THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.138 OF 2022
ARISING FROM THE CRIMINAL CASE NO.607 OF 2020 BUGANDA ROAD CHIEF MAGISTRATES COURT
OSADOLOR COLLINS ENOGIEMWAN----------APPEALLANT
VERSUS
UGANDA----------RESPONDENT
BEFORE HON: JUSTICE ISAAC MUWATA

JUDGEMENT

Background

The appellant herein was convicted of the offences of unauthorized access contrary to section 12(1) and 12(7) of the Computer Misuse Act, Electronic Fraud contrary to section 19 and 27 of the Computer Misuse Act, Conspiracy to commit a felony contrary to section 390 of the Penal Code Act and Unlawful stay in Uganda contrary to section 66 of the Uganda Citizenship and Immigration Control Act. He was sentenced to 5 years' imprisonment, ordered to pay compensation of shs. 65,000,000/= and deported on completion of his sentence.

Being dissatisfied with the above decision, he appealed on the following grounds;

1. **That the learned trial magistrate erred in law and fact when she relied on weak, unreliable and unsatisfactory circumstantial evidence and conjecture to convict the appellant hence occasioning a miscarriage of justice.**
2. **That the learned trial magistrate erred in law and fact when in evaluation of evidence she held that the ingredients of the offences had been proved beyond reasonable doubt**
3. **That the learned trial magistrate erred in law and fact when she solely relied on prosecution evidence to convict the appellant without weighing and considering the appellant's**

evidence and defence thus occasioning a miscarriage of justice

4. **That the learned trial magistrate erred in law and fact when she was biased in reaching her decision to convict the appellants thus occasioning a miscarriage of justice**
5. **That the learned trial magistrate erred in law and fact when she handed down a harsh and excessive sentence of 5 years' imprisonment, an order for compensation of UGX 65,000,000/= and an order for deportation**

Representation

At the hearing of the appeal, counsel Rogers Kamulegeya was for the appellant while Ainebyona Happiness was for the state. The parties filed their written submissions which I have considered in determining this appeal

Duty of this court

The first appellate court has a duty to review the evidence of the case and reconsider the materials before the trial court. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. **See: Kifamunte Henry V Uganda SCCA No.1 of 1997**

Ground 1 and 2

The conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities.

In **Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR)** the court held that it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

1. **The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,**

2. **Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
3. **The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.**

Furthermore, it is the requirement of the law that in order for the court to sustain a conviction on basis of such evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. **See Simon Musoke v. R [1958] EA 715,**

All of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence of the accused. The evidence must equally be considered as a whole and not by a piece meal approach to each particular circumstance.

I will now reconsider the circumstantial pieces of evidence that were before the trial court and properly scrutinize the same to see if they are incompatible with the innocence of the appellant.

The learned trial magistrate considered that A1 the appellant herein was a boyfriend to Maureen Katusiime in whose name the bank account was opened. She also considered the evidence of A1 in cross examination who had told court that he had instructed Maureen to open the said account to help him receive tuition from his relatives.

The learned trial magistrate also considered the fact that the ATM to the said account belonging to Maureen where the money was wired was found in his house. She further noted in her judgment that the fact the ATM used in the transaction was found in the possession of A1 is incapable of any reasonable explanation by A1.

She also further considered the fact that A1 pleaded to pay back some of the said money to PW1 and he actually did so. The learned trial magistrate then considered the charge and caution statement of Maureen wherein she confirmed that A1 instructed her to open the account and that he would access the money on the said account.

What is clear from the above circumstantial pieces of evidence is that it is the appellant who requested Maureen to open the said account in her names. This was firmly established by the prosecution. This is supported by the appellant's own admission that he had no visa and Maureen normally assisted her to receive money. The appellant denied knowledge of the said 72,000,000/= which had "miraculously" appeared on the account he had requested Moureen Katusiime to open.

In this particular case, there was evidence that the appellant requested Moureen Katusiime to open a bank account. I want to emphasize that this account opening was at the request of the appellant. There is also evidence that the appellant had access to this account. There is also evidence that shows that shs. 72,000,000/= was wired onto this account. Furthermore, there is evidence that the appellant was found in possession of the ATM cards to the said account. The charge and caution recorded by PW2 also indicates that the appellant together with Moureen Katusime withdrew the money.

Great caution must be exercised in convicting solely based on circumstantial evidence and in doing so the circumstances as stated above taken cumulatively form a chain so complete that there is no escape from the

conclusion that the crime was committed by the accused and none else. The learned trial magistrate cannot therefore be faulted for relying on this circumstantial evidence to convict the accused

The appellant's explanation that he had no business with what Moureen was doing with the account is not convincing especially after having been in possession of the ATM and having requested Moureen to open the account. He was aware at all times that suspicious money had been wired on his account. Had he been truthful he would have informed the bank. There was evidence that the said sums were withdrawn by the appellant. From this it is my considered opinion that there is no other reasonable inference that can be drawn from this other than the appellant's guilt.

Regarding the nature of the offences there is no doubt that there was unauthorized access contrary to the email communication of PW1 without authority. The prosecution proved beyond reasonable doubt that PW1's email address harrietnaskirya@yahoo.com had been hacked into. There was no evidence to suggest otherwise.

On count two there was also evidence there was also evidence to show that electronic fraud had been committed. Electronic fraud is committed where there is deception deliberately performed using a computer network with the intention to secure unfair or unlawful gain. In this particular case there was evidence on record to show that PW1's email was deliberately hacked into. She denied ever giving anybody the access passwords to her emails. The hackers using the hacked email addresses availed PW1's donors with another account number well knowing that this false. The donors unsuspectingly believing that they were communicating with PW1 sent Shs. 72,000,000/= to the said account. It can therefore be said that the hackers using a computer network secured unfair or unlawful gain to the detriment of PW1

On count three regarding conspiracy to commit a felony, under section 390 of the Penal Code Act, the offence of conspiracy is committed when two or

more persons agree to do or cause to be done an illegal act or legal act by illegal means. The offence is complete the moment such an agreement is made. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. **See**: **Director of Public Prosecutions V. Nock, [1978] 2 All E.R. 654).**

Not only is the prosecution required to prove the intention but also that there was an agreement to carry out the object of the intention, which is an offence. The offence of conspiracy has three elements: (1) an agreement, (2) which must be between two or more persons by whom the agreement is effected and (3) a criminal objective which may be either the ultimate aim of the agreement or may constitute the means or one of the means by which the aim is to be accomplished. See: **Angodua v Uganda (CRIMINAL APPEAL No. 0013 OF 2016) High Court at Arua**

In this particular there was evidence the appellant together with Moureen Katusiime agreed to open a bank account, the stolen 72,000,000/= was wired on the said account. It can therefore be said that the appellant together with Moureen formed an intention to commit a felony of electronic fraud.

The fact Moureen Katusime a suspect had been struck off the amended charge sheet does not take away the fact that a conspiracy can be proved against her co accused. In any case she is still a suspect at large within the meaning of the law and could be still tried at any time of the same charge. In proving the offence of conspiracy to commit a felony, the prosecution relied entirely on a series of circumstantial evidence which should that Moureen and the appellant had a criminal objective to commit open up a bank account which was eventually used to commit electronic fraud.

With regard to count four of unlawful stay in Uganda, there was evidence that the appellant's visa had expired and there was nothing to show that the he was legally in Uganda. His defense together with A2 and A3 who were acquitted of the other charges was that were students and had not extended their stay due to the lockdown. The trial magistrate made a finding that the none of the accused persons adduced any authorization for their stay in Uganda after the expiry of their visas albeit the lockdown. I have examined the record and l find her decision justified.

With regard to the participation, the circumstantial evidence as discussed in ground one of this appeal leaves no doubt that the appellant participated in the commission of these crimes. The facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than that of guilt. There are no other co-existing circumstances which would weaken or destroy this inference. The chain of circumstances unerringly pointed to the guilt of the appellant. It excludes any reasonable hypothesis of innocence of the accused.

Ground 3 and 4

An appellate court will interfere with the findings made and conclusions arrived at by the trial court only if it forms the opinion that in the process of coming to those conclusions the trial court did not back them with acceptable reasoning based on a proper evaluation of evidence, which evidence as a result was not considered in its proper perspective. This being the first appellate court, findings of fact which were based on no evidence, or on a misapprehension of the evidence, or in respect of which the trial court demonstrably acted on the wrong principles in reaching those findings may be reversed. **Angodua v Uganda (CRIMINAL APPEAL No. 0013 OF 2016) High Court at Arua**

The prosecution presented evidence to show that the PW1's emails had been hacked and intercepted and money from her donors channeled to an account

belonging to a one Moureen Katusime a suspect at large. The record indicates that she jumped bail but the charges are still pending in the trial court. She not in any way exonerated. Further, the learned trial magistrate evaluated the circumstantial evidence and found that the appellant was culpable having been the one who had requested Moureen to open up the said bank account. She also considered the fact that the ATM to the said account had been found in possession of the appellant. There was no reasonable explanation given by the appellant on how the said money appeared on an account he had requested Moureen to open for her.

The learned trial magistrate also considered the defense of the appellant who said that he had no knowledge of the source of money on an account he had requested Moureen to open on his behalf. One would wonder why the appellant who was not staying with Moureen but was found in possession of an ATM belonging to the account said to have been used to receive stolen funds. I find no reason to fault her findings, her findings were clearly backed by the evidence adduced at the trial.

In respect of the allegations of bias raised by counsel for the appellant, the learned trial magistrate in her wisdom sought it wise that since Moureen Katusime had jumped bail, there was need to exclude her from the charge sheet to avoid any further delays. This is normal practice. It is very unfortunate that counsel for the appellant is imputing bias on the learned trial magistrate because of this. Did he expect the trial to stall because Moureen Katusime had jumped bail? In any case the prosecution still had the burden to prove its case. The trial magistrate relied on the evidence before her to convict the accused person. Allegations of bias against a judicial officer must be proved.

Ground 5

An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this Court will not

normally interfere with the discretion of the trial Judge unless the sentence is illegal or unless Court is satisfied that the sentence imposed by the trial Judge was manifestly so excessive as to amount to an injustice: **Ogalo s/o Owousa** vs. **R (1954) 21 E.A.C.A. 270**

The appellant was sentenced to 5 years' imprisonment, an order of compensation of 65,000,000/= and an order of deportation. The learned trial magistrate noted that appellant was unlawfully in Uganda, had defrauded a catholic organization of money that helps poor people and that there is need for a deterrent sentence. She also noted that the appellant was a first time offender and a student but instead chose to engage in illegal activities. I find her reasoning and sentence objective. Electronic fraud is on a rise and with the use of computers and online transactions there is need to guard the unsuspecting population from such fraudsters. There is nothing harsh about the sentence, it is well justified and I cannot interfere with the learned trial magistrate's discretion.

The appeal is accordingly dismissed.

I so order.

JUDGE
31/08/2023