

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*[CORAM: Kasule, Tibatemwa-Ekirikubinza & Egonda-Ntende, JJA]*

Criminal Appeal No.166 of 2011

(Arising from High Court Criminal Appeal No. 83 of 2009 at Kampala)

Between

Mukasa Lubanga Charles=====Appellant

And

Uganda=====Respondent

*(On Appeal from the Judgment of the High Court of Uganda [Rugadya Atwoki, J.,] in Criminal Appeal No. 83 of 2009 sitting at Kampala and delivered on the 17 December 2010)*

**JUGDEMENT OF THE COURT**

**Introduction**

1. This is a second appeal. The appellant was charged before the Chief Magistrates Court of Buganda Road, Kampala with three counts of forgery contrary to section 348(1) of the Penal Code Act, uttering a false document contrary to section 355(b) of the Penal Code Act, and obtaining registration by false pretences contrary to section 312 of the Penal Code Act. He was acquitted of the first 2 counts and convicted on the third count of obtaining registration by false pretences and sentenced to 12 months imprisonment. He appealed against that decision to the High Court of Uganda which dismissed the appeal and now appeals to this court against the judgment of the High Court in relation to both conviction and sentence.

2. The learned Judge on appeal summarised the facts of the case as follows:

'The appellant is the registered proprietor of land at Bakuli known as Block 10 Plot 173. The appellant got registered as the proprietor on 21st March 1986 at 2.37pm, according to the certificate of title. The original owner prior to this registration was one Bwete who was reported to have died in 1986. It is this registration which was impugned as having been procured by false pretence. This same suit land was under a lease to an Asian and had been repossessed. But the lease was due to expire, and in the course of these disputes, the lease indeed expired and the unencumbered mailo interest reverted to the owner.

The said Bwete was a brother to Norah Naddamba and when Bwete died, she became the administrator of his estate. She realized that the appellant was claiming that Bwete gave the suit land to him as a gift. She placed a caveat on the same. An Asian who was representing the lessees was in court against the appellant over the ownership of this land. A few days later before Norah Naddamba was due to testify in court in that suit on behalf of the Asian, she disappeared and her body was recovered murdered in or near the village where appellant lives. He was one of the suspects and he recorded a statement under charge and caution in respect of that matter. ....

The learned trial Chief Magistrate found that there was evidence to prove that the appellant had obtained registration by false pretence and convicted him accordingly. '

3. The appellant set forth 4 grounds of appeal, namely,

(1) The learned Judge erred in law in relying on the evidence of PW2, Mohamed Alibhai, PW3 Norah Nadamba & PW5 Samwiri Moma Kasasa to find that the late Bwete was not possessed of mental capacity to execute a transfer in favour of the Applicant when no medical proof was tendered to that effect.

(2) The learned Trial Judge erred in law in holding that the Appellant made a false representation to the Registrar of Titles when the Registrar of Titles was not called to give evidence to that effect.

(3) The learned Judge of the High Court erred in law in holding that the appellant made false representations to the Registrar of Titles through the lawyers.

(4) The learned Judge erred in law when he failed to properly re-evaluate the evidence on record and thereby came to a wrong conclusion.'

4. The State opposed this appeal.

### **Submissions of Counsel**

5. Mr Deo Mamawi, learned counsel for the appellant submitted in relation to ground no 1 of the appeal, that the learned judge on appeal wrongly relied on the evidence of PW2, PW3 and PW5, to conclude that the deceased Bwete was mad and did not possess the capacity to effect a transfer of the land in question. These witnesses were not experts as is required under section 43 of the Evidence Act. PW2 was hardly a year old in 1986 and therefore had no knowledge of the facts she testified about. The respondents ought to have adduced medical evidence, which was available to prove

the fact of incapacity of Bwete. Not having done so Mr Mamawi prayed that this ground be allowed.

6. Mr Mamawi argued grounds no.2 and 3 together. He submitted that the prosecution failed to prove that the registrar of titles was induced to act by the false presentations of the appellant in so far as the prosecution failed to call the Registrar of Titles to testify and prove that he was so induced. He referred to the cases of Abdallah v Republic [1970] EA 657 and Serwano Mawanda v Republic [1962] EA 123 in support of his proposition. He referred also the cases of Nalongo Naziwa Josephine v Uganda Court of Appeal Criminal Appeal No. 88 of 2009 [unreported] and Oketcho Richard v Uganda Supreme Court Criminal Appeal No.26 of 1995 [unreported].
7. With regard to ground no.4 Mr Mamawi submitted that since the appellant had been acquitted on counts no.1 and 2 of altering and forging the documents in question, on a proper evaluation of the evidence on record, he ought to have been acquitted on count 3 as well. The learned trial judge failed to properly evaluate the evidence on record. The evidence of the handwriting expert was inconclusive with regard to the signature of the deceased on the transfer documents.
8. Mr Simon Ssemalemba, learned counsel for the respondent, chose to respond to all grounds of appeal by taking them together. He conceded that there was no medical evidence to prove the fact of mental incapacity to execute a transfer. However, there was other evidence upon which the learned appellate judge relied upon to dismiss the appeal. It is also correct that the Registrar of Titles was not called as a witness but this was not fatal to the prosecution's case and was properly dealt with by the appellate judge at page 5 of the judgment.
9. The real question for decision before the first appellate court was whether the registration of land into the names of the appellant had been procured by false pretences. The learned appellate judge dealt with this matter from page 3 to page 5 of the judgment. On the appellant's instructions, his lawyers presented documents for transfer of the land in question. The registrar believing the same to be genuine, exhibits P9 and P10, acted upon the same and effected a transfer. Those documents

shown to have contained false representations with regard to signature of the seller and consideration for the same.

10. The transfer instrument claimed that the land was gifted to the appellant yet the appellant claimed to have purchased the same in his charge and caution statement to the police. When all the evidence was considered together the learned appellate judge concluded that the registration had been obtained by false pretences. He prayed that this appeal be dismissed.

## **Analysis**

### **Ground No.1**

11. The testimony of PW2 and PW3 in relation to mental illness of Bwete was hearsay and it had no evidential value with regard to proof of that fact. The evidence of PW5 stands in a somewhat different light, in spite of the obvious fact that he was indeed not a mental health expert. In examination in chief he stated in part as follows,

'In 1986 (not sure) I was informed that he was sick [Bwete]. I went to see him. I found when he has lost his minds. He was mentally sick. He was sick for a long time. His father was Kiviri. When Kiviri died, he did not leave a will. Kiviri's estate was distributed and Bwete was given that house. Nora Naddamba was given the place she used to live. When Bwete died, Nora Naddamba remained with the responsibility over the house. '

12. In cross examination PW5 further stated,

'I am not aware of the year in which the accused was registered on the title. He transferred it when Bwete was still alive. Bwete was mad during that time. We have medical documents to prove that he was mad then.'

13. Obviously contemporaneous records in relation to Bwete's mental illness were quite relevant to the facts in issue and ought to have been produced. However, the proof of mental illness is not only possible by way of medical evidence. Oral evidence by those persons who were familiar with Bwete at the time in question may suffice. Section 43 of the Evidence Act specifically establishes that the opinion of experts on some matters of science, art and others upon a matter on which court has to make a finding, are relevant facts. It is not authority for the proposition that an illness is only provable by an expert witness.
14. PW5 was competent to testify to Bwete's mental condition in 1986 as he was quite familiar with Bwete at the time. He visited him and found him mentally deranged. Bwete remained mentally deranged for a considerable period. In our view the evidence of PW5 was sufficient to establish that in 1986 Bwete was mentally sick and could not therefore have had the capacity to effect a transfer.
15. Notwithstanding the foregoing even if the mental capacity of Bwete is taken as unproven by the evidence on record this would not necessarily absolve the appellant of the conviction for the offence of obtaining registration by false pretence contrary to section 312 of the Penal Code Act in light of the other evidence on record.

### **Ground No.2 and No.3**

16. The essence of the complaint here is two-fold. Firstly that both courts below erred in holding that the appellant had made false pretences when the Registrar of Titles was not called as a witness. Secondly that it was an error to hold that the appellant made these false pretences through his lawyers.
17. Relying on *Abdallah v Republic (supra)* Mr Mamawi submitted that the prosecution had to prove that the Registrar of Titles acted on the false pretences and to do so the Registrar of Titles had to testify that he or she acted on the false pretences. *Abdallah V Republic (supra)* is a case that was considering a charge of obtaining money by false pretences. It was contended for the prosecution that the appellant had issued 2 post dated cheques knowing that there was no money in his account to meet payment of those cheques. The Court of Appeal for Eastern Africa held that giving of a post

dated cheque was not a representation that there were sufficient funds to meet the cheque. It also further held that the prosecution must prove that the false pretence induced the acceptor of the cheque to part with the money.

18. *Abdallah v Republic (supra)* is not helpful to the appellant's case as it revolves around a different set of facts and offence charged.
19. The facts and offence charged in the case of *Sarwano Mawanda v R (supra)* are distinguishable from the facts and offence with which the appellant was convicted of in this case. This case is likewise unhelpful to the appellant's case before us.
20. The learned Judge on appeal considered two documents which had to be submitted in order to effect a transfer. These documents were firstly the Application for Consent to Transfer purportedly signed by Bwete, exhibit P9 and the transfer form purportedly signed by both Bwete and the appellant, exhibit P10. On a review of the evidence available on record the learned judge on appeal found that both documents had been presented to the appellant's lawyers by the appellant with instructions to obtain the registration of a transfer of the land in question from Bwete to the appellant. The lawyers carried out their instructions and the land in question was transferred to the appellant.
21. The learned Judge on appeal examined in great detail the evidence available with regard to the said two documents and concluded that to the knowledge of the appellant these documents did not bear the signature of the original owner as that signature was forged. He accepted the evidence of the hand writing expert who concluded that the signature on the said documents was most probably not the signature of the original owner, Bwete. The learned judge accepted the evidence of PW2, PW3 and PW5 to establish that Bwete was mentally ill at the time and could not have had the mental capacity to sign the said documents. Much as we have found the evidence of PW2 and PW3 to be hearsay evidence on this point the evidence of PW5 was sufficient to conclude that Bwete lacked the mental capacity to execute any legal document in 1986.

22. The said two documents exhibit P9 and P10 did claim that Bwete had gifted the land in question to the appellant. No consideration had been paid for the same. However, there is evidence from other witnesses that shows that the appellant claimed in writing that he had purchased the said land for valuable consideration. Once such evidence was believed it was clear then that the exhibits P9 and P10 that were presented for transfer of land from Bwete to the appellant were false in so far as they purported to state that the land was a gift while in fact it had actually been paid for.

23. Exhibit P9 described the land being transferred as 'undeveloped' which was false as the land had in fact been developed with a house on it by the Asian Lessee. The appellant was aware that this form was false in this regard as he was aware of the existence of the house in question. He presented this form to his lawyers who were his agents in effecting this transaction.

24. The learned judge on appeal stated in part,

'Under the above provision the prosecution must prove

- that there was procuring of registration under any law;
- for oneself or another;
- by false pretence.

To procure means to acquire, to secure or to obtain. There was no dispute that the appellant is the registered proprietor of suit land. He stated so himself. A certificate of title to that effect was exhibited. He secured this registration on 21/03/1986 at 12.37 pm under instrument no. KLA 117398. The registration was under the Registration of Titles Act. Under this Act, the person who carries out the registration of title is a Government official known as the Registrar of Titles. On the exhibited certificate of title as indeed on every such document, the said Registrar had to initial his or her signature in the space provided for that purpose.'



25. Later on his judgment the learned judge on appeal stated,

'In order for the Registrar of Titles to effect a change and transfer the title from Bwete to the appellant, she was convinced of the genuineness of the documents produced before her. These were the application for consent to transfer, and the transfer form.'

26. What was required to be established was the fact of registration of the transfer of land to the appellant or another person based on false pretences attributable to the appellant. The fact of registration was capable of being established without calling the Registrar of Titles. In the instant case this was established by the testimony of the appellant himself and a certified copy of the duplicate certificate of title. The evidence of false pretences was established by a number of other witnesses.

27. The state of mind of the Registrar of Titles in relation to the false pretences was irrelevant. What had to be established was the fact that the Registrar acted on the false pretences and effected a transfer and registration of the appellant as owner of the land in question.

28. The appellant's lawyers who he instructed to act as his agents to transfer the land in question did so, presenting the documents that the appellant had provided to them. It is these documents that contained false pretences. That fact that he acted through agents, rather than personally, in presenting the documents to the Registrar of Titles, does not absolve the appellant of responsibility or culpability in this matter.

29. The learned judge on appeal established 3 elements for the offence in question and examined in great detail the evidence available to support each element. He rightly concluded, in our view, that the appellant had been rightly convicted of the offence of obtaining registration of the land in question by false pretences. We are unable to fault him.

#### **Ground No.4**

30. The essence of the complaint on this ground is that the learned judge on appeal failed in his duty as a first appellate court to re-examine the evidence on record and come to his own conclusions with regard to the facts of the case. In light of our discussion of grounds 2 and 3 it is clear that this ground is baseless and has no merit whatsoever. It is dismissed.

### **Decision**

31. This appeal is dismissed.

Dated, signed and delivered at Kampala this 1<sup>st</sup> day of September 2015

Remmy Kasule  
**Justice of Appeal**

Professor Lillian Tibatemwa-Ekirikubinza  
**Justice of Appeal**

Fredrick Egonda-Ntende  
**Justice of Appeal**