THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CRIMINAL DIVISION)

CRIMINAL APPEAL NO. 50 OF 2016

(ARISING FROM BUGANDA ROAD CRIMINAL CASE NO. 663 OF 2014)

KIRYA ROBERT ---------- APPELLANT

VERSUS

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

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

This appeal arises from the judgment of His Worship Jameson Karemani, then Chief Magistrate of Buganda Road Court, delivered on 02.05.16, whereby the Appellant was convicted on eleven (11) counts that included conspiracy to commit a felony, conspiracy to defraud, forgery, ultering a false document, impersonation and obtaining money by false pretences all contrary to the Penal Code Act.

The Appellant was sentenced to imprisonment on the several counts to terms of imprisonment ranging from one (1) year, three (3) years to six (6) years.

He was also directed to pay compensation of Shs. 100,000,000/- to the complainant.

The background to the appeal is that the Appellant and three others were charged on twenty one (21) counts of the above mentioned offences. The Appellant was acquitted on ten (10) counts and convicted on eleven (11) counts.

Aggrieved by the decision of the trial Magistrate, the Appellant appealed to this court on the following grounds:-

1) The trial Magistrate erred in law and fact when he convicted the Appellant relying on documents placed on record for identification but not admitted as Exhibits, hence leading to a miscarriage of justice.

2) The trial Magistrate erred in law and fact when he wrongly evaluated the evidence and came to a wrong conclusion.

3) The trial Magistrate erred in law and fact when he passed a harsh sentence of six (6) years imprisonment against the Appellant and also directed him to compensate the complainant company with Shs. 100,000,000/-.

4) The trial Magistrate erred in law and fact when he failed to properly consider the mitigating factors in passing sentence and relied so much on aggravating factors.

The Appellant then contended that the whole judgment and orders were atravesty and caused a miscarriage of justice. He prayed court to allow the appeal and quash the conviction, sentence, and orders and or that they be revised.

The appeal was heard on 24.05.18. Both parties made oral submissions.

Ground 1: Relying on documents placed on record for identification but not admitted as Exhibits.

Counsel for the Appellant relied on the case of **Okwanga Anthony vs. Uganda [2001-2005] HCB 36 at 38** for the holding that ***"there is a distinction between Exhibits and Articles marked for identification. The term "exhibits" should be confined to articles which have been formally proved and admitted in evidence".*** In the instant case, since the makers of the statements denied having made them, and they were not proved by the Police Officer who recorded them, they could only be referred to as articles of identification and not exhibits.

It was contended that, in the present appeal, all documents relied upon by the lower court were marked for identification as seen on pages 119-166 of the record of appeal. At page 132 of the record of appeal, it is apparent that identification document no. 2, the alleged loan agreement

between the Appellant and the complainant was never tendered in court as an Exhibit. Counsel then argued that the lower court should therefore not have relied upon it in reaching its conclusion.

Further that, the alleged bank statement and forged cheques were placed on record as identification documents – page 119 of the record and marked as P_1D_1. And that, whereas the Appellant told court that he had no knowledge of the documents, he was never cross examined by the prosecution in relation to those documents allegedly executed by him.

That these documents could therefore be a creation of the prosecution to make up evidence against the Appellant, since they were never admitted as Exhibits. And that the lower court ought to have disregarded them.

Referring to pages 14 and 144 of the record, the letter to the Electoral Commission requesting for verification of the voters cards alleged to have been submitted by the Appellant while applying for the loan. The letter is said to have been issued by Bogere Ronald, who never appeared as a witness to confirm that he issued the letter. Instead Pw5 Enock Kigamirwa gave evidence in respect of the said letter although he was not the author, and the documents were admitted for identification as ID_4 and ID_5.

None of the staff from the Electoral Commission appeared in court to confirm the alleged forged identification documents.

Further that, the receipts from Nation Water and Sewage Corporation as well as the identification card from Soroti Produce and Supplies were also tendered in court for identification.

Yet, Counsel argued, it is on the basis of all those documents that the court reached the conclusion that the Appellant uttered false documents and hence convicting him.

It was submitted in reply by Counsel for the Respondent that, the trial Magistrate did not rely on the identification documents to convict the Appellant. She referred to the judgment pages 7-32, contending that the trial Magistrate evaluated the evidence of all prosecution witnesses in respect of the different counts, and then convicted the Appellant. She

cited the case of **Simon Musoke vs. R [1958] EA 715** - where circumstantial evidence was discussed and court held that, ***"the evidence on file must be incapable of any other explanation upon any other hypothesis other than the guilt of the accused".***

She argued that, the trial Magistrate relied on circumstantial evidence in addition to the identification documents on record to convict the Appellant.

Referring to the alleged bank statement and forged cheques that were admitted in court, Counsel stated that they were in respect of counts 15 and 16. She referred court to judgment page 23-24 where counts 15 and 16 were resolved.

That Pw2 who was a Manager in charge of operations of Crane Bank who clearly testified that ***"he looked at the cheque and bank statement in issue and realized that they did not match the records. The color of the cheques were different from those of Crane Bank. The outlay of the cheques was different and the authorized signature is always drawn on two lines. – Page 43 proceedings".***

Counsel argued that it is upon that evidence that witness stated that the two cheques and bank statement before court were forgeries. And for that reasons the letter of request to which they responded formerly in regard to the cheques together with a genuine cheque leaf were admitted in evidence as Exhibit P_1.

Therefore that, the trial Magistrate was in order to convict the Appellant with ultering false documents in respect of counts 15 and 16.

Also that, the request letter to the Electoral Commission is in respect of count 13. That when the Investigating Officer told court at page 66 of the records that he wrote a letter to the Electoral Commission to verify the voter's identification in Opio George's name, the Electoral Commission verified and told him that the voter's identification in issue was not in their database.

It was asserted that, this information as told to court by the Investigating Officer was within his mandate and his evidence in that regard was not controverted. Therefore that it could not be ignored by

the trial Magistrate even if no one came from the Electoral Commission to tender in the letter.

Further that, Opio George was in court during the trial but denied ever having applied for the loan or ever owning the identification together with the National Water and Sewage Corporation tax invoice in respect of count 12 and also the identification from Soroti Producers and Suppliers in respect of count 15.

Counsel argued that, this was sufficient evidence to prove that whatever documents were uttered to Pw1 and Pw3 were forgeries. And that, that was the finding of the trial Magistrate as high lighted in his judgment pages 22-24.

Counsel insisted that the trial Magistrate properly evaluated the evidence and found that the Appellant uttered false documents.

From the outset, I wish to observe that in criminal cases, ***"the burden to prove the offences preferred against the accused person/now Appellant lies on the prosecution and the standard of proof is beyond reasonable doubt"*** – Refer to **Woolington vs. Director of Public Prosecutions**.

And further that, ***"this being a first appeal, this court has the duty to re-appraise the evidence on record and arrive at its own independent conclusions on issues of fact as well as of law. However, in cases of conflicting evidence, the Appellant Court has to make due allowance for the fact that it has neither seen nor heard the witnesses"*** - See **Selle vs. Associated Motor Boat Co [1968] EA 123** and **Begumisa and 3 Others vs. Kibebage SCCA 17/2002.**

In the present case, it is apparent from the record that the Appellant was convicted of the offence of ultering false documents, forgery and impersonation. The trial Magistrate based his finding of conviction on documents presented to court for identification purposes but which were never exhibited and on oral testimonies of the prosecution witnesses. – Refer to pages 119-166 of the record of appeal.

- Interim bank statement and copies of cheques from Crane Bank Ltd bearing the stamp of Acacia Finance Ltd marked as P_1D_1- Pages 119-124.

- Letter of introduction of Opio George from Mawanga Local Council, I, Umeme Tax invoice of Opio George of Ndejje Ssabagabo, a photocopy of the certificate of title in respect of land comprised in Kyadondo block 257, Plot 917 in the name of Opio George, identity card of Soroti Produce and Suppliers in the name of Opio George, Mortgagors approval and consent of Opio George. Legal mortgage securing Shs. 130,000,000/- between Opio George and Acacia Finance Ltd, Loan agreement between Acacia Finance Ltd and Opio George, tax invoice of National Water and Sewage Corporation- P_1D_2 - Pages 125-141 of the record.

- Local purchase order addressed to Mmaak Trading Co. Ltd- attention Kyarisima Margaret, letter from State House addressed to Mmaak Trading Co. Ltd – P_1D_3 - pages 142-143 of the record.

- Letter from Police to Chairman Electoral Commission about alleged forged voter's card, letter from the Electoral Commission to the Divisional CID Officer, Jinja Road- P_1D_4 - pages 144-145 of the record.

- Letter from Uganda Police to the Registrar of Titles, KCCA, Kampala, copy of the certificate of title in respect of Kyadondo Block 257, Plot 917, in the names of Ishaq Kayanja marked as forged, transfer from, High Court Execution Division Court order between Bwamika Deogracious and Opio George, transferring the said title to Othieno Ochieng Clement and, other attachments – P_1D_5 – pages 146-162 of the record.

- Specimen of correct stamp, signature, headed letter and identification of the chairman Mawanga LCI, Buziga Parish, Makindye Division – P_1F_6 – pages 163-166 of the record.

Looking at SS. 342, 343 and 351 of the Criminal Procedure Act, regarding the offences of forgery and uttering false documents, the offences relate to and rotate around a document said to have been forged and uttered. It therefore follows that, the documents said to

have been forged and uttered must be presented to court and admitted as exhibits for purposes of proving the offences.

Case law has established that "*there is a distinction between exhibits and articles marked for identification. The term exhibits should be confined to articles which have been formally proved and admitted in evidence"*. – Refer **Des Raj Shema vs. Reginan (1953) EACA 310** and **Okwonga Stephen vs. Uganda (2002) KALR** – *"The mere marking of a document for identification does not dispense with the formal proof thereof".* – See **Okwanga Anthony vs. Uganda**.

It follows therefore that *"once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case"*.

The document then becomes part of the court record. If the document is not admitted into evidence as an exhibit, it only remains as hearsay evidence, untested and an unauthenticated account.

Under S.58 of the Evidence Act *"all facts except contents of documents may be proved by oral evidence".*

As earlier indicated in this judgment, while the prosecution adduced various documents at the trial, the documents P_1D_1 – P_1D_6 were only marked for identification and were never admitted in evidence.

This means that those documents were not part of the evidence before the trial Magistrate and therefore ought not to have been relied upon to arrive at any conclusion. I therefore find that, the trial Magistrate erred in convicting the Appellant basing on documents only placed on record for purposes of identification as such documents do not carry any evidential value.

Ground 2: The Trial Magistrate erred in law and fact when he wrongly evaluated the evidence and came to a wrong conclusion.

The argument of Counsel for the Respondent the trial Magistrate properly evaluated the evidence and came to the right conclusion as there was also ample oral evidence from the prosecution witnesses, coupled with the original and genuine documents cannot be accepted. It falls short of the proof of the documents which are alleged to have been forged or falsely uttered. For example Pw1 Kabarungi Susan testified that she saw the Appellant with others at the bank. But this evidence cannot solely be relied upon to convict as it does not establish participation of the Appellant in committing the offence.

Considering the ingredients of the offences of uttering a false document and forgery, it is worth noting that the documents that were forged and uttered ought to have been tendered in court to prove the forgery, impersonation and a false document uttered.

In the absence of the forged and uttered documents as exhibits, the statements of the prosecution remain just statements with no evidential value. No exception is seen to be provided to justify the exclusion of those documents from the record of the court.

There was no evidence to sustain the offence of forgery and uttering a false document. The case would have been different and proved beyond reasonable doubt had the prosecution produced and tendered in evidence as exhibits both the genuine documents and the forged ones in question to enable court to observe and make an informed opinion regarding the two sets of documents.

The offences with which the Appellant was convicted are intertwined. Since the prosecution could not prove beyond reasonable doubt that the Appellant forged the documents in question as they were never exhibited in court; it cannot be said that the Appellant uttered false documents as they were also never exhibited in court.

It was also wrong for the court to convict on the offence of impersonation basing on which have not formally proved and admitted in evidence.

This court accordingly agrees with the submissions of Counsel for the Appellant that the trial Magistrate failed to properly evaluate the evidence on record and thus arrived at a wrong conclusion, thereby occasioning a miscarriage of justice.

While Counsel for the Respondent argued that the trial Magistrate relied on other independent evidence connecting the Appellant to the crime. Case law has established that *"corroboration is additional independent evidence which connects the accused with the crime, confirming in same material particulars, that not only a crime was committed but also that the accused committed".*

However, corroboration is additional evidence that cannot stand on its own. The foundation of the offence need to have been proved in the first place. – Refer to **Solomon Ouma vs. Rep. (1978) LRT P. 53** Katiti Ag. J.

Ground 3: The trial Magistrate erred in law and fact when he passed a harsh sentence of six years against the Appellant and also ordered him to compensate the complainant Company with Shs. 100,000,000/-.

It was submitted by Counsel for the Appellant that six tears imprisonment was given in respect of court 17 for uttering false documents. And that the trial Magistrate referred to S. 51 of the Penal Code Act, which must have been an error as it should have been S. 351 of the Penal Code Act.

Counsel pointed out that the sentence under S.351 Penal Code Act is the same as for forging a document. Under S.347 Penal Code Act, the maximum sentence for forgery is three years. Therefore that, the sentence of six years on count 17 was an error. The case of **Ainebushobozi Venancio vs. Uganda CACR App 242/2014** was relied upon for the holding that *"it has been consistently held in various court cases both by the Supreme Court and the predecessor court of East Africa, more specifically in the case of Livingstone Kakooza vs. Uganda SC CR App. 17/1993 that "an Appellate Court will only alter a sentence imposed by the trial court if it is evident that it acted on a wrong principle or overlooked some material facts or if the sentence is manifestly excessive in view of the circumstances of the case".*

Therefore that the trial Magistrate in the present case acted on the wrong principle by quoting S.51 of the Penal Code Act and sentencing

the Appellant to six years imprisonment when the maximum sentence is three years.

Counsel for the Respondent argued on the other hand that the sentence was not harsh. That from counts 12-16 and counts 18-21, the trial Magistrate was lenient in sentencing on uttering false documents for which the maximum sentence is three years under S.351 Penal Code Act.

However, Counsel agreed that six years in respect of count 17 was excessive as the maximum sentence is three years.

But that three years in respect of count 21 of obtaining money by false pretences under S.305 of the Penal Code Act was inadequate considering that the amount of money involved was huge that is Shs. 100,000,000/-. And the preparation, plan and execution of the offence was deceitful. Therefore that, the sentence of six years was justified, more so as a clear message has to be sent out to other would be offenders as offences of this nature are very rampant. And people should know that engaging in fraud carries consequences.

Looking at the court record, count 17 of uttering false documents was dealt with by the Magistrate on page 24-25. The section under which the offence is provided for was misquoted as S."51" instead of S.351 of the Act. This was an error which is normally correctable.

The general punishment under part XXIV of the Penal Code Act under which S.351 for uttering a false document falls is provided for under S.347 of the Act, which provides for the maximum sentence of three years.

Counsel for the Respondent conceded as already indicated that the sentence imposed by the trial Magistrate under count 17 was excessive.

The punishment under SS. 347 and 351 of the Penal Code Act is clearly prescribed by law- Refer to Article 28 (12) of Constitution. It was therefore an error of law for the trial Magistrate to impose a sentence of six years.

I agree with Counsel fro the Appellant that the sentence was harsh and excessive and resulted into a miscarriage of justice.

Compensation: As regards the order for compensation of the Appellant with Shs. 100,000,000/- said to have been received by the Appellant.

Counsel for the Appellant argued during allocutions that the sections of the law under which the Appellant was charged and convicted do not provide for compensation.

But under S.197 of the Magistrates Court Act, court has powers to order for compensation for material loss or personal injury.

S. 197 (1) provides that ***"when any accused person is convicted by a Magistrate's Court of any offence and it appears from the evidence other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable".***

The trial Magistrate therefore has the power to order compensation. And considering that the sum of Shs. 130,000,000/- had been allegedly obtained from the complainant and the trial Magistrate has convicted the Appellant the regard the sum was fair and reasonable.

However, having found that the trial Magistrate erred in law and fact when he convicted the Appellant based on documents not admitted as Exhibits and that he wrongly evaluated the evidence on record and came to a wrong conclusion, it follows that the order for compensation cannot stand as it was based on wrongful conviction. It is accordingly hereby set aside.

Ground 4: The trial Magistrate erred in law and fact when he failed to properly consider the mitigating factors in passing sentence but relied so much on aggravating factors.

Counsel submitted that, while passing sentence, the trial Magistrate noted that the Appellant was a first offender, had spent one year and

seven months on remand and was remorseful. However that in sentencing, he gave the maximum of three years on all counts and for count 17 exceeded the maximum and gave six years.

The case of **Ainebushobozi Venancio vs. Uganda (Supra)** was cited in support. The court held in that case that *"the sentencing order of the trial judge states that an accused is admittedly a first offender. Has been on remand for three years. I take this period into consideration while sentencing him yet in sentencing; the court noted that "the maximum sentence for the offence of man slaughter is life imprisonment".*

"It appears that the learned trial judge in this case in effect reached for the maximum sentence of life imprisonment when you take into account that the appellant had spent three years on remand and was sentenced to eighteen years imprisonment, the aggregate of which is entire term of twenty years and life. Imprisonment in light of S.47 (7) of the Prisons Act is 20 years. She argued that it is a rule of practice the first offenders do not ordinarily receive maximum sentences for the offences of which they have been convicted".

In the present case, Counsel submitted that, the Appellant was a first offender. He had been on remand for one year and seven months. Giving him a maximum sentence of three years and exceeding it on count 17 was erroneous on part of the trial Magistrate.

Counsel urged court to review the sentence should the conviction be upheld, taking also into account that the Appellant has been in prison for one year and seven months.

It was the argument of Counsel for the Respondent that the one year sentence clearly took into account the time spent on remand when compared to the maximum sentence. She cited the case of **Rwabuganda Moses vs. Uganda SC Cr. App 25/14** where it was held that *"taking into account the period spent on remand is not supposed to be a mathematical or arithmetic calculation that is, considering that the period the Appellant spent on remand is normally known from the records of the file of the court. Therefore, does not have to come up with a calculation as proof that it has taken that time into account".*

That as along as the trial Magistrate clearly states that he has taken into account the period spent on remand and that time can also be seen from the sentence passed vis a vis the maximum sentence, then the trial court should be seen to have dispensed its responsibility of taking into account the period spent on remand.

Counsel then asserted that the trial court rightly convicted the Appellant and the judgment and sentence should be upheld. The court may only be pleased to exercise its power in respect to the sentence meted out in respect of count 17.

Looking at pages 30-32 of the court record, it is evident that the trial Magistrate took into account all the factors complained of by the Appellant before arriving at the sentence. On count 20 where the maximum sentence is seven years, the Appellant was given a sentence of one year. He had been pointed out that he had been on remand for one year and seven months.

For counts 12, 13, 14, 15, 16, 18, 19 and 20, the Appellant was sentenced to one year's imprisonment on each count, but the sentences were to run concurrently. The Appellant would accordingly serve a sentence of one year and five months in prison. The trial Magistrate clearly took into account the period the Appellant had spent on remand and that he was a first offender and hence did not give him maximum sentence.

But since this court has already come to the conclusion that the Appellant ought not to have been convicted in the first place for reasons already stated, the appeal is hereby allowed and the Appellant is acquitted on all the counts that the trial court had convicted him.

He should therefore be set free forthwith, unless otherwise held on other legal charges.

FLAVIA SENOGA ANGLIN
JUDGE
23.07.18