

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
HCT-03-CR-CN-60-2014
ARISING FROM JIN-00-CR-CO-0220/2013)

1. MAGANDA MUSA

2. SALONGO KIGUNDU EDIRISA ::::::::::: APPELLANT

VERSUS

UGANDA ::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The appellants, **MAGANDA MUSA** and **SALONGO KIGUNDU EDIRISA** filed this appeal against the Judgment, orders and sentence of **Her WORSHIP KABUGHO BYAKUTAGA CAROLINE**, Magistrate Grade I Jinja sitting at Bugembe, who convicted them on two counts of Obtaining Money By False Pretenses c/ss 305, and one count of conspiracy to commit a felony c/s 309, all of the **Penal Code Act, Cap120**. The convicts were sentenced to a caution on condition that they paid back the money taken from the complainant within 2 months from the date of the Judgment. Default on payment would lead to a 12 month term of imprisonment.

The brief facts for the prosecution were that one Kabiito Shafiq, PW 1, was the complainant in this matter. He was approached by A2, **SALONGO KIGUNDU EDIRISA**, who told him of a plot of land available for sale in Buwekula, Katende in Jinja District. A2 was well known to complainant and went along with him to inspect the land. The two called first at the home of one Kayaka the LC II chairperson in the area. It was here that they got **A1 MAGANDA MUSA**. A1 and A2 took the complainant to the exact location of the land. The complainant indicated that he was interested in concluding the deal. The group

returned to Kayaka's home. The complainant was told that the land belonged to one Baganzi Sam who was away at the time but the LC I chairman, Kisule Silagi, was called to confirm that the land belonged to Baganzi and was available for sale. A1 assured Kabiito that he was the one who had been selling the rest of the plots in the area. Kisule was originally charged as A2 but passed away in the course of trial. The complainant spoke to Baganzi on phone where they agreed on a price of Eight Million Five Hundred Thousand Shillings (8,500,000/-).

The complainant paid 5,000,000/- on the 27th of April 2012 to A1. The balance was paid on the 21st of June 2012 also to A1. The sale agreement is tendered as P Exh 1.

The complainant planted boundary marks on the land in the company of A1. In February 2013 he found that the boundary marks had been removed. His inquiries revealed that PW 2 had removed them and was indeed the rightful owner of the plot having purchased from one Kirunda Isoba Helen the legitimate vendor.

A1, the late Kisule and A2 were arrested and charged with these offences.

The appellants denied the charges.

A1 states that he was simply called as a witness to the agreement and requested by Kayaka to fetch the son of the seller called Ausi Nsubuga to receive the money for the first installment. The second installment was received by Baganzi in person. A1 witnessed both payments and signed the sale agreement as such. He denies ever receiving any money from the complainant.

A2 on the hand states he was asked by Kayaka to find a seller for the land. That was the extent of his involvement. He only got to know A1 on that day when he found him at Kayaka's home. He did not know Baganzi or his son.

The trial magistrate believed the prosecution case and gave judgment as stated earlier. The aggrieved appellants filed this appeal with 7 grounds namely,

1. That the learned trial magistrate failed to evaluate evidence adduced on record so as to come to a just decision.
2. That the learned trial magistrate erred in law and in fact when she disregarded the evidence of the appellants and convicted them.
3. That the learned trial magistrate erred in law and in fact when she failed to realize that the appellants were merely witnesses for the buyer but not the ones who bought the land and had no interest in the matter.

4. That the learned trial magistrate erred in law and in fact when she failed to exercise the law of natural justice while presiding over the case which resulted in pronouncing a wrong and contradictory decision.
5. The decision of the learned trial magistrate occasioned a miscarriage of justice.
6. The sentence of 12 months is harsh and excessive in the circumstances.

The parties were granted leave to file written submissions but only the appellants complied.

This is a first appeal and as such this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect (see *Kifamunte vs Ug SCCA 10/1997*). I am mindful that the standard of proof is beyond a reasonable doubt.

It is also a complaint of the appellants that the trial magistrate failed to consider their evidence in her evaluation of the material before her. At this level therefore, this court shall evaluate the evidence as a whole, carefully balancing each item of evidence in relation to the rest (see **Okethi Okale and others v Republic [1965] 1 EA 555**).

The appellants have argued their grounds jointly. I shall do the same in determining this matter, starting with the first two counts. The offence there is Obtaining Money by False Pretences which is provided for in Section 305 the **Penal Code Act** as,

Any person who by any false pretence, 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.

The elements the prosecution should show are:

- i. Use of a false pretence
- ii. An intent to defraud
- iii. Theft
- iv. Participation of the appellant

With regard to whether there was a false pretence, section 304 of the PCA defines a false pretence as,

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

In **R v Dent [1955] 2 All ER 806** it was held that *that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed ...*"

In this instant case the complainant paid 8,500,000/- shillings for the plot. In February 2013 he discovered that the owner of the plot was PW 2 Mwesiga Godfrey. He also learnt that Mwesigwa had bought from one Isooba. It turned out that Isooba and not Baganzi was the right vendor. Therefore Baganzi, who allegedly sold to Shafiq Kafiire, did not own the plot. He conducted himself as though he was the owner well knowing the plot was not his. There was therefore a false pretence made to Kafiire here, regarding ownership and availability of the plot of land in Buwekula. The first element was proved.

With regard to the second element, an intent to defraud, the complainant was duped into thinking that the plot was available to buy from the parties who purported to sell it to him. He then paid the money which he lost for good.

To defraud is to cause loss or injury to a person by deceit (*Black's law dictionary 8th Edition*).

Kafiire in this instance paid the stated sums of money as a result of the fraudulent representations regarding the availability and ownership of the plot. That money he paid has been lost for good. In that regard therefore the elements of theft with the intent to defraud the complainant were complete proving the second and third elements of the offence.

With regard to participation, A1 stated that he was simply a witness in this transaction and that the first instalment was paid to one Ausi Nsubuga while the second one directly to Baganzi Sam. I have closely examined P Exh 1, the sale agreement concluded and signed by the parties. It is a prosecution exhibit tendered through the complainant who stated that it was the agreement against which the moneys were paid.

I will start with the transaction on the 27th of April 2012. A1 states the money on this day (5,000,000/-) was paid to one Ausi Nsubuga. Indeed the agreement shows A1 as a witness and Ausi Nsubuga as one of the sellers which appears to support his testimony. It is therefore my finding that the complainant did not

pay the money to A1 but to Ausi Nsubuga as stated by A1. The complainant himself on pg 5 of the proceedings states that he paid the balance to Baganzi directly. It is therefore true that the money was not paid to any of the appellants directly.

I will return to this element later in this judgment.

The third count in this case was conspiracy to defraud c/s 309 of the PCA. The offence is provided for as,

Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, commits a misdemeanour and is liable to imprisonment for three years.

In **Kalibala 3 Ors V Ug Cr App No. 16/2012** the High Court held the ingredients of the offence of Conspiracy to commit a felony to be:

- i. The existence of two or more persons in the act
- ii. The agreement and meeting of minds of these two people to commit an offence
- iii. The failure to commit the crime is not an offence

The elements are similar to those in this case of conspiracy to defraud.

Here there were several people involved in this matter. A2 is the person who went to tell the complainant about the availability of land for sale. He was well known to the complainant as a friend of this father. It was one of the reasons why the complainant believed in the deal. A1 was said to be from the area where the sale was made. He told the complainant that it was he who had been selling all the plots in that area went to call Ausi Nsubuga. He also signed on both occasions of payment as a witness. The late Kisule confirmed Baganzi as the owner.

It appears to this court that this was a ruse orchestrated by different players to persuade the complainant that the deal was genuine whereas not.

In an offence of conspiracy, there will rarely be an actual agreement laying out the role to be played by each party, but the agreement can be deduced from their conduct which shows an intention to achieve the common purpose. The parties here held out the land as belonging to Baganzi, with each of them acting to persuade Kabiito to part with his money.

In my view, the participation of A1 and A2 was crucial for this whole plot to succeed. Accordingly I find that A1 and A2 were two of the key players in this transaction. The others were Kayaka, Kisule, Baganzi and Nsubuga. I therefore find that they all conspired to defraud the complainant although three, namely Ausi Nsubuga, Sam Baganzi and Kayaka were not charged.

There is therefore sufficient evidence on record to sustain the 3rd count of this offence.

Turning back to the element of participation in the first two counts, now that the appellants are guilty of conspiracy, it proves their participation in the entire transaction including the first two offences where the first three ingredients of the offence had been proved.

In the result this appeal must fail and the convictions are confirmed.

This court orders that **MAGANDA MUSA** and **SALONGO KIGUNDU EDIRISA**:

- a. On the Count 1, they each shall be sentenced to a fine of 250,000/- or to serve a sentence of 1 year in default.
- b. On the Count 2, they each shall be sentenced to a fine of 250,000/- or to serve a sentence of 1 year in default.
- c. On count 3 they each shall be sentenced to a fine of 100,000/- or to serve a sentence 3 months in default.

MAGANDA MUSA and **SALONGO KIGUNDU EDIRISA** shall each compensate the victim, Kabiito Shafiq one sixth of the sum lost. They shall each therefore pay a sum of One Million Four Hundred and fifteen thousand shillings (1,415,000/-).

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Michael Elubu

Judge

19.9.17