THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA CRIMINAL DIVISION

CRIMINAL APPEAL NO. 41 OF 2015

(ARISING FROM CRIMINAL CASE NO. 496 OF 2011 OF BUGANDA ROAD COURT)

ATUHWERE LABAN a.k.a LUMALA BAKER:::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::RESPONDENT

JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. **Introduction.**

The appellant is represented by Mr. Ssesaazi Mark from Zaale Otete & Co. Advocates. Whereas, the respondent is represented by Ms .Lucy Kabahuma, Senior State Attorney working with the Directorate of Public Prosecutions.

2. **Brief facts of the appeal**.

This is an appeal against conviction and sentence of the appellant. The appellant was charged with obtaining money by false pretences Contrary to Section 305 of the Penal Code Act. He was found guilty and convicted of the charged offence by Her Worship Sanyu Mukasa, magistrate Grade 1, at Buganda Road Court.

It was alleged that on 4th June 2010, the appellant pretended to be Atuhwere Laban a.k.a Lumara Baker, sold land comprising in Kyadondo Block 223 Plot 1796, located at Namugongo for a sum of shs.6,450,000/=.

The prosecution adduced evidence from three witnesses. The defence adduced evidence from the appellant. The Trial Magistrate believed the evidence of the complainant (PW1) who had been tricked by the appellant into giving him the money for the property that did not belong to him. She also relied on the identity card that was adduced by the prosecution to prove that there was false pretences.

The appellant was convicted and sentenced to one (1) year and eight (8) months imprisonment, and a compensation of shs. 4,800,000/=.

Hence this appeal.

3. Grounds of appeal.

1. That the learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record as a whole therefore arriving to the wrong conclusion.
2. The Trial Magistrate erred in law and fact when she convicted the appellant on insufficient circumstantial evidence.
3. The learned Trial Magistrate erred in law and fact when she established that there was a case to answer without allowing the appellant to submit on whether there was a case to answer or not.
4. The learned Trial Magistrate erred in law when she did not allow both the appellant and the respondent to address Court at the closure of the appellant's case.
5. The learned Trial magistrate was manifestly biased when she failed to allow the appellant to adduce evidence from other witnesses to support his case.

4. Resolution of the grounds of appeal by Court.

4.1 The appellant's Counsel abandoned grounds 2 and 3 of appeal. In that regard, the said grounds of appeal stand dismissed. He argued grounds, 1, 4 and 5 separately and in that order. In reply, Counsel for the respondent followed the same order in arguing the case for the respondent.

4.2 Ground 1 of appeal:

That the learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record as a whole thereby arriving at the wrong conclusion.

Counsel for the appellant submitted that the Trial Magistrate in her judgment based on the evidence of the complainant, PW1, Nakiwoolo Teddy. That the witnesses who

witnessed on the sale agreement were never called in Court to testify. That the Trial Magistrate never evaluated the evidence of the appellant who never signed on the sale agreement. That PW1 gave evidence that she reported the matter to Central Police Station, but that the investigating Officer was never called to testify.
Counsel for the appellant further submitted that the Trial Magistrate did not consider the defence that was raised by the appellants which is that the identity card bearing his photo and description of him being Atuhwere Laban and a carpenter were never his descriptions. That the photograph was his. That to rebut the identity card, the appellant described himself by tendering in Court his passport which was accepted in evidence. That the appellant denied selling the land in issue to the respondent.

Furthermore, Counsel for the appellant, submitted that the Trial Magistrate did not evaluate the evidence of the transfer form, that it did not bear the appellant's photograph. Again, that there is nowhere in the testimony of PW1 proved that money exchanged hands. That PW2, the Registrar of Titles and PW3, the real Atuhwere Laban, the owner of the land never proved to Court that it was the appellant that transferred the suit land to PW1.

Finally on this ground 1 of appeal, Counsel for the appellant submitted that the Trial Magistrate if she had pointed her mind to the Crucial points he has submitted on hereinabove, she ought to have found out that the evidence of PW1 needed to be corroborated by at least by another document or by someone who was there when the money was exchanging hands. That the Trial Magistrate's failure to evaluate this evidence led to the miscarriage of justice, that thus leading to a wrong conclusion.

In reply, Counsel for the respondent did not agree with the submissions by Counsel for the appellant. In her submissions, she supported entirely the judgment of the Trial Magistrate. She, too, evaluated the evidence on record, and endeavoured to show that the Trial Magistrate properly evaluated the evidence on Court record as a whole and thus came to the right decision. She prayed that ground 1 of appeal be disallowed.

It should be noted that this Court is the first appellate Court in handling this appeal. It is settled law that the first appellate Court has duty to re-evaluate evidence on the Trial Court record as a whole, subject the same to exhaustive scrutiny and come to its own conclusion. In the case of **AKAL PATRICK & ORS VS – UGANDA [2006] 1HCB 4**, the Court of Appeal Justices held that:-

> **"The duty of the 1st appellate Court is to re-evaluate the entire evidence on record and come to its own conclusions bearing in mind that it did not see the witnesses testify."**

And in the case of **Charles Bogere Vs – Uganda [1999] KALR 17**, it was held that:-

> **"It is the duty of the 1st appellate Court to reconsider the entire evidence on record and subject it to a fresh and exhaustive Scrutiny and make its own conclusion."**

To shoulder my duty as the first appellate Court, I have evaluated the evidence of the parties on the Court record as a whole afresh and I shall subject the same to exhaustive scrutiny and come out with my own conclusions.

In her three page judgment, the Trial Magistrate endeavoured to evaluate the evidence of the parties as a whole. At page1, last paragraph of the Trial Magistrate judgment referred to the testimony of PW1. She referred to the signed transfer forms and the identity card of the appellant. At page 2, 2nd paragraph, She considered the evidence of PW2; and in the 3rd paragraph and 4th paragraph of the judgment of the Trial Magistrate considered the evidence of PW3. Still at page 2, 5th paragraph of the said judgment, the Trial Magistrate considered the appellant's case. At pages 2 and 3 of the Trial Magistrate's judgment, the Trial Magistrate briefly analyzed the evidence of both parties as a whole.

In his submissions, Counsel for appellant submitted that the evidence of PW1 needed to be corroborated by another person who saw money exchange hands. In her judgment at page 2, 3rd paragraph, 1st line, the Trial Magistrate raised an issue as to whether the

evidence of one witness may be believed. She further warned herself on the danger of convicting on the evidence of uncorroborated evidence.

In this regard she held that:-

> **"I have found that the complainant's evidence sufficient to establish the guilt of the accused; she had sufficient time to observe the accused."**

In this case, the Trial Magistrate properly relied on the identity card which bear the appellant's photograph, which similar photograph was in the appellant's passport, which was tendered in Court as a defence Exh3. In the proceedings of the lower court and in his submissions, the appellant did not deny the said photograph which was on his identity card and in his passport that it was his photograph. I, therefore, support the finding of the Trial Magistrate whereby she highly believed that the fact that the appellant's photograph was his, he used the same identity card to trick and lure the complainant into giving him shs. 6,450,000/= for the purchase of land situated for the purchase of land situated at Kyadondo, Block 223, Plot 1796 land that the appellant claimed to be his and it was registered in the names of Atuhwere Laban, the same names which were on the identity card.

Still at page 2, line 6 of the judgment of the lower Court, the Trial Magistrate rightly so noted that the real Atuhwere Laban (PW3) testified to the fraud that happened on his land. PW3 gave evidence that he is the proprietor of the land in issue. At page 11, 3rd paragraph of the lower Court proceedings, PW3 further testified that he picked his land title which was registered in his own names from his lawyer Mr. Onesmus Mugyenyi in 2006. That he forgot that same title in the compound of the Chambers of his said lawyer in Kamwokya. That thereafter he processed a special certificate of title Exh.P10 after making the necessary announcements on radio and also reported to the Police where he was given a police report, Exh P9.

PW3 at page 11, last paragraph of the Court proceedings gave evidence that he carried out a search in the land office and found out that Plot 1796 was registered in the names of Nakiwoolo Teddy. He went ahead to complain to the Commissioner of Lands where he

was informed that a fraudulent land transaction took place between a fake Atuhwere Laban and Nakiwoolo Teddy. This evidence was neither challenged in cross-examination of PW3 nor in defence by the appellant.

At page 9, last paragraph line 6, of the lower Court proceedings, PW2 gave evidence that he discovered that another person calling himself Atuhwere Laban had transferred the suit land to Nakiwoolo teddy as a purchaser.
At page 20 last paragraph, 3rd line, of the lower Court proceedings, the appellant stated that he knew the complainant, PW1, as a person who wanted to buy his own land, not the land in issue. This statement corroborates PW1's piece of evidence that she knew the accused (appellant) very well.

On the submissions by counsel for the appellant that the Transfer Form not having the photograph of the appellant exonerated him from the charged offence. On this submission, I agree with Counsel for the respondent that there is no law that expressly provides for the photographs for both the buyer and the seller to be affixed on the transfer forms for the buyer to be registered on the certificate of title of any land. The fact that the transfer forms had a signature of the appellant and the signature of the complainant; this is enough to prove that it was on the basis of the said transfer forms that the Registrar of Title had registered the complainant (PW1) as the proprietor of the land comprised in Kyadondo Block 223 Plot 1796, situated at Namugongo. The aforestated land was fraudulently registered in the names of PW1 by a man who disguised himself as the real Atuhwere Laban.

On the submission by Counsel for the appellant that the appellant never signed on the sale agreement Exh.P1. I have looked at that Exh. P1, the sale agreement and the seller, one Laban Atuhwere signed on the said sale agreement. The same Laban Atuhwere signed on the transfer form and on the consent to transfer the land in issue.

There is another important fact to consider that connects the appellant with the charged offence. At page 14 lines 4 and 5 of the lower Court proceedings the appellant (accused) stated:-

> **"I have so far paid the complainant Shs. 3,000,000/= and I intend to pay the balance very soon."**

This statement by the appellant amounts to an admission that he had dealings, as alleged by PW1, with the latter.

In conclusion, as the 1st appellant Court re-evaluated the evidence on record as a whole, subjected the said evidence to fresh and exhaustive scrutiny and my conclusion is that the prosecution adduced both direct and circumstantial evidence that proved that the appellant fraudulently and with intent to defraud, employed a false pretence that induced PW1, the complainant in a fake purchase of the land in issue at shs. 6,450,000/= and that money exchanged hands between the appellant and the complainant, PW1. In the result, ground 1 of the appeal fails.

4.3 Ground 4 of appeal: The learned Trial Magistrate erred in law when she did not allow both the appellant and the respondent to make address to Court at the closure of the appellant's case.

Counsel for the appellant submitted that the Trial Magistrate failed to comply with Section 131 (2) of the Magistrate's Court At, Cap. 16 Laws Uganda, which provides that after the close of the accused's case, the accused shall be entitled to address Court and that the prosecutor shall then be entitled to reply. But if the accused person adduces no evidence other than the evidence given by him/her, the accused person subject to Section 112 (3) of the Magistrate's Court Act (Supra) be entitled to the right of reply.

That under Section 131 (2) of the Magistrate's court Act (Supra), Counsel for the appellant submitted that the Trial Magistrate ought to have directed both parties on their duties. That the denial of this opportunity led to unfair and wrong decision. In reply

Counsel for the respondent supported the procedure that was adopted by the Trial Magistrate. That in any event, it should have been the due deligency of both Counsel for the parties to guide Court as it is their duty as officers of Court. She prayed that this ground 4 of appeal be dismissed.

I have read Section 131 (2) of the Magistrate's Court Act (Supra), it is clear that at the close of the defence case both the accused and the prosecutor are entitled to address Court. By interpretation of this Section and its sub section, it is not mandatory that the parties have to address Court at the closure of the defence. The parties are free to either address Court at the closure of the defence case.

Further, at page 27 last paragraph of the lower Court proceedings, both Counsel for the appellant (accused) and the respondent (state) were present in Court.

They never raised any interest to sum-up their respective cases. Counsel for the appellant never intimated to the Trial Magistrate of his intentions to submit on the position of the appellant's case. Therefore, I do not find any fault on the Trial Magistrate Contrary to the submissions by Counsel for the appellant. Failure by the Counsel for the accused (appellant) and Counsel for the prosecution to make final submissions to the Trial Court, did not occasion any miscarriage of justice at all. In any event, on ground 1 of appeal hereinabove, both Counsel for the parties addressed Court on the evidence and the law; and I have subjected the evidence as a whole on the Court record to a fresh and exhaustive scrutiny and came to my own conclusion. The prosecution adduced enough evidence that proved a case against the appellate beyond reasonable doubt. In the premises ground 4, too, fails.

4.4 Ground 5 of appeal: That the learned Trial Magistrate was manifestly biased when she failed to allow the appellant to adduce witnesses to support his case.

Counsel for the appellant submitted and pointed out in his view biases on the part of the Trial Magistrate:-

1. The comment by the Trial Magistrate in her Judgment that the long adjournments were mainly caused by the appellant points to the fact that she was biased in her Judgment.

2. That the mention that there is backlog of cases in Court caused by the continued adjournment by the Trial Magistrate.

3. That the Trial Magistrate refused to allow the appellant call his more two witnesses to testify on his belief.

Counsel for the appellant submitted that all the abovestated biases occasioned miscarriage of justice against the appellant. He prayed that this ground of appeal be allowed.

In reply, Counsel for the respondent does not agree with the submissions by Counsel for the appellant on this ground 5 of appeal. She supported the findings of the Trial Magistrate in her Judgment.

At page 27th 2nd last paragraph, last sentence of the lower Court proceedings the appellant stated:-

> **"I had two witnesses. They were unable to come <u>because the lawyer would represent them</u>. That is all." The underlining is mine for emphasis."**

Then at same page 27, last paragraph of the lower Court proceedings the Court noted:-

> **"In the interest of a speedy trial, the defence is closed. The accused has had plenty of opportunity to present his defence which he chose not to mount. Courts are burdened by backlog very often due to excess of the adjournments by the Trial Magistrates Society has a great interest in seeing that matters in Courts proceed speedily. The right to a speedy trial also accompanies the need of complainants who seek the justice. For these reasons hearing is now closed."**

My concerns here are that on that date of 11/12/2014 when the Trial Magistrate ordered the closure of the defence case, the then Counsel for the appellant Ndugwa Zai was present in Court. She never addressed Court that her client (appellant) had more witnesses to call. It appears that she was convinced by the reasons of the Trial magistrate before the latter closed the defence case.

Again, factors raised by Counsel for the appellant attributing bias on the part of the Trial Magistrate do not in my considered view constitute bias. Those were comments made as reasons to justify the close of the defence case by Court.

Counsel for the appellant submitted that the denial by the Trial Magistrate to the appellant to call witnesses occasioned a miscarriage Justice on the part the appellant. At page 2 last paragraph, of the judgment, the Trial Magistrate addressed the issue of her Court to forcibly closing the defence case. She stated:-

> **"It is on record that the accused has had time to present his defence to the prosecutions allegations since the 2nd October,2012. He has had ample time to prepare his defence and instead chose to drag his feet."**

The submissions by counsel for the appellant on this ground 5 of appeal are to the effect that the mentioned two (2) defence witnesses were to prove and strengthen the appellant's case. It should be noted that in Criminal proceedings, an accused person does not bear any burden to prove himself innocent. The burden of proving the guilt of the accused person is always on the prosecution. And the standard of proof is proof beyond reasonable doubt. The prosecution in the lower Court discharged that duty of burden of proof. In this case the appellant gave evidence on oath and exhibited some defence exhibits. The way the defence was conducted by Court and Counsel for the accused (appellant), the intended defence witnesses, if adduced in Court would not have made any difference. It should also be noted that by the time of closing the defence case the appellant was on bail. And if there were any witnesses at all for him to call, he would have come with them to Court to testify in support of his case. In that regard I am in

agreement with the observations made by the Trial Magistrate before she closed the defence case. In the results ground 5 of appeal also fails.

5. Conclusion

I have considered the submissions by Counsel for both parties, re-evaluated the evidence of the lower Court as a whole, subjected the said evidence to a fresh and exhaustive scrutiny, considered the laws applicable to this matter and my conclusion is that this appeal lacks merit. This appeal is accordingly dismissed.

The conviction, sentence and the order for compensation to the complainant of Shs. 4,800,000/= are upheld and confirmed by this Court.

Dated at Kampala this 4th day of September 2015.

Joseph Murangira

JUDGE

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LUMALA BAKER } **::**
APPELLANT

VERSUS

UGANDA ::
RESPONDENT

REPRESENTATION

Ms. Jacquelyn Okuni Senior State Attorney holding brief for Ms. Lucy Kabahuma, Senior State Attorney for the state.

The matter is for judgment and I am ready to receive it.

The appellant is in Court unrepresented.

Ms. Margaret Kakunguru the Clerk in Court.

Court: Judgment delivered to the parties in open Court.

Right of appeal explained to the parties.

Joseph Murangira

JUDGE.

4/9/2015