THE REUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CRIMINAL APPEAL NO.42 OF 2019

(ARISING FROM CRIMINAL CASE NO. 376/2019; CRB 633/2019)

WAFULA PAUL :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

JUDGMENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] In this appeal, the Appellant **Wafula Paul** is appealing against the decision of the Chief Magistrate of Busia at Busia delivered on the 15th day of August 2019.

[2] The facts of the case as found and presented by the learned trial Chief Magistrate are that the complainant **Nakawooya Faridah** (PW_1) owned 2 plots of land within Busia Municipality for which she needed to process and obtain titles. Through her friend a one **Mulira Mohamed** (PW_2), the complainant was introduced to the accused for the work/process. The accused who is a chainman under surveyors accepted to do the work and demanded a total of 8,600,000/= which he received to process the titles. It is alleged that upon receipt of the money, the accused disappeared. The complainant reported the matter to police. The accused was then tricked to come for work of another plot. When he appeared, he was arrested and consequently charged with the offence of **obtaining money by false pretences** contrary to **Section 205 P.C.A.**

[3] The accused admitted receiving only 6,800,000/= and told court the titles were in process. Upon trial, he was found guilty of the offence charged and was convicted and sentenced to a fine of 9,500,000/= and

in default suffer 5 years imprisonment. The fine was to be paid to the complainant as compensation.

[4] The accused being dissatisfied with the judgment and orders of the learned trial Chief Magistrate, appealed to this court on the following grounds as contained in his memorandum of appeal;

> *"1. That the trial Chief magistrate erred in law and fact when she failed to evaluate evidence before her and arrived at a wrong decision hence occasioning a miscarriage of justice.*
>
> *2. That the learned trial Chief Magistrate erred in law and fact when she failed to accord the appellant a fair hearing.*
>
> *3. That the learned trial Chief Magistrate erred in law and fact when she gave a manifestly harsh sentence to the appellant.*
>
> *4. That the learned trial Chief magistrate erred in law and fact when she imposed an illegal sentence."*

[5] Duty of a 1st appellate court as per **PANDYA V R (1957) E.A 336,** is *"to review the evidence and consider the materials that were before the trial court and come to its own independent conclusion."* In **SUNDAY ALEX V UGANDA H.C.CRIM APPEAL NO. 29 OF 2018**, it was observed that;

> *"where the trial court has erred, the Appellate court will only interfere where the error has occasioned a miscarriage of justice. The Appellate court has a duty to evaluate the evidence of the trial court while considering facts, evidence and the law. The court can interfere with the findings of the trial court if the court misapplied or failed to apply the principles applicable to the offence."*

[6] Counsel for the Appellant Mr. Wamimbi submitted inter alia on grounds 1 and 2 together because they are all on evaluation of evidence leading to the conviction of the appellant as follows;

a) **Section 304 PCA** defines false pretence as a false representation which may be made by words, writing or conduct of a matter of fact,

either past or present, which expression the person making it knows to be false or does not believe to be true. That in the case of **R V DENT (1955) 2 ALLER 806** and **GREEN V R (1949) 79 CLR 353,** it was held that the accused must knowingly and intentionally deceive the victim by false or fraudulent representation or pretence relating to a matter of fact either past or present but not in the future.

b) Counsel for the appellant submitted further, therefore, that the principles in the above authorities are that if the pretence relates to future actions, evidence of non-performance of the promise is not enough to establish the falsity of promise.

c) That the Appellant disputes the fact that the taking of the money was fraudulent in that the appellant on his part stated that he received 6,800,000/= from the complainant, took the Area Land Committee Busia Municipal council for inspection, it inspected and approved her as the owner of the plots but when the titles were submitted to the district land board, the board never sat. That the prosecution therefore failed to prove that the appellant fraudulently took the money with intent not to perform his part of the bargain since he did all the necessary steps of acquiring the title for the complainant.

[7] On his part, State Attorney **Semakula** for the Respondent submitted that the Appellant was paid money for processing of titles of land but upon receipt of the money, the appellant ran to Kalangala where he closed all communication. That in his defence, the Appellant admitted receiving the money but failed to deliver the services. The 1st and 2nd grounds of appeal should fail.

Determination of the appeal.

[8] The law relating to obtaining money by false pretence contrary to **Section 304 PCA** is as follows;

a) In **R V DENT [1975] 2 ALLER 806 AT P.807** " *A statement of intention about future conduct whether or not it be a statement of existing fact, is not a statement that will amount to false pretence in criminal law."*

b) In **TERRAH MUKIWA V R [1966] E.A 425** *"parties who make promises that do not materialize should be left to settle their disputes in civil court."*

[9] In the instant case, the appellant obtained the alleged 8,600,000/= promising to render a service which never materialized. Such a promise or statement of intention about a future conduct does not amount to a false pretence. The trial magistrate therefore misdirected herself on the applicable law and evaluation of evidence and hence arrived at a wrong conclusion of convicting the appellant and thereby occasioning a miscarriage.

[10] **Grounds 2 and 4** were argued together and I will also resolve them together because they both relate to the sentence.

[11] Counsel for the appellant referred this court to **Article 23(8) of the Constitution** which states that *"where a person is convicted and sentenced to a term of imprisonment of an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his trial shall be taken into account in imposing the term of imprisonment."*

That in this case, the Appellant was sentenced a maximum term of imprisonment as envisaged under **Section 305 PCA** yet on record the appellant is a first time offender. That there was therefore no justification for the sentence the learned trail magistrate ordered.

[12] Indeed, I have perused the sentencing notes of the learned trial magistrate, nowhere did she take into account the mitigating factors in favour of the accused/appellant, to wit; being a first offender since the state had announced that there is no past conviction, before

considering handing over to him the maximum sentence prescribed by **Section 305 PCA.** The appellant's act of keeping quiet during allocutus should not have been reason to deny him the privilege of being a first offender as admitted by the prosecution and therefore did not deserve a maximum sentence.

Secondly, it has not been shown by the learned trial magistrate that she took into account the period spent on remand before the completion of his trial while imposing the term of imprisonment as commanded by **Article 23(8) of the Constitution.** See also **KATENDE AHAMAD V UGANDA CRIM.APPEAL NO.6 OF 2004 (SC)** and other related authorities.

Lastly, the sentencing jurisdiction of magistrates to fines is governed by **Section 180 M.C.A** and fixes the maximum sentences in default of fines as follows;

Amount	Maximum period
Not exceeding 2000/=	7 days
Exceeding 2000/= but not exceeding 10,000/=	1 month
Exceeding 10,000/= but not exceeding 40,000/=	6 weeks
Exceeding 40,000/= but not exceeding 100,000/=	3 months
Exceeding 100,000/=	12 months

In the instant case, the sentence of a fine of 9,500,000/= (exceeds 100,000/=) and the maximum imprisonment would be 12 months. It follows therefore, the sentence to a fine of 9,500,000/= in default of 5 years was in the first place, for the foregoing reasons harsh and excessive and in fact illegal.

[13] The appeal on the whole succeeds. The conviction of the lower court is quashed and the sentence is set aside. The appellant is acquitted and is to be released from prison, unless he has other lawful pending charges to hold him.

Dated at Mbale this 9th day of February, 2021.

Byaruhanga Jesse Rugyema

JUDGE.

9/2/21.

Appellant present

Wamimbi for the Appellant

Semakula for the Respondent

Masola: Clerk

Court: Judgment delivered in the presence of the above.

Byaruhanga Jesse Rugyema
JUDGE.