

UGANDA / JUDGMENT

Kavuma v Uganda (Criminal Appeal No. 38 of 2021) [2021] UGHCCRD 25 (17 December 2021)

[2021] UGHCCRD 25

COURT

HC: Criminal Division (Uganda)

CASE / FILE NUMBER

Criminal Appeal No. 38 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO 38 OF 2021 (ARISING FROM CRIMINAL CASE NO. 1074 OF
2019 BUGANDAROAD COURT)

KAVUMA DENIS APPELLANT

VERSUS

UGANDA RESPONDENT

BEFORE HON JUSTICE TADEO ASHMWE

JUDGMENT

The Appellant was charged and convicted before a Magistrate Grade I with the offence of obtaining money by false pretenses contrary to Section 305 of the Penal Code Act.

The case of the prosecution was that on the 7th of February 2019 at post office in kampala district with intent to defraud obtained cash worth ugx 12000,000/=(twelve million shillings only from kamanyire jotham by falsely pretending that he was going to transfer it in to his name whereas not.

The Appellant (then Accused) denied the charge.

Upon hearing both the Prosecution and defence, the trial Magistrate convicted the Appellant as charged and sentenced him to a fine of 4.8 million Ugandan shilling in default to serve 3 years imprisonment.

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Being dissatisfied with the judgement and orders of the Trial Magistrate The appellant appealed against the judgment and orders on the following grounds: -

1. The trial Magistrate erred in law and fact by failing to use the laws applicable and precedents when he ruled that a loan acquired by the appellant from the complainant was good capable of being stolen, thereby causing miscarriage of justice
2. The trial Magistrate erred in law and fact by sanctioning an illegality of an individual purporting as a money lender who did not have any money lending license, thus arriving at erroneous decisions.
3. The trial Magistrate erred in law and in fact when he relied on false, baseless deliberate lies and hearsay by the complainant of allegations that the appellant had promised to transfer the car logbook in to his names with completely no evidence on record, this causing a miscarriage.
4. that the learned trial magistrate erred in law and fact when he ignored and did not take in to consideration key issues raised by the appellant of failure to disclose to him exhibits asked for, which exhibits prosecution relied upon as evidence thereby causing a miscarriage of justice.
5. that the learned trial magistrate in law and fact when he judged, convicted and sentenced the appellant, basing on evidence of an old agreement well aware it was discharged and nulled by fresh agreement entered in to by the complainant and the appellant with a new witness guarantor and new security, thereby causing a miscarriage of justice.
6. That the learned trial magistrate erred in-law and in fact when he relied on evidence of loan application forms from a company to unjustly convict and sentence the appellant whereas the complaint accused the appellant in his own private individual's capacity, thereby failing to differentiate an individual, Mr. Jotham Amanyire from a company Atomica Financial,

services ltd in contemplation of the law of separation of power between a company and an individual, thus arriving at erroneous decisions.

7. That the learned trial Magistrate erred in law and fact when he based himself on contradictory testimonies and evidence of prosecution witnesses with no collaboration to convict and sentence the appellant, thereby causing a miscarriage of justice.
8. That the learned trial magistrate erred in law and fact when he ruled that the appellant had exhibited characters of a fraudulent person by failing to pay back the acquired loan, whereas the appellant had not failed to pay back the loan but was arrested within the validity period of fresh agreement, thus causing a miscarriage of justice.
9. that the learned trial Magistrate erred in law and fact when he failed to remind PW1 that he was on Oath upon further cross- examination thus leading to a miscarriage of justice.

10. That the learned trial magistrate erred in law and fact when he found that prosecution had proved all the ingredients of the alleged offence beyond reasonable doubt whereas not thus occasioning a miscarriage of justice.
11. That the learned trial magistrate erred in law and fact when he imposed a fine sentence of ugx. 4,800,000/= on the appellant which was too excessive as this is the maximum possible sentence of a fine a magistrate grade one can impose thus being unfair and unjust.
12. That the learned trial magistrate erred in law and fact when he failed to arithmetically put in to account the one year, nine months and four days the appellant had spent on remand while sentencing him thus occasioning a miscarriage of justice.

At the hearing, the appellant represented himself while the respondent was represented by Joanita Tumwikirize a State Attorney.

The appellant filed written submissions and the state Attorney was ordered to reply ^I [>]5[<] days from the date of hearing. However, to date the said state attorneys did not file written submissions in reply I shall therefore proceed to determine the appeal basing on the lower court record and the appellant's submissions only.

RESSOLUTION

This court as the first appellate court has the duty to review the evidence and consider the materials that were before the trial court and come to its own independent conclusion" - See Pandya vs. R [1957] EA 336.

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 re-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 charged.

DETERMINATION.

The appellant argued grounds 1,3 and 10 together,5&8 together.2&9 together,4 alone, 6&3 together, 11 and 12 together. I shall resolve them in the same order.

GROUND 1,3&10

1. The trial Magistrate erred in law and fact by failing to use the laws applicable and precedents when he ruled that a loan acquired by the appellant from the complainant was good capable of being stolen, thereby causing miscarriage of justice

3. The trial Magistrate erred in law and in fact when he relied on false, baseless deliberate lies and hearsay by the complainant of allegations that the appellant had promised to transfer the car logbook in to his names with completely no evidence on record, this causing a miscarriage.

10. That the learned trial magistrate erred in law and fact when he found that prosecution had proved all the ingredients of the alleged offence beyond reasonable doubt whereas not thus occasioning a miscarriage of justice.

On the above grounds the appellant submitted that the appellant was charged with the offence of obtaining money by false pretenses on the basis that on the 7th of February, with intent to defraud obtained cash worth 12 million Uganda shillings from the complainant. That the particulars of the charge sheet were not sufficient to enable the appellant understand the nature of the offence and that it contravened section 85 of the Magistrate's court act cap 16.

He further stated that the elements of the offence of obtaining money by false pretence are very clear and that the evidence on record was not sufficient to prove the same. That the appellant obtained the said money as a loan and not for purposes of being fraudulent.

That a promise to transfer the log book from the names of a one Patricia Akomolot to the appellant's names is a mere allegation and was not term of the alleged loan agreement.

In addition, he stated that the complainant as a money lender did not have a money lending license as required by the Tier 4 microfinance Act. That the penal code Act defines false pretence as misrepresentation made by words of a matter of fact either in the past or present but not in the future as it was in this case. He cited a number of authorities arguing that for a statement to be regarded as one to amount to a false statement, the

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misrepresentation or concealment it must proceed or be contemporaneous with the execution of a contract.

Therefore, a Trial Magistrate erred in-law and in fact when he convicted the Appellant on the basis of his failure to execute his promise of transferring the alleged log book from the names of his wife to his names.

For court to convict of an accused of the offence of obtaining money by Q false presence the following elements must be proved beyond reasonable doubt.

- 1. Obtaining or taking away something capable of being stolen
- 2. Taking must be by false pretence
- 3. There must be intent to defraud

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4. That the accused person participated in the commission of the offence.

In the trial court prosecution led evidence of 2 witnesses while the defense led evidence of 1 witness.

The gist of the complainant's evidence as pwl is that he is a money lender and that the appellant is his client who he gave a loan of 12 million relying on a security of a car. That the appellant handed to the complainant a log book in the names of the appellant's wife. That the appellant promised to transfer the log book in his name which he did not do. That subsequently the appellant was arrested and another agreement of 16 million was executed but the appellant only paid 5 million and failed to pay the balance. He further stated that the said log book was initially in the names of Patricia Okomoroti and later in to the names of Kavuma Denis. In cross examination, he confirmed that the appellant indeed transferred the said log book to his name and that he kept giving empty promises about payment of the balance. The evidence of pwl was supported by evidence of pw2 the investigating officer who confirmed that the appellant had

mortgaged a car that did not belong to him. That however the appellant's wife reported a case of a missing car which they returned to the owner.

On the other hand, the appellant testified as DW1 and stated that it is true he obtained a loan of 10 million from the complainant and mortgaged his wife's car with her consent. That for unknown reasons his wife reported a case of a missing car. That he was arrested and released. That he made a new agreement with the accused with a new grantor who unfortunately died later on. That he did not obtain the said loan by false pretence.

^T The Appellant in the present case was convicted of obtaining money by false pretence when he allegedly acquired a loan of 12 million shillings and gave to the complainant a log book in the names of the appellants' wife as security and promised to transfer the log book in his name whereas not.

However, from the above evidence, it is clear that the appellant acquired a loan and mortgaged his wife's car whose log book was later changed into the appellant's name, his wife's consent notwithstanding.

in fact, by his conduct, if the appellant wanted to defraud any one, it would be his wife and not the complainant who was given a genuine log book according to his testimony. Besides no evidence was led in court to prove that indeed the appellant's wife reported the case of a missing car to police or that the said car was mortgaged without his wife's consent.

What is clear from the record is that the appellant took a loan from the complainant and failed to pay it. If the security he had given had issues, the complainant would have sued the appellant in a civil court. It was the duty of the complainant, a money lender to carry out all due diligences about the security given to him.

In my view loans, mortgages and money lending transactions are governed by civil laws and are best handled under those laws.

In addition, even if the appellant had indeed promised to transfer the log book in his names and he did not, convicting him on that basis, would be contrary to the principle established by decided cases in regard to the offence of obtaining money by false pretense.

"A statement of intention about further conduct, whether or not it be a statement of existing fact, is not a statement that will amount to a false presence in criminal law". – See R vs. Dent [1975] 2 ALL ER 806 at page 807.

The principle was confirmed in the case of **Uganda vs. Daudi Bosa** [1977] HCN 235 where Sekandi J held that "A person who obtaining money from fraudulently on promising to render services or to deliver goods cannot be convicted of obtaining money by false pretenses or of obtaining credit by fraud, the reason being that a statement of intention about further conduct whether or not it be a statement of existing fact, is not such a statement as will amount to a false presence in criminal law".

From the evidence on record, the legal framework that governed the alleged transaction between the complainant and the Appellant was purely of a civil nature and not of criminal law. The Criminal Court therefore ought not to have entertained a matter that was obviously of a civil and not criminal nature.

Criminalizing civil disputes is an abuse of court process and perverts the course of justice". – Refer to Okello Oris Atana & Another vs. Uganda Cr. App \$0035/2013\$. This Court cannot close its eyes to such abuse of court processes as is in this case.

Prosecution clearly failed to lead sufficient evidence to prove the offence of obtaining money by false pretence beyond reasonable doubt.

For the above reasons, grounds 1,3 &10 succeed and in effect determine the entire Appeal. I therefore find no reason to resolve the rest of the grounds.

In conclusion, ^I find that the Trial Magistrate erred in law and fact in convicting the Appellant, and thereby occasioned a miscarriage of justice.

For the reasons set out in this Judgment, the appeal succeeds and is accordingly allowed.

The Judgment, orders and sentence of the Trial Magistrate against the Appellant are hereby set aside. The Appellant is hereby set free forthwith.

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