THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT KAMPALA
HCT-00-CR-CN-0012-2012

KATUSIME ROY……..APPELLANT

VERSUS

UGANDA…….RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

Representation:

Mr. Ladislaus Kizza Rwakafuzi of counsel for Appellant
Ms. Chartone Akandwanirira (SSA) for Respondent
Mr. Kutosi Charles – court clerk

JUDGMENT:

This is our appeal against conviction and sentence by the Chief Magistrate at Buganda Road Court in Criminal Case No. 1193 of 2011 whereby the Applicant, was convicted of the offence of obtaining money by false pretence contrary to section 305 of the Penal Code Act.

The grounds of Appeal were that:-

1. The learned Trail Chief Magistrate erred to have refused or failed to explain to the appellant her right to be represented by counsel throughout the trial.
2. The Learned Trial Chief Magistrate erred in law and fact when she first believed the prosecution's case and thereby failed to appreciate the accused's defence.
3. The Learned Trial Chief Magistrate erred when failed to evaluate the evidence and thereby came to a wrong conclusion.
4. The Learned Trial Chief Magistrate erred when she imposed such an excessive sentence.

Counsel for the Appellant argued ground one first, then ground 4 and lastly ground 2 and 3 together. In my judgment I intend to consider ground 1 first followed by grounds 2 and 3 together and lastly ground 4.

Ground I: The Lower Court record shows that trial commenced on 19th January 2012 and the Applicant was represented by Mr. Waiswa Patrick. The case was adjourned to 20th January. The court record from then onwards does not show any representation for the Appellant. There is no record of what had happened to the Applicant's counsel and hearing proceeded against the Appellant without legal representation. The record is silent as to whether, in the absence of her counsel, the Appellant was given an opportunity to engage alternative legal representation.

Mr. Rwakafuzi argued that this was prejudicial to the Appellant since her right to legal representation was not explained to her. On her part Ms Akandwanirirwa argued that in non-capital offences legal representation is not a mandatory requirement. She submitted that the fact that the Applicant was represented at the commencement of the case shows that she knew her right to legal representation. That it was her right and choice when she opted later on to proceed without legal representation. She argued that there was no record to show that she had requested and was denied the right to engage alternative representation. She submitted that there was no miscarriage of justice.

Article 28 of the Constitution on the right to fair hearing, inter alia, provides:-

> ***"(3) Every person who is charged with a criminal offence shall-***
>
> ***(c) be given adequate time and facilities for the preparation of his or her defence;***
>
> ***(d) be permitted to appear before the court in person, at that person's own expense, by a lawyer of his or her choice".***

In James Sawoabiri & Anor v/s Uganda SC Criminal Appeal No. 5 of 1990

The Supreme Court held that the rights of the accused person under Article 28(3)(d) of the Constitution are not absolute.

Their Lordship commented;

> ***"One has a right to be defended by Counsel of one's choice but if such counsel is absent, how long must the court wait for his appearance?"***

They further stated:

> ***" It was the duty of defence counsel having been briefed to appear or if he was unable to do so , to have another lawyer hold his brief and appear either with instructions to make before the court any necessary application for adjournment. That duty does not appear to be particularly onerous where (as was the case) defence counsel is a member of a firm of practicing advocates".***

In the instant case the Appellant exercised her legal right to be defended by counsel of her choice, one Waiswa Patrick. When the Appellant's case came up the following day for further hearing there is no record of any communication from Counsel or the Appellant the reasons for Mr. Waiswa's absence. Court has a duty to conduct speedy hearings. When court opted to proceed with the hearing there is no record to show that Appellant ever sought for time to contact her counsel or engage an alternative counsel. The Appellant was prepared to proceed without legal representation. PW1 was cross-examined by her counsel. With respect to PW2 when the Accused's turn for cross-examination came she only stated:

> ***"Whatever their witness has said is not true and I first saw her when I was brought here***"

With respective to PW3 she stated:

> ***"The witnesses are brother and sister and they all say the same words but I do not know them"***

The appellant cross-examined PW5 and PW6. The Appellant was given the opportunity to cross-examine all the prosecution witnesses. She opted not to cross-examine them save for PW1, cross-examined by her counsel, and PW5 and PW6, cross-examined by herself. In Uganda v/s Dusman Sabuni 91981) HCB it was decided that:-

> ***" An Omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible or probably untrue"***

In further argument on this ground Mr. Rwakafuzi stated that when the time came for the Accused's defence the record is silent as to whether she was given the options she was entitled to. He contented that this was aggravated by the fact that the Accused was not represented. Court proceedings are recorded as follows:

> ***"Court: Accused has a case to answer and is therefore put on defence"***
> ***Accused: I will make a statement on oath"***

The Court Record is silent as to whether the Accused was informed of the options available to her in her defence. However her choice to make a statement on oath is evidence of a choice from among other options.

In the circumstances I find that the Appellant was not prejudiced and ground 1 fails.

Grounds 2 and 3: In her judgment the Learned Chief magistrate first considered the prosecution evidence. On the issue of intent to defraud the learned Chief magistrate considered the prosecution evidence at the conclusion of which she stated:

> ***" The Accused by presenting herself to the complainant as a landlady and going ahead to take the complainant to her lawyer Sebanja showed that she was indeed intending to defraud the complainant.***

The complainant trusted her and went ahead to give her shs. 6,000,000/- as one year's rent. By the mere act of receiving the money the accused indeed sealed the fact of her intention to defraud".

On the second issue whether the Accused person made a representation by words which representation was false, Her Worship considered and evaluated PW1, PW2, PW4, PW5 and PW6's evidence, then proceeded to conclude:

"All this shows that the Accused person was a conwoman who had falsely represented herself to the complainant and thereby obtained shs. 6,000,000/= from them"

It was after she had come to the above conclusions that Her Worship considered the Appellants evidence. About such a practice the Supreme Court in James Sawaobiri & anor vs Uganda (Supra) stated:

"This Court has frequently inveighed against the practice, surprisingly continuing in some judgments, of considering in isolation the prosecution evidence or the defence evidence. This practice gives the impression, particularly when the prosecution evidence is considered first, and accepted as true, that the mind of the trial judge is already made up by the time he turns to consider the defence evidence. How can that impression not to be given when as in the instant case, the learned Judge states that he has found certain facts attested by prosecution witnesses to be proved 'beyond doubt'. Or that he has accepted evidence of identification by prosecution witness as 'correct'? All this when he has not even begun to consider the defence case.

This impression that the trial judge gave only superficial consideration to the defence case because his mind had already been convinced of the guilt of Appellants is strengthened by a closer analysis of the manner the learned Judge dealt with the witnesses' evidence……"

In the instant case the learned Chief Magistrate found the main ingredients of the offence charged, proved by the prosecution evidence before considering the defence case.

The Prosecution relied on a Tenancy Agreement, exhibit P1, as the agreement on which the Appellant had acknowledged receipt of shs. 6,000,000/= from the complainants as rent. She was stated to have presented herself as the landlady, whereas not, and signed as Katusime Loy. In her defence the Appellant stated that she was Namutebi Maria and not Katusime Loy. That she had never seen the complainants and had never stolen from them. That she first saw them at Kiira Road Police Station. That the complainant never gave her money and had never gone to City House with complainants and had never signed any agreement with them.

Further the Appellant while being cross-examined state:

> ***"On 17/12/2011, I was at Kanabulemu Rakai District I had taken money for my parents for the big day. My mother is Nagawa Sylvia. I told police that I was at Masaka…..***
> ***I went and slept there and came the following day……"***

Ms. Akandwanirira for the State, asked this court to re-evaluate the evidence on record. She cited Kifamunte Henry vs Uganda SC Crim Appeal no. 10 of 1997 where the Supreme Court held that:

> ***" We agree that on first appeal, from a conviction by a judge the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The first appellate court has a duty to rehear 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……."***

In her defence the Appellant denies being Katusime Loy, the party to the Tenancy Agreement and contends that she is Namutebi Maria. She contested her execution of the Agreement. The record does not show any evidence adduced by the prosecution to prove that the name and signature attributed to the Appellant were re-written on that document by her. In my view it required the evidence of a handwriting expert which was not adduced. The Learned Chief Magistrate did not make any finding on the execution of the Tenancy Agreement.

Further in her defence the Appellant stated that on the date of execution of the Tenancy Agreement and of receipt of the money, she was at Kanabulemu Rakai District and not at City House. She thereby raised the defence of an alibi. In Mushikikona Watete alias Peter Wakhokha & Others vs Uganda SC Crim. Appeal no. 10 of 2000 their Lordships the Justices of the Supreme Court stated:

> ***"The defence of alibi is set up when an accused person, wishing to show that he could not have committed the offence charged, asserts that at the time the offence was committed he was in a different place from the scene of the crime. The law is well settled that an accused person who puts forward an alibi as an answer to the charge against him, does not assume any burden of proving that answer. The burden remains on the prosecution to prove that the accused was at the scene of crime and not at the different place where he claims to have been.***
>
> ***This emanates from the general principle propounded in the well known decision of the House of Lords in Woolington vs DPP(1935) AC 462 to the effect that, with the exception of the defence of insanity and some other statutory defences which are not relevant here, , no burden rests on an accused person to establish his defence. That is true of the defence of alibi also. An accused person does not have any burden to prove his alibi.***

Needless to say, however that for the prosecution to negative it and so for the court to consider it as the defence, the alibi has to be put forward as the answer to the charge".

The learned Chief Magistrate did not consider this defence in her judgment. PW1, PW2, PW3 and PW5 testified that the Appellant was paid the sum of shs. 6,000,000/= and signed the Tenancy Agreement at PW5's Chambers at City House on 17th December 2011. In her defence the Appellant denied knowledge of any of the prosecution witnesses prior to her arrest, denies being at PW5's Chambers on 17th December 2011, denies receipt of the money and denies execution of the Agreement. She stated that on the material date she was at Kanabulemu, Rakai and came back to Kampala the following day. Without any independent evidence to prove that the Appellant was the signatory to the Agreement I find that the Prosecution did not adduce evidence to disprove her alibi.

The Applicants' defence was not considered in the judgment. In the circumstances grounds 2 and 3 of the Appeal succeed.

Ground 4: The Appellant was sentenced to three years imprisonment and ordered to pay back shs. 6,000,000/ to Babirye Lydia and Nakato Lydia. Mr. Rwakafuzi argued that the Trial magistrate erred in not indicating whether or not she considered the period spent on remand when sentencing. He submitted that failure to do so was contrary to Article 123(8) of the Constitution. The article requires the period spent in lawful custody to be taken into account in imposing the term of imprisonment. It provides:

"Where a person is committed and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before completion of his or her trial shall be taken into account in imposing the term of imprisonment."

This constitutional requirement is mandatory. The lower court record shows that the Appellant was charged and remanded on 13th January, 2012. Throughout her trial she

was on remand and was sentenced on 5th April 2012. By the time she was sentenced she had spent on remand a period more than two and half months.
The record does not show that the Learned Chief magistrate took the period into account while sentencing the Appellant. Such failure was in contradiction of Article 23(e) above.

As regards the order to pay back the sum of shs. 6,000,000/= Mr. Rwakafuzi argued that the order was contrary to section 197(1) of the Magistrate Courts Act which talks of "fair and reasonable" compensation. He argued that to order an accused to pay full compensation was restitution which is a preserve of a Civil Court. On the other hand Ms .Akandwanirirwa argued that the order was fair and reasonable compensation under the provisions of section 197(1) of the Magistrate Court Act. The subsection provides:

> ***" 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 to any other lawful punishment, order the convicted person to pay to that other person such compensation is the curt deems fair and reasonable".***

The award of compensation is a discretion exercised by court where it finds that compensation is recoverable from the evidence before it by civil suit. The lower court found that the Appellant had executed a tenancy agreement with the complainants upon which she received rent in the sum of shs. 6,000,000/= but could not put the complainants in possession of the rented premises because they were not her but of PW6.
There was failed consideration thus making the rent paid by he complainants recoverable by Civil Suit. In view of the Trial Chief Magistrate's findings I cannot fault her on the exercise of her discretion to order a refund in the full sum. It would be the most failure and reasonable compensation in the circumstances.

In the circumstances ground 4 succeeds in part, as regards the period of imprisonment.

On an evaluation of all the evidence on record I find that the learned Chief magistrate failed to properly evaluate all the prosecution and defence evidence before her. A conviction based on the evidence on record cannot stand. I accordingly allow the Appeal quash the conviction and set aside the sentences.

The Learned Senior State Attorney prayed that in the event court allows the appeal a retrial be ordered. Section 34(2)(a) of the Criminal Procedure Code Act provides that the appellate court on any appeal may reverse the finding and sentence and acquit or discharge the appellant or order him or her to be tried or retried by a court of competent jurisdiction.

In Ahmed Ali Dharamsi Sumar vs Republic (1964) EA 48 the above provision was considered and held that re-trail should not be ordered where the conviction was se aside because the evidence was insufficient to establish the charge, or for the purpose of enabling the prosecution to fill up gaps left in their evidence at the first trial. That in general the courts order re-trial only where the original trial was illegal or defective. The above principles were approved by the Supreme Court in James Sawoabiri & Anor vs Uganda (Supra)

In the instant case to order a retrial would be giving the prosecution a chance to fill up the gaps left in their evidence. In the circumstances the interests of justice would not be served by ordering a retrial. There will be no order for a retrial and it is accordingly ordered that the Appellant be set free forthwith unless otherwise lawfully held.

I must, however comment that this doesn't affect the complainant's right to pursue a civil suit against the Appellant.

Lameck N. Mukasa

Judge

15/08/2012

15/08/2012

Mr. Rwakafuszi for Appellant

Ms. Akandwanirirwa for state

Appellant present

Mr. Kutosi Charles, court clerk

Court: Judgment delivered.

Lameck N. Mukasa

Judge

15/08/2012