

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.125 OF 2014**

**(Arising from Buganda Road Court Criminal Case No. 661 of 2013)**

**MUGWANYA MAJIDU alias SHEIKH BRUHAN ::::::::::::::::::::APPELLANT**

**VERSUS**

**UGANDA ::::::::::::::::::::RESPONDENT**

**JUDGMENT BY HON.MR.JUSTICE JOSEPH MURANGIRA**

**1. Introduction**

The appellant, Mugwanya Majidu, alias Sheikh Bruhan, is represented by Mr. Okwalinga Moses from Legal Aid Project of the Uganda Law Society. Whereas, the respondent is represented by Ms. Jacquelyn Okui, Senior State Attorney working with the Directorate of Public Prosecutions.

**2. Facts of the appeal**

The appellant (accused) was charged with obtaining money by false pretences Contrary to Section 305 of the Penal Code Act, on Count 1. The particulars of this offence are that the appellant and two others already convicted and sentenced to imprisonment over the same offence between January 2012 and March 2012 in Kyengera, Nsangi Sub-county in Wakiso District with intent to defraud obtained Shs. 300,000,000/= (three hundred million shillings) from Sunday Osbert by falsely pretending that the said Sunday Osbert would receive in return Ug. Shs. 3,000,000,000/= (three billion) from the spirits allegedly possessed by the said Mugwanya Magidu alias Sheikh Bruhan and the two convicted and sentenced persons.

And of conspiracy to commit a felony Contrary to Section 390 of the Penal Code Act, on count 2. The particulars of the said offence are that, the appellant and two others already convicted and sentenced to imprisonment over the same charge/offence between January, 2012 and March 2012 in Kyengera, Nsangi Sub-county in Wakiso District conspired together to commit a felony to wit theft of money worth Shs. 300,000,000/= (three hundred million shillings) the property of Sunday Osbert Contrary to Section 261 of the Penal Code Act.

The respondent adduced evidence against the appellant through four (four) prosecution witnesses. The appellant in defence gave evidence on oath and called no other witness. The appellant was found guilty on the two counts and sentenced accordingly.

The appellant was dissatisfied with the judgment of the Trial Magistrate, His Worship Araali K. Muhirwa, Senior Magistrate Grade I, delivered on 5<sup>th</sup> day of December, 2014. Hence this appeal.

### **3. Grounds of appeal**

- 3.1 The appellant appealed to this Court against conviction on the offences of obtaining money by false pretences and conspiracy to commit a felony; and sentences on the said offences of 4 (four) years imprisonment and 3 (three) years imprisonment, respectively. And the appellant was ordered to pay the alleged stolen money to the complainant.

Thus, the appellant appeals on the following six grounds; that:-

- i. The learned Trial Magistrate erred in law when he convicted the appellant of obtaining money by false pretences without satisfying himself with all the ingredients of the offence.
- ii. The learned Trial Magistrate erred in law and fact when he relied on the contradictory evidence of the prosecution witnesses to convict the appellant thereby occasioning a miscarriage of Justice.

- iii. The learned Trial Magistrate erred in law and fact when he convicted the appellant of conspiracy without supporting evidence on record.
- iv. The learned Trial Magistrate erred in law and fact when he simultaneously convicted the appellant of obtaining money by false pretences and conspiracy to commit a felony.
- v. The learned Trial Magistrate erred in law and fact when he ordered the appellant to pay the stolen money without sufficient evidence of the money alleged to be stolen.
- vi. The learned Trial Magistrate erred in law and fact when he sentenced the appellant to imprisonment of 4 years and 3 years, respectively to run concurrently without taking into account the 16 months period the accused had been on remand before conviction.

3.2 The appellant prayed for the following orders:-

- a) The appeal be allowed.
- b) That both convictions be quashed.
- c) That both sentences be set aside.
- d) That the order of the Trial Magistrate to refund the money be set aside.

#### **4. Resolution of the grounds of appeal by Court.**

4.1 Before going to consider the grounds of appeal, it is important to note that

the duty of the first appellate Court is to re-evaluate the evidence on record as a whole, subject it to fresh and exhaustive scrutiny and come to its conclusion, bearing in mind that it never saw the witnesses testify, see the case of Kifamunte Henry Versus Uganda, SCCA No.10 of 1997.

It is also equally important for the first appellant Court note that in all criminal cases except in statutory offences, the prosecution bears the burden to prove the charge against the accused person. The standard of proof is proof beyond reasonable doubt. The accused is not expected to prove himself innocent. The burden of proof always rests on the prosecution. In the case of Kabali Anthony Vs-Uganda [2004] KALR 23, it was held that:-

“In all criminal cases the burden of proof rests on the prosecution to prove every ingredient of the offence and the guilt of the accused. That this burden never shifts to the accused except in a few statutory exceptions.”

See also the cases of: **Woolmington vs-DPP [1935] AC 462; and Twine Naboth-vs-Uganda, criminal appeal No.1 of 2011.**

4.2 When this appeal came up for hearing, the parties opted to file in Court

written submissions. The Court gave each party schedules within which to file its respective submissions. Counsel for the parties did comply with the Court's directives on the said schedules.

In his submissions Counsel for the appellant, Mr. Okwalinga Moses, argued grounds of appeal 1,2,4 and 5 together. Then grounds of appeal 3 and 6 were argued separately. In her reply, Ms. Jacquelyn Okui, Counsel for the respondent, in her submissions followed the same sequence. In his written submissions Counsel for the appellant smuggled in the ground of appeal he named ground 4 of appeal, that:-

**“The learned Trial Magistrate failed to properly evaluate the evidence before him thereby arriving at wrong conclusion which caused injustice to appellant.”**

In her written submissions, Counsel for the respondent detected this anormally, and in rejoinder, Counsel for the appellant abandoned that ground of appeal. In his written submissions in rejoinder Counsel for the appellant, Mr. Okwalinga Moses, in the only one page, 1<sup>st</sup> paragraph, stated that:-

**“I didn't draw the appellant's memorandum of appeal but I had to combine and fuse the grounds of appeal to suit preparation of these submissions and I accordingly pray that this honourable Court ignores the same and look at the arguments from the grounds as outlined.”**

In resolving this appeal I shall consider grounds 1,2,3 and 4 together.

Then grounds 5 and 6 of appeal separately.

In his submissions on grounds 1,2,3 and 4 of appeal Counsel for appellant, Mr. Okwalinga Moses, argued that the prosecution never produced evidence to prove all the ingredients of the offences charge beyond reasonable doubt. He argued that from the evidence on record it is true that the appellant obtained money from the complainant as is evident from the appellant's testimony as well as the testimonies of PW1, and PW2, that who all confirmed that the appellant was paid Shs. 380,000/= for dhuwa services and medicine (professional services fees.) That however the appellant disputed and testified that he did not receive the alleged Shs. 300,000,000/= as alleged by PW1, PW2, PW3 and PW4. He argued that:-

- “ (i) The prosecution never presented acknowledgement or documentary proof that the appellant had received the said Shs. 300,000,000/= (three hundred million only which is such a big sum of money as alleged.
- (ii) The prosecution only relied on the sole oral evidence of the complainant and his wife (PW1 and PW2) who could easily have connived to frame the appellant in order to extort money from him to solve their financial problems.
- (iii) The prosecution did not present any independent evidence to corroborate PW1 and PW2 (husband and wife) in as far as appellant being paid Shs. 300,000,000/= (three hundred million only) since they did not invite the other alleged 2 witnesses, namely Tumwesigye Jimmy and Paul Asaba who were allegedly to be present during the said transaction.
- iv. Further the prosecution only furnished and showed that the complainant had sold his house at Shs. 180,000,000/= (one hundred eighty million shillings only), a money lending agreement of Shs. 34,500,000/= (Shillings thirty four million five hundred only) and a bank withdrawal slip of shs. 52,000,000/= (Shillings fifty two million only), but it did not account for all the money and for how the complainant raised all this money, if it was from sale of his land does he have

proof that upon payment the money was given to the appellant and not any other person and invested it elsewhere.

- v. The complainant (PW1 and PW2) as well as the appellant in their testimonies as well as in the judgment, it was found that PW1 had misappropriated money from his work place at MUBS to a tune of Shs.250,000,000/= (two hundred fifty million shillings only), one wonders how then he would be silly enough to raise Shs. 300,000,000/= (three hundred million shillings) for a witchdoctor when he could not even repay the Shs. 250,000,000/= (two hundred fifty million shillings only) that he had misappropriated from work.
- vi. Also the fact the complaint had misappropriated money from his work place which is the reason as to why he went to the appellant in the first place, how can the trial Court rely on his evidence in the absence of any corroborative proof that he indeed paid the said Shs. 300,000,000/= (shillings three hundred million only) to the appellant and yet his financial integrity is suspect.”

He relied on the abovestated facts and cited some authorities in his endeavours to fault the Trial Magistrates on grounds of appeal 1, 2,3 and 4.

In reply, Counsel for the respondent, Ms. Jacquelyn Okui, does not agree with the submissions by Counsel for the appellant. She criticized the submissions by Counsel for the appellant. She, too, evaluated the evidence on record and cited some authorities. In her written submissions she supported the judgment and orders of the Trial Magistrate.

As this Court is the first appellate Court, my duty is to re-evaluate the evidence on record as a whole, subject the same to fresh and strict scrutiny and come out with my own conclusions on the matter. In this endeavour, my duty is analyze and find out whether the Trial Magistrate properly evaluated the evidence as a whole on the Court record and whether he came to the correct decision. And also, whether the prosecution proved its case against the appellant beyond reasonable doubt.

I perused and re-evaluated the prosecution and the defence evidence on the Court record. I also read and analyzed the Trial Magistrate's judgment. In the same vein I read and compared the written submissions by Counsel, on how they resolved each ground of appeal.

In his judgment, the Trial Magistrate on page 2 gave the definition and ingredients of each charged offence. Then from page 2, last paragraph to page 10, 2<sup>nd</sup> paragraph of the judgment, the Trial Magistrate summarized and re-stated the prosecution evidence. Then, on page 10, last paragraph up to page 11, up to line 9 from top, in his judgment the Trial Magistrate summarized and re-stated the defence evidence.

On grounds, 1, the said grounds of appeal, on page 3 lines 19-23 of the record of proceedings the appellant asked PW1's wife (PW2) to tell him to go and see him with Shs. 500,000/= and PW1 went with 380,000/= which the appellant took from him the following day for cleansing PW1 and PW2 their problems to go. His evidence was corroborated by the evidence of PW2, on page 20 lines 15-20, 22-23, 26-27 of the record of proceedings. PW1 further on page 3 line 29, page 4 lines 1-6 of the record of proceedings testified that in January 2012 the appellant called PW1 and told him to take Shs.48,000/= to his shrine as the jjajjas ancestors had told him to do so which PW1 did. On page 4 lines 23 and 24 of the record of proceedings PW1 testified that a voice from the behind the black curtains while he was in the appellant's shrine said that "since you are at Sheikh Bruhan's shrine, your problems will be solved." On page 5 lines 18-20 of the record of proceedings PW1 testified that the voices said that in order for him not to have problems, he was to mix each Shs. 1,000,000/= in the box in the shrine with his own money of 20,000/= notes which PW1 and the appellant calculated and the amount came to Shs.30, 000,000/= (thirty million) PW2, Atukwasa Adrin corroborated that evidence of 1million on page 21, lines 5-9 of the record of the proceedings.

Again on page 5, lines 22-24 of the record of proceedings, PW1 testified that in January 2012 the appellant kept on calling him and told him that the jjajjas ancestors' offers could

not be turned down and that PW1 would soon get involved in an accident or lose one of his family members.

This evidence was corroborated by the evidence of PW2 on page 21 lines 12 and 13 of the record of proceedings on page 6, lines 13-16 of the record of proceedings PW1 testified that he gave Shs. 30,000,000/= (thirty million) to the appellant at his shrine who told him to put the money in the wooden box, which PW1 did. The appellant then sent them out and came out later with the said wooden box. This evidence was corroborated by the evidence of PW2 on page 21, lines 16-18; 21-26 of the record of proceedings.

Still on page 7 lines 3-5 of the record of proceedings, PW1 testified that on 26<sup>th</sup> January, 2012 the noises in the shrine where the appellant was said that PW1 had to add Shs.170,000,000/= (one hundred seventy million). This evidence was corroborated by the evidence of PW2 on page 22 lines 12 and 13 of the record of proceedings. PW1 further on page 7 lines 11 and 12 of the record of proceedings testified that for the whole month of February, 2012 the appellant was calling him and was asking him how far he had gone looking for the balance. He further testified on page 7 lines 23-29 that he took 90,000,000/= (ninety million) to the appellant on 5/3/2013. This evidence was corroborated by the evidence of PW2 on page 22 lines 16-19 of the the record of proceedings. On page 8 lines 2 and 3 of the record of proceedings PW1 gave evidence that while in the appellant's shrine at Kyengera that voices said that if he could go and get the balance of Shs. 60,000,000/= (sixty million shillings), he then took Shs. 53,000,000/= (fifty three million shillings) to the appellant as given on page 8 lines 5-8 of the record of proceedings. This evidence was corroborated by the evidence of PW2 on page 22 lines 23 and 24 of the record of proceedings.

Further on page 8, lines 27-29 of the record of proceedings PW1 testified that voices from the black curtain said that he had 40 (forty) witchcrafts on him and for the snake to leave the wooden box, he had to reward the jjaja ancestors with Shs. 86,000,000/= (eight six million shillings only). PW1 then mobilized Shs. 86,000,000/= which money he gave to the appellant; this is at page 9 lines 1-6 of the record of proceedings. This evidence



was corroborated by the PW2 on page 23 lines 9 and 10 of the record of proceedings. Again on page 9 lines 6-11 of the record of proceedings PW1 testified that the appellant placed the money on his side where the voices were coming from. That the appellant excused himself as if he was going for a short call and he never returned. That on checking where the appellant placed the money where the voices were coming from, the money was not there and that they established that there was a hole leading to another room where the voices were coming from. This evidence was corroborated by the evidence of PW2 on page 23 lines 10-12 of the record of proceedings. More still, on page 9 lines 11-16 of the record of proceedings PW1 testified that the appellant then began to avoid him and Pw2.

PW3, the investigating officer and PW4 the arresting officer in their respective testimonies corroborated the evidence of PW1 and PW2.

On page 10 lines 27-29, of the record of proceedings PW1 testified that when the appellant was arrested by the police, the appellant wanted to settle the case by paying PW1. This evidence was corroborated by the evidence of PW2 on page 23, line 15 of the record of proceedings. PW1, further on page 16 lines 5 and 6 of the record of proceedings gave evidence that the appellant told him that he used the money obtained to buy a truck, that he built a house in Kawempe, that he bought a saloon car and that some money was on his account. On page 18 lines 19-21 of the record of proceedings, PW1 testified that the appellant was working with Rajab Twebaze and Musa Katongole. According to the evidence of PW1 and PW2 the appellant obtained from them Shs.302, 428,000/= which is relatively the money being stated in the charge sheet.

In defence, the appellant admits meeting PW1 and PW2, at his working place in Kyengera on several occasions to administer the duwah to cleanse PW1 of his problems. On this admission, the appellant put himself at the scene of crime. Still in his testimony, the appellant admits being investigated by PW2, and arrested by PW4 at Kawanda on the visitation day of his children. In his evidence he said the two police officers treated him very well. Thus, I make a considered view that what PW3 and PW4 testified against him

is truthful. More importantly, apart from denying receiving Shs. 300,000,000/= from PW1, the appellant more or less admitted all the events as narrated by PW1 and PW2 in their respective evidence in examination in Chief.

The prosecution evidence came into attack by Counsel for the appellant, Mr. Okwalinga Moses, when he submitted that the prosecution never produced documentary evidence to prove that the appellant by false pretences obtained from the appellant Shs. 300,000,000/=. PW1 and PW2 according to their evidence on record gave direct evidence as to what they saw, heard, and did on the demands by the appellant and by his other colleagues in the shrine. They described the events as they happened in the appellant's shrine. In cross-examination PW1's and PW2's evidence in examination-in-chief was never challenged. Their evidence is supported by Section 58 of the Evidence Act, Cap. 6, reads:-

**“All facts except the contents of documents may be proved by oral evidence.”**

Such evidence, however, must be direct. Under Section 59 of the Evidence Act, Cap. 6, reads:-

**“Oral evidence must, in all cases whatever, be direct; that is to say:-**

- a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it.**
- b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he or she heard it.**
- c) If it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he or she perceived it by that sense or in that manner.**
- d) If it refers to an opinion or the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.”**

Certainly, the evidence of PW1, PW2, PW3 and PW4 is fortified by Section 59 the Evidence Act (Supra).

Again, Counsel for the appellant attached the evidence of PW2, Atuwase Adrine, the wife of PW1, on grounds that she being the wife of the complainant (PW1) her evidence cannot corroborate the evidence of her husband. That thus, the Trial Magistrate was wrong to rely on the oral evidence of PW1 which was not corroborated by an independent evidence. The perception by Counsel for the appellant that the PW2's evidence in this matter was and is still wrong under Section 117 of the Evidence Act (Supra), PW2 was a competent witness in this case. Therefore, I hold that PW2's evidence is independent evidence and did corroborate the evidence of PW1 on pinning the appellant (accused) on the charged offences.

Consequently and in addition to my analysis hereinabove, from page 11 from line 13 up to entire page 12 of the Trial Magistrate's judgment, the Trial Magistrate properly evaluated the evidence on record and properly applied the law in finding that the appellant was guilty of the charged offences. The appellant failed to advance any reasons that I could base on to fault the Trial Magistrate. The prosecution adduced direct evidence against the appellant, and the appellant, in defence put himself at the scene of crime. Therefore, from the entire evidence on Court record, the prosecution proved its case against the accused/appellant beyond reasonable doubt. The Trial Magistrate properly convicted the appellant (accused) on both counts, as charge. In the result, grounds 1,2, 3 and 4 of appeal fail.

- 4.4 I now turn to resolve ground 5 of appeal. On this ground of appeal, Counsel for the appellant submitted that the order to refund to the complainant Shs. 300,000,000/= (three hundred million) was ungrounded, without justification, that the prosecution never proved that the appellant did receive the said monies. In reply, Counsel for the respondent does not agree. As I have already found grounds 1,2,3 and 4 of appeal in the negative, I hold that the Trial Magistrate was within the law when he ordered the appellant to pay Shs. 300,000,000/= (three

hundred million) to the complainant (PW1) because there is sufficient evidence on the Court record that prove that the same money through tricks administered through witchcraft was obtained by the appellant from PW1 by false pretences and with the intent to defraud. Accordingly, having the appellant been found guilty and convicted on the offence of obtaining money by false pretences Contrary to Section 305 of the Penal Code Act, Trial Magistrate was under Section 197 of the Magistrates' Courts Act, Cap.16 to give such an order for compensation to the complainant. Again, also, ground 5 of appeal fails.

- 4.5 On ground 6 of appeal both Counsel for the parties agreed that in passing the sentence against the appellant the Trial Magistrate never took into count the period of 16 months the appellant had spent on remand.

On page 49, lines 7 and 8 of the record of proceedings it is stated that the accused therefore sentenced to:-

**“On count 1 to four (4) years imprisonment.**

**On count 2, I sentence the accused to three (3) years imprisonment.**

**Sentences to run concurrently.”**

Certainly, I agree with both Counsel that in passing the sentences against the appellant, the Trial Magistrate never considered the period the convict had spent on remand. The convict had spent on remand as from 31/7/2013 when he appeared in Court for plea and remanded in prison till 5/12/2014 when sentences were passed against the appellant, it is a period of 16 months and 5 days, which period should have been taken into account when passing the sentences by the Trial Magistrate. Since it was ordered by the Trial Magistrate that sentences shall run concurrently, the said period the appellant spent on remand shall be deducted from the sentence of 4 (four) years imprisonment. To that extent ground 6 of appeal succeeds in part.

## **5. Conclusion.**

In closing, considering the evidence on record and my findings on the grounds of appeal in this Judgment, I hold that this appeal has no merit. It is accordingly dismissed. Judgment is given in favour of the respondent in the following orders; that:-

- a) The appeal is dismissed.
- b) The convictions on Courts 1 and 2 on the charged offences, the respective sentences and orders therein are confirmed and upheld.
- c) On the sentence of 4 (four) years the period of 16 months is deducted to give the appropriate sentence of 2 (two) years and 4 (four) months imprisonment from the date of sentence by the Trial Magistrate.
- d) The order of compensation by the Trial Magistrate for the appellant (accused) to pay Shs. 300,000,000/= (three hundred million shillings only) as the loss and damage to the complainant is upheld.

Dated at Kampala this 3<sup>rd</sup> day of November, 2015.

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**Joseph Murangira**

**Judge.**

**THE REPUBLIC OF UGANDA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.125 OF 2014**

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**VERSUS**

**UGANDA ::::::::::::::::::::RESPONDENT**

**REPRESENTATION**

Mr. Okwalinga Moses for the appellant.

The appellant in Court.

Mr. Amuza Muzige Senior State Attorney is holding brief for Ms. Jacquelyn Okui, Senior State Attorney for the respondent.

We are ready to receive the judgment.

The complainant is not in Court.

Ms.Mable Kirabo, the Clerk is in Court.

**Court:** Judgment is delivered to the parties in open Court.

Right of appeal is explained.

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**Joseph Murangira**

**Judge.**

**3/11/2015.**