THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 1 OF 1995

(FROM JINJA MJ. 130/93)

STEPHEN BATUMBIA::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

JUDGMENT

This is an appeal by the Appellant Stephen Batumbia whom I shall hereinafter refer to as the appellant. The appeal is against the conviction and sentence by the learned Chief Magistrate of Jinja. The appellant was charged with 2 counts. The first count was for attempted theft c/s 370 and 252 of the Penal Code Act, the second count was for giving false information to a person employed by the Public Service c/s 109(c) of the Penal Code Act. The appellant pleaded not guilty to all the 2 counts. He was tried and found guilty on both counts. He was accordingly convicted and sentenced to 12 months imprisonment on each count and the sentences were to run consecutively.

The gist of the case as established by prosecution at the trial was that the appellant was a business colleague of the complainant Dan Musoke (PW1) and that in the course of their business the appellant advanced 1.5m/- the complainant. The complainant then wrote a cheque for that amount due for payment on 28-5-93. Later on the appellant reported to Musoke (Pw1) that the cheque had been lost and Musoke informed his bankers about the loss meanwhile the appellant wrote a note to Dan Musoke requesting him to make payments to 3 people amounting to 700,000/=. An arrangement was also made whereby the appellant was paid by Musoke a sum of 200,000/= leaving a balance to be recovered from Musoke by the appellant amounting to 600,000/= out of 1.5m/= which the appellant lent to Musoke.

Meanwhile appellant proceeded to present the cheque for payment for the full amount sometime in October 1993 but the cheque bounced as there was no money from the account of Musoke at the Co-operative bank where the cheque was to be cashed. After the cheque had bounced the appellant went to Jinja police station and reported that Dan Musoke had

committed a crime of issuing a bouncing cheque. It was on this ground that the police proceeded to investigate the matter and discovered that the appellant had actually been paid in respect of the cheque which had bounced and it was on that basis that the two counts were preferred against the appellant.

On the other hand the case for the appellant was that the complainant Musoke had in fact borrowed from him (appellant) a total of 1,850,000/= and he had issued him with a cheque for a sum of 1.5m/= which was post-dated and that is why he (appellant) had presented the cheque for payment. He denied ever having received 900,000/= from Musoke as part payment of the money he had lent him. He also stated that the information he gave to the police was not false at all.

The appellant gave 7 grounds of appeal in his amended memorandum of appeal. The 7 grounds are as follows: -

1. That, the learned trial Chief Magistrate did not fully evaluate all the evidence on record and hence came to a wrong (sic) conclusion.
2. That, the learned trial Chief Magistrate erred in law in giving undue weight to the evidence of the handwriting expert which was not conclusive.
3. That the learned trial Chief Magistrate erred in law in believing the prosecution case before considering and rejecting the defence case.
4. That the learned trial magistrate erred in law in imposing harsh consecutive sentences upon the appellant without just cause and in total disregard of the mitigating factors advanced by the appellant.
5. That the learned trial magistrate erred in 1aw and fact by reaching a decision not reported by evidence on record thereby occasioning miscarriage of justice.
6. That, the learned trial Chief Magistrate failed to consider and/or resolve the inconsistencies, contradictions and lacuna in the prosecution case, in favour of the appellant/ accused.
7. The learned trial Chief Magistrate was biased: -
(i) In the conduct of the trial
(ii) In the formation of his judgment

Before I proceed to deal with these grounds of appeal it is important to point out here that this being a first appellate court it has the duty to evaluate and scrutinise the evidence as produced

in the lower court and then come to its own conclusion bearing in mind however that the trial court had advantage of seeing the witnesses in the witness box, an advantage which the appellate court does not enjoy: Williamson Diamonds LTD v Brown (1970) EA 1 and D. Pandya v R (1957) EA 336.

Miss. Nakacwa who appeared for the appellant abandoned the 7th ground of appeal and she argued the 1st and 3rd grounds together, she also argued grounds 5 and 6 jointly then she came to grounds 2 and 4 in that order. I propose to deal with those grounds in the order she dealt with them.

Arguing the 1st and 3rd grounds she carefully and forcefully maintained that the learned trial magistrate did not evaluate the evidence before him properly and for that reason he came to the wrong conclusion. She pointed out that the learned trial magistrate believed the evidence of the prosecution before he considered that of the appellant. Her main point of contention was that the learned trial magistrate did not fully evaluate the evidence to ascertain whether or not Musoke had paid 900,000/= to 3rd parties on behalf of the appellant, She also pointed out that although the case -for prosecution had been that 3 people had received money from Musoke on behalf of the appellant, only 2 testified in that respect and that no explanation had been offered as to why Richard was paid 100,000/= instead of 60,000/= which Musoke had allegedly told to pay him. She (Miss Nakacwa) stated that the evidence of Richard should not have been believed as it was in a jumble, she relied on the case of Uganda v Ngirabakunzi & ors (1988-90) HCB 40 a case which deals with contradictions but I do not think that this case is applicable to the present case because PW2 did not make any contradictions in his evidence he was only trying how the appellant came to owe him 100,000/= and how he was paid in kind by PW1 who gave him fish nets worth 100,000/=.

On his part Mr. Okwanga the learned Resident Senior State Attorney supported the conviction and sentences on both counts. It was his view that the prosecution had proved its case beyond reasonable doubt, he said that the accused/appellant having received 900,000/= was wrong to claim the whole amount of 1.5m/=. He also contended that the learned trial magistrate had properly evaluated the evidence before him and had come to a correct decision.

With due respect I do agree with The learned counsel for the appellant when she says that the learned trial magistrate did not properly evaluate the evidence before him with regard to the

amount of money which prosecution alleged had been paid to the appellant by the complainant (Musoke) . According to the judgment of the learned Chief Magistrate and according to the evidence of Musoke himself (PW1) the 900,000/= was arrived at as follows: 200,000/= paid directly to the appellant by Musoke, 500,000/= paid to Nile Fishing company through Christopher Said (PW6), 100,000/= was paid to Waiswa Kadidi or Waiswa Richard (PW2) and 100,000/= was paid to Akamba. Although in Exh P2 the appellant had authorised Musoke to pay Akamba 100,000/= there was no other evidence apart from Exh P2 and the evidence of PW1 to shoe that Akamba was ever paid that amount of 100,000/= since Akamba himself did not testify to confirm the allegation by Musoke that he paid him that amount. In that Exhibit also the appellant authorized Musoke to Pay 60,000/= to Waiswa (PW2) but according to Waiswa himself and Musoke he was instead paid 100,000/=. There is no explanation as to why Musoke had to pay this man an extra 40,000/=. The trial courts findings that 900,000/= had been paid was not supported by the evidence on record. The evidence on record clearly shows that Akamada might not have been paid the 100,000/= and that 40,000/= was paid to Richard (PW2) outside the authority of the appellant. According to the evidence the amount paid was 900,000/= less 140,000/= which comes to 760,000/=. be that as it may, the fact remains that the accused/appellant was in fact paid this amount of 760,000/= although not directly, It is immaterial that the mount he was alleged to have attempted to recover from the complainant was greater than this amount. The crux of the matter is that the appellant wanted unjustifiably to get some money from Musoke.

My finding on the 1st and 3rd grounds of appeal is that although the learned trial magistrate misdirected himself as to the amount involved he certainly came to the right conclusion when he held that the appellant attempted to recover money from Musoke when he was not entitled to. Even if the learned trial magistrate had addressed his mind properly to the matter pointed out above he would still have come to the same conclusion but for a different sum of money.

That leads me to the 5th and 6th grounds of appeal. The learned counsel for the appellant Miss. Nakacwa bitterly attacked the judgment of the learned trial magistrate on the ground that some of his findings were not supported by evidence on record and that resulted in miscarriage of justice. She in particular expressed her misgivings,-in the paragraph appearing in the judgment of the trial court which reads as follows: -

“shortly afterwards the accused secured a scholarship or studies in U.K while in his process of arranging his departure he met Musoke in a taxi and asked the said Musoke to pay him 200,000/= which would be offset from the principal sum of 1.5m/=.”

It was her view that this statement in the learned Chief Magistrate’s judgment was not supported by evidence on record and she quoted the case of: Kanalusoki v Uganda (1988-90) HCB 9 in support of her argument that it was wrong to base a judgment on a matter which was not on record, she was also of the view that the learned trial magistrate did not resolve some inconsistencies which had appeared in the prosecution case e.g Tom Kato who was given Exh. P2 was not called as a witness. She further pointed out that evidence of PW1 and PW5 contradicted itself because PW1 said the cheque was not paid because he had stopped the payment but PW5 said the cheque could not be paid because there was no money on Musoke’s account. It was her view that this contradiction should have been resolved in favour of the appellant by accepting the Evidence of the banker (PW5) as being truthful. Miss. Nakacwa further contended that the court failed to consider the fact that the accused had never been paid any money and that even if he had been paid he still had an outstanding debt of 600,000/= to be recovered from the same cheque.

On the other hand Mr. Okwanga the learned counsel for the respondent insisted that the cheque was not paid because the complainant had stopped the payment of the cheque not because there was no money on Musoke‘s account. According to him after the complainant had received information from the appellant he proceeded to have the cheque stopped.

I will first deal with the paragraph quoted by Miss. Nakacwa from the judgment of the lower court with due respect, to Miss. Nakacwa I do agree with her when she says that that paragraph was not supported by any piece of evidence on record. No witness ever mentioned any transaction having taken place between the appellant and Musoke in a tax. It is trite law that court should not base its decision on extraneous matters which were not before the court: Kanalusoki v. Uganda (1988-90) HCB 9. There can be only 2 reasons as to why the learned trial magistrate made reference to that taxi transaction. The first reason could be that in the course of his testimony, the complainant might have mentioned that transaction but which was never recorded, as it at times happens, but failure to record it in the proceeding would mean that that point was not treated as important by the trial court. It should not therefore be made as a subject of reference in the judgment. The second reason why the learned trial magistrate might have been tempted to include that paragraph in his judgment might be that

because the prosecutor in his written submission said something about it. I am not so sure as to where the prosecutor got that part of information from since the record does not show that there was any transaction between the 2 men in a taxi. I quite agree with the learned counsel for appellant that court should restrict itself to the matter which appears on record only.

There is however evidence that the appellant received 200,000/= from the complainant as contained in the evidence of the complainant himself and in a note dated 9-9-93 which was written by the appellant to the complainant acknowledging receipt of the 200,000/=. In my view even if the learned trial magistrate did not include that offensive paragraph in his judgment there was still evidence in support of the finding that 200,000/= was in fact paid to the appellant by the complainant (Musoke).

The other point raised by the learned counsel for the appellant in her submission was that the learned trial Chief Magistrate did not address his mind to the 600,000/= which, even if the complainant had paid some money to the appellant, he still owed to him. According to the evidence on record as adduced by both sides there is no doubt that by the time the appellant presented the cheque he was still owed some money by the complainant. It is only question of how much? According to my finding when dealing with grounds 1 and 3 of this appeal it seems that the appellant was still owed some 740,000/= which the complainant was supposed to pay him which means that the appellant in fact had vested interest in the cheque which he presented to the bank for payment and this was an important factor to consider when dealing with count 11. Had this point been considered by the trial court possibly it would have come to a different conclusion as far as count 2 is concerned.

Regarding the contradictions I do agree with Miss. Nakacwa when she says that there was a contradiction between the evidence of PW1 and that of PW5 to the effect that while PW1 says the cheque was not paid because it was stopped by him, PW5 the bank official says the cheque could not be paid because there was no money on PW1's account. This contradiction was hot resolved by the learned trial magistrate. The law as stated in the cases of Dusmani Sabuni v Uganda (1981) HCB 1; Alfred Tajar v Republic EACA Criminal appeal no. 167/69 and Uganda v Ngirabakunzi 91988-90) HCD 40; is that there are inconsistencies which are minor and they were not deliberately intended to mislead the court such inconsistencies should be ignored; but where such inconsistencies are major and they go to the root of the case they should be resolved in favour of the accused person. In the present case Mr. Okwanga argued that the inconsistencies were minor and should be ignored. With respect I do

not agree with the learned counsel's contention this was a major inconsistency as regards to the issue of whether or not the cheque had been properly rejected. If I understood the case for prosecution properly the second count was based on the allegation that the cheque did not bounce and therefore the report to the police by the appellant was false. The evidence of PW5 clearly shows that the cheque bounced because there was no money on Musoke's account it follows that when the appellant reported to the police about the bouncing of the cheque he was not making a false report. Had the learned trial magistrate resolved this matter he would probably have come to a different decision in regard to the second count.

In these circumstances the submission by the learned counsel ant on grounds 5 and 6 must succeed so for as that submission concerns second count but not the first count.

Turning to the 2nd ground of appeal the learned counsel for the appellant Miss. Nakacwa seriously complained that the trial court should not have relied on the evidence of the handwriting expert because no specimen document written by the appellant had been obtained from the appellant to compare it with the other documents which he was alleged to have written. It was her view that the document found in the appellant's bag which was presented by prosecution as Exh.3 might not have been written by the appellant. She based her argument on 2 cases of Muzei v Uganda (1971) EA 225 and Onyango v Republic (1969) EA 362. It is trite law that the evidence of an expert is not binding on the court, it is to be considered like any other evidence and the court may or may not reject it as was pointed out in the case of: Onyango v Republic (1969) EA 362. In the present case however it is not true to say that Exh. 3 which was found in the appellant's bag had not been written by him because according to the evidence of Habomugisha (PW3), which the trial court accepted as truthful, was to the effect that when this document was found in the bag of the appellant he was asked whether it was him who had written it and he said that the document had been written by him and the handwriting, was his. It was on this basis that the police decided to send that document to the handwriting expert to compare it with other documents such as Exh. 1 and 2. The expert found that the handwriting was the same. This ground of appeal therefore has no merit and accordingly must fail.

The 4th and last ground of appeal to be argued was that the sentences imposed upon the appellant were harsh and excessive and more especially as he 2 sentences had to run consecutively. Appellant's counsel further maintained that as the accused was the first offender and had an interest in the cheque he deserved less punishment than what he got and

after all the 2 offences were misdemeanors. She based her argument on the cases of; Uganda v Lubega (1985) HCB 9; Mayuta v Republic (1973) EA 89 James Mwagira v R unreported. Mr. Okwanga the learned counsel for the respondent argued that the sentences were proper and they were not illegal and that the learned trial magistrate argued that the sentences were proper and they were not illegal and that the learned trial magistrate gave reasons as to why the sentences had to run consecutively.

It is trite law that an appellate court can only interfere with a sentence imposed by the trial court if such a sentence is manifestly harsh or low and offends the established sentencing principles: Harries v R (1921) 8 EALR 186; Monesamy v R (1931-34) 3 TTLR 69; (1931) 3 LRK 55; R v Mohamedali Jamal (1948) 15 EACA 126; James s/o Yaran v R (1951) 18 EACA 147 and Ogalo s/o Owoura v R (1954) 21 EACA 270.

In the present case I would say the sentences did not offend the sentencing policy of this court considering all the circumstances of this cases I have no intention of interfering with those sentences except that in respect of the second count which was illegally imposed as no offence had been committed in respect of that count.

The final outcome of this case is that the appeal is allowed in respect of count two and conviction imposed in respect of that count is quashed and sentence is set aside. Appeal for count one is dismissed and the sentence imposed by the lower court in count 1 is to remain.

C.M. KATO
JUDGE
25/8/1995