THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

(Originating from City Hall Court Criminal Case No. 1578 of 2006)

CRIMINAL APPEAL NO. 64/2007

NAKIGUDDE MADINA……APPELLANT

VS

UGANDA…… RESPONDENT

Before: Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

This judgment is in respect of an appeal. The above-named (appellant) preferred the appeal against a decision Her Worship Esta Nambayo (a Magistrate Grade 1) made on 5th September 2007 at City Hall - Kampala. Under that decision the learned trial Magistrate convicted the appellant of the offence of obtaining money by false pretence contrary to section 305 of the Penal Code Act (Cap. 120). She then sentenced her to a term of 8 months' imprisonment. She further made an order requiring the appellant to refund the complainant (one Haruna Sewanyana) the money that is the subject of the above charge (i.e. a sum of shillings 2,500,000/=).

The above decision, sentence and order aggrieved the appellant. Therefore, she appealed against them; and in her Memorandum of Appeal dated 6th February 2008 she sought this Honourable Court's orders overturning the decision and setting aside the sentence and order that followed the decision.

Before Court goes into the merits of the appeal it is prudent to understand the background that gave rise to the appeal. That background was briefly follows:

Near the end of the year 2006 some one advised Haruna Sewanyana (PW1) that there was a piece of land measuring 58' x 50'; and 38' x 48' at a place called Kulambiro/Kasana that was up for sale. Sewanyana visited the above place, saw the piece of land and consulted the Local

Council Chairman (the late Semakula) about it. The said Local Council Chairman confirmed the land's availability for sale. Later on, Sewanyana returned to Kulambiro to buy the above piece of land, but its owner was not around. However, a lady called Nambooze Aisha agreed to go and bring the owner of the land. Sewanyana gave Nambooze some money to facilitate that exercise. The owner of the land (i.e. the appellant) did not come. However, she rang and said she had given Nambooze her photograph and written authority to sell the land for her. Therefore, when Nambooze returned to Kulambiro with the above authority and photograph, Sewanyana was satisfied that all was well. He proceeded to the Local Council Chairman and entered into an agreement to buy the above piece of land. Finally, all the parties concerned and their respective witnesses (including the Local Council Chairman) signed the above agreement. Lastly, Sewanyana paid Nambooze a sum of shillings 2,500,000/= as the purchase price for the above piece of land. Eventually, Sewanyana discovered that the above piece of land actually belonged to Muhamed Sendagire (PW3) who had a title to it. As a result of all this the police arrested the appellant, took her to the lower court and had her tried on a charge of obtaining a sum of shillings 2,500,000/= from Sewanyana by false pretence.

In essence, the appellant's defence was that she did not commit the above offence because she had a customary interest in the above piece of land. Ali Sebidde (DW2 and a brother to the appellant) also testified that his father donated the land in question to the appellant.

After considering the above two versions (i.e. the State's version and the defence version) the learned trial Magistrate was satisfied that the appellant committed the offence in question. She accordingly convicted her and sentenced her as earlier on pointed out; and hence the appeal herein.

At the time of hearing the appeal Mr. Kusiima represented the appellant; and proceeded ex parte, for despite service the Director of Public Prosecutions did not show up for the hearing.

Without going into the details of the submissions that Mr. Kusiima made during the hearing of the appeal it will suffice to say that his arguments raised two important issues which are as follows:

(a) whether on the evidence as a whole the learned trial Magistrate was right in convicting the appellant of the offence in question; and

(b) the remedies available.

Court will discuss the above issues in turn.

With regard to the first issue **(i.e. whether on the evidence as a whole the learned trial Magistrate was right in convicting the appellant of the offence in question)** before getting into its merits it is important to examine the offence in section 305 of the Penal Code Act (Cap. 120), which is laid out as follows:

"305. Obtaining goods by false pretences.

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, … commits a felony and is liable to imprisonment for five years."

From the above provision it is quite clear that in order to commit the above offence a person must by "***false pretence and with intent to defraud"*** obtain from another something capable of being stolen. This means that, among other things, a valid charge under section 305 of the Penal Code Act (Cap. 120) must include in its particulars an averment alleging some form of "***false pretence"*** coupled with "***intent to defraud"***.

The particulars of the charge under which the learned trial Magistrate convicted the appellant read as follows:

"MADINA NAKIGUDDE AND ANOTHER STILL AT LARGE ON THE 20/10/2006 AT KASAANA ZONE IN THE KAMPALA DISTRICT OBTAINED CASH USHS: 2.5 MILLION …FROM HARUNA SSEWANYANA BY FALSELY PRETENDING THAT THEY WERE SELLING A PIECE OF LAND AT KASANA ZONE THAT BELONGED TO THEM WHEREAS NOT."

It is quite clear that the above particulars do not include an averment alleging the ***"intent to defraud".*** Therefore, in the absence of such averment Court doubts whether the appellant had a fair trial under the above charge in the lower court.

Turning to the ***"false pretence"*** the crux of that allegation was that the appellant sold a piece of land at Kasana on the understanding that it belonged to her, when in fact it did not. Consequently, in order for State to succeed under the above allegation, it had to lead evidence proving beyond reasonable doubt that the appellant well knowing that the above piece of land was not hers sold it to Sewanyana claiming that it belonged to her.

In a bid to prove the above allegation the State led evidence from two vital witnesses, namely, Sewanyana (PW1) and Sendagire (PW3). Sewanyana was the victim of the alleged scam. He testified that he parted with a sum of shillings 2,500,000/= in an effort to buy the above piece of land. This was on the understanding that the said piece of land belonged to the appellant. On his part, Sendagire testified that he busted the above racket (of lies) in December 2006; and later showed that he was the registered proprietor of the above piece of land under Exhibit PX3.

On the contrary, the appellant denied the offence in question. She testified that she had a customary interest in the land in question (i.e. a Kibanja interest). She gave the history of that Kibanja; and explained that she inherited it from her grandmother (one Bazanyawendi) who died in 1966. She further insisted that a number of her relatives were buried near that Kibanja. The appellant's brother (Ali Sebidde – DW2 -) also testified that the above Kibanja belonged to the appellant.

In view of the foregoing, it is staggering to find that in her decision the learned trial Magistrate came to the conclusion that the appellant was guilty of the "***false pretence"*** referred to above. It seems she made that finding mainly because she did not consider the appellant's defence, which showed that the appellant sold only a Kibanja interest to Sewanyana. Besides, the Agreement of Sale (Exhibit PX2) also tended to confirm that fact. Of course, it is perfectly lawful and quite common in Buganda to find both a registered interest in land (popularly known as a Mailo interest) lying side by side with an unregistered interest on the same land (i.e. a Kibanja interest.)

All in all, therefore, Court is of the opinion that on the evidence as a whole the learned trial Magistrate was wrong in convicting the appellant of the offence in question.

With regard to the second issue **(i.e. the remedies available)** Court has this to say: Since Court decided the first issue in favour of the appellant it means that the appeal herein has succeeded. Therefore, the remedy available is this: The conviction of the appellant in respect of the charge of obtaining money by false pretence contrary to section 305 of the Penal Code Act (Cap. 120) must be quashed; and the sentence and order that followed must be set aside. It is so ordered.

Finally, before Court takes leave of this matter it wishes to comment as follows: The learned trial Magistrate's undoing (while writing her judgment) was the usual trap that judicial officers are caught into i.e. a failure to evaluate the evidence on record. The case of **Bogere v Uganda (SC) Appeal No. 1 of 1997** vividly explains the concept of proper evaluation of evidence in a criminal case; and judicial officers, especially, of the lower courts would do well to remember what **Bogere (Supra)** says on the subject.

E.S. Lugayizi (J)

2/9/2008

Read before: At 10.15 a.m.

Mr. Kusiima for appellant

Ms. E. Kansiime c/clerk

E.S. Lugayizi (J)

2/9/2008