

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL APPEAL NO. 45 OF 2011**

**BUTAAMA JOHN ..... APPELLANT**

**VERSUS**

**UGANDA ..... RESPONDENT**

*(Arising from Buganda Road Court Criminal Case No. 244 of 2009)*

**HON. LADY JUSTICE MONICA K. MUGENYI**

**JUDGMENT**

This Criminal Appeal arises from the judgement and orders of the Buganda Road Court in Criminal Case No. 244 of 2009. The appellant, Butaama John, was the registered proprietor of land comprised in Ranch 5B4, Singo Ranching Scheme, Kiboga. He was alleged to have sold the said land to a one Nuwagira but, prior to the transfer of the land, the said Nuwagira sold the same piece of land to the complainant, Antonio Rwakana. Following Nuwagira's death, the complainant sought to effect the land transfer but the appellant requested for Ushs. 3 million to execute a fresh sale agreement. However, upon receiving the said money the appellant declined to facilitate the sought land transfer. Consequently, he was charged and convicted on 2 counts of obtaining money by false pretences contrary to section 305 of the Penal Code Act, and sentenced to a fine of Ushs. 3.5 million (Ushs. 3 million being compensation to the complainant) or 1 year's imprisonment. Aggrieved by both conviction and sentence, the appellant lodged the present appeal.

The Memorandum of Appeal comprised three (3) grounds as reproduced below:

- 1. The learned trial magistrate erred in law and fact when he convicted and sentenced the appellant on the basis of uncorroborated and inconsistent evidence.**
- 2. The learned trial magistrate erred in law and fact when he failed to evaluate the evidence on record as a whole.**
- 3. The learned trial magistrate erred in law and fact when he convicted and harshly sentenced the appellant in reliance upon the evidence of a lease agreement that was mutually executed by the appellant and the complainant.**

Mr. Emmanuel Wamimbi appeared for the appellant while Ms. Rose Tumuhaise represented the respondent. At the hearing of the Appeal learned counsel for the appellant abandoned grounds 1 and 3 thereof, and clarified that the Appeal was only against conviction.

On the sole ground of appeal, to wit, whether or not the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on the court record, Mr. Wamimbi argued that the appellant did not sell the land in question to Nuwagira, but rather executed a 5-year sub-lease agreement with the complainant that was merely intended to formalise the complainants' stay on the land. Mr. Wamimbi further contended that the Prosecution did not prove all the ingredients of the offence in issue presently. Although he conceded that the appellant received the money in question, Counsel argued that the money was not procured fraudulently or by false representation. He further argued that the failure by the prosecution to produce Nuwagira and the absence of any evidence of his alleged sale of land to the complainant left the alleged purchase unproved. Finally Mr. Wamimbi argued that, as a lessee on the land in question, the appellant could only transfer a sub-lease to the complainants not ownership thereof.

Learned State Counsel, on the other hand, supported the findings of the trial magistrate. She contended that the prosecution had presented well corroborated evidence to the trial court the gist of which was that the complainant purchased the land in question from Mr. Nuwagira but, following the death of the said Nuwagira, sought to have the said land registered in his names. It

was State Counsel's submission that the prosecution proved that when approached by the complainant the appellant requested for Ushs. 3 million to effect the transfer of the land to him, which money was duly paid to and received by the appellant. Ms. Tumuhaise argued that the fact of the appellant having received the Ushs. 3 million was not in contention; rather, what was in contention was whether or not the money was received by misrepresentation. It was her contention on this question that the prosecution had proved that the complainant paid the money in issue upon receipt of assurance from the appellant that he would execute the requisite transfer forms; that the appellant reneged on this assurance and, when the complainant attempted to pursue the land transfer himself, the appellant intervened and stopped his actions. In learned counsel's view, in so far as the appellant solicited for money from the complainant to execute transfer forms in the latter's favour but did not do so, he was rightfully convicted of the offence of obtaining money by false misrepresentation.

Of Mr. Wamimbi's submission that the money the appellant received was in respect of a sub-lease agreement between him and the complainant, Ms. Tumuhaise contended that the complainant was an illiterate man who only understood Kinyarwanda yet the purported sub-lease agreement was drafted in English. Learned counsel argued that the complainant had attested to endorsing the agreement in the belief that he was executing an agreement for the transfer of land to him, which misinformation the appellant took advantage of. She further argued that as a lessee, the appellant did not have authority to sub-lease the said land without the consent of the lessor therefore the purported sub-lease was a misrepresentation in itself.

In a brief reply, Mr. Wamimbi argued that the appellant sought not to offer a sub-lease to the complainant but rather to create a 5-year tenancy arrangement between them. Learned counsel further argued that the evidence of PW1, PW2 and PW3 was unsubstantiated hearsay, and the complainant was bound by his signature on the purported sub-lease agreement.

The law on the powers of an appellate court in an appeal from a conviction, such as the present one, is stated in Section 34 of the CPC Act. Section 34(1) enjoins such appellate court to allow the appeal if it deems the judgment to have been unreasonable or one that cannot be supported having regard to the evidence; entails a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice. This legal provision renders the success of an appeal

conditional upon the incidence of a miscarriage of justice, save in instances of an unreasonable judgment or one that is not supported by evidence, in which case such judgment may on its own form the basis for an appeal's success.

Further, in **Bogere Moses & Another v. Uganda Supreme Court Criminal Appeal No. 1 of 1997** it was held:

**“A first appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses and should, where available on record, be guided by the impression of the trial judge on the manner and demeanour of the witnesses. What is more, care must be taken not only to scrutinise and re-evaluate the evidence as a whole, but also to be satisfied that the trial judge had erred in failing to take the evidence into consideration.”**      (*emphasis mine*)

In the present appeal, the sole ground of appeal would appear to fault the trial magistrate's judgment as one that cannot be supported having regard to the totality of the evidence that was adduced. Therefore, as stipulated in section 34(1) of the CPC Act, this appeal could succeed on that basis alone without recourse to whether or not there was a miscarriage of justice. Be that as it may, this court has a duty not only to scrutinise and re-evaluate the totality of the evidence before the trial court, but also to satisfy itself as to whether or not the trial magistrate did in fact err in failing to take all this evidence into account. See **Bogere Moses & Another v. Uganda** (*supra*).

As quite rightly argued by learned State Counsel, the fact of the appellant's having obtained Ushs. 3 million from the complainant was not in contention in this appeal. This was conceded by counsel for the appellant. What is in contention presently is whether or not the money obtained by the appellant was received by false pretences.

I have carefully re-considered the evidence on record with regard to what formed the basis for the appellant's receipt of the money in question. PW2, the complainant's daughter, testified that the appellant asked her father for Ushs. 3 million as transfer fees but later told her that the money had been a payment for renting the land for 5 years commencing in 2008. She further testified

that when she inquired from the advocate that provided legal services to that transaction (PW5) he told her that the money in question had been intended to effect the land transfer. PW3 (the complainant) attested to having bought the disputed land from a one Nuwagira, who had in turn had bought it from the appellant. He testified that following Nuwagira's death he requested the appellant to execute the transfer of the land to him so as to enable him apply for a lease. According to the complainant, to that end, he later paid the appellant Ushs. 3 million but the complainant did not give him the lease, title or any other document. The complainant further testified that, on the contrary, the appellant told him that the Ushs. 3 million was for rental purposes and not sale of land. During re-examination, the complainant averred that the agreement he executed with the appellant was in English, he did not know the contents thereof but had been told he would be given the title to the land. PW5, in turn, testified that initially the appellant approached him for legal services in respect of a land sale but later informed him that he only wished to sub-lease the land. The transaction agreement in question was admitted on the court record as Exh. D1. On his part, the appellant denied receiving money by false pretences and testified that the money he received was in return for the renting of his land to the complainant.

In my view, the ingredient of 'false pretences' in the present offence connotes the existence of untruthful representations or deceit underlying an offender's receipt of money. In **Re: London and Globe Finance Corporation Ltd (1903) 1 Ch 728** Buckley J held as follows:

**“A person acts with intention to deceive when he induces another to believe that a thing is true, which is false, and which the person practicing the deceit knows or believes to be false.”**

In **Welham vs DPP (1960) All ER 805** Lord Radcliffe held:

**“Deceit can involve a reckless indifference to truth or falsity as well as the deliberate making of false statements; and in all cases it may involve the inducing of a man to believe a thing to be false which is true, as well as to believe to be true what is false.”**

In the present appeal, clearly the complainant paid Ushs. 3 million to the appellant on the belief that such payment would secure him signed transfer forms by the appellant and ultimately ownership of the disputed land. This understanding by the complainant was corroborated by the

evidence of PW2. The question then is whether the complainant's understanding was simply a mistaken belief on his part or the result of a deliberate and deceitful misrepresentation on the part of the appellant.

I have had occasion to peruse the content of Exh. D1 and must state from the onset that it is a sale agreement not a sub-lease agreement as has been inferred by both counsel. As rightly observed by the trial magistrate, the agreement sought to transfer the appellant's interest in the land to the complainant for a period of 5 years commencing on 29<sup>th</sup> October 2007 whereupon the parties would revert to the advocate for further guidance. Further, the terms of the agreement are such that in consideration for Ushs. 3 million the appellant did in fact execute a transfer of his interest in the disputed land to the complainant. Accordingly, having received the agreed sums of money, his continued refusal to hand over the said agreement or execute transfer forms in favour of the complainant was not entirely honest. However, in my view, to prove the ingredient of 'false pretences' in the present offence to the required standard, there would be need to illustrate that an accused person obtained money after deliberately, intentionally or knowingly misrepresenting or distorting facts that were within his knowledge. The English cases cited earlier in this judgment also lay emphasis on the *mens rea* of an offender as an essential ingredient of the misnomer of deceit.

In the present appeal PW5 testified that knowing both parties to the sale agreement to have been illiterate he interpreted the contents thereof for the complainant through the appellant. He explicitly stated thus: "*I did translate through the vendor (appellant).*" Therefore, it is reasonable to conclude that having been favoured with an interpretation of the agreement, the appellant knew that the agreement he had executed was a sale agreement not a sub-lease agreement as might have been his wish. For him, therefore, to misrepresent that document to the complainant and PW2 as a 5-year tenancy agreement was deceitful and dishonest. Had he had misgivings about PW5's legal service, the honest and truthful course of action would have been to reimburse the complainant's money, failure of which he was guilty of obtaining money by false pretences.

Before I take leave of this issue, I am constrained to observe that under cross examination the appellant averred that he gave the complainant transfer forms, which forms, duly signed by the complainant and PW1, were admitted on the court record as Exh P2. This piece of evidence is in

direct contradiction of the complainant's evidence that as at the date of his testimony the appellant had never given him the lease, title or any other document, and his reminders to the appellant prompted the latter to inform him that the payment he had made was in respect of a 5-year tenancy. It defeats reason for the appellant to purport to have availed the complainant with signed transfer forms when the trial from which the present appeal arises was premised on his refusal to do so. It is quite telling that this piece of evidence was only volunteered by the appellant under cross examination. This court therefore treats this evidence as an afterthought.

In the premises, having carefully re-considered the evidence on record, I am satisfied that the trial magistrate took all the evidence before him into consideration in arriving at his decision to convict the appellant. I therefore uphold the learned trial magistrate's decision and duly dismiss this appeal.

**Monica K. Mugenyi**

**JUDGE**

**3<sup>rd</sup> July, 2012**