

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 247 OF 2014**

**1. SARAH SSOZI**

**2. ABDU SSOZI ::: APPELLANTS**

**VERSUS**

**UGANDA ::: RESPONDENT**

*(Appeal from the judgment of Hon. Justice Joseph Murangira in Criminal Appeal No. 28 of 2014; also arising from the Judgment of Her Worship Esta Nambayo in Criminal Cause No. 1377 of 2012)*

**CORAM: HON. JUSTICE GEOFFREY KIRYABWIRE, JA**

**HON. JUSTICE CHEBORION BARISHAKI, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF COURT**

This is a second appeal from the judgment of the High Court which upheld the conviction and sentence of the Chief Magistrate's Court which convicted the appellants of the offence of obtaining money by false pretence contrary to section 305 of the Penal Code Act. The appellants were dissatisfied with the judgment of the High Court and filed this appeal on the following grounds as laid out in the memorandum of appeal;

1. (Formerly ground 2). The learned Judge erred in law in upholding the conviction of each appellant in a criminal offence of obtaining money shs. 7,600,000/= (seven million six hundred thousand shillings from Serwanga Isa by false pretence.
2. (Formerly ground 3). The learned Judge erred in law by not upholding the decree and judgment passed by the Makindye Chief Magistrates Court in Civil Suit No. 207 of 2009 Aida



Naluwoza Vs Abdul Sozi thereby wrongly allowed it to be enforced in Makindye Chief Magistrate's Criminal Cause No. 1377 of 2012 by criminal law and criminal procedure.

### **Background**

5 The 1<sup>st</sup> and 2<sup>nd</sup> appellants are husband and wife and have their matrimonial home on titled land at Kabowa Church zone. On 26<sup>th</sup> January 2002, the appellants entered into an agreement of sale of part of their land at Kabowa church zone to Aida Naluwoza. Aida Naluwoza, who stays in Sweden, did not get the land. Issa Serwanga, a brother to Aida Naluwoza, was directed by his sister to go to the home of the appellants and inspect the land. He inspected it but was not given the land title for inspection. The next day, Aida directed Issa to go to Barclays Bank and pay for the land. She had sent the money to one Diana. On 8/1/2002 a withdrawal of 15 8,000,000/= was made and the appellants were paid 7,600,000/= and Issa retained the 400,000/= and an acknowledgment for the money was made and signed. The next day Issa went and requested for an agreement to be made but the appellants said they would sign transfers. He looked for the area LC Chairman who said he would 20 talk to the appellants. Later they made an agreement and it was written by the 2<sup>nd</sup> appellant and witnessed by the 1<sup>st</sup> appellant in the presence of the Chairman. The appellants did not hand over the land and went into hiding. The matter was reported to police. Aida Naluwoza went ahead to give powers of attorney to Issa Serwanga 25 to follow up the case on her behalf. Issa reported the matter to police and also filed civil suit No. 207 of 2009 against Abdu Ssozi. The appellants were later arrested and charged accordingly.

### **Representation**

30 At the hearing of the appeal, Mr. Victor Magambo appeared for the appellants while Ms. Joanita Tumwikirize appeared for the respondents.

### **Submissions of the appellant**

5 Counsel argued grounds 2 and 3 together and abandoned grounds 1, 4 and 5 of the memorandum of appeal. He argued that the trial Judge failed to properly re-evaluate the evidence on record and came to a wrong conclusion. That whereas it was established that the complainant was Issa Serwanga as was stated in the charge sheet, the Judge failed to appreciate the actual person who received the money. According to the sale agreement, the seller of the land was the 2<sup>nd</sup> appellant while the buyer was Aida Naluwooza and the 1<sup>st</sup> 10 appellant was only a witness. That PW1 was a mere attorney of the buyer and that it did not make him the complainant. Counsel submitted that the 1<sup>st</sup> appellant was wrongly charged, convicted of receiving money from Serwanga Issa by false pretence.

15 In addition, there was no intent to defraud proved at the trial. The appellant's case in the civil suit was that they introduced the buyer to the local authorities but she later reneged the terms of the agreement and demanded for more land which could not be given to her. In addition, that the learned appellate Judge failed to appreciate 20 that there was a consent judgment and decree made by both parties before the Magistrates court. As a result of the consent judgment, an initial payment of 1,000,000/= was made to the complainant.

25 Further, that the power of attorney granted to PW1 was not inclusive of instituting criminal proceedings on behalf of the donor of the powers of attorney. He prayed that the appeal be allowed and the conviction and sentence of the trial court be set aside.

### **Submissions of the respondent**

30 In reply, the respondent submitted that the learned trial Judge was alive to the law and the responsibility of the 1<sup>st</sup> appellate court in re-appraising evidence and properly exercised his powers. Regarding who the buyer was, PW1 presented irrevocable powers of attorney signed by the sister who authorized him to pursue her case regarding the purchase of land and to commence, defend and settle any

proceedings whatsoever before courts of law in Aida's interests which also covers criminal proceedings.

Further, that the 1<sup>st</sup> and 2<sup>nd</sup> appellants reside together as husband and wife and on different occasions spoke as one regarding this particular transaction. When the money was paid, it was received by the 1<sup>st</sup> appellant and handed over to the 2<sup>nd</sup> appellant. The appellants at the trial did not comment on the evidence of PW4, the LC1 chairman who witnessed the sale of land from the appellants to Aida Naluwoza. When the new developer was asked, he told PW4 that he paid sufficient funds to pay off the complainants which means that the appellants sold the land to two buyers.

### **Courts consideration of the appeal**

Before we delve into the merits of this appeal, we note that this is a second appeal. The role of this court as a second appellate court is laid down under **Rule 32(2) of the Judicature (Court of Appeal Rules) Directions** which provides that;

***“On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence.”***

This Court is therefore obliged to appraise the inferences of fact drawn by the trial court.

We also recall the provisions of **Section 45 of the Criminal Procedure Code Act**, which is the applicable law concerning appeals from the High Court in the exercise of its appellate jurisdiction. It provides;

### **Second appeals**

***“Either party to an appeal from a magistrate's court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law.”***

The effect of this provision is to bar appeals on matters of fact or matters of mixed fact and law. The Supreme Court has distinguished clearly the duties cast on a first appellate and on a second appellate court in the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997** thus;

***“We agree that on a 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 a 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 judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the Judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya v. R [1957] EA 336, Okeno v. Republic [1972] EA 32 and Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985 at page 5.***

***Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 33(i) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles: See P.R. Pandya v. R (supra), Kairu v. Uganda 1978 HCB 123....”***

Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied, were

properly applied and if it did not, for it to proceed and apply the said principles.

As earlier noted, grounds 1, 4 and 5 of the appeal were abandoned by the appellants.

5 From the record, the appellate Judge properly re-evaluated the evidence on record. The Judge held that;

10 *“From the offence of obtaining money by false pretence, it does not matter from whom the goods or money capable of being stolen is obtained. Thus the argument by counsel for the appellants that the said money was received or not received from Isa Serwanga does not hold any water at all. The offence charged is committed when any person (in this case the appellants) by false pretences, and with intent to defraud obtains money from any person anything capable of being stolen. In this instant case, it is not*  
15 *disputed by the appellants that they received shs. 7,600,000/= from the complainant as consideration for the purchase of land. The land was not given to the complainant. As we talk, according to the evidence on record of appeal, the land that was showed to the complainant for sale is not available. The appellants sold the*  
20 *same land to another person well knowing that they had sold the same piece of land to Aida Naluwoza. The conduct of the appellants in that regard was fraudulent, to say the least.”*

From the above excerpt, we are satisfied that the learned Judge relied on all the evidence on record and came to a correct conclusion that  
25 the appellants were guilty of the offence of obtaining goods by false pretence.

A preliminary objection was raised at the trial in the Magistrates Court that the dispute was of a civil nature and therefore could not be presided over by a criminal court. According to the record, a  
30 consent judgment was entered into on 7/6/2009. The appellant’s argument is that the criminal prosecution was preceded by the civil suit in which a consent judgment was made. The preliminary objection raised by the appellants was over ruled by the trial Magistrate and an application for revision was filed by the appellants

and the High Court, on revision upheld the orders of the Chief Magistrate. As rightly held by the learned appellate judge, the appellants did not appeal against the decision of the High Court on revision which ideally meant that the appellants were satisfied with that decision.

We find that the learned appellate Judge properly re-evaluated the evidence on record and properly found that it is possible to have both civil and criminal proceedings. The learned trial Judge on page 144 of the record held that;

***“It is therefore, in my view, not a defence available to the defendant to assert that civil proceedings were already instituted against him. My reasoning behind this principle is that the standard of proof required in civil matters is generally different from the one required in criminal matters.”***

We must note, inter alia, that at the time the said consent judgment was entered into, the complainant was out of the country and Issa Serunkuuma, the donee of the powers of attorney, was not aware of the consent judgment. In addition, there was nothing on the record to show that the complainant had lost interest in the criminal case and there was no statement of withdrawal of charges against the appellants. We thus find that the learned appellate Judge properly re-evaluated the evidence and we find no reason to fault his findings in regard to the consent judgment.

This appeal therefore lacks merit and is dismissed accordingly.

Dated this 9<sup>th</sup> day of July 2019



**Hon. Justice Geoffrey Kiryabwire, JA**



**Hon. Justice Cheborion Barishaki, JA**



**Hon. Justice Stephen Musota, JA**

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