

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CV-CA-123-2011  
(ARISING FROM BUSIA CIVIL SUIT NO. 0074 OF 2010)**

**MACHOKA FRED.....APPELLANT  
VERSUS  
TUSKER OFUBO.....RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

This is an appeal from judgment of **Simon Ochen** Magistrate Grade I.  
The appellant raised 12 grounds of appeal.

Both parties were unrepresented and therefore the method of presentation of the arguments to court was greatly unprofessional. However parties filed written submissions and from their statements this court was able to narrow down the grounds to the following issues:

1. Whether the trial Magistrate correctly evaluated the evidence and reached a correct conclusion.
2. Whether the trial Magistrate was biased against the appellant and his witnesses.

The duty of a first appellate court is to review the evidence and scrutinise it afresh and reach its own conclusions aware that it never had chance to examine the witnesses. (See *PANDYA V. R (1957) E.A. 336*).

**1. Whether the trial Magistrate correctly evaluated the evidence and reached a correct assessment thereon.**

The record from the lower court shows that the plaintiff sued defendant for recovery of shs. 1,800,000/=. The plaint in paragraph 6 states that the plaintiff and defendant were close friends. On 10<sup>th</sup> April 2009, defendant approached plaintiff for a loan of 1,400,000/= so that he could purchase a power saw to generate money to enable him pursue his case in Mbale High Court Civil Suit No.19/2009 against Attorney General. That on 22.04.2009 he sold a piece of land at Buyenga B village at 3,500,000/= and gave defendant 1,400,000/=. That in August 2009 plaintiff sent defendant to collect a debt of 400,000/= on his behalf from Ongaro, who gave him 400,000/= but defendant instead converted it to his use.

That todate the amounts are still due and owing.

In his defence the defendant denied all, save paragraph 8 where he contended that plaintiff lent him 400,000/= and on 09.01.2010 he paid shs. 110,000/= leaving a balance of 290,000/= which he is willing to pay.

During the hearing the plaintiff called four witnesses and the defendant called four witnesses including themselves.

From the evidence on record the plaintiff's evidence is that he demands shs. 1,800,000/= from defendant.

PW.1 claimed he initially gave defendant 1,400,000/= where after he converted 400,000/= to himself from **Ongaro** to whom he sent him to pick it up.

PW.2 said plaintiff sold land for 1,500,000/=: gave defendant 1,400,000/= from defendant.

PW.3 said PW.1 was given shs. 1,400,000/= for the land, which was then given to defendant.

**PW.4 Ongaro** said in August 2009 plaintiff sent him to defendant to collect his money shs. 400,000/= in presence of LCs but later he learnt that he never delivered the money to plaintiff.

**DW.1 Machoka** states that he received shs 400,000/= from plaintiff re repaid 110,000/= in presence of **Zacharia** balance owing is 290,000/=. He denied the shs. 1,400,000/=.

In cross-examination he stated that plaintiff got 1,500,000/= and gave him only 400,000/= and he witnesses on the sale agreement.

**DW.2 Oundo** said he knew of the claim of 400,000/= by plaintiff from defendant and fact that defendant had paid 110,000/=:

DW.3 knew that plaintiff demands 400,000/= and had paid 110,000/= leaving a balance.

DW.4 also confirmed that plaintiff demanded 400,000/= from defendant and had so far paid 110,000/= to plaintiff.

In his judgment the trial Magistrate found for plaintiff and held that he had proved that defendant owes him shs. 1,800,000/=. The appellant (defendant) then appealed citing the fact that court reached wrong conclusions and was biased against him.

I have perused the lower judgment and with due respect to trial Magistrate find it incoherent on a number of issues. The trial Magistrate's findings on the issues he set out to examine in his judgment which he reduced in the two issues on record do not come out clear. He begins his judgment by stating that evidence on record is "ambiguous" that plaintiff claims 1,800,000/= which he purportedly gave the defendant. He then concludes. "This means there were two transactions."

The above findings are not supported by any reference to evidence on record.

My own assessment of the evidence is that there were discrepancies in the evidence on record and the pleadings on the plaint regarding the claim sought. Also evidence from PW.1 put the amount of sale at 1,400,000/=: PW.2 put it at 1,500,000/= and PW.3 put it at 1,400,000/= while PW.4 only referred to Shs. 400,000/=:

Clearly the trial Magistrate's finding that the plaintiff's witnesses were more consistent than those of the defence cannot be found out by evidence on record. Defence witnesses all supported the defendant's assertion that he only received shs. 400,000/= and paid shs. 110,000/=:

I therefore do not agree with the Magistrate's assessment and findings on the evidence on record.

I find that the judgment lacks reasoning for his conclusions and the appeal raises elements of failure to properly evaluate the evidence which i uphold because the conclusions in the judgment are not supported by reasons and references to evidence on record. I am therefore satisfied that the Magistrate did not properly evaluate evidence in this case thereby occasioning injustice to the appellant.

Issue 1 terminates affirmatively.

**2. Whether Magistrate was biased against the appellant.**

Bias unless specifically pointed out cannot be assumed. From the grounds, appeal No.3 stated bias because he failed to allow the appellant to call more witnesses; and for holding court in chambers not in open court. he also faulted the trial Magistrate for allowing witnesses who were close relatives to testify for respondent.

All the above are issues which this appeal court cannot prove as it never was present during the trial. The record that is supplied does not indicate that the court is guilty of any of those allegations.

I therefore find that the said allegations of bias are not proved and this issue fails.

For the above reasons this appeal succeeds on the ground that the trial court failed to correctly evaluate the evidence and hence reached a wrong decision. This

appeal will succeed with an order setting aside the lower court orders, replaced with an order for a retrial before another competent Magistrate. I so order.

**Henry I. Kawesa**

**JUDGE**

**28.08.2014**