

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO.28 OF 2014 (Arising from Makindye CMC Criminal Case No. 1377 of 2012)

1. SARAH SSOZI }
2. ABDU SSOZI }: **APPELLANTS**

VERSUS

UGANDA: RESPONDENT

JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction.

1.1 The appellants are jointly represented by Mr. Eria Muhwezi from The Muhwezi Law Chambers Advocates and M/S Ndugwa Zaituni from M/S Magala Mutyaba & Co. Advocates.

1.2 The respondent is represented by the Director of Public Prosecutions.

2. The appeal by the appellants.

2.1 Facts of the appeal.

The appellants were charged with obtaining money by false pretences contrary to Section 305 of the Penal Code Act. The appellants were each prosecuted at Makindye Chief Magistrate’s Court, convicted and sentenced to five (5) years imprisonment, with an order that the land which is the subject of the alleged sale be sold by the complainant to recover Shs. 7,600,000/= which was had and received by the appellants. The appellants were dissatisfied with the conviction, sentence and the order of the trial Chief Magistrate. Hence this appeal.

2.2 Memorandum of appeal.

2.2.1 The above named appellants appealed to this Court against the conviction, sentence and the order of Her Worship Esther Nambayo, Chief Magistrate, Makindye Magistrate's Court in Criminal Case No. 1377 of 2012, whereby the judgment was delivered on 4th April, 2014.

2.2.2 **Grounds of appeal**

The memorandum of appeal is based on the following grounds:-

1. **The learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision.**
2. **The learned trial Chief Magistrate erred in law and fact when she denied upholding the appellants' objection that the matter before her was of civil nature with a judgment thereof.**
3. **The learned trial Chief Magistrate erred in law and fact when she made an order of sale of the appellants' land to recover the money complained of by the complainant.**
4. **The learned trial Chief Magistrate erred in law when she relied upon the evidence of a donee of a power of attorney as a complainant in a criminal matter.**
5. **The learned trial Chief Magistrate erred in law when she imposed a harsh and excessive sentence to the appellants.**

3. **Resolution of the grounds of appeal by Court.**

3.1 Counsel for the appellants, Mr. Eric Muhwezi, on the day of the hearing this appeal addressed Court that he shall argue grounds 2 and 3 separately. And that Mr. Ndugwa Zaituni shall argue grounds 4 and 5 together and ground 1 separately.

3.2 **Ground 2 of appeal: The learned trial Chief Magistrate erred in law and fact when she declined to uphold the appellants' objection that the matter before her was of civil nature with a judgment thereof.**

Counsel for the appellants submitted that the Preliminary Objection was raised in the proceedings during the trial of the applicants, (see pages 37 and 38 of the

record of appeal) that the trial Chief Magistrate overruled their preliminary objection, that despite the fact that the evidence of the prosecution was adduced subsequent to the filing of the suit and conclusion of the same suit. He referred to the **plaint, at page 17 of the record of appeal** which was filed in the Court below.

I have looked at the appeal and noted that on 1st April, 2009, the consent judgment which was filed in Court on 7/6/2010. Counsel for the appellants submitted that, therefore, the civil suit preceded the prosecution of the criminal case. He relied on the following cases to support his submissions:-

- 1) **Kigorogolo versus Rueshereka [1969] EA 426 at P.428. paragraphs D, E, and F. , and**
- 2) **Uganda versus Kamundani Phillip and Kapasi Amosi, in High Court Criminal application No.74 of 2002.**

He submitted that the trial Chief Magistrate in that regard did not properly direct her mind that the criminal prosecution was preceded by the civil suit in a consent judgment. That in her judgment, the trial Chief Magistrate, **at page III of the record of appeal** alluded to the existence of the civil suit proceedings and judgment, but that she did not pronounce herself on the said preliminary objection. He further submitted that the trial Chief Magistrate was bound by the consent judgment. He prayed that ground 2 of appeal be allowed.

In reply to the submissions by Counsel for the appellants on this ground 2 of appeal, Ms Agaba Moreen, State Attorney, Counsel for the respondent, supported the findings of the trial Chief Magistrate. She did not agree with the submissions by Counsel for the appellants. She prayed that ground 2 be dismissed.

I read the entire record of appeal. It is true that Counsel for the appellants in the lower Court raised this said preliminary objection. **At pages 6-9 of the record of appeal**, the trial Chief Magistrate in disallowing the appellants' preliminary objection ruled that:-

- “1 I agree with the holdings in the authorities provided by Mr. Muhwezi, however in this case the State Attorney has indicated to Court that at the time of consent judgment the complainant was out of the Country and the person following up the case on her behalf is not aware of the consent judgment by the complainant and/or himself on behalf of the complainant.**
- 2. The advocate who represented the complainant in and consent judgment has not confirmed to his Court in any way that he had instructions from the complainant to handle the civil suit and enter a consent judgment. In fact on the date of the consent judgment, it is not indicated that the complainant and/or her representative was present in Court. It is only the lawyers who appeared before the trial Magistrate.**
- 3. Since there is nothing to show that the complainant has lost interest in the criminal case as there is no additional statement to that effect or against the accused persons by DPP, it is my view that the criminal case can and should proceed against the accused persons.**
- 4. The offence with which the accused persons are charged before this Court is obtaining money by false pretence. It is my view that this Court should take care before trusting that consent was actually entered into by the complainant as by the nature of the offence in itself and the accused persons’ character already comes an issue. If they committed themselves to pay as the judgment, what has hindered them from payment up to date?”**

The appellants were not satisfied with the ruling and orders made by the trial Chief Magistrate and they filed in the High Court of Uganda, Criminal Division an application by way of Revision, challenging the said orders, under criminal application 121 of 2012 (see pages 10 -15 of the record of appeal.) This very application was opposed by the respondent and it was dismissed by the High Court Judge.

I have perused the Court record and noted that Counsel for the appellants made lengthy submissions similar to those he made in the lower Court and the High Court. The grounds of that said criminal application were similar to this ground 2 of appeal. In her ruling, Hon. Lady Justice Jane F.B Kiggundu, on 5th April, 2013 held that:-

- “1. The authorities quoted by the learned Counsel for the applicant may not be relevant in this case because the two were proper appeals and not revisions and further the Criminal Case seems to have been filed before the civil matter was taken to Court. Secondary, the two authorities are in respect of enforcement of an order of Court in a civil matter using criminal law. The instant case is different in that the criminal charges were laid before the consent judgment.**
- 2. Court will not grant the applicant the remedy of quashing the charges and the proceedings. This Court doubts that it has the power to order that a given criminal matter should be converted into a civil matter. Such power seems to be the preserve of the Director of Public Prosecutions under Article 120 of the Constitution and for that reason this Court cannot lawfully grant such order. Needless to say this Court has no power to discontinue criminal prosecutions.”**

The above orders of the High Court on Revision upheld the orders of the trial Chief Magistrate in her ruling when rejecting the appellants’ (accused) said preliminary objection. The appellants never appealed against the decision of the High Court. This means that the appellants were satisfied with the decision in the criminal application No.121 of 2012.

Consequently, the appellants never pursued this point in the entire Court proceedings. The appellants even never raised that preliminary objection as a defence. When the trial Chief Magistrate ruled on a case to answer, the appellants opted to keep quiet. At this juncture, one wonders why Counsel for the appellants again, framed this ground 2, well knowing that the Preliminary Objection was resolved by the High Court in the said Revision application. There is, therefore, no way I can overrule my sister judge on her findings on the same matter. I agree

with decision of my sister judge. The appellants are thus estopped from raising ground 2 in this appeal.

Furthermore, it is noted that it is possible to have both civil and criminal proceedings happening at the same time against the same defendant/accused. It is, therefore, in my view, not a defence available to the defendant to assert that civil proceedings were already instituted against him. My reasoning behind this principle is that the standard of proof required in civil matters is generally different from the one required in criminal matters. The standard of proof in criminal cases is that of beyond reasonable doubt and whereas that in civil cases is that on the balance of probabilities.

Before I take leave of this ground I should comment on the consent judgment and the decree which form the major contention in ground 2 of appeal. The consent judgment is dated 7th June, 2010 (**see page 14 of the record of appeal**). But it is surprising to note that the same consent judgment was entered by the lower Court on 27th March, 2012. This means that on 7th June, 2010, there was no consent judgment. Then, there is demand letter by Mbidde & Co. Advocates that was written on 20th March, 2012 referring to consent judgment which was by then not yet in existence. It is also a false statement in that said letter that the consent judgment is vide civil suit No. 07 of 2009. I can, therefore, safely state that there was something fishy in regard to the said consent judgment and the demand letter of Mbidde & Co. Advocates. To that extent I would have agreed with the findings of the trial Chief Magistrate in her ruling on the said preliminary objection.

In sum total, for the reasons given hereinabove in this judgment, ground 2 of appeal has no merit. It fails.

3.3 Ground 3: The learned trial Chief Magistrate erred in law and fact when she made an order of sale of the appellants' land to recover the money complained of by the complainant.

Mr. Muhwezi Eric, Counsel for the appellants submitted that this order was made irregularly because there already existed a consent judgment and a decree for the recovery of the money in the civil case and that it was partly paid on. He submitted that two orders cannot exist side by side. That the former has to be respected. He further submitted that, that order is erroneous and bad in law because the trial Chief Magistrate gave the responsibility to the sale of the appellants' land (**see page 116 of the record of appeal**) to the complainant to recover the said monies. He prayed that the order be set aside.

In reply, Ms. Agaba Maureen, the state Attorney supported the powers of the trial Chief Magistrate to pass such an order. She submitted that the said order was good in law. She prayed that ground 3 of appeal be disallowed.

When resolving ground 2 of appeal hereinabove in this judgment, I commented on the fact of the consent judgment and the Decree that were issued by the trial Civil Court. I hasten to add that even the consent judgment and the decree never, despite their shortcomings, respected by the appellants. Since 27th March, 2012 when the consent judgment was entered into and the decree issued by the trial Civil Court the appellants have never abide by it. The appellants have up to date not compensated Aida Naluwoza of her money, Shs.7,600,000/=. I wish to acknowledge one disturbing scenario, in that, the appellants according to the record of appeal acknowledged that they owe Aida Naluwoza Shs. 7,600,000/= but the appellants do not want to pay that money had and received by them.

As to whom the money belonged, should not be an issue as argued by Counsel for the appellants. It is my finding that the events of how the said money exchanged hands were captured by the trial Chief Magistrate in her judgment, see page 1 and then page 107 line 5 from the top of the record of appeal where Aida Naluwoza gave evidence that she gave money to Issa Serwanga to pay for the suit land and to follow up the case on her behalf. There was nothing erroneous, Isa Sserwanga was by all means Aida Naluwoza's agent throughout this case in viewing the

and, in paying the money and in making the agreements before LCI Chairman of the area, and filing a complainant at the police. Thus, he was acting for Aida Naluwoza, **see page 45, line 9 from the bottom of the record of appeal.** I hasten to add that Shs. 7,600,000/= exchanged hands from the complainant to the appellants. If it passed through Diana, then to Isa Serwanga, then to Sarah Ssozi, according to the record of appeal, which is not disputed by the appellants upon a representation of selling land by the appellants, which representation turned out later to be a misrepresentation.

In my view, the legal point to consider is whether the disputed order was legally handed down by the trial Chief Magistrate. Under Section 197 of the Magistrate's Court Act, 1970 as amended, any trial Magistrate after conviction and sentence has discretion to award adequate compensation to the complainant. The said Section 197 thereof provides:-

“ (1) 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 this 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, receivable 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 that other person such compensation as the Court deems fair and reasonable.

2. When any person is convicted of an offence under chapters XXV to XXX, both inclusive, of the Penal Code Act, the power conferred by subsection (1) shall be deemed to include a power to award compensation to any bona fide purchaser of any property in relation to which the offence was committed for the loss of that property if the property in relation to which the offence was committed for the loss of that property, if the property is restored to the possession of the person entitled to it.”

The under section 198 of the Magistrate's Court Act (Supra):-

- “ (1) **Sums allowed for costs or compensation under Section 195, 196, or 197 shall in all cases be specified in the conviction or order.**
- (2) **If the person who has been ordered to pay such costs or compensation fails to pay, a warrant of distress may be issued in accordance with section 182, and shall in default of distress, the Court may issue such process as may be necessary for his or her appearance and may sentence him or her to imprisonment in accordance with the provisions of Section 183 or 186, and thereupon all the provisions of section 181 relating to sentences of imprisonment in default of distress shall become applicable.”**

In the result and for the reasons given and the law cited hereinabove in this judgment I do not have any reasons upon which to fault the trial chief Magistrate on the order of compensation she granted in her judgment. Therefore, ground 3 of appeal fails.

3.4 Ms. Ndugwa Zaituni argued grounds 4 and 5 of appeal together.

3.4.1 **Ground 4 of appeal. The learned trial Chief Magistrate erred in law when she relied upon the evidence of a donee of a power of attorney as a complainant in a criminal matter.**

3.4.2 **Ground 5 of appeal: The learned trial Chief Magistrate erred in law when she imposed a harsh and excessive sentence to the appellants.**

Counsel for the appellants, MS Ndugwa Zaituna submitted that the trial Chief Magistrate erred in law and fact when she relied on the evidence of the donee of the power of attorney to grant an order of the sale of the appellants' land to recover the money complained of, **see page 111, line 10 from below of the record of appeal.** That PW1, Isa Serwanga had no powers to lodge a complaint to the police for the fact that the powers of attorney attached as an exhibits, **at**

page 73 of the record of appeal was obtained long after the complainant had lodged a complaint at Katwe police station, and that the powers of attorney itself was meant for the Civil Suit No.207 of 2009. She relied on the case of A.C. Narayanan –vs.- state of Maharashtra and another criminal appeal No.73 of 2007. She submitted that their submissions in the lower Court and their concerns were ignored by the trial Chief Magistrate as she held on **page 111, 1st paragraph lines of the record of appeal**. She then prayed that grounds 4 and 5 be allowed.

In reply, Counsel for the respondent Ms. Agaba Moreen did not agree. She submitted and prayed that grounds 4 and 5 of appeal be disallowed. She, too, evaluated the evidence on record in her submissions.

3.4.3 **Resolution of grounds 4 and 5 of appeal by Court.**

First and foremost, on ground 4 of appeal the issue of Isa Serwanga reporting the matter to the Police without authority, in my view should not arise or disturb the minds of the appellants and their lawyers. The most important point to note is that when Isa Serwanga reported the case to the police at Katwe Police Station, the State/Prosecution got interested in the criminal case. The State investigated the case and preferred the said charge against the appellants.

It should be appreciated that the complainant under section 119 of the Magistrates' Court Act (Supra) is the prosecutor. The prosecution was conducted by the Republic of Uganda on behalf of her citizen, for instance, in this particular case, Aida Naluwoza, Isa Semwanga and other interested persons in this case. In such regard, I make a finding that Issa Serwanga committed no mistake in reporting the matter against the appellants at the police. It is a duty and responsibility of every Ugandan under our laws to report any crime committed or is being committed or is about to be committed to the police for the proper maintenances of law and order in society. Instead of condemning Isa Serwanga as it is being by Counsel for the appellants, he should be recommended for reporting the said crime to the police. I hereby recommend him for being patriotic and law abiding in the circumstances.

Further on this ground 4 of appeal, I perused the entire record of appeal particularly the evidence adduced by the prosecution, considered the judgment of the trial Chief Magistrate and noted that the trial Chief Magistrate in her judgment did not only rely on the evidence of Isa Serwanga, PW1, on the powers of attorney but also she considered the evidence of other prosecution witnesses, PW2, PW3, PW4, PW5 and PW6, which included that Aida Naluwooza, the source of Shs. 7,600,000/=. In this case, therefore, there was no delegation to Isa Serwanga to testify in the place of Aida Naluwooza. Aida Naluwooza did come to Court and testified as PW3. I, thus, make a finding that the conviction and sentence of the appellants are not only based on the evidence of Isa Serwanga (PW1) as is being complained of by the appellants. Again, ground 4 of appeal must fail.

3.4.4 On ground 5 of appeal: At page 115 of the record of appeal, the trial Chief Magistrate passed a sentence of five (5) years imprisonment plus an order of compensation. When resolving ground 3 of this appeal I dealt with the complaint of the appellants on the order for compensation. I made a finding that the said order was proper.

At page 115 of the record of appeal, before passing the sentence the trial Chief Magistrate considered the sentencing guidelines and the mitigating factors that were submitted on by Counsel for the parties. The sentence that was handed down by the trial Chief Magistrate, considering the mitigating factors and in her exercise of discretionary powers in sentencing, the said sentence is proper. In my view, however, such sentence can be said to be harsh on ground that the trial Chief Magistrate in addition gave against the appellants the order of compensation. Thus, I would be of the considered opinion that the trial Chief Magistrate would have given an imprisonment sentence of (5) five years in the alternative. To that extent ground 5 would succeed in part.

3.4.5 Ground 1 of appeal: The learned Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision.

Counsel for the appellants, MS Ndugwa Zaituni, submitted that the prosecution failed to prove all the ingredients of the offence of obtaining money by false pretence contrary to section 305 of the Penal Code Act beyond reasonable doubt. That the trial Chief Magistrate never evaluated the evidence properly as to who paid the money to Sarah Ssozi, that which caused a miscarriage of justice. That at page 109 line 12 from the bottom of the record of appeal that the trial Chief Magistrate relied on non-existent evidence on record. That on page 114 line 1 of the record of appeal, the trial Chief Magistrate applied the evidence which was not on record. That by such observation, she wrongly arrived at a wrong decision, that the appellants obtained money by false pretences. She finally submitted that the trial Chief Magistrate misdirected herself when she convicted and sentenced the appellants basing on the erroneous evidence and non-existent evidence. She prayed that this ground 1 of appeal be allowed.

In reply to this ground 1 of appeal, Ms. Agaba Maureen, State Attorney, does not agree with the submissions by Counsel for the appellants. She, too, evaluated the evidence on record, and in her submissions supported the judgment of the trial Chief Magistrate. In her submissions she emphasized that the trial Chief Magistrate properly evaluated the evidence on record of appeal and that she properly convicted and sentenced the appellants. Counsel for respondent prayed that this ground 1 of appeal be disallowed. And that the entire appeal be dismissed.

3.4.6. Resolution of ground 1 of appeal by Court.

The applicants were charged under Section 305 of the Penal Code Act, which reads:-

“Any person who by any false pretences, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of

being stolen, commits a felony and is liable to imprisonment for five years.”

False pretence is defined under Section 304 of the Penal Code Act, as:-

“Any presentation made by words, writing or conduct, of a matter of fact, either past or present, which representation is the person making it knows to be false or does not believe to be true, is a false pretence.”

At page 108 last paragraph of the record of appeal the trial Chief Magistrate properly laid down the ingredients of the offence of obtaining goods by false pretence. From the offence of obtaining money by false pretence, it does not matter from whom the goods or money capable of stolen is obtained. Thus the argument by Counsel for the appellants that the said money was received or not received from Isa Serwanga does not hold any water at all. The offence charged is committed when any person (in this case the appellants) by false pretences, and with intent to defraud obtains money from any person anything capable of being stolen. In this instant case, it is not disputed by the appellants that they received Shs. 7,600,000/= from the complainant as consideration for the purchase of land. The land was not given the complainant. And as we talk, according to the evidence on record of appeal, the land that was showed to the complainant for sale is not available. The appellants sold the same land to another person well knowing that they had already sold the same piece of land to Aida Naluwoza. The conduct of the appellants in that regard was fraudulent, to say the least.

In her judgment, the trial Chief Magistrate framed the ingredients of the offence she set down at page 108 of the record of appeal into issues.

On whether the appellants obtained money by false pretence, the trial Chief Magistrate **at page 109 – 111, 1st paragraph of the record of appeal**, properly evaluated the evidence on record. She considered all the evidence of the prosecution evidence to come to the right conclusion as she did. In this instant case, when the trial Court gave a ruling that the accused persons (appellants) had

a case to answer, should have given an explanation in defence to negative the prosecution case.

Again, on whether the appellants had the intention to defraud the complainant on pretext that they were selling to him land, the trial Chief Magistrate **at pages 111, last paragraph, 112, 113 and 114 of the record of appeal** properly evaluated the available prosecution evidence on record and properly resolved that issue in favour of the prosecution. Counsel for the appellants, did not offer any reasons in her submissions, on which I could base on to fault the trial Chief Magistrate.

Consequent to the above, it is trite law that the duty of the 1st appellant Court is to re-evaluate the evidence on record of appeal and come to its own conclusion. I have exercised that duty. I re-evaluated the evidence on record and indeed the prosecution did produce witnesses who testified on behalf of the prosecution. The evidence of the prosecution in most parts is direct evidence which evidence qualified under Section 59 of the Evidence Act, Cap.6, Laws of Uganda.

PW1, Isa Serwanga gave evidence that he was present when the money was given to the 1st appellant for the said suit land. He went on to say that upon receipt of the said money the appellants became illusive and never delivered to him on behalf of Aidah Naluwooza the said suit land, until they were arrested after 6 (six) years down the road. It is also my finding that the prosecution's evidence placed each appellant at the scene of crime, which evidence each appellant failed to offer an explanation to negative it in defence. The appellants remained at the scene of crime. I wonder why Counsel for the appellants failed to properly scrutinise the evidence on the Court record.

I perused the judgment of the trial Chief Magistrate and my finding is that she properly evaluated the evidence on record and came to the correct decision. I do not, therefore, agree with the submissions by Counsel for the appellants in that regard. Therefore, ground 1 of appeal also fails.

5.

Conclusion

In the result and for the reasons given hereinabove in this judgment, this appeal has no merit. Grounds 1, 2, 3 and 4 are dismissed. Ground 5 partially succeeds. Accordingly, therefore; judgment is entered in the following terms and orders:-

- 1. The conviction by the trial Chief Magistrate is upheld.**
- 2. The sentence of 5 years imprisonment on each appellant and an order for sale of the appellants' land is substituted for the reasons I advanced when resolving ground 5 of appeal in this judgment with a sentence of :-**

(a)(i) the 1st accused (appellant) is sentenced to pay a fine of Shs.

10,000,000/= (ten million shillings) Cash.

(ii) The 2nd accused (appellant) is sentenced to pay a fine of

Shs. 10,000,000/= (ten million shillings) cash.

In default of each appellant failing to pay the fine as

indicated above, (b) Then each accused person (appellant) shall serve a sentence of 5 (five) years imprisonment in default of payment of a fine, which sentence had been imposed by the trial Chief Magistrate

Order: The abovestated fines shall be paid by the appellants in a lump sum immediately after the delivery of this judgment but not later than fourteen (14) days from today.

When the said above-stated fines totaling to UGX.20,000,000/= are paid, the same shall be paid to Aida Naluwoza, as compensation for the loss of her money suffered by her, costs she has so far incurred in following up this criminal case and inflation that has affected the value of her money had and received by the appellants, pursuant to Section 198 of the magistrate's Courts Act, Cap. 16 Laws of Uganda.

Dated at Kampala this 13th day of May, 2014.

.....
Joseph Murangira
Judge.

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL DIVISION
CRIMINAL APPEAL NO.28 OF 2014
(Arising from Makindye CMC Criminal Case No. 1377 of 2012)

1.SARAH SSOZI
2.ABDU SSOZI }**APPELLANTS**
VERSUS
UGANDA **RESPONDENT**

REPRESENTATION

Ms. Ndugwa Zaituni for the appellants. Counsel Eric Muhwezi for the appellants has another matter in the Supreme Court.
The appellants are in Court.
We are ready to proceed.
Ms. Agaba Maureen, State Attorney for the respondent.
Ms Margaret Kakungulu the Clerk is in Court.

Court: Judgment is delivered to the parties. Right of Appeal is explained to the parties.

.....

Joseph Murangira

Judge

13/5/2014.