THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL 092.OF 2019

ARISING FROM NABWERU CRIMINAL CASE NO.567 OF 2013

SSEMATIMBA ALOYSIOUS & ANOR::::::::::::::APPELLANTS

VERSUS

UGANDA:: RESPONDENTS

BEFORE: HON. JUSTICE TADEO ASIIMWE

JUDGEMENT

This appeal arises out of a decision of His Worship Patricia Amoko Chief Magistrate Nabweru delivered on the 16/09/2019 where both appellants were convicted on count 1 and A1 additionally convicted on counts 2,4 & 10.

Background

The background of this appeal as can be ascertained from the record of the lower court is that the accused persons were charged with kidnapping with intent to confine c/s 244 of the penal code act. A1 was additionally charged with 4 counts of forgery,4 counts of uttering a false document,2 counts of giving false information to a person employed in public service and 1 count of obtaining registration by false presence.

In count one, it was alleged that ssematimba aloysious and Ndiwalana Peter on the 10th day of February at Kibwa in wakiso District kidnaped or

abducted Ndagire Alexandria with intent to cause the said Ndagire Alexandria to be secretly and wrongfully confined.

In count 2, it was alleged that Ssematimba Aloysius on the 5th day of April 2008 forged an official document to with LC1 letter introducing him to Nakawa Court.

In count 3, it is stated that Ssematimba Aloysious on 5/05/2008 in Kampala District forged a stamp of the chairman LC1.

In count 4, it is alleged that Ssematimba Aloysious on 24th of April 2008 in Kampala District forged a certificate of no objection in the Estate of late Mubiru Joseph.

In count 5, it is stated that on 20/05/2008 Ssematimba forged a Death certificate of late Mubiru Joseph.

In count 6, it is stated that in the month of April 2008 the 1st accused Uttered a false document to wit an LC1 introductory letter purporting it to have been signed by Kato Hussein the LC1 chairman whereas not.

In count 7, the 1st appellant is alleged to have Uttered the same letter to the Registrar Nakawa Court on 25/04/2008 letter purporting it to have been signed by Kato Hussein the LC1 chairman whereas not.

In count 8, the 1st appellant is alleged to have Uttered a forged certificate of no objection p Registrar Nakawa Court on 25/04/2008 letter purporting it to have been signed by Administrator General whereas not.

In count 9, the 1st appellant is alleged to have Uttered a forged Death Certificate of late Mubiru Joseph in 2008.

In count 10, it is alleged that in the year 2005 A1 (Ssematimba) gave false information to Mr. Ssemakula a person employed in public service as

assistant administration which he knew to be false that Ndagire is dead and he is the only surviving child of JOSEPH MUBIIRU whereas not

In count 11, it is alleged that in the year 20058 A1 gave false information to the Registrar of high court a person employed in public service as High Court Registrar which he knew to be false that Ndagire is dead and he is the surviving child of JOSEPH MUBIIRU in order to obtain letters of administration in respect of the estate which the registrar would not have done if the true state of facts in respect to which such information was given were known to her.

In count 12, it is alleged that Ssematimba Aloysious on the 22/03/2011 at the Lands Office in the Luweero District Willfully procured for himself a certificate of land tittle comprised in Bulemezi Block 164 plot 28 at Mutumba 11 -Bukolwa by falsely pretending that he is the only son, the heir and administrator of the late joseph Mubiru, the registered proprietor of the said land whereas not.

At the conclusion of the trial, both appellants were convicted on count 1 and A1 additionally convicted on counts 2,4 & 10. A1 was sentenced to 8 years on count 1, 6 years on count 2, 3 years on count 4 and 2 years on count 10 and all sentences were to run co-currently.

A2 was sentenced to 5 years on count 1.

Being dissatisfied with the decision of the learned trial magistrate, the appellants filled this appeal on the following grounds;

1. The learned Trial Magistrate erred in both law and fact when he failed and omitted to properly evaluate the evidence on record in its totality and or entirely by ignoring the appellants defence and relying on grossly discredited prosecution evidence and contradictory witness testimonies to convict the appellants.

2. The learned Trial Magistrate erred both in law and fact when she wrongly evaluated the expert testimony of the document examined there by arriving at a wrong and a prejudicial finding of guilt on the charge of forgery against the 1st appellant.

3. The learned Trial Magistrate erred both in law and fact in her treatment and admission of electronic audio evidence and further in evaluating the testimony of PW1 and arriving at a wrong finding of guilt against the appellant on the strength of such evidence.

4. The learned Trial Magistrate erred in both law and fact when she wrongly evaluated the entire evidence relating to the charge of forgery of an official document and forgery contrary to the testimonies of pw4-9 and ignoring to evaluate the appellants defence testimony and evidence and as a result arrived at a wrong finding of Guilt on the charges of forgery of an official document and forgery against the 1st appellant.

5. That the trial magistrate erred in law when she failed to make a finding of law that the failure and or Deliberate omission by prosecution to summon vital witnesses amounts to suppression of exculpatory evidence adverse to the prosecution's case and that as such failure and omission is always to be resolved in favour of the accused.

6. That the trial magistrate erred law and in fact in evaluating the entirety of the evidence and relied on weak, discredited, contradictory, speculative, circumstantial evidence by the prosecution and rejected congent explanations and evidence to the contrary by the appellants and there by arriving at wrong findings of guilt against both appellants.

7. That the trial magistrate erred in law and in fact when she made a wrong finding of guilt against the appellant on charges of giving false information to a person employed in public service in the absence of any

evidence, direct or circumstantial in proof and or support of such allegations.

8. That the trial magistrate erred in law and in fact when she wrongly handed excessively harsh and severe custodial sentences against the appellant.

At the hearing, the appellants were represented by Counsel Abdallah Kiwanuka and the respondent by Debora Itwawu a state attorney. Both counsel filled written submissions, which I shall consider in this judgement.

DUTY OF THE FIRST APPELLATE COURT

This being a first appellate court, the court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997 and Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997, where it was held that: "the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it".

An appellant on a first appeal expects the whole evidence to be subjected to a fresh and exhaustive examination, **(see Pandya v. Republic [1957] EA. 336)** and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion **(see Shantilal M. Ruwala v. R. [1957] EA. 570).** It is not the

function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, **(see Peters v. Sunday Post [1958] E.A 424).**

The position of the law in criminal cases is that prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused persons and the accused are only convicted on the strength of the prosecution case and not because of weaknesses in their defence, **(See Ssekitoleko v. Uganda [1967] EA 531).** By their plea of not guilty, the respondents put in issue each and every essential ingredient of the offences with which they were charged and the prosecution had the onus to prove all the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused are innocent, **(see Miller v. Minister of Pensions [1947] 2 ALL ER 372).**

Determination

Before resolving the grounds of appeal as framed by the appellants, I wish to state that some of the grounds offends the rules governing formulation of grounds of appeal. The law is that the grounds of appeal should be concise without any Argument or narrative as per the case of

BYARUGABA LOZIO VS UGANDA CRIMINAL APPEAL NO. 168 OF 2009.

In this appeal, some the grounds in the memorandum of appeal are repetitive, others argumentative and not Concise. I will therefore strike out grounds 4&5 for being argumentative and not concise as the law require.

Ground 2 was never argued by the appellant's counsel and this court takes it to have been abandoned. I will therefore proceed to resolve the remaining grounds.

Grounds, 1,3, 6 & 7 relate to evaluation of evidence and this court will resolve them together and ground 8 separately.

Ground 1,3,6 & 7

1.The learned Trial Magistrate erred in both law and fact when he failed and omitted to properly evaluate the evidence on record in its totality and or entirely by ignoring the appellants defence and relying on grossly discredited prosecution evidence and contradictory witness testimonies to convict the appellants.

3. The learned Trial Magistrate erred both in law and fact in her treatment and admission of electronic audio evidence and further in evaluating the testimony of PW1 and arriving at a wrong finding of guilt against the appellant on the strength of such evidence.

6.Erred law and in fact in evaluating the entirety of the evidence and relied on weak, discredited, contradictory, speculative, circumstantial evidence by the prosecution and rejected congent explanations and evidence to the contrary by the appellants and there by arriving at wrong findings of guilt against both appellants.

7. Erred in law and in fact when she made a wrong finding of guilt against the appellant on charges of giving false information to a person employed in public service in the absence of any evidence, direct or circumstantial in proof and or support of such allegations.

In support of ground 1, the learned for the appellants attacked the prosecution's evidence on record arguing that the trial magistrate did not properly evaluate the evidence on record and that she relied on hearsay evidence since none of the witnesses were at home when the alledged kidnap took place. He further submitted that their evidence was contradictory as regards the consent of Ndagire since no complaint of kidnap was made for the three years the victim was missing and yet PW1 knew where she was. That the trial magistrate failed to evaluate the defence evidence and only relied on prosecution evidence which was according to him contradictory and inconsistent in nature.

On ground 3, counsel for the appellant argued that it was wrong for the magistrate to admit electronic evidence and evaluating the testimony of PW1 and as a result he reached a wrong finding since pw1 was telling lies.

On grounds, 6 and 7 learned counsel faulted the trial magistrate for relying on prosecution evidence which was speculative, contradictory and circumstantial evidence which was weak in nature.

In reply the learned state Attorney on ground 1supported the finding of the trial magistrate arguing that she properly evaluated the entire evidence on record including the defence case. She referred this court to the judgement of the Magistrate at page 5 & 6 and invited this court to agree with her judgement.

On ground 3 learned attorney argued that the trial magistrate properly evaluated the evidence of PW1 & PW2 as per the record of proceedings. She argued that Although PW1 confirmed having visited Ndagire at the

time she was being held by the appellant, the same witness added that she was threatened with arrest by the defence secretary of the area when she attempted to bring her grandmother back (page 15 of the proceedings.)

On grounds 6&7, the respondent's attorney argued that the trial magistrate properly directed her mind to the ingredients of the offence before convicting and acquitting the appellants on some counts.

To demonstrate this, she cited counts 3,5,6,7,8,9,11 and 12 where the magistrate acquitted the appellants after evaluating the evidence.

I shall now proceed to re-evaluate evidenced on record in regard to 4 count where convictions made.

Count1; KIDNAP WITH INTENT TO CONFINE.

According to black's law dictionary 4th page 219 kidnaping is defined as a crime of seizing, confining, abducting or carrying away a person by force or fraud, often to subject him or her to involuntary servitude in an attempt to demand a ransom or in furtherance of another crime.

To find the accused guilty of this offence of kidnap with intent to confine, court must be satisfied that;

1. There was kidnap or confinement of a person.

2. That such was with intent to do so wrongly and secretly.

3. That the accused is responsible.

From the lower court record, evidence from both sides confirm that the complainant/ victim was actually taken by A1 and kept by A2 for all the period she was not at her home. The trial magistrate in her judgement was alive to this fact. What remains to be determined is whether the victim volunteered her taking or not.

Although the first appellant does not dispute taking the victim, he claimed that the said victim (Ndagire) was taken with her consent for treatment. Evidence from PW9 who rescued the victim told court that the said Ndagire told him that the treatment actually never took place at page 60 of the record of proceeding. Defence never led evidence to disprove this. Instead DW3 testified that she was not aware of her sister's /victim's sickness. The 1st appellant having listened to the prosecution evidence about non treatment of the victim, this court would have expected him to submit medical evidence to confirm that the said treatment took place. It also defeats logic as to why the victim could not be treated at her home or admitted to a hospital over the 3 years she stayed with the appellants. Why would the other members of the family especially those who used to reside with her be left out on their relative's treatment. The threat to her security by people who wanted to grab her land was not backed by any evidence on record. A concerned person would have reported such threats to Police and seek protection.

The totality of the entire evidence on record does not show use of force in the taking of the victim. However, that does not rule out kidnap through deceit which in my view amounts to fraud as an important aspect in the definition of kidnap as earlier explained in this judgement. The fact that the appellant declared the victim dead in order to obtain letters of administration when she was alive speaks volumes on the part of the 1st appellant.

I am fully satisfied that evidence on record clearly shows an intention to take the victim out of picture in order to defraud her of her father's land. The victim (Ndagire) was rescued from boy's quarters while very weak, dirty malnourished as per evidence of PW9. The appellants cannot distance themselves from the offence of kidnap with intent to confine. Therefore, I find that the learned trial magistrate properly evaluated the

evidence as regards the first count of kidnap with intent to confine. I find no justifiable reasons to depart from her finding on count one. Therefore, the conviction on count 1 is upheld against both appellant.

In count 2, the 1st appellant was charged with forgery of an official document contrary to section 349 of the penal code act. In the trial court, it was alledged that the 1st accused forged an official document (Kiwamirembe LC1 an introductory letter) introducing him to Nakawa court as a son of late Mubiru Joseph.

From the evidence on lower court record, the chairman LC1 of Kiwamirembe testified PW3 and denied having issued the said questioned letter (PE11). PW 7 the expert on documents authored a report (PE 15) confirming that indeed PW3 is not the author of the questioned document. This evidence can be seen on page 51-58. The accused denied forgery of the letter and blamed the court clerk who helped him to obtain letters of administration and there it's the said clerk who put together the documentation for that purpose. The trial magistrate in her judgement at page 9-10 evaluated the evidence of both sides before arriving at her finding. Ordinarily applications for letters of administration are made by the applicants and or through their lawyers. It's always the applicant to bring the necessary documents to support the application. If it's true the 1st accused was aided by a court clerk, the supporting document must have been provided by the applicant. I find that the trial magistrate properly evaluated the evidence on count 2. The conviction on this count is upheld.

In count 4, the 1st appellant was charged with forgery contrary to section 342 of the penal code act. In the trial court, it was alleged that the 1st

accused on the 24th day of April 2008 forged a certificate of no objection in the estate of late Mubiru Joseph.

On lower court record, there is evidence from PW6 and 7, PE5 and PE 8 which support a fact that a certificate of no objection was obtained and used by the applicant to get letters of administration in the estate of late Mubiru Joseph. The administrator general through PW6 denied issuing the said document. The only person it can be attributed to is the person who used it for a benefit. Evidence shows it is the 1st appellant who used it for a benefit of obtaining letters of administration from Nakawa court. The document having no root from the official administrators it cannot be said to be true. In her judgement at page 11-13, the trial magistrate analyzed the evidence of both sides before making her finding and I find no justifiable reasons to disagree with her.

On count 10, the 1st accused is alleged to have given false information to a person employed in public service contrary to section 115 of the penal code act. In arriving at her decision to convict the1st appellant, the trial magistrate at page 17 in her judgement analyzed the evidence from both sides. Therefore, it is not correct to say that the magistrate did not consider the defence case as stated by the appellant's counsel. from the record its clear the trial magistrate. There was sufficint evidence on record on which the magistrate based her decision aginst the 1st appellant.. it is my finding that the trial magistrate properly evaluated the evidence on record on count 10 and rightly convicted the 1st appellant. Therefore th conviction on count 10 is upheld.

In conclusion, i find no merit in grounds 1,3,6 and 7 of the appeal since the trial magistrate properly evaluated the evidence on record basing on the facts and law without any misdirection as was argued by the appellants. Therefore, Grounds 1,3,6and 7 fail.

Ground 8; the trial magistrate erred in law and in fact when she wrongly handed excessively harsh and severe custodial sentences against the appellant.

On the above ground, the appellant's counsel argued that the trial magistrate never considered the mitigating factors since his client were first time offenders. He cited decided cases to say that this court has powers to interfere with any sentence which is excessive and based on a wrong principle. In his view the magistrate imposed a hash and excessive sentences to his clients. In reply to this ground, the learned state attorney argued that the magistrate took in consideration the aggravating and mitigating factors before passing the sentences. She agreed with the trial magistrate's findings and sentences and invited this court to uphold them.

In this appeal, I agree with both counsel the cited cases concerning the powers of an appellate court on sentences and principle.

Sentencing is matter of court's discretion. An appellate court will only interfere with the said discretion of the trial judicial officer if the sentence is illegal, manifestly excessive as to amount to an injustice.

In this case the1st appellants was sentenced to 8 years and 2nd appellant to 5 years on count 1respectively. The maximum sentence for count 1 being 10 years, the sentence of 8 years to a first offender was excessive in my view. I will interfere with the sad sentence and substitute it with a sentence of 6 years for the 1st appellant. I do not find the to the second appellant's sentence to be excessive. Therefore, the sentence of 5years for the 2nd appellant is maintained on count 1. The sentence of 6years against the 1st appellant on count 2 is not excessive and is maintained. The sentence of 3 years on count 4 is excessive since under section 347 of the PCA the maximum punishment for general forgery is 3 years. It was

therefore improper to pass maximum sentence in the circumstances of this case where the 1st appellant was a first offender who needed a reformatory sentence. I will therefore set aside the sentence of 3 years and substitute it with a sentence of 2years against the 1st appellant on count 4.

In count 10, the 1st appellant was convicted and sentenced to 2 years yet it's a misdemeanor offence which attracts maximum of 2 years. In effect the trial magistrate sentenced the 1st appellant to a maximum sentence. I find it a harsh sentence in light of the mitigating factors. The same is hereby set aside and substituted with a sentence of 1year.

In conclusion, I find no justifiable reasons to depart from the lower court decision to convict on all the counts. This appeal lacks merit on conviction and partly succeeds on sentence. I hereby issue the following orders and sentence;

1. Judgment and conviction of the trial Magistrate is upheld.
2. 1st appellants sentence on count 1 reduced to 6 years.
3. 2nd appellant's sentence of 5 years on count1 maintained.
4. 1st appellant's sentence on count 2 is maintained.
5. 1st appellant's sentence on count 4 is reduced to 2 years.
6. 1st appellant's sentence of 2 years on count 10 is reduced to 1 year. All Sentences for the 1st appellant shall run concurrently. Both appellants shall serve the remaining part of their respective sentences from the time they were released on bail. I so order

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Tadeo Asimwe

JUDGE -29/04/2021