

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 24 OF 2018

ISINGOMA ABUBAKER.....APPELLANT

VERSUS

10 UGANDA.....RESPONDENT

(Appeal from the decision of the High Court of Uganda in Criminal Appeal No. 61 of 2017 at Kampala by Hon. Justice Joseph Murangira dated 23rd March 2018)

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

15 HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF THE COURT.

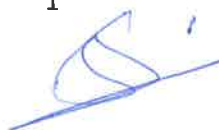
Introduction

20 This appeal emanates from the decision of the High Court of Uganda at Kampala, in High Court Criminal Appeal No. 061 of 2017 dated 23rd March, 2018 before Hon. Justice Joseph Murangira. It is brought under Articles 28(1), 44(c), 126(1) and 134(2) of the 1995 Constitution of Uganda, Sections 28, and 34(1) (2), 38, 39 of the Criminal Procedure Code Act Cap.116 and Rules 60, 64,66,73,74 of the Judicature (Court of Appeal Rules) Directions.

25 The appellant had been charged with the offence of obtaining money by false pretense contrary to Section 305 of the Penal Code Act at the Chief Magistrate's Court of Kampala at Buganda road. The trial magistrate



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5 acquitted him of the offence under Section 133(1) of the Magistrate's Court Act Cap.16. The DPP appealed against the acquittal to the high court, which reversed the decision of the trial magistrate and convicted the appellant.

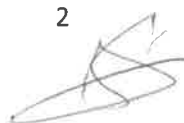
10 The appellate Judge sentenced him to pay a fine of Shs. 100,000,000/= to the complainant as compensation for the loss and damage inflicted on him by acts and omissions of the appellant and as a refund of the money that was conned from him by the appellant in default of which he was to serve a 4 year sentence in Murchison Bay Prison Luzira or any other government prison. The appellant being dissatisfied with the decision
15 filed this appeal.

Brief background

At the hearing of this appeal Mr. George William Bwanika, counsel appeared for the appellant while Wanamam Mics-Isaiah, Senior State Attorney, appeared for the respondent.

20 Mr. Bwanika who initially had wished to amend the memorandum of appeal filed by the appellant himself but later abandoned his proposed memorandum of appeal and proceeded with the original filed by the appellant. The memorandum of appeal sets out five grounds as follows;

- 25 1. *The trial judge erred in law when he failed to properly evaluate the evidence on record.*
2. *The trial judge erred in law when he failed to apply the law on the evidence on record thereby coming to a wrong conclusion.*
3. *The trial judge erred in law when he shifted the burden of providing the receipt of Shs 96,500,000/- to the appellant.*
- 30 4. *The trial judge erred in law when he shifted the burden of proof to the appellant to prove his innocence.*



5 5. *The trial judge erred in law when he sentenced the appellant to 4 years in prison without considering the antecedents of the appellant, and that he was a first offender.*

Submissions by the appellant

10 Counsel argued grounds 1, 2, and 5 separately and grounds 3 and 4 together.

15 On ground 1, Counsel submitted that, failure of the appellant to cross appeal on the findings of the trial court on ingredients 1, 2, 3 and 4 of the offence of obtaining money by false pretence in the first appellate court should not be a reason for court to allow the appeal or make a weak case strong as the appellate Judge found. Further that, failure by the appellant to discredit a weak case should not be used against him as stated in the judgment of the appellate Judge.

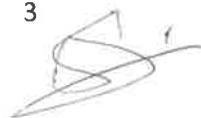
20 Counsel argued that, court should not convict on the weakness of the accused's case but rather on the strength of the prosecution's case. He noted that, the appellate Judge ignored the findings of the trial court in relation to convicting the appellant on a weak case.

25 On ground 2, counsel submitted that, the first appellate court relied on Sections 58 and 59 of the Evidence Act in isolation of Sections 60 to 63 of the same Act which was an error. Counsel argued that, court relied on oral evidence to admit the contents of a document not tendered in evidence at trial. Counsel contended that, this was procedural error adopted by the appellate court.

30 On grounds 3 and 4, counsel submitted that, the appellate court relied on hearsay evidence of PW3, D/IP Echengu Faustin a police officer who the matter was reported to and as such court ought to have cautioned itself before convicting the appellant.



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5 Counsel submitted that, the first appellate court accepted and relied on the sale agreement that was denied by the appellant during trial. He argued that, the appellate Judge held that the appellant had accepted the signature on the same. Further that, this denial of signature should have been ruled in favor of the appellant as the prosecution failed to
10 bring a handwriting expert to prove otherwise.

Counsel argued that, the first appellate court admitted additional evidence without an application for leave from the prosecution to tender in such evidence. Further that, court relied on such evidence to hold that the complainant failed to deliver the bank statement to prove that he
15 had earlier withdrawn Shs. 150,000,000/=.

Furthermore that, the appellate Judge engaged in a lot of speculation in his judgment resulting into an erroneous decision. He pointed out that the character of the appellant was not in issue in the trial court. He relied on Section 52 of the Evidence Act and Section 98 of the Trial on
20 Indictments Act. Counsel further pointed out the issue that there was no sale agreement made between the appellant and the complainant and that it was unjustified for the appellate Judge to find that the appellant took the said agreement and never came back.

On ground 5, counsel submitted that, the appellate Judge did not give
25 reasons as to why it awarded Shs. 100,000,000/= yet the charge sheet states Shs. 96,500, 000/=. Further that, the appellate Judge did not consider the fact that the appellant was a first offender. Counsel prayed that this appeal be allowed and set aside the conviction and sentence.

Submissions by the respondent

30 Counsel supported the judgment of the first appellate court. He submitted that, the appellate judge complied with the principles in *Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of*



5 1997 as regards the duty of the first appellate court. In reply, counsel submitted that, the findings on ingredients 1, 2, 3 and 4 were findings of fact by the trial court and confirmed by the first appellate court.

Counsel relied on *Kifamunte Henry v Uganda*, (supra) and **Rule 30(1)** of the Judicature (Court of Appeal Rules) Directions, SI. 13-10 and
10 submitted that, this court is precluded to make findings on points of facts where the trial court and the first appellate court have made findings on the same as it is in this case. Further that, if the appellant was not satisfied with the trial magistrate's findings of fact on ingredients 1, 2, 3 and 4, he should have cross appealed in the first appeal. Counsel argued
15 that all these were also not discredited by the appellant at trial in cross examination which shows that he had the intention to defraud.

On ground 2, counsel submitted that, the application of Sections 58 and 59 of the Evidence Act was proper because Shs. 96,500,000/= reflected in the charge sheet was not based mainly on PEXB.3 that counsel for the
20 appellant referred to. Further that, a proper purchase agreement was supposed to be drawn after the appellant had sent the money to the alleged co-director of the appellant in London. Counsel contended that, whereas PEXB 3 emphasizes that there was a transaction between PW1 and the appellant, it required direct oral evidence.

25 Further that, this case was not based only on PEXB 3, but rather all the evidence as a whole and direct oral evidence. He submitted that, PW1 gave evidence on contents of the document that was tendered in court and it is on court's record.

On grounds 3 and 4, counsel submitted that, the evidence of PW3 D/IP
30 Echengu Fustin is not hearsay evidence, it was direct as it was the findings of the investigation officer from the appellant's interrogation. He argued that, the witness testified that the appellant did not know how

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5 much he was paid for rent but he received the money in a black “kavera” and this cannot be hearsay.

Counsel submitted that, the evidence of an expert cannot stand alone or cannot be interpreted alone. That the first appellate court looked at the prosecution and the defense case as a whole to come to its conclusion.

10 Counsel submitted that, the comment about the appellant’s character by the appellate Judge was one made based on the evidence on record, such as, signing tenancy agreements as a landlord whereas not, receiving money as a landlord whereas not and admitting receiving such rent.

15 In response to ground 5, counsel relied on *Kobusheshe v Uganda, Criminal Appeal No. 110 of 2008*, where this court held that it cannot interfere with the sentence imposed by the trial Judge unless it is apparent that the judge acted on a wrong principle or over looked a material fact. Counsel argued that, the appellant did not show how the
20 first appellate court failed to comply with the authority above other than failure to consider that the appellant was a first offender.

He relied on Section 126(1) of the Trial on Indictments Act that provides that “once there is proof that a party has suffered financial loss or personal injury, the court has the discretion to order compensation.

25 Counsel argued that, the Shs. 96,500,000/= is in the charge sheet and 5,000,000/= received on PEXB 3 meaning that when these two figures are added together the first appellate Judge left out Shs. 1,500,000/= in the compensation awarded. Further that the 4 years in prison is not harsh since the offence charged attracts a punishment of 5 years in
30 prison.

Counsel prayed to court to find no merit in the appeal and uphold the decision of the first appellate court.



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5 **Consideration by court**

We have carefully perused and considered the submissions of both parties and have also perused the court record. This being a second appeal, we are not required to re-evaluate the evidence unless we find that the first appellate court had failed in its duty to do so. **See; Rules 30(1), 32 (2)** of Rules of this Court and section 45 (1) of the Criminal Procedure Code Act Cap. 116 ***Bogere Moses v Uganda, Supreme Court Criminal Appeal No.1 of 1997*** and ***Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997.***

As earlier noted above, counsel for the appellant abandoned his proposed memorandum of appeal and asked court to adopt the original filed by the appellant himself. This is a second appeal and the grounds of the appeal should be restricted to only matters of law as provided for under section 45(1) of the Criminal Procedure Code Act Cap 116. Further, the appellant's submissions should relate to the grounds of the appeal as set out in the filed memorandum of the appeal.

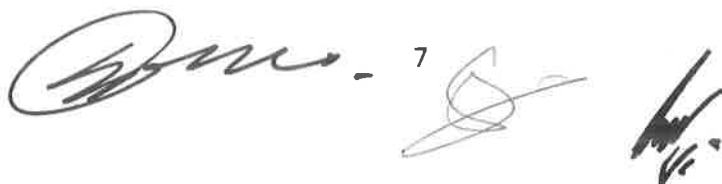
The appellant's submissions however do not relate to the grounds framed for resolution. The appellant in his submissions faults the appellate judge/court while the memorandum of the appeal complains against the "trial" judge.

25 Section 74(1) (a) of this Court's rules thus provides as follows:-

74. Arguments at hearing.

(1) *At the hearing of an appeal—*

(a) *the appellant shall not, without leave of the court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 67 of these Rules;*

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5 From the above provision of the law, we observe that the appellant's submissions are not in line with the grounds of this appeal. We would therefore be justified not to consider this appeal. However in order to administer substantive justice, we will proceed and resolve the grounds of the appeal to set the record straight.

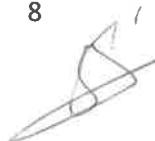
10 Ground one relates to failure to re-evaluate the evidence. Counsel for the appellant argued that, the appellant should not have been convicted on a weak case of the prosecution.

In execution of his duty as the first appellate court to re-evaluate the evidence, the appellate judge at page 4 of his judgment noted the five ingredients of the offence of obtaining money by false pretense as follows;

1. *There must be a presentation.*
2. *The presentation must be false.*
3. *The person making it knows it is false.*
- 20 4. *It must be intended to defraud.*
5. *There must be delivery of something capable of being stolen.*

The appellate Judge upheld the findings of the trial magistrate on ingredients 1, 2, 3 and 4. He found that the trial magistrate hurried to make a conclusion on ingredient 5 that the prosecution had failed to adduce evidence to prove the same. The appellate Judge observed that money is property capable of being stolen and that PW1 the complainant gave evidence detailing how the accused conned him of his money, Shs Shs. 96,500,000/= as this was direct evidence covered by Sections 58 and 59 of the Evidence Act.

30 The appellate Judge also stated that PW1's evidence against the appellant was never challenged in cross examination or cross appealed against the findings of the trial magistrate on ingredients 1, 2, 3 and 4.



5 From the above findings and the evidence on record, we have no doubt that the appellate Judge properly re-evaluated the evidence on record and came to a justified conclusion. Ground one of this appeal therefore fails.

10 In respect of ground 2, it is the appellant's contention that the appellate Judge relied on inapplicable law to admit the contents of a sale agreement which was not tendered in court at trial. Counsel for the appellant argued that the applicable law in the instant case were sections 60 to 63 of the Evidence Act which provide as hereunder;-

60. Proof of contents of documents.

15 *The contents of documents may be proved either by primary or by secondary evidence.*

61. Primary evidence.

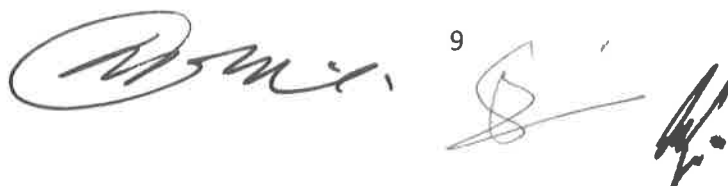
Primary evidence means the document itself produced for the inspection of the court.

20 *Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.*

25 *Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.*

30 **62. Secondary evidence.**

Secondary evidence means and includes—

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- 5 (a) certified copies given under the provisions hereafter contained;
(b) copies made from the original by mechanical processes which in
themselves ensure the accuracy of the copy, and copies compared
with those copies;
- (c) copies made from or compared with the original;
- 10 (d) counterparts of documents as against the parties who did not
execute them;
- (e) oral accounts of the contents of a document given by some
person who has himself or herself seen it.

63. Proof of documents by primary evidence.

15 Documents must be proved by primary evidence except in the cases
hereafter mentioned.

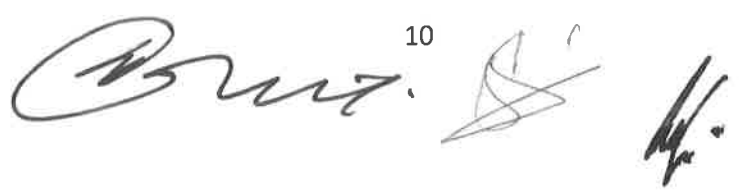
The appellate Judge further relied on Sections 58 and 59 of the same Act
and they provide as follows;-

58. Proof of facts by oral evidence.

20 All facts, except the contents of documents, may be proved by oral
evidence.

59. Oral evidence must be direct.

- Oral evidence must, in all cases whatever, be direct; that is to say—
- 25 (a) if it refers to a fact which could be seen, it must be the evidence
of a witness who says he or she saw it;
- (b) if it refers to a fact which could be heard, it must be the evidence
of a witness who says he or she heard it;
- (c) if it refers to a fact which could be perceived by any other sense,
or in any other manner, it must be the evidence of a witness who
- 30 says he or she perceived it by that sense or in that manner;

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5 (d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds, except that—

10 (e) the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which those opinions are held, may be proved by the production of those treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable; and


15 (f) if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of that material thing for its inspection

20 It is our considered opinion that the provisions of the law contested by counsel for the appellant all apply to the instant case. Oral evidence must be direct and must be given by a person who saw the facts in issue happen as in this case. PW1, Benon Mugizi, the complainant gave evidence on a sale agreement that he signed with the appellant and agreed to execute another on return of the appellant. This means that he saw this happen and his evidence is credible. Further, PW1 gave oral accounts on contents of a document (sale agreement) that he had seen.

25 The same is on record as PEXB 3. In the premises, ground 2 fails as well.

In respect of ground 3 and 4, we find that the evidence of Pw3 is not hearsay. The witness gave evidence on what he had heard from the appellant, and this is covered by Section 59(b) of the Evidence Act.

30 The finding that the appellant is a habitual conman was an observation made by the appellate Judge to reach his decision. This was neither brought out during trial nor did it affect the appellant's case in any way at the first appellate court. Further, the fact that the appellant denied



5 knowledge of the sale agreement does not imply that it cannot be considered in evidence to reach a just conclusion. Grounds 3 and 4 of appeal fail.

10 In respect of ground 5, the appellant contends that the appellate Judge did not take into account the fact that the appellant was a first offender, and that he did not give reasons for awarding compensation of Shs. 100,000,000/=

The appellate Judge awarded compensation of Shs. 100,000,000/= and in default the appellant to serve 4 years in prison.

Section 35 of the criminal procedure code act provides as follows;-

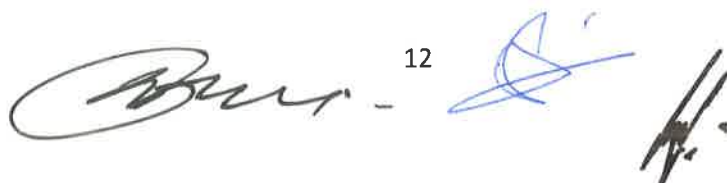
15 **35. Powers of appellate court on appeals from acquittals.**

“The appellate court may, on an appeal from an acquittal or dismissal, enter such decision or judgment on the matter as may be authorised by law and make such order or orders as may be necessary.”

20 Section 197 subsection 1 of the Magistrate’s Court Act Cap. 16 provides for Order for compensation for material loss or personal injury. It expressly provides as follows;-

25 *“When any accused person is convicted by a magistrate’s court of any offence and it appears from the evidence that some 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*
30 *to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.”*

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5 The appellate judge noted that the award was to compensate for the loss and damage inflicted on the complainant and as a refund of the money that was conned from him by the appellant. We therefore find that the sentence is legal and we hereby uphold it. Ground 5 therefore fails.

Conclusion

10 In the final result, this appeal fails on all grounds and we dismiss it.

Dated at Kampala this..... 7th day of ... February 2019.



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Geoffrey Kiryabwire

Justice of Appeal



Ezekiel Muhanguzi

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Justice of Appeal



Christopher Madrama

Justice of Appeal

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