

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

**CRIMINAL APPEAL NO.87 OF 2013 (Arising from Original Buganda Road,
Criminal Case No.116 of 2012)**

FREDRICK NTANDA :::APPELLANT

VERSUS

UGANDA :::RESPONDENT

JUDGMENT BY HON. MR.JUSTICE JOSEPH MURANGIRA

1. Introduction.

1.1 The appellant through his lawyers, Tumusiime, Kabega & Co. Advocates filed this appeal against the respondent seeking for the following order; that:-

- (a) This appeal to be allowed.**
- (b) The conviction be quashed.**
- (c) The sentence be set aside.**
- (d) In the alternatives, the sentence be reduced.**

1.2 This appeal is based on the following grounds; that:-

- 1. The learned Chief Magistrate erred in law and fact when she allowed the appellant to be joined in the middle of the proceedings when some evidence had already been recorded in his absence and allowed the proceedings to continue without recalling the witnesses who had testified in his absence for his cross- examination.**
- 2. The learned Chief Magistrate erred in the law and fact when she convicted the appellant and basing the conviction on the evidence of PW1 who had testified in the appellant's absence.**

3. **The learned trial Chief Magistrate erred in law and fact when she proceeded with the trial after the change of the trial Magistrate occurred without informing the appellant of his rights under the law after such a change.**
4. **The learned trial Chief Magistrate erred in law and fact to hold and find that the appellant committed the offence of cheating when there was no evidence to prove it.**
5. **The learned trial Chief Magistrate erred in law and fact when she sentenced the appellant to the maximum term of imprisonment of three years in the circumstances.**

1.3 The respondent was represented by MS Nambuya Sarah Sheron, in arguing this appeal in opposition. Mr. Kabega Macdosman, from Tumusiime, Kabega & Co. Advocates represented the appellant.

2. In the lower Court, the appellant was charged on two (2) counts.

2.1 On count I, he was charged with obtaining money by false pretences contrary to Section 305 of the Penal Code Act.

2.2 The particulars of offence are that Ntanda Rachael and Ntanda Fredrick on the 13th day of January, 2012 at Orient Bank in Kampala District with intent to defraud obtained cash totaling Shs. 160,000,000/= from Kasumba Rashid by falsely pretending that they were selling to him land comprised in Kibuye Block 9 Plot 542 at Makerere West in Kampala District whereas not.

2.3 The appellant is charged with an alternative count of cheating contrary to Section 307 of the Penal Code Act.

2.4 Particulars of offence are that Ntanda Rachael and Ntanda Fredrick on the 13th January, 2012, at Orient Bank in the Kampala District obtained from Kasumba Rashid cash totaling Shs. 160,000,000/= by fraudulent trick by purporting that they were selling to him land comprised in Kibuye Block 9 Plot 542 at Makerere West whereas they knew the same land had been sold to Nakasero Primary School way back in 1983.

3. The trial Chief Magistrate in her judgment held; that:-

- 3.1 **“Court therefore finds both the accused, did with fraudulent intent obtain Ug. Shs.160,000,000/= from the complainant using deception that A2 had the authority to deal with the land when he had relinquished all rights to it in 1983 to Nakasero Primary School. The prosecution has amply discharged their burden of proof with regard to the alternative count of cheating Contrary to Section 307 of the Penal Code Act. The two accused are found guilty in the alternative count of cheating Contrary to Section 307 of the Penal Code Act and are convicted accordingly.”**
- 3.2 The appellant being dissatisfied with the judgment, conviction and sentence by Her Worship Olive Kazaarwe Mukwaya, the Chief Magistrate, Buganda Road Court given on 19th December, 2013 appealed against both conviction and sentence, and well set out in the memorandum of appeal.

4. Resolution of the grounds of appeal by Court.

4.1. When the matter came up for hearing on 10th April, 2014, Counsel for the appellant argued grounds 1, 2 and 3 together, grounds 4 and 5 were agreed separately.

Counsel for the appellant on arguing grounds 1, 2, and 3; in his oral submissions evaluated the evidence on record and submitted that the trial Chief Magistrate erred in law and in fact when she based her conviction of the appellant on the evidence of PW1, (Kasumba Rashid), which evidence had been given before the appellant was charged. That the trial was unconstitutional and that thus such error in law rendered the trial a nullity. The appellant’s Counsel prayed that grounds 1, 2, and 3 be allowed by this Court.

4.2 In reply to grounds 1, 2 and 3 of appeal, Counsel for the respondent, MS Nambuya Sarah Sheron, State Attorney submitted that the trial proceeded in the presence of the appellant. That at the close of the prosecution case, the appellant gave his defence. She submitted that despite some irregularities, that the appellant was accorded a fair trial by the trial Chief Magistrate and that the trial of the appellant was valid. She finally prayed that grounds 1, 2 and 3 of appeal be dismissed.

4.3 **Court.**

It is trite law that the duty of the first appellate Court is to re-evaluate/re-appraise the evidence on record and come to its own conclusion. In this particular appeal, therefore, I shall re-evaluate the evidence on record in order to resolve the complainants raised by Counsel for the appellant in grounds 1, 2 and 3 of appeal.

It is the submission of Counsel for the appellant that the testimony of PW1 continued in the absence of the appellant. That at page 1 of the record of proceedings, A1, Ntanda Rachael, appeared for plea. At page 7 of the said proceedings, PW1 Kasumba Rashid, began his testimony in the absence of the appellant. PW1's evidence went on up to page 14 of the record of Court proceedings. In the last paragraph of page 14 of the Court proceedings, the prosecution indicated that they intended to amend the charges to include the appellant.

At page 17 of the record of the Court proceedings, the proceedings of 23rd November, 2012 it is indicated that the appellant appeared in Court and he took plea. He pleaded not guilty to the charges.

Again at page 18, line 5 of the record of the proceedings, the record shows that the prosecution case was under way into the hearing. There is an application that was made by the appellant for his release on bail pending the hearing of his case. At page 19 of the record of proceedings, the appellant was given a cash bail. Again on the same page 19, 2nd last paragraph, PW2, Mayanja Elizakali, took his stand to give evidence. There is nothing on record at the stage in the proceedings that shows that the Court despite having been aware that the appellant was not in Court when PW1 was testifying ever advised the appellant of his right to recall PW1 for his cross-examination. This failure on the part of the trial Chief Magistrate contravened Article 28 (1) and (3) (g) of the Constitution of the Republic of Uganda.

Further, at page 19 proceedings of 25 the November, 2012 shows that Counsel Kusiima was for A1. Then when I looked at page 3 2nd last paragraph of the judgment of the trial Chief Magistrate whereby she held that:-

“This Court is of the opinion that the state has proved beyond reasonable doubt that the rightful owner of Block 9 Plot 542 is NPS. They purchased the land from A2 and obtained the certificate of title.”

This above finding was principally made by the trial Chief Magistrate based on the evidence given by PW1.

At page 4 of the Judgment of the trial Chief Magistrate, 1st paragraph, the trial Chief Magistrate trashes off the defence of the appellant when she held that:-

“A2’s defence was fantastic to say the least. He attempted to distance himself from the actions of A1 of taking Shs. 160,000,000/= from PW1, a transaction which was well documented by Exh.P1, an acknowledgement of receipt of cash, Exh. P2, a sale agreement signed by A1 and Exh. P8, a bank statement print out of A1’s Bank Account showing receipt of the monies complained of; could not be sanctioned by this Court. According to PW1, A1 was in possession of Powers of Attorney from A2, the registered proprietor of the land in question, upon which he relied to part with his money.”

From the findings of the trial Chief Magistrate at page 4 of the judgment, it is evident that the trial Chief Magistrate based herself on the evidence of PW1 to convict the appellant and subsequently sentenced him to three (3) years imprisonment and gave an order for compensation of PW1 with Shs. 130,000,000/=. The aforesaid evidence of PW1 upon which the trial Chief mainly based her conviction was given when the appellant was not yet charged; and the trial Chief Magistrate never advised the appellant to have PW1 re-called for his cross – examination. This was a fundamental error in law and fact, which renders the trial of the appellant being unfair to him.

Further, in reply to the submissions by Counsel for the appellant, Counsel for the respondent/state failed to challenge the grounds 1, 2 and 3 of appeal to the satisfaction of the Court. In her submissions, Counsel for the respondent agreed that as far as grounds 1, 2 and 3 of appeal are concerned the trial Chief Magistrate made grave procedural irregularities; though she submitted that such irregularities were just technicalities which did not go to the root of the appellant's trial.

Consequent to the above, I have analysed the submissions by Counsel for the appellant, and indeed he never addressed his submissions on ground 3 of appeal and as such I treat that ground 3 of appeal was abandoned by the appellant. In sum total, grounds 1 and 2 of appeal do succeed. Ground 3 of appeal stands dismissed.

- 4.4 I now turn to resolve ground 4 of appeal. In his submissions, Counsel for the appellant submitted that there is no evidence on the record of proceedings to support the findings of the trial chief Magistrate in her judgment. At page 4 last paragraph of the trial Chief Magistrate's judgment, she held that:-

“Court, therefore, finds that both the accused did with fraudulent intent obtain Ugs. 160,000,000/= from the complainant using the deception that A2 had the authority to deal with the land when he had relinquished all rights to it in 1983 to Nakasero Primary School. This prosecution has amply discharged its burden of proof with regard to the alternative count of cheating Contrary to Section 307 of the Penal Code Act. The two accused are found guilty in the alternative count of cheating Contrary to Section 307 of the Penal Code Act and are convicted accordingly.”

In her submissions in reply, Counsel for the respondent argued that all the ingredients of the offence of cheating Contrary to Section 307 of the Penal Code Act were successfully proved by the prosecution and that the trial Chief Magistrate justly arrived at the right decision. She prayed that ground 4 of appeal be dismissed.

The ingredients of the offence of cheating Contrary to Section 307 of the Penal Code Act, are:-

- (1) A fraudulent trick by the accused.
- (2) To obtain from any person property capable of being stolen.

I have analysed the submissions by both parties and re-evaluated the evidence on the record of Court proceedings, and noted that it is not in dispute that the appellant signed the Power of Attorney for his daughter (A1) to manage his property Block 9 Plot 542 Makerere West.

From the evidence on record PW2, Mayanja Elizakali, a friend of PW1 (the complainant) at page 20, 2nd paragraph of the record of Court proceedings, from the evidence of PW2, it is apparent that PW1 and PW2 ascertained the ownership of the suit land and the fact that the appellant (owner of the land in question) was in the UK and the fact that A1 (daughter of the appellant) had powers of Attorney, giving her authority to deal with the suit land. From the evidence of PW1, PW2 and the rest of the prosecution witnesses, the appellant was not around when PW1 and A1 were transacting business between themselves. So from that evidence of PW2 the appellant cannot be said to have employed any tricks on the complainant (PW1) because the evidence of PW2 did confirm from the Chairman of LCI of the area that the daughter of the appellant (A1) was the one managing the suit property.

I have thoroughly perused the entire record of proceedings and there is also the evidence of PW3 at page 21 thereof confirming that the appellant was not around when the said transaction between PW1 and A1 was sealed. At page 22, from top, 1st paragraph, the evidence thereat further shows that even the vice Chairperson of LCI of the area was aware that it was A1 (daughter of the appellant) on the ground and not the appellant who was living abroad.

There is no evidence from any of the prosecution witnesses who said that the appellant used fraudulent tricks and obtained Shs. 160,000,000/= from PW1. Nor

that Shs. 160,000,000/= was paid to the appellant by PW1. It is my considered view that in criminal proceedings like this one, the fact that the appellant signed the powers of Attorney for A1 (his daughter) is not evidence to show that the prosecution proved its case against the appellant beyond reasonable doubt. That is, for the fact that A1 received Shs. 160,000,000/= from PW1 does not mean that, they said money was received by the appellant by using fraudulent trick on PW1.

Further, from the submissions by Counsel for the respondent, the latter totally failed to support the findings of the trial Chief Magistrate in her judgment at page 4, last paragraph.

Therefore, I make a finding that the finding of the trial Chief Magistrate at page 4 of her judgment was not supported by any evidence on the Court record. Hence, ground 4 of appeal succeeds.

On ground 5 of appeal, Counsel for the appellant submitted that the trial Chief Magistrate never considered the mitigating factors submitted on by the parties. That the sentence passed was in the circumstances of the case excessive. In reply, Counsel for the respondent submitted that the trial Chief Magistrate correctly and justly exercised her discretion and properly sentenced the appellant to 3 (three) years imprisonment as provided by law. She prayed that ground five (5) of appeal be dismissed.

Upon my findings on grounds 1, 2 and 4 of appeal in the affirmative hereinabove, such findings, therefore, would have answered ground 5 of appeal in the affirmative.

The above notwithstanding, at page 6 of the record of Court Judgment where the parties mitigated for sentence, it is clear that the appellant was first offender. There is evidence on record that A1 had already paid Shs. 30,000,000/= to PW1. There is evidence which was accepted by Court that the appellant is HIV + (positive) status. In passing the sentence, the mitigating factors that were

advanced by the appellant were not considered by the trial Chief Magistrate. The trial Chief Magistrate erred in law and fact when she held that:-

“I find that there is nothing to mitigate the sentence in this matter and the gravity to call for the maximum sentence of 3 (three) years. The convict is sentenced to 3 years imprisonment.”

It is my finding that had the trial Chief Magistrate considered the appellant’s mitigating factors; she could not have sentenced the appellant to the maximum sentence of 3 years of the offence charged. In that respect, therefore, ground 5 of appeal is answered in the affirmative.

It is important to note that A1 (Ntanda Rachael) in the middle of the trial absconded from the Court. And the trial proceeded with A2 (appellant) and the case was defended by her lawyer, Mr. Kusiima, for both accused persons. Kusiima Counsel for both accused persons cross-examined the prosecution witnesses. In the judgment of the trial Chief Magistrate, after evaluating the evidence of the prosecution witnesses at page 4, last paragraph, last sentence, she held that:-

“The two accused are found guilty in the alternative count of cheating Contrary to Section 307 of the Penal Code Act and are convicted accordingly.”

At page 7 of the said judgment, the trial Chief Magistrate did not pass a sentence against A1. In his submissions, Counsel for the appellant never addressed himself on this issue. Even, Counsel for the appellant never attacked the order of compensation of Shs.130,000,000/= that was awarded against the convicts.

The above observation poses a serious legal issue which should be resolved by this Court. The issue is whether A1 who was not throughout the trial not present in Court was properly convicted by the trial Chief Magistrate. According to Section 123 (1) of the Magistrates Courts Act, Cap.16 (MCA) as amended, a trial

of accused person charged with a misdemeanor can proceed in his/her absence. Section 123 (1) of the Magistrate's Court Act (Supra) provides:-

“123 Non appearance of the parties after adjournment.

(1) If, at the time or place to which the hearing or further hearing shall be adjourned, the accused shall not appear before the Court which shall have made the order of adjournment, that Court may, unless the accused person is charge with a felony, proceed with the hearing or further hearing as if the accused were present; and if the complainant shall not appear, the Court may dismiss the charge with or without costs as the Court shall think fit.”

Underlining is mine for emphasis.

Cheating Contrary to Section 307 of the Penal Code Act, Cap 120 as amended is a misdemeanor. Therefore, the trial in the absence of A1 was proper and that the conviction of A1 in that regard was lawful. A1 should be re-arrested for sentencing by the trial Court. Accordingly, therefore, a warrant of arrest is issued to any police Officer in Uganda to effect the arrest of A1 anytime and produce her to the trial Chief Magistrate for sentencing. The said warrant of arrest shall remain in force until the time A1 is arrested.

5. Conclusion

In sum total, the appeal is allowed in the following orders:-

- (a) The conviction of A2 (appellant) by the trial Chief Magistrate was not based on evidence adduced by the prosecution. I would find him not guilty of the offence of cheating Contrary to Section 307 of the Penal Code Act, I accordingly acquit him of the charged offence. Wherefore, the conviction of the appellant by the trial Chief Magistrate is quashed.
- (b) The sentence of 3 (three) years imprisonment that was imposed by the trial Chief Magistrate is set aside.
- (c) The appellant is free to go home unless he is held on other charges.

Court: From the Court record, it is clear that PW1 suffered material loss of Shs. 130,000,000/= plus interest that could accrue from it. This loss can be recovered by the complainant (PW1) through a civil suit under Section 197 of the Magistrate's Court Act (Supra). The trial Chief Magistrate was right to order the compensation of Shs 130,000,000/= to be paid by the convicts to PW1. Since the appellant did not appeal against that order, and for the fact that the appellant according to the record of proceedings acknowledges that his daughter (A) was his agent by virtue of the powers of attorney he signed for her to manage his property, Block 9, Plot 542, Makerere West, is bound under the law of agency to pay the compensation of 130,000,000/= that was awarded by the trial Court within thirty (30) days from the date of this judgment. Failure of which the property comprised of Block 9 Plot 542 Makerere or any other property belonging to the appellant be attached to realize the compensation sum of Shs. 130,000,000/= that was awarded by the trial Chief Magistrate. This order shall be executed by the trial Chief Magistrate as provided under Section 198 of the Magistrates Court Act, Cap.16 (Supra).

Dated at Kampala this 15th day of April, 2014.

Joseph Murangira

Judge

THE REPUBLIC OF UGANDA

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CRIMINAL DIVISION

CRIMINAL APPEAL NO.87 OF 2013

(Arising from Original Buganda Road, Criminal Case No.116 of 2012)

FREDRICK

NTANDA :::APPELLANT

VERSUS

**UGANDA :::RESPONDEN
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REPRESENTATION

- Ms. Lwanga Brenda from Tumusiime, Kabega & Co. Advocates, holding brief for Mr. Kabega Macdosman for the appellant.
- The appellant is in Court.
- Ms. Nambuya Sarah Sheron, 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 if any to the parties.

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Joseph Murangira

Judge

15/4/2014