

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL DIVISION

CRIMINAL APPEAL NO.44 OF 2015

**(ARISING FROM BUGANDA ROAD COURT CRIMINAL CASE FILE NO. 239
OF 2015)**

LOKUWE AHMED:.....:APPELLANT

VERSUS

UGANDA :.....:RESPONDENT

JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction.

1.1 The appellant, Lukuwe Ahmed Doko brought this appeal in this Court through his lawyers M/S Kusiima & Co. Advocates. The appellant in this appeal is represented by Ruth Nampijja from M/S Kusiima & Co. Advocates.

1.2 The respondent is represented by Ms. Jacquelyn Okui, Senior Attorney, working with the Directorate of Public Prosecutions.

2. Briefs facts of the appeal.

The appellant (accused) was charged with the offence of obtaining goods by false pretences Contrary to Section 305 of the Penal Code Act, Cap.120, and Laws of Uganda.

The prosecution at his trial adduced evidence from six (6) prosecution witnesses, who testified against the appellant. The appellant gave evidence on oath but never called any other witness to testify on his behalf.

At the end of the Trial, the Trial Magistrate, Her Worship Sanyu Mukasa found him guilty and accordingly convicted him as charged. The appellant was sentenced to 1 ½

(one and half) years imprisonment and a fine of Ug. Shs. 4,800,000/= (four million, eight hundred thousand Shillings) and to pay to the complainant Ug. Shs. 12,000,000/= (twelve million Shillings), on 19th March, 2015.

The appellant was dissatisfied with the whole judgment and decision there from by the said Trial Magistrate. Hence this appeal to this Court.

3. Grounds of Appeal.

The appellant's appeal is based on the following grounds; that:-

- a) The learned Trial Magistrate erred in law and fact when she failed in her duty to evaluate the evidence on record and she wrongly held that prosecution had proved its case beyond reasonable doubt as required by law.
- b) The learned Trial Magistrate erred in law and fact when she disregarded the defence of the accused when it was never rebutted.
- c) That the learned Trial Magistrate erred in law and fact when she passed manifestly harsh and excessive orders.

4. Resolution of the appeal by Court

4.1 On 26th August 2015, when this appeal came up for hearing, Counsel for the parties requested Court to file written submissions, which request was granted by this Court. Each party was given a schedule within which to file his written submissions. I am happy to state that each party complied with the Court's directives. The parties, therefore, presented their respective arguments in writing.

Both Counsel for the parties argued the grounds of appeal separately.

4.2 Ground 1 of appeal:-

The learned Trial Magistrate erred in law and fact when she failed in her duty to evaluate the evidence on record and she wrongly held that the prosecution had proved its case beyond reasonable doubt as required by law.

It is trite law that the duty of the 1st appellate Court is to re-evaluate the evidence on Court record as a whole subject the same to a fresh scrutiny and draw its own conclusions, bearing in mind that the Judge never saw the witnesses testify in Court. The aforesate principle is satisfied by Section 34 (1) of the Criminal procedure Code, Cap.116, laws of Uganda, which reads:-

“(1) The appellate Court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside into the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on ground of wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the Court is satisfied that there has been a miscarriage of justice, and in any case shall dismiss the appeal; except that the Court shall, notwithstanding that it is of the opinion that the point issued in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”

It is a cardinal principle in criminal law that in all criminal cases, the prosecution bears the burden of proof. The standard of proof required of the prosecution is proof beyond reasonable doubt. This burden of proof does not shift to the accused to prove his innocence.

In this particular ground of appeal, my duty is to re-consider the evidence on the Court record as a whole to establish whether the prosecution evidence that was adduced from the six (6) prosecution witnesses did prove all the ingredients of the offence charged against the accused.

Counsel for appellant in her written submissions relied on the case of Nakigudde Madina VS Uganda Criminal appeal No. 64 of 2007, whereby Lugayizi, J (as he then was) set out the ingredients of the offence of obtaining goods by false pretences Contrary to Section 305 of the Penal Code Act, that:-

- a) The accused must have committed some form of **“false pretence.”**

b) Compiled with “**intent to defraud.**”

Counsel for the appellant further submitted that considering the prosecution evidence on record that the prosecution failed to prove the above ingredients, in that the appellant denies ever taking any goods from the complainant (PW1) on credit. That the appellant only took goods worth 1, 200,000/= which he knew of and was willing to pay. That, therefore, the Trial Magistrate convicted and sentenced the appellant on an unproved offence.

In reply, Counsel for the respondent, Ms. Jacquelyn Okui, Senior State Attorney, in her written submissions support the judgment and findings of the Trial Magistrate. She submitted that the Trial Magistrate properly evaluated the evidence on record and that the prosecution proved its case against the appellant beyond reasonable doubt. She evaluated the evidence on record and concluded that the appellant was properly convicted and sentenced of the charged offence.

In the case of Uganda –Vs- Patrick N. W. Mugenyi, High Court Criminal appeal No 4 of 2000, Katutsi, J (as he then was) held that in order for the offence under Section 305 of the Penal Code Act to be proved, the prosecution had to prove that the pretence was made, that the goods were received, with intent to defraud and that the pretence was false to the knowledge of the accused.

I re-evaluated the evidence on record as a whole. I read the Judgment of the Trial Magistrate, her judgment though in a summary form, she looked at and considered the evidence of both parties.

At page 1 from 2nd paragraph of the judgment the Trial Magistrate re-stated the testimonies of the prosecution witnesses (PW1, PW2 and PW3) from the last paragraph at page 1 of the judgment, the Trial Magistrate stated:-

“ There is strong evidence that the accused took 506 bags of pine tree lighting sticks for which he had not paid. The evidence clearly shows that basis of prior business relationship between him and the complainant, and promising to pay for the goods where as he had no intention to pay for them.”

The above findings of the Trial Magistrate clearly show that the Trial Magistrate considered the ingredients of the offence charged and the evidence on record to support proof of the ingredients of the charged offence.

Then at page 11 of the record of appeal, line 13 from top, PW1 stated:-

“I have agreements.”

Then at line 15 of the same page 11 of the record of appeal, Counsel for the appellant never objected to the tendering in of the said agreements as exhibits for the prosecution case. At line 16 thereof; the agreements were exhibited as agreement dated 17/5/2013, Exh PE1 and agreement dated 31/5/2012 Exh PE2.”

In the agreement of 31/5/2012 (Exh. PE2) the appellant before a Magistrate admitted to pay Shs. 12,800,000/= (Twelve million eight hundred thousand shillings) for goods he obtained from the complainant and did not pay. The appellant breached that agreement and never paid any money to the complainant.

Again in the agreement of 17/5/2013, the appellant through his lawyers Mukisa, Mugisha & Co. Advocates made an agreement with the PW1, whereby the appellant agreed that he obtained goods from PW1 sometime in February, 2012. He agreed to pay the balance of 12,800,000/= to PW1 by 31/5/2013, which money the appellant never paid. He again breached that agreement.

At pages 8, 9, 10 and 11 of the Court proceedings where PW1 stated that he knew the appellant and that the appellant went to Owino and said that he wanted 530 bags of pine tree lighting sticks. That the appellant by tricks took delivery of the good with the promise that he would pay which promise the appellant never fulfilled.

Further, the evidence of PW2, PW3 and PW6 do corroborate the evidence of PW1. I noted that the evidence of PW1, PW2, PW3, PW4, PW5 and PW6, was never challenged by the defence in cross-examination.

The prosecution evidence put the appellant at the scene of crime. I have considered the evidence of the defence on Court record at page 18 in the evidence of the appellant; the appellant denied the offence in total.

In cross-examination, at page 18 of the Court proceedings, he stated:-

“I have been buying from the complainant from 2009 – 2010.” This shows that he knew PW1 very well. His evidence never created any doubt in the prosecution case.

From the evidence on record, the prosecution proved its case against the appellant beyond reasonable doubt. I thus see no merit in ground 1 of appeal. In the result ground 1 of appeal fails.

On ground 2 of appeal:

That the learned Trial Magistrate erred in law and fact when she disregarded the defence of the accused when it was never rebutted.

Counsel for the appellant submitted that at page 18 of the Court record of appeal the accused (appellant) defended himself by stating that he has never taken the goods worth the amount that the complainant claims. That the Trial Magistrate convicted and sentenced the accused (appellant) without taking into account the above defence which occasioned a miscarriage of justice on the appellant. In reply, Counsel for the respondent did not agree with the submissions by Counsel for the appellant. In her submissions, Counsel for the respondent supported the judgment of the Trial Magistrate.

It should be noted at this stage, that the accused in criminal cases is not supposed to prove himself innocent. On ground 1 of appeal hereinabove in this judgment, I re-evaluated the evidence as a whole on the Court record. I, too, found that the appellant's defence was a mere denial.

I further found that the prosecution proved its case against the accused (appellant) beyond reasonable doubt. I note from the submissions by Counsel for the appellant that she never considered the prosecution evidence on record. Has she done so, she would have clearly seen that this ground 2 of appeal has no merit. I reiterate my arguments on ground 1 of appeal hereinabove in this judgment and make a finding that ground 2 of appeal holds no water at all.

It accordingly fails.

On ground 3 of appeal:

That the learned Trial Magistrate erred in law and fact when she passed manifestly harsh and excessive orders.

On this ground 3 of appeal, Counsel for the appellant submitted that the Trial Magistrate in sentencing the appellant to a fine of Ug. Shs. 4,800,000/=, imprisonment of one and half (1½) years and granting an order for compensation of Shs. 12,000,000/= to the complainant (PW1) was manifestly excessive and harsh and that it occasioned injustice to the appellant. In reply, Counsel for the respondent does not agree with the submissions by Counsel for the appellant.

In her submissions, Counsel for the respondent supported the sentence and the orders that were passed by the Trial Magistrate. She prayed that this ground of appeal, too, be disallowed.

After convicting the appellant, the Trial Magistrate passed a sentence of 1½ years imprisonment and a fine of shs. 4,800,000/= against him. She also gave an order of compensation of Shs.12, 000,000/=. Both the fine and compensation monies were to be paid to the complainant.

Under Section 305 of the Penal Code Act, on conviction, the convict is liable to imprisonment for five years. That Section does not prohibit a sentence of imprisonment in addition to a fine.

In passing the sentence and the orders, she considered the mitigating factors that were submitted by both parties at page 20, 1st paragraph of the Court proceedings. In consideration of the nature of the offence and how the accused/appellant obtained the goods from PW1 and refusing to pay up to date, the sentence of 1½ years imprisonment and a fine of shs. 4,800,000/= is not manifestly harsh and excessive.

For the order of compensation of Shs. 12,000,000/= to PW1, the complainant, under Section 197 (1) of the Magistrate Courts Act, Cap.16, the Trial Magistrate had powers to grant such order of compensation to PW1, as against the appellant. At page 20 of the Court proceedings, the Trial Magistrate gave reasons for granting the order for compensation. From the evidence of the prosecution witnesses and Exhs PE1 and PE2, PW1, the complainant suffered material loss in the consequence of the offence committed. In that regard, I do not see any reasons why I should fault the Trial Magistrate. In the case of *Ogalo s/o Owoura VS R (1954) 21 EACA 126* it was held that an appellate Court will not interfere with the discretion of the sentencing judge unless the Court is satisfied that the sentence imposed by the Court/Trial Judge, Magistrate was manifestly so excessive as to amount to an injustice.

In the instant appeal, find that the sentence of 1½ years imprisonment, a fine of Shs 4,800,000/= and the compensation order of Shs. 12,000,000/= that were passed by the Trial Magistrate against the appellant are not manifestly excessive and that no injustice was occasioned to the appellant. The amount of shs.16, 000,000/= (sixteen million) is the amount of money that was calculated to be worth the goods he fraudulently obtained from the complainant (PW1). The evidence to that effect is clear on the Court record.

In the result, ground 3 of appeal, too, fails.

5. Conclusion:

In closing, for the fact that grounds 1, 2 and 3 of appeal failed, I hold that this appeal has no merit. It is accordingly dismissed. The sentence of 1½ years imprisonment, a fine of shs. 4,800,000/= and the Order of compensation to the complainant of Ug. Shs. 12,000,000/= and the order for the fine to be remitted to the complainant Mwebaze Moses are upheld.

Dated at Kampala this 14th day of October, 2015.

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Joseph Murangira

Judge.

