THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CRIMINAL DIVISION)

CRIMINAL APPEAL NO. 39 OF 2016

(ARISING FROM BUG. ROAD COURT, CRIMINAL CASE NO. 291/2014)

NATUKWATSA JOHN KATEBARIRWE ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

BEFORE: HON. MR. JUSTICE J. W. KWESIGA

JUDGMENT

In the Lower Court the Accused was charged with the offence of Obtaining Money by False Pretence Contrary to Section 305 of penal Code Act. It was alleged by the prosecution that the Accused, between 30th August and 8th December 2013 at Equity Bank, Nakumat Garden City in Kampala District with intent to defraud, obtained Ugs. Shs.115,000,000/= from Mudenyo Ben by falsely pretending that he was selling him a six roomed house located at Kulambiro Village, Tuula zone in Kampala in the Kampala District .

The Accused pleaded not guilty to the charges against him, the Prosecution had the obligation to prove each ingredient of the offence beyond reasonable doubt. The Learned Magistrate found the Accused guilty and convicted him. The Appellant was dissatisfied hence this

appeal, appealing against both the conviction and sentence of the trial court. Mr. J. M. M. Mugisha, Senior Counsel of Mugisha & Co. Advocates represented the Appellant and Miss Joanita Tumwikirize, State Attorney represented the D.P.P.

The grounds of appeal are that:-

1. That the Learned Trial Magistrate erred in law and fact when she found that the prosecution had proved the existence of all the ingredients of the offence of obtaining money by false pretences which with the Appellant was charge thereby arriving at a wrong conclusion .

2. That the Learned Trial Magistrate erred in law and fact when she held that the Appellant disclosed the fact that he had already sold the property in issue to a one Mukisa Joshua when there was abundant evidence to the contrary.

3. That the Learned Trial Magistrate erred in law and fact when she held that much as the property in issue was in existence it was not available for sale by the Appellant.

4. That the Learned Trial Magistrate erred in law and fact when she held that the prosecution had proved its case beyond reasonable doubt that the Appellant had made a false representation of facts of a present matter and that the Appellant was aware that the representation he was purportedly making was false.

5. That the Learned Trial Magistrate erred in law and fact when she held that the Appellant's conduct displayed intention to defraud

the Complainant of the sum in issue which the Complainant had paid him.

6. That the Learned Trial Magistrate erred in law and fact when she travailed the grave contradictions which had been pointed out by defence Counsel as minor and did not go to the root of the case.

7. That the Learned Trial Magistrate erred in law and fact when after recognizing that the charges in issue were a civil nature went ahead to convict the Appellant.

8. That the Learned Trial Magistrate erred in law and fact when she failed to evaluate the evidence as a whole thereby arriving at a wrong conclusion which occasioned a miscarriage of justice.

9. That the Learned Trial Magistrate erred in law and fact when she passed an excessively harsh sentence against the Appellant thereby occasioning a gross miscarriage of justice.

10. That the Learned Trial Magistrate erred in law and fact when she ignored the prevailing mitigating factors of sentencing.

The grounds of appeal are numerous and repetitive in substance and could have been compressed since they almost all amount to complaint over the failure to evaluate evidence. I will avoid dealing with each ground of appeal but look at the case as a whole as was at the trial.

The Supreme Court in the case of **KIFAMUNTE HENRY VERSUS UGANDA (SCCA NO. 10 OF 1997)** held that it is the duty of the first

Appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial Court and make its own mind and failure to do so amounts to an error of law. In exercising this role, court has to bear in mind the requirement to the Law that the prosecution bears the burden of proving its case beyond reasonable doubt.

It is a cardinal principle at Common Law and now our written Law that the burden of proving the guilt of an Accused person lies squarely on the prosecution and does not, with a few exceptions with which I am not concerned here, shift to the Accused person. That burden is only discharged on proof beyond any reasonable doubt.

Speaking of the degree of proof required in Criminal Law LORD DENNING said:

> ***"-that degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond doubt does not mean beyond the shadow of doubt. The Law would fail to protect the community if it admitted fanciful probabilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote probability in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt but nothing short of that will suffice".***

See:- **MILLER U. MINISTER OF PENSIONS [1947] 2 ALL E.R .323**. Whenever an allegation of crime is made against a man, it is the duty of the court to quote LORD KENYON'S advice. ***"If the scales of evidence hang anything like even, to throw into them some grains of mercy"*** in short to give the accused person the benefit of doubt. But as it has been said elsewhere: ***"not, be it noted, of every doubt, but only of a doubt for which reasons can be given."*** And as it was said by the Irish Chief Justice;

> ***"To warrant an acquittal the doubt must not be light or capricious such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as, upon a calm view of the whole evidence, a rational understanding will suggest to an honest heart; the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice, or subdued by fear".***

For an Accused to be convicted of the offence of false pretence the prosecution has to prove the elements of the offence. A person is said to have obtained anything by false pretence when they ***"make any representation by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true".*** The essence therefore, is a misrepresentation. This means that if an individual obtains another's property by stating a

fact that they mistakenly believe to be true, they have not committed the crime of false pretence. ***See Section 304 of the Penal Code Act.***

Section 305 of the Penal Code provides that, ***"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, commits a felony and is liable to imprisonment for five years".***

In ***R V. SULLIVAN (1945) 30 CR APP R 132*** **HUMPHREYS J**, delivering the judgment of the Court, stated at pages 134 – 136:-

> ***"In order that a person may be convicted of that offence [i.e. "false pretences"] it has been said hundreds of times that it is necessary for the prosecution to prove to the satisfaction of the jury that there was some misstatement which in law amounts to a pretence, that is, a misstatement as to an existing fact made by the Accused person; that it was false and false to his knowledge; that it acted upon the mind of the person who parted with the money, and that the proceeding on the part of the accused person was fraudulent. That is the only meaning to be applied to the words "with intent to defraud".***

From the above it is therefore evident that the elements the prosecution has to prove are that;-

1. That there was some misstatement which in law amounts to a pretence.
2. That a misstatement is an existing fact made by an accused person.
3. That the accused must have known to be false.
4. That the complainant acted upon the false pretence to his /her detriment.

Element 1: misstatement which in law amounts to a pretence.

PW1 testified that he picked interest in block 215 Plot 2932, I made an offer of 200 million and the Accused told him he had kept the Title in Centenary Bank,and had no mortgage. That in November he asked the Complainant to show seriousness, and on 08th /12/2013 he gave a commitment fee of Ug. Shs. 100,000,000/= in addition to the 15 million that he had given him. It was agreed that the balance of 115,000,000/= was to be paid in two weeks.

PW2 stated that the Accused first received 15 million in three instalments as shown in Exhibit 2. That before they paid they knew that the accused had borrowed money and the title was in the bank.That when they were making the agreement for a second property he realised the Accused was reading to them the Plot Number of the previous Plot. So they became suspicious so the buyer went out with the balance without paying the balance.

He noted that this suspicion implored them to go and establish with the bank the status of the land. Upon the search it was discovered that there

was a sale agreement between Johnson (Accused) and Joshua Mukisa and that he had received the payment of the same. He noted this transaction took place at the same time they were making payments. Though the actual transaction happened months before the Complainant paid the 100 million for the property.

PW4 testified that she handled a transaction that was between Joshua Mukisa and the accused concerning the suit land. It was testified that centenary bank advanced a loan to Joshua Mukisa on 20/09/2013 and it was credited on his account on the 21st.the loan was advanced in purchase of land whose agreement was made in June 2013.

DW testified that the purchaser whose is the complainant knew the property was in the bank and he had told the buyer that there was an attempt to buy that land by Mukisa however he had failed. He stated that the complainant had to give him the balance of 115,000,000 to complete the mortgage but since he did not the bank had to sell off the suit property.

In his appeal submission, Counsel for the Appellant submitted that the Learned Magistrate erred in law when handling the ingredient of representation being false when she held that the prosecution had proved it without taking into the account the evidence by the defence. That at the time of the sale the Complainant knew that the property was subject to a sale in Centenary Bank and that it was the Complainant who had failed to fulfil his bargain that the bank advertised the property for sale.

State submitted that the Complainant was desiring to make a second purchase from the Appellant of block 215 plot 2932 which the Appellant said he also owned. The price was Ug. Shs. 230, 000,000/=. The Complainant deposited Ug. Shs. 15,000,000/= and the Ug. Shs. 100,000,000/= on 08/12/2012 and the balance of 115,000,000/= was to be paid by 23/12/2013 when the Land Title would be handed over.

At the time of payment, the agreement was reading description of the already bought Plot and the Complainant didn't pay and sought compensation of the previously paid money. The Appellant refunded only Ug. Shs. 40,000,000/= and had a balance of Ug. Shs. 75 million to hand over which he did not. That the Advert in monitor 20/3/2014 showed a one Mukisa Joshua to be the owner of Block 215 plot 2932 land located at Kulambiro . He noted that these lies where false representation.

I have looked at both the lower record and the submissions for both counsel and come to this one conclusion, that the learned magistrate properly concluded that there was a false representation. Considering the definition of false presentation manifests itself by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true.

According to the evidence the accused represented himself as the registered proprietor of the said property well knowing that he had sold it to Joshua Mukisa in June according to Exhibit P 5. The time he started transacting with the complainant in august through the different agreements he did not have the said title in the suit land.

***Element 2:* that the misstatement was made by the accused with the intention to defraud.**

PW1 stated that he was interested in the suit land so he offered to buy it at Ug. Shs. 200 million. They however agreed to buy the same at 230 million. In his own statement, the Accused agrees to the fact that he accepted to sell the suit land. He insists that he had the title in the suit land at the time of the sale. It is not in doubt that the accused made the misstatement.

It is also important to establish whether the representation was made with an intention to defraud. A representation is fraudulent only if made with the contemporaneous intent to defraud - i.e., the statement was knowingly or recklessly false and made with the intent to induce harmful reliance.

It is the preconceived design of the Accused, formed at or before the contract, not to perform his or her side of the bargain, that constitutes the fraudulent concealment which renders the representation fraudulent, and not an intent formed after the contract is executed.

This intent whether to or not to perform his or her side of the bargain has sometimes been treated as a fraudulent misrepresentation, and sometimes as a fraudulent concealment, but in either event it must precede or be contemporaneous with execution of the contract. **GWOLO JACKSON VERSUS UGANDA - CRIMINAL APPEAL NO. 0014 OF 2017:**

It was evident that the accused entered the sale agreement with the complainant well aware of the fact that he had sold the suit land to

Joshua Mukisa. He had already concluded anagreement with Joshua in June 2013 which was reduced into writing in furtherance of a loan in September 2013. Hence by the time he signed a sale agreement with the complainant in December and the preceding agreement he was aware he had nothing to sale to the complainant he concealed these facts with the intention to defraud the complainant.

Element 3: that the accused knew the statement to be false.

The accused made an agreement with Joshua Mukisa to sale the suit land in June. In his own testimony the accused testified that he told the complainant that there was an attempt to buy the suit land but it was never successful. This was evident that he knew the statement he was false. He went ahead and received money from the complainant on 08/12/2013 well knowing that he had concluded the transaction with Joshua Mukisa in September 2013.

Element 4: that the complainant acted upon the misstatement.

The Complainant made different deposits on the said suit land basing on the fact that the land was available for sale by the Accused Exhibit 2 and 3 corroborate this fact. According to the evidence on record he deposit up to the tune of 115,000,000 and was going to pay the balance when he discovered the fraud. The accused did not deny receiving money from the Complainant, which is further evidence that he acted on the misstatement.

Ground 7

Counsel for the accused submitted that the learned magistrate erred when he held that the matter had a civil element but went ahead and heard the matter. I agree with the state's argument that a case for false pretence was made out so the magistrate rightly held so.

Ground 09 and 10

It was submitted by the accused that the sentence of 5 months was harsh and arbitrary that the learned magistrate did not take into account the mitigating factors.

It has been consistently held in numerous cases both by the Supreme Court and the predecessor Court of Appeal for East Africa, and more specifically in the case of **LIVINGSTONE KAKOOZA VERSUS UGANDA SC CRIMINAL APPEAL NO. 17 OF 1993 [UNREPORTED]** that:

> ***"An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration:*** See:- **OGALO S/O OWOURA V R (1954) 21 E.A.C.A. 270".**

According to section 305 of the Penal Code provides for the maximum penalty as 5 years. On assessment five years and 7months is not harsh. It was evidently not excessive this court cannot interfere with the sentencing powers of the Lower Court.

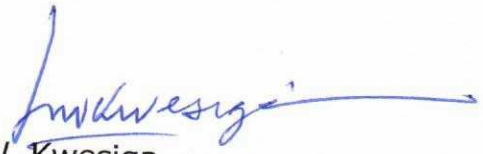
I have examined the sentencing proceedings where the Learned Trial Magistrate relied on Section 197 of the M.C.A and she held correctly that ***"--- Where material loss has been suffered in consequence of the offence committed and that substantial compensation is in the opinion of the court recoverable by that person in a Civil Court, the court may in it's discretion and in addition to any lawful punishment, Order the convicted person to pay such compensation as the court deems fair and reasonable".*** The Trial Magistrate sentenced the Appellant to 7 months imprisonment which is hereby confirmed and the 7 months term was from the 22nd day of April 2014.

The Trial Magistrate Ordered that the convict pays compensation to the Complainant in the sum of Ug. Shs. 115,000,000/= which is upheld.

It is further upheld that the Complainant be paid Ug. Shs. 40,000,000/= that was recovered from the convict and treated as a state Exhibit in the trial hearing the convict's debt as Ug. Shs. 75,000,000/= payable to the Complainant with effect from the 22nd day of April 2016 as Ordered by the trial court.

The final outcome is that this appeal is dismissed and it is hereby Ordered that Bail pending Appeal which was granted on 20th June 2016 shall immediately elapse and the Appellant shall be returned to prison to

serve the balance of the 7 months imprisonment with effect from the date of this Judgment. It is so Ordered.



J. W. Kwesiga

High Court Judge

27/02/2019.

In the presence of:-

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2. .....
3. .....
4. .....