THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL SUIT NO. 0004 OF 2000

UGANDA::: **APPELLANT**

VERSUS

PATRICK N.W. MUGENYI::: **RESPONDANT**

BEFORE: HON. MR. JUSTICE J.B.A. KATUTSI

JUDGEMENT:

This is an appeal by the Director of Public Prosecutions against the decision of a Magistrate Grade 1 passed on the 21st day of February, 2000. The respondent was charged on three counts. On the first count he was charged with Forgery, Contrary to section 326 of the Penal Code Act. On court 2 he was charged with uttering a false document contrary to section 330 of the Penal Code Act and court 3 with obtaining goods by false pretences contrary to section 289 of the Penal Code Act. He was convicted on courts 1 and 2 and sentenced to a fine of shs. 150,000 or one year in default an enluct. He was acquitted on the third court. The appeal is against both the acquittal on count 3 and the sentence imposed in respect of counts 1 and 2. There are two grounds of appeal. These are:-

1. The Learned Trial Magistrate erred in law and fact when she made a finding that prosecution had not proved count III of the charge relating to obtaining goods by false pretence when in fact there was evidence on record, thereby accessioning a gross miscarriage of justice.

2. The learned trial magistrate misdirected herself in passing a sentence too lenient to mitigate the loss suffered by the respondent, thus occasioning a miscarriage of justice. In court Susan Nafula who appeared for the D.P.P. enlarged on the above grounds of appeal. Mr. Nyakana counsel for the respondent supported both the acquittal on court 3 and the sentences imposed in respect of courts 1 and 2.

During the hearing of the appeal I did… pg3 to both counsel that the first ground of appeal had no merit. The arguments of the Learned State Attorney on this found were outside the particulars of the offence as were laid down before the Lower Court. The particulars were that:-

> "Patrick N.W. Mugenyi on the 25/9/96 at Kampala in the Kampala District with intent to defraud obtained us $5,400. From Ochaki Kasoro by falsely pretending that he would buy a Toyota Dyna Truck".

Prosecution had to prove that the pretence was made, that money was received, with intent to defraud, and that the pretence was false to the knowledge of the respondent. Prosecution had to prove the making of the pretence, as stated in the particulars of the offence. Any variance in substance between the pretence in the particulars of the offence and that proved would be fatal. Learned State Attorney was arguing the pretences proved and not those laid down in the particulars of the offence. The evidence as supplied by PW1 who was the complaint was that he had sent the money to Japan personally through serif. Therefore to turn round and say respondent had "on 25/9/96 at Kampala in the Kampala District with intent to defraud, obtained US $5,400 FROM Ochaki Kasoro" was not proved. I am only surprised that the chambers of the Director of Public Prosecutions could make such a futile appeal. This ground will be dismissed with the contempt it deserves.

I think with much respect to the learned counsel for the respondent that the second ground of appeal has merit. Respondent was charged with and convicted of forgery. This offence carries a maximum of three years imprisonment without an option of a fine. I agree with learned counsel for respondent however that the trial magistrate was vested with discretion in the matter. Such discretion however had to be exercised judiciously. The discretion had to be exercised according to common sense and justice. It had to be judicial discretion "and not mere whim or caprice of the person to whom it is discreet". Before sentence was passed, prosecution submitted that respondent was a first offender but added "These offences are rampant. The money was not recovered". Such plea it would appear fell in deaf ears. Instead the learned trial magistrate commented: "Since the accused a first offender and willing to reform ". Thus the learned trial magistrate made herself into an expert in reading peoples

thoughts. In Macbeth Shakespeare admonishes thus:

"There is no art to find the mind's construction in the face".

I respectfully agree. In this case the respondent had pleaded not guilty. The trial dragged on for more than a full year. In the end he was convicted. With respect to say that respondent looked willing to reform was mere wishful thinking on the part of the learned magistrate.

I am very grateful to learned counsel for respondent for his industry and research. The cases he cited for the benefit of the court show that before sentence is passed the following must be considered: The maximum penalty provided by the laws for the offence in question. The circumstances of the offence including the manner in which the offence was committed. The prevalence of the offence, the circumstances of the offender, including his or her social status and character. After all these have been considered the sentence must be in proportion to the seriousness of the offence in question. Respondent was convicted of the offences of forgery and altering a false document both of which involve grave moral turpitude. Complainant lost US $5,400 through respondent's dishonesty. A fine of shs 150,000 (one hundred fifty thousand) was less than US $100. Lucifer must have broken his ribs with laughter on hearing the sentence pronounced. Such sentence cannot be allowed to stand. To do so would amount to a traversity of justice. The sentence imposed by the trial Magistrate is set aside. It will be substituted with a custodial sentence of 12 months. To this extent the appeal succeeds. If the fine as imposed is already paid, (and I would be surprised if it were not,) the same must be refunded to the respondent. Sentence is to begin running when the gates of prison open to the respondent. I so order.

J.B.A. Katutsi

JUDGE.

11/8/2000

Waninda Fred holding brief for Nafula for D.P.P.

Dwekisa holding brief for Nyakana.