in Nakawa Division, Kampala District, with intent to defraud, the Appellant obtained Shs. 12,000,000/- from Katushabe Gloria, by falsely pretending that he would buy her a plot of land, whereas not.

The Appellant (then Accused) denied the charge.

Upon hearing both the Prosecution and defence, the trial Magistrate convicted the Appellant as charged and sentenced him to a term of eight months imprisonment on 07th March, 2018.

Court also ordered the Appellant to pay the Complainant Shs. 12,000,000/- as compensation for the loss incurred or else execution would issue in accordance with S.182 (i) of the Magistrates Court Act.

The Appellant appealed against the judgment and orders on the following grounds:-

1) The trial Magistrate erred in law in convicting the Appellant on the basis of an illegal transaction.

2) The trial Magistrate erred in law and fact in convicting the Appellant with no proof of receipt of the alleged funds.

3) The trial Magistrate erred in law in shifting the burden of proof to the Appellant, hence reaching a wrong conclusion.

4) The trial Magistrate misdirected herself on evaluation of evidence hence coming to wrong conclusions occasioning a miscarriage of Justice.

The appeal was called for hearing on 04.06.18. Ground 1 and 2 were argued separately, while ground 3 and 4 were argued together.

In determining this appeal, I bear in mind the duty of a first appellate court *"to review the evidence and consider the materials that were before the trial court and come to its own independent conclusion"* - See **Pandya vs. R [1957] EA 336**.

Decided cases have also established that "*where the trial court has erred, the Appellate Court will only interfere where the error has occasioned a miscarriage of justice. The Appellate Court has a duty to reevaluate the evidence of the trial court while considering facts, evidence and the law. The court can interferer with the findings of the trial court, if the court misapplied or failed to apply the principles applicable to the offence charged".*

Ground 1: **The trial Magistrate erred on law in convicting the Appellant on the basis of an illegal transaction.**

Counsel for the Appellant submitted that the gist of the matter is the allegation that Shs. 12,000,000/- was passed on to the Appellant from the Complainant.

He pointed out that in her evidence, the Complainant stated that **"on 05.02.15, the Appellant told her, he deals in land and agreed to help her purchase a piece of land and she gave him Shs. 12,000,000/- for that purpose"** - Page 3 of the record of proceedings fourth paragraph from the top.

And that the Complainant states that no agreement was executed.

It was Counsel's contention that, the law on the Sale of Goods Act provides that "*any transaction above the sum of Shs. 20,000/= must be reduced into writing".*

That this is mandatory and failure to do so amounts to a penal offence.

Therefore that the trial Magistrate erred to convict the Appellant on a basis of an illegal transaction after failing to evaluate the evidence and apply the law to the facts.

Further that, PW1 refers to PW2 in her testimony when she states that PW2 called the Complainant who had custody of the money to deliver it to PW3 Ezra Mugamba, a bodaboda rider; who is alleged to have delivered the money to the Appellant.

And that all three witnesses state that PW2 delivered the money to PW3.

However that, PW4 Sharon Ngabirano, the Supermarket Attendant allegedly trained by PW1 in mobile money business did not witness the transaction in writing.

In cross examination, PW4 states **"I did not see him sign anywhere after receiving the said money. I do not know what they were talking about**" – Page 7, second paragraph of proceedings third line.

Counsel then argued that, had the trial Magistrate considered the evidence, she would have dismissed the charge. The court was being used to sanction an illegality contrary to the principle in the case of **Makula International vs. Cardinal Nsubuga & Another [1982] HCB 11** where it was held that *"any illegality once brought to the attention of court at whatever stage, overrides all matters of pleadings including dismissal thereof".*

Counsel then emphasized that; it would not have mattered even if the Appellant had pleaded guilty. The charge should have been dismissed.

Court was urged to look at the evidence and the law and on that ground alone acquit the Appellant.

In reply, it was the argument of Counsel for the State that Counsel for the Appellant made reference to the Sale of Goods Act, without referring to a specific section that provides for that.

She referred to S.4 of the said Act, which provides *that "subject to the provisions of the Act, a contract between parties that may be of sale of any other transaction may be made in writing with or without a seal or by word of mouth".*

Counsel then asserted that the transaction between PW1 and the Appellant was by word of mouth which is recognized by law. Adding that the fact that no written agreement was executed does not make the transaction illegal.

Whether the Appellant was convicted on the basis of the illegal transaction.

It is evident that there was no written agreement between the Appellant and the Complainant. Both Counsel relied upon the provisions of the Sale of Goods Act to support their submissions. However, the Act is not applicable to the circumstances of the present Appeal on the ground that, it was repealed by the Sale of Goods and Supply of Services Act, 2017. And secondly, the Act did not relate to the sale of land since it did not define land to fall into the category of goods, although the Act of 2017 talks about the supply of services.

And as to **whether the alleged contract between the Complainant and the Appellant was illegal**, was not an issue that could be determined in criminal proceedings as the ingredients of the offence for which the Appellant was charged do not fall within the realm of a civil matter.

While the Appellant and the Complainant never executed an agreement, it did not affect the charges preferred against the Appellant.

The fact that there was no written agreement executed between the parties did not make the transaction illegal. *"Since a contract between parties that may be of sale or any other transaction may be made in writing either with or without a seal or by word of mouth".*

Ground of the Appeal cannot therefore be sustained for those reasons. However, I wish to observe that the Criminal Court ought not to have entertained a matter that was obviously of a civil and not criminal nature.

Grounds 2 and 3 will be dealt with together.

The trial Magistrate erred in law and fact in convicting the Appellant without proof of receipt of the alleged funds.

The trial Magistrate erred in law in shifting the burden of the proof to the Appellant hence reaching a wrong conclusion.

In respect of these grounds, it was submitted for the Appellant that this calls for evaluation of evidence as a first Appellate Court, as it is a trial court and should reach its own conclusion. And once the evidence is scrutinized, court will reach the same conclusion.

Counsel stated that PW7 did not state anywhere that the Shs. 12 million she refers to had been in possession of PW2.

She states on page 3 of the proceedings, second paragraph that "I agreed with the Accused that .... I give him Shs. 12 million which I had kept with my brother Agaba Emmanuel and it was brought by Mugarura Ezra.

Later, she says that she could not recall the date she handed over the money.

On the other hand, it is claimed that Agaba Emmanuel, the mobile money operator allegedly kept the Shs. 12 million over a long period of time. And it is the same person who says he handed over an envelope to Ezra Mugarura (PW3) one evening.

PW3 did not check the envelop before delivering it to PW1. He allegedly took the envelope and handed it over to PW1. But that PW1 counted the money before handing it over to the Accused (Appellant) and that the Accused put it in his pocket.

PW4 Sharon Ngabirwe who alleges to have been present when the money was delivered did not see the money.

Counsel then asserted that, the trail of evidence is suspect. The denominations of the money were not mentioned. There is a haze surrounding the evidence and it should have been resolved in favour of the Appellant, he argued.

Further that, there was no proof of receipt of the money availed to court. It is just uncoordinated pieces of evidence from PW1 – PW4.

Therefore that, court should look at the evidence and find that the Appellant did not receive the money and acquit him of the charges.

In respect of the third ground of shifting the burden of proof from the Prosecution to the Appellant, it was the submission of Counsel that at page 1 of the Judgment, the trial Magistrate having addressed her mind to the law and burden of proof and having cited the case of **Woolmington vs. Director Public Prosecutions [1935] AC 462** went ahead to misdirect herself on who bears the burden, on page 4 of the Judgment.

That she shifted the burden when she stated that **"on the contrary..."** page 4 paragraph 4 of the judgment from top).. and did not specifically refute what PW1 told court that **"he told her that he deals in land and they did not execute an agreement when she gave him the money in issue. He dwelt on how he had obtained the loan from Centenary Bank".**

It is true, Counsel pointed out that in his defence, (page 11 of the proceedings) the Appellant stated that he had obtained a loan from the Bank to facilitate his business. He is a business man.

However that, the conclusion of the trial Magistrate clearly shows bias and shifting of the burden.

And that while at page 5, first paragraph, **"the Accused did not refute what PW3 and PW4 told court that they saw him receive Shs. 12 million from PW1, or that he did not pick the complainants calls and he was a friend of the Complainant".**

The Magistrate's conclusion that the Accused pretended that he would get land from the Complainant was wrong. The Appellant could have kept quiet since he did not have the burden to prove anything. That this was not one of those cases where the burden shifts.

In response, Counsel fro the Respondent referred to the evidence of PW1, paragraph 2 of the proceedings, page 2, where the witness stated that "around 15.02.16, she agreed with the Appellant to help her purchase a piece of land and she gave him Shs. 12 million, which she was keeping with her brother PW3. That the money was brought by PW4 and she handed it over to the Appellant in the presence of PW3 and PW4.

And that PW3, Mugarura Ezra a bodaboda cyclist at page 5 of the proceedings, paragraph 5 states that "he was sent by PW1 to PW2, who counted Shs. 12 million, sealed it in an envelope and gave it to him to take to PW1.

That when he got to PW1's place, PW1 also counted the Shs. 12 million, gave it to the Appellant and the Appellant put the money in his pocket.

Counsel asserted that PW3 witnessed PW1 handover the money to the Appellant. Therefore that, this covers the submission that PW3 did not check what PW2 gave him to take to PW1.

PW4, the mobile money attendant (Ngabirwe) at page 6 of the proceedings stated that on that day, she saw a bodaboda ride bring money in a khaki envelope. PW1 received the envelope and counted the money and handed it over to the Accused who also counted it and left. Later, the Complainant told PW4 that the Accused was going to buy land for her.

Counsel then contended that, the Prosecution witness clearly brought evidence to court that proved the transaction between the Appellant and PW1 and also receipt of the said Shs. 12 million by the Appellant from PW1.

And that, contrary to the contention of Counsel for the Appellant that the trial Magistrate relied on uncoordinated testimony of the Prosecution witness, the evidence of the witness was consistent and without contradictions.

And that the Magistrate was therefore justified to rely on the evidence to convict the Appellant. The existence of the transaction had been proved.

Commenting about the alleged shifting of the burden of proof by the trial Magistrate, Counsel stated that, looking at page 2 of the judgment, the trial Magistrate clearly evaluated the evidence on record; looked at the ingredients of the offence and the testimony of the Prosecution witnesses. And that, by observing that the Appellant dwelt on getting a loan from the Bank did not mean that she required the Appellant to prove the case. But that, she relied on the fact that the evidence of PW3 had not been discredited by the Appellant in cross examination.

Counsel insisted that the evidence of PW3 at page 6 of the proceedings paragraph 2 that **"after handing over the envelope to the Complainant, she counted the money after getting if from the envelope and handed it over to the Accused. I saw Accused put the money in his pocket. I was paid my transport and I left"** was not controverted.

That this was evidence from an eye witness and the trial Magistrate was justified in arriving at her decision. Therefore the claims of bias by the Appellant are clearly speculative, Counsel emphasized.

Considering the ingredients of the offence with which the Appellant was charged, the burden was on the Prosecution to prove beyond reasonable doubt that the Appellant received the Shs. 12,000,000/- from the Complainant Katushabe. No agreement was executed between the parties to indicate what the Shs. 12,000,000/- was for and there was no acknowledgment of receipt of the said sum.

Looking at the evidence of the Prosecution witnesses, there were inconsistencies and contradictions which go to the root of the prosecution case. PW1 the Complainant could not recall the date on which she allegedly gave the money to the Appellant. While PW3 in whose presence the money is alleged to have been given to the Appellant claims the money was passed on 15.02.16; PW2 who says was keeping the money says that when PW1 requested for the money on 15.02.16, he asked for be given more time and passed on the money to PW1 three weeks later.

While PW3 the bodaboda man who was sent to pick the money from PW2 says he picked the money on 15.02.16. These contradictions, raised doubt as to whether the Appellant actually received the money.

It is trite law that grave contradictions which go to the root of the case will lead to the evidence of the prosecution being rejected. – Refer to **Alfred Tajar vs. Uganda Criminal Appeal 167/1969.**

I also agree with Counsel for the Appellant that the trial Magistrate misdirected herself as to whom bears the burden of proof when she commented that **"the Accused did not specifically refute what PW1 told court that the Accused told her that he deals in land".**

This was in total disregard of the principle of law that *"the burden of proof is upon the prosecution, to prove all the ingredients of the offence beyond all reasonable doubt, and that the burden never shifts except in some exceptional cases provided for by law".* - **Woolington vs. Director of Public Prosecutions [1935] AC 322.**

And that, *"it is not the Accused person to prove his innocence, but he only needs to raise a defence that may raise doubt in the mind of the court".*

The Appellant in the present case denied having got money from the Complainant. He explained how he got the house by getting a loan from Centenary Bank; it was up to the Prosecution to have disproved this evidence.

And as pointed out by Counsel for the Appellant and rightly so, the Appellant could have opted to remain silent.

The trial Magistrate's statement that **"the Appellant dwelt on getting a loan from Centenary Bank"** implies that the Accused was required to prove his innocence, which was erroneous.

The Appellant's evidence that he borrowed money from Centenary Bank as conformed by Exhibit DE_2 part of which he used to pay for the house as per agreement Exhibit DE_1 was ignored by the trial Magistrate. So was the Appellant's explanation that it was the Complainant who asked money from him after she got to know that he had got a loan from Centenary. And that it was after his refusal that PW1 claimed that the Appellant solicited money from her to buy land.

By ignoring the Appellant's defence entirely and shifting the burden of proof on to him, the trial Magistrate came to the wrong conclusion.

No intent to defraud the Complainant was proved by the Prosecution. The Appellant in the present case was convicted of obtaining money by false pretence for allegedly claiming that he was going to buy the Complainant land.

This was contrary to the principle established by decided cases that *"A statement of intention about further conduct, whether or not it be a statement of existing fact, is not a statement that will amount to a false pretence in criminal law".* – See **R vs. Dent [1975] 2 ALL ER 806 at page 807.**

The principle was confirmed in the case of **Uganda vs. Daudi Bosa [1977] HCN 235** where Sekandi J held that *"A person who obtaining money from fraudulently on promising to render services or to deliver goods cannot be convicted of obtaining money by false pretences or of obtaining credit by fraud, the reason being that a statement of intention about further conduct whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law".*

Based on the above authorities even if it had been proved that the Appellant had received money promising to buy land for PW1, it would still have been wrong for the trial Magistrate to convict him.

The trial Magistrate therefore misdirected herself in evaluation of the evidence and hence arrived at a wrong conclusion.

I wish to observe that, the legal framework that governed the alleged transaction was purely of a civil nature removing it from the realm of criminal law.

The trial Magistrate hence erred in law and fact in convicting the Appellant, and thereby occasioned a miscarriage of justice.

Sentence: Submitting about the sentence of eight months imprisonment given to the Appellant, Counsel stated that it was also an indicator of bias on the part of the trial Magistrate. He asserted that the Magistrate ignored the fact that the Appellant was a first time offender,

ignored the mitigating facts and even observed that the Appellant wasted court's time by going for full trial. That she was bent on giving a custodial sentence order of.

Compensation: Counsel pointed out that at page 6 of the judgment, while the Magistrate could have been right to order compensation, the fact that she had erred led her to even order execution.

Court was urged to allow the appeal, over turn the wrong conclusion arrived at by the trial Magistrate, quash conviction and sentence and set the Appellant free.

Counsel for the State on the other hand argued that the sentence of eight months imprisonment was justified. She stated that the offence with which the Appellant was charged under S.205 of the Penal Code Act carries a maximum sentence of five years. Therefore that eight months was very lenient.

As regards the order for compensation, Counsel for the State was of the view that it was justified as S.197 (1) of the Magistrate Courts Act empowers a trial court to order substantive compensation that may appear just in its discretion; where it appears that any person has suffered material loss as a consequence of the offence.

The compensation is in addition to the lawful sentence.

Therefore that, the trial Magistrate was right to order compensation of Shs. 12 million after convicting the Appellant.

Counsel the prayed court to dismiss the appeal and uphold the conviction and sentence.

In rejoinder, Counsel for the Appellant reiterated the earlier submissions and prayers.

Sentence of eight months: Having already found that the Appellant ought not to have been convicted, it follows that the sentence of eight months cannot stand.

I agree with Counsel for the Appellant that the Magistrate's comment that **"the Accused wasted court's time by going for a full trial"** was an indicator of bias and was uncalled for.

The law allows any person who has been charged with an offence to be heard and to present his/her defence. No one ought to plead guilty to any charge as a matter of course. Pleas of guilty should only be entered in circumstances where an accused actually admits that the committed an offence.

As matters stand in this case, the case should have been of a civil nature and it would have been unjust for the Appellant to plead guilty instead of opting for a full hearing which is a right.

If the conviction had been upheld, I would have agreed with Counsel for the State that the sentence of eight months as opposed to the maximum of five years was lenient.

Compensation: As regards the order for compensation, it is true that under S.197 (1) of the Magistrates Court Act, a Magistrate Court has powers to order compensation, where a Complainant has suffered material loss in consequence of the offence committed, in addition to any other lawful punishment as the court deems fair and reasonable. However, the compensation is recoverable by civil suit.

In the present case, the trial Magistrate ordered the Appellant to pay the Complainant Shs. 12,000,000/- on failure of which execution would issue!

The order for compensation would have been proper if the conviction had been proper as the court had the power to make the order under S. 197 (1) Magistrates Court Act. But this court has already found that the conviction was improper as this should have been a civil matter. ***"Parties who make promises that do not materialize, should be left to settle their disputes in a civil court"***- **Terrah Mukiwa vs. R [1966] EA 425.**

But it was also wrong for the Magistrate to order execution to issue if the Appellant failed to pay the compensation. The order for execution to issue was in total disregard of S.197 (1) Magistrate Court Act, which as already indicated is to the effect that ***"the compensation is recoverable by civil suit".***

For all the reasons set out in this judgment, the appeal succeeds and is accordingly allowed.

The conviction of the Appellant is quashed and the attendant orders are hereby set aside. The Appellant is hereby set free forthwith.

The compensation ordered by the lower court if paid should be refunded to him.

FLAVIA SENOGA ANGLIN
JUDGE
15.08.18